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| Dated 20[\*\*] |
| (1) *[Developer]*AND(2) *[ESCo]*

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| HEAT NETWORKS INVESTMENT PROJECTDRAFT: TEMPLATE CONNECTION AND ADOPTION AGREEMENT  |

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# Version Control

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| **Version number** | **Date of issue** | **Comment** | **Author** |
| 1.0 | 31.07.19 | Draft for focused consultation | Lux Nova Partners |
| 2.0 | 16.10.19 | Marked up following responses to consultation meeting on 19.09.19 | Lux Nova Partners |
| 3.0 | 13.12.19 | Marked up after responses to wider consultation which closed on 17.11.2019 | Lux Nova Partners |
| 4.0 | 15.1.20 | Marked up following comments by BEIS | Lux Nova Partners |

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| ***GUIDANCE NOTE****This Connection and Adoption Agreement is not relevant to every district heating scheme.* *However, it may be relevant to a district heating scheme where an energy supplier (ESCo) has been contracted to connect buildings and/or plots on a development to a district heating scheme and to adopt certain assets comprising the energy system.* *The Connection and Adoption Agreement and the Framework Supply Agreement are intended to dovetail and the counterparties are intended to be the same entity. Where this Connection and Adoption Agreement is entered into by a different entity to the Framework Supply Agreement (for example where an investment entity holds the freehold to the development and therefore grants necessary property/ access rights and enters into the Connection and Adoption Agreement whilst an incoming Developer develops out the development) the two Developer parties may need to enter into bilateral agreements to link the suite.* *The Framework Supply Agreement includes the provision for Heat Supply (including all relevant heat billing and metering services) to end Customers pursuant to a suite of supply agreements which the Developer shall require all Customer on the Development enter into.**How this Agreement might fit into a project structuring is illustrated in the following diagram:**This Connection and Adoption Agreement covers:* 1. *construction of a Connection of the Energy System to the Development, including any necessary heat distribution network on the Development;*
2. *the standards to which the Developer must have constructed elements of the Energy System;*
3. *Adoption or Acceptance of part or all of the Energy System assets: either where the whole Energy System has been constructed by a Developer, or where part of the Energy System has been constructed by Developer (e.g. secondary (in building) distribution networks);*
4. *the operation and maintenance of any elements of the Energy System constructed by and Adopted from the Developer.*
 |
| *Unlike a Concession Agreement, this Connection and Adoption Agreement together with the Framework Supply Agreement do not cover the following (on the basis that the Developer is “connecting to” an Energy System rather than granting a Concession for the development of an Energy System):* 1. *Governance of ESCo’s Financial Model;*
2. *Detailed governance of the build out of the Energy System;*
3. *Detailed Operation and Maintenance regime for the Energy System;*
4. *A planned Plant Replacement regime.*

*It is assumed that the connection of separate buildings or plots (within which heat consumers are located on the Development) to ESCo’s Energy System will be governed by the Connection and Supply Agreement (Plot/ Building).**The technical specification – Schedule 4 is where the technical specification is to be set out, detailing the technical requirements that the Contractor is required to comply with. This could be drafted as a detailed specification of technical system requirements. Alternatively, an outcomes based approach could be adopted and this is indicated through drafting notes.* *The structuring assumption and risk allocation underlying this Connection and Adoption Agreement is far from the only possible or valid structure and, even adopting the structure described above, there could be a wide range of variant approaches to aspects of the commercial structuring and contracting matrix. Therefore, it is very likely that this template Connection and Adoption Agreement will serve only as a starting point for drafting of an agreement that will need to be tailored to the particular characteristics of a given district heating scheme. Public sector bodies should take into consideration any public accounting impacts when entering into agreements.**THIS DOCUMENT IS RELEASED TO BE USED AS A DRAFTING TEMPLATE, TAILORED AND DEVELOPED FURTHER FOR THE SPECIFICS OF THE PARTICULAR PROJECT.**Neither the content of the above guidance, nor the drafting of this template document, is intended to constitute or to replace the need for expert legal advice, which should be sought on every district heating project. No liability is accepted for use of this template document. All liabilities are excluded to the fullest extent permitted by law.* |

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**THIS AGREEMENT** is dated [DATE]

**Parties**

1. [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS](**Developer**); and
2. [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is [ ] (**ESCo**).

**Recitals**

1. The [DESCRIPTION OF THE DEVELOPMENT] (the “**Development”)** is [a development project being delivered by the Developer which includes delivery of [ ] new homes, [ ] commercial units and [ ][[1]](#footnote-2)]/ [an existing development comprising [ ] homes, [ ] commercial units and [ ]] in the [ LOCATION ] area, [ LOCATION]
2. This Connection and Adoption Agreement sets out the terms on which:
	1. The Developer shall have designed, installed and constructed the [Secondary Distribution Network]/[*component of the Energy System]/*[Energy System][[2]](#footnote-3)
	2. [ESCo shall Accept the [Secondary Heating Network] and the [Substation(s)]][[3]](#footnote-4)
	3. [ESCo shall Adopt the [[*component of* *the Energy System* ]/ [Energy System]/ [the Secondary Heating Network]/[the Substations(s)][[4]](#footnote-5).
	4. [Following Adoption of the [[*component of* *the Energy System* ] [Energy System]/[Substation(s)] ESCo shall keep the [Secondary Distribution Network] Connected to the [ESCo’s Energy System][[5]](#footnote-6)
	5. ESCo shall provide the Developer with services relating to the operation and maintenance of the Connection [and the Secondary Distribution Network] (including Customer Meters, Residential HIUs and Commercial Unit Heat Exchangers)[[6]](#footnote-7).
3. The Parties shall also enter into a Framework Supply Agreement which shall set out the terms on which:
	1. ESCo shall provide a Heat Supply to Customers on the Development pursuant to agreed form Customer Supply Agreements and to certain standards; and
	2. the Developer shall provide ESCo with exclusivity in relation to the Heat Supply to occupants of the Development and shall facilitate ESCo’s delivery of the Heat Supply.

**Agreed Terms**

1. Interpretation

The following definitions and rules of interpretation apply in this Agreement.

* 1. Definitions:

**[Accept:** means the transfer to ESCo of the responsibility for the operation and maintenance of a relevant component of the Energy System designed and installed by the Developer [or the Plot Developer as the case may be] in accordance with Schedule 7 (Acceptance Procedure) and **Accepted** and **Acceptance** shall be construed accordingly][[7]](#footnote-8).

**[Acceptance Date:** has the meaning given under Schedule 7 (Acceptance Procedure)]

**[Adopt:** means the transfer to ESCo of the sole responsibility for the [ownership], operation, maintenance, replacement and insurance of a relevant component of the Energy System designed and installed by the Developer [or the Plot Developer (as the case may be)] in accordance with Schedule 8 (Adoption Procedure) and **Adopted** and **Adoption** shall be construed accordingly][[8]](#footnote-9).

**[Adoption Criteria:** means the adoption criteria set out under Schedule 8 (Adoption Procedure)].

**[Adoption Date:** has the meaning given under Schedule 8 (Adoption Procedure)].

**Affiliate:** means, in relation to any person, any subsidiary, any holding company or any subsidiary of such holding company, and holding company and subsidiary shall have the meaning given to them in section 1159 of the Companies Act 2006.

**Authorisations:** means an authorisation, consent, permission, approval, resolution, licence, exemption, filing, notarisation, permit, licence, agreement or registration, (whether statutory, regulatory, contractual or otherwise) including (without limitation), relating to Planning Permissions, Outline Planning Permission, Detailed Planning Permission, Planning Agreements, Building Control, the Energy Strategy and all Environmental Laws.

**Background IPR**: any and all IPRs that are owned by or licensed to either Party and which are or have been developed independently of this Agreement (whether prior to the Effective Date or otherwise).

**Base Rate:** means the borrowing base rate published by the Bank of England from time to time.

**Business Day**: a day, other than a Saturday, Sunday or public holiday in England, when banks in London are open for business.

**Change**: means changes as contemplated pursuant to Schedule 15 (Change Procedure).

**Change Control Procedure**: means the procedure set out under Schedule 15 (Change Procedure).

**Carbon Compliant**: means Connections or on‑site energy solutions (as appropriate) that meet [all relevant planning and regulatory requirements applicable and binding in the UK in respect of carbon intensity or carbon emissions]/[the requirements set out under clause [ ][[9]](#footnote-10)].

**[Challenge Period[[10]](#footnote-11):** means, in respect of a Planning Permission, the expiry of the later of:-

1. six weeks from the date of the relevant decision granting the Planning Permission; and
2. where an application for judicial review of the relevant decision is initiated within the period in paragraph (a) above, the period up to and including the final determination or withdrawal of that application and any resulting judicial review proceedings plus five Business Days.]

**Change Control Procedure**: means the procedure set out under Schedule 15 (Change Procedure).

**Change in Law**: means the occurrence of any of the following after the Effective Date:-

1. the enactment or commencement of any new Law, other than any Law which on the Effective Date has been published:-
	1. in a draft Bill as part of a Government Departmental Consultation Paper
	2. in a Bill
	3. in a draft statutory instrument; or
2. the modification or repeal of any Law;
3. a change in the interpretation, application, or enforcement of any Law;
4. any applicable judgment of a relevant court of law which changes a binding precedent; or
5. the imposition of a requirement by a Regulatory Body for an additional Consent that was not required on the Effective Date.

**Change of Control**: in respect of either Party, a change in Control of that Party.

**[CIU:** means a customer interface unit which contains a display and associated ancillary equipment, wiring and apparatus connected to a Customer Meter in a Residential Unit, showing consumption, payment, debt and consumption history as described further in the Technical Specification.][[11]](#footnote-12)

**[Commercial Building:** means a building located on the Development which is served by its own Connection Point (Commercial Building)][[12]](#footnote-13).

**[Commercial Building Connection:** means the physical connection of a Commercial Building to the Heat Distribution Network at the Connection Point (Commercial Building) to enable a Heat Supply to be provided to that Commercial Building].

**[Commercial Building Customer:** means a customer taking a Heat Supply in a Commercial Building pursuant to a Connection and Supply Agreement (Plot/ Building).]

**[Commercial Building Heat Substation:** means a plant room located within a Commercial Building, within which the Connection Point (Commercial Building) and all relevant ancillary equipment and infrastructure is housed.]

**[Commercial Building Heat Substation Lease:** means a lease of the Commercial Building Heat Substation, granted pursuant to the Connection and Supply Agreement (Plot/ Building)][[13]](#footnote-14)

**Commercial Customer:** means a Commercial Unit Customer or Commercial Building Customer as the context requires.

**Commercial Unit Supply Agreement:** means an agreement between a Commercial Unit Customer and ESCo for a Heat Supply in the form set out under Schedule 6 (Customer Supply Agreements) of the Framework Supply Agreement.

**Commercial Unit Customer:** means a customer taking a Heat Supply in a Commercial Unit pursuant to a Commercial Unit Supply Agreement.

**Commercial Unit:** means a self‑contained unit for occupation forming part of the Development which is not a Residential Unit, in respect of which an individual Commercial Heat Supply Agreement has been entered into or is to be entered into pursuant to a Connection and Supply Agreement (Plot/ Building).

**Commercial Unit Heat Exchanger:** means a unit comprising heat exchanger, pump and associated input and output valves and controls used for the transfer of heat from the Secondary Distribution Network to a Commercial Unit, as further detailed in the Commercial Unit Heat Exchanger Specification.

**Commercial Unit Heat Exchanger Specification:** means the specification for the Commercial Unit Heat Exchanger as detailed in Schedule 4 (Technical Specifications).

**[Common Parts:** means any part of the Development which is not a Commercial Building, Commercial Unit or a Residential Unit.][[14]](#footnote-15)

**Compensation Event:** means:

1. prevention, impediment, default or failure of the other Party of its obligations under this Agreement (which shall include the Developer Related Parties and ESCo Related Parties as relevant), whether by act or omission;
2. in relation to a claim by ESCo, errors, omissions or material inconsistencies arising from information supplied by the Developer pursuant to Schedule 5 (Design and Delivery Process);
3. [a failure by the Developer to grant the necessary property rights required by ESCo to deliver the Heat Supply as detailed under Clause 9.8 (Ownership and Access)]; and [[15]](#footnote-16)
4. [ ][[16]](#footnote-17).

**Competent Person:** means a person with the necessary skills, experience and knowledge to perform the relevant task pursuant to this Agreement.

**[Conditions Precedent[[17]](#footnote-18):** means the conditions precedent set out in Clause 2 (Conditions Precedent)].

**Confidential Information**: any information, however conveyed or presented, that relates to the business, affairs, operations, customers, processes, budgets, pricing policies, product information, strategies, developments, trade secrets, know-how, personnel and suppliers of the disclosing Party, together with all information derived by the receiving Party from any such information and any other information clearly designated by a Party as being confidential to it (whether or not it is marked "confidential"), or which ought reasonably be considered to be confidential.

**Connection:** means a Commercial Building Connection or a Plot Connection (as relevant) made pursuant to a Connection and Supply Agreement (Plot/ Building).

**Connection and Supply Agreement (Plot/ Building**)**:** means an agreement entered into between a Plot Developer or Commercial Building Customer (as the context requires) and ESCo, in the form set out under Schedule 10 (Connections).

**Connection Charge:** means the connection charge for a Plot Connection or a Building Connection calculated in accordance with Schedule 10 (Connections).

**Connection Date:** means the date on which the Developer, Plot Developer or Commercial Building Customer (as relevant) requires each Connection to have achieved Service Readiness, pursuant to paragraph 1, Part 1 of Schedule 10 (Connections) or the Connection and Supply Agreement (Plot/ Building) and as may be extended from time to time in accordance with the terms of this Agreement, or the Connection and Supply Agreement (Plot/ Building) (as relevant).

**Connection Details:** means the details provided by ESCo in relation to the relevant Connection pursuant to paragraph 1, Part 1 of Schedule 10 (Connections).

**Connection Notice:** means a notice served pursuant to paragraph 1, Part 1 of Schedule 10 (Connections) in relation to a Plot Development or a Commercial Building (as relevant).

**Connection Point:** means a Connection Point (Plot) or a Connection Point (Commercial Building) as the context requires.

**[Connection Point (Commercial Building)** means the outlet valve of the [heat exchanger located within a Commercial Building Heat Substation] at which point a Commercial Building is connected directly to the Primary Distribution Network as identified on the Connection Point Drawings.]

**Connection Point (Plot):** means the outlet valve of the [Plot Boundary Valve, forming part of the [Primary Distribution Network]/[Plot Heat Exchanger located within the Plot Heat Substation] and identified in the Connection Point Drawings.

**Connection Point Drawings:** mean the drawings set out under Schedule 4Part 10 (Drawings) identifying the Connection Point (Commercial Building) and Connection Point (Plot) as relevant.

**Consents**: all permissions, consents, approvals, certificates, permits, licences, agreements and authorities (whether statutory, regulatory, contractual or otherwise) necessary for the provision of the Works or Operation and Maintenance Services.

**Contract Year**: a period of 12 months (or such shorter period if this Agreement is terminated earlier), commencing on the Effective Date.

**Control**: in respect of either Party, the acquisition of either:

(a) the voting rights attaching to 25% or more of the voting shares in that Party; or

1. the power to direct or cause the direction and management of the policies of that Party in accordance with the acquirer's wishes, whether as a result of the ownership of shares, control of the board of directors, contract or any powers conferred by the articles of association or other constitutional documents of that Party.

**[CP Longstop Date:** means [DATE][[18]](#footnote-19).

**[CP Satisfaction Date:** means the date that the last of the Conditions Precedent is satisfied.]

**Customer:** means, on the Development, the individual, business, organisation or other body who, by way of a Customer Supply Agreement or Connection and Supply Agreement (Plot/ Building), consumes or requires the availability of the Heat Supply [or Electricity].

**Customer Meter:** means the metering equipment intended to be used to measure the Heat Supply delivered to any Customer, as described further in the Technical Specification.

**Customer Services:** means as set out in the Framework Supply Agreement.

**Customer Supply Agreement(s):** means a Commercial Unit Supply Agreement, a Residential Unit Supply Agreement, a Connection and Supply Agreement (Plot/ Building), or a [Registered]/[Developer Void] Heat Supply Agreement.

**Data Protection Legislation:** means all legislation and regulatory requirements in force from time to time relating to the protection and handling of personal data and the privacy of electronic communications, including, without limitation (i) any data protection legislation from time to time in force in the UK including the Data Protection Act 2018 or any successor legislation, as well as (ii) the General Data Protection Regulation (*(EU) 2016/679*) and any other directly applicable European Union regulation relating to data protection and privacy (for so long as and to the extent that the law of the European Union has legal effect in the UK).

**Data Protection Protocol:** means the data protection processes and duties set out in Schedule 12 (Data Processing) as the same may by updated in writing from time to time in accordance with Clause 16.3 (Data Processing).

**Deed of Variation:** means a deed of variation to the Energy Centre Lease substantially in the form set out in Schedule 11Part 2 (Deed of Variation), to replace, on each occasion (if any) that there is an extension to the Easement Corridor, the plan of the Easement Corridor set out in the Energy Centre Lease, with a revised, updated plan.

**Delay Damages:** means the ESCo Delay Damages and the Developer Delay Damages as appropriate.

**Detailed Planning Permission:** means a written planning permission for the Development Site (or part thereof) granted by the local planning authority or by the Secretary of State pursuant to a Planning Application for full planning permission, it being recognised that a resolution alone to grant planning permission subject to completion of a Planning Agreement or any other condition precedent shall not of itself constitute a grant of Detailed Planning Permission;

**Developer:** means the entity identified as such in the recitals to this Agreement.

**Developer Authorisations:** means any Authorisations directly relating to the Planning Permissions and [ ][[19]](#footnote-20) required for delivery of the Developer Works by the Developer.

**Developer Cap on Liability:** means the cap on liability specified in Clause 21.6 (Limitations on Liability).

**Developer Cure Period:** means a reasonable time limit agreed between the Parties in accordance with Clause 25 (Default Cure and Termination) within which the Developer must take action to remedy a breach.

**Developer Delay Damages:** means [ ][[20]](#footnote-21)

**Developer Delivery Programme:** means the indicative delivery programme for the Development set out in Schedule 3 (Programmes) including details of [Reserved Matters applications, Planning Applications for Plot Developments and] [ ]][[21]](#footnote-22) and proposed Connection Dates as updated and provided to ESCo from time to time.

**Developer Related Parties:** means the Developer’s employees, subcontractors, agents, Developer Representatives and Affiliates.

**Developer’s Representative**: means the person appointed by the Developer pursuant to Clause 19 (Representatives).

**Developer Termination Grounds:** means:

1. a Notice of Defective Performance has been issued by the Developer pursuant to Clause 25 (Default, Cure and Termination) and ESCo:-
	1. has failed to either put forward a reasonable programme setting out how it proposes to remedy the breach (the “**ESCo Cure Programme**”) or to commence remedying the breaches specified in the Notice of Defective Performance within the ESCo Cure Period; or
	2. has put forward an ESCo Cure Programme but has materially failed to remedy the breaches specified in the Notice of Defective Performance in accordance with the ESCo Cure Programme; and/or
2. a Major Default is caused by a breach of this Agreement by ESCo and which is not capable of remedy, and in respect of which:-
	1. it would be unreasonable to expect the Developer to accept financial compensation for such default (where applicable); and
	2. such Major Default has given the Developer reasonable grounds to believe that ESCo is manifestly incapable of properly fulfilling its obligations pursuant to this Agreement; and/or
3. an Insolvency Event occurs in relation to ESCo; and/or
4. ESCo has breached Clause 28 (Assignment and Other Dealings); and/or
5. the aggregate liability of ESCo to the Developer arising out of or in connection with this Agreement and with respect to any and all claims and costs arising out of or under this Agreement, or arising out of the performance or non‑performance of any other obligation of ESCo in connection with this Agreement, including any non‑contractual obligations arising from this Agreement, exceeds the ESCo Cap on Liability.

**Developer Warning Notice:** has the meaning given under Clause 25.2 (Right to Serve Warning Notice).

**Developer Works:** means those works set out under Schedule 6Part 1 (Developer Works).

**Development:** has the meaning given in Recital (A).

**Development Plan:**  means the plan identified as such in Schedule 2 (Plans) to this Agreement.

**Dispute**: any dispute under this Agreement.

**Dispute Resolution Procedure**: the dispute resolution procedure set out in Clause 25.1 (Dispute resolution procedure).

**Due Date**: has the meaning give in Clause 12.1 (Charging and invoicing).

**Easement Corridor:** has the meaning given under the Lease(s).

**Effective Date**: [means the date of this Agreement]/ [the date on which this Agreement becomes unconditional pursuant to Clause 2 (Conditions Precedent)].

**[Electricity Network**: the private network of wires and ancillary plant and equipment more particularly described in the Electricity Network Specification as may be modified in accordance with this Agreement.]

**[Electricity Network Specification**: means the specification for the Electricity Network as detailed in Schedule 4 (Technical Specifications)].

**[Electricity Supply**: the supply of electricity to Commercial Building Customers or Commercial Unit Customers, enabled over the Electricity Network delivered in accordance with Clause 7.2 (Private Wire Network)][[22]](#footnote-23)

**Emergency:** means any event where ESCo reasonably considers it necessary to take urgent steps to remedy any matter for reasons of health and safety or events requiring the intervention of the police or emergency services or water leaks that may cause significant material damage whether or not this is as a result of ESCo’s failure to comply with any of its obligations under this Agreement.

**Emergency Works:** means any works carried out by ESCo which are required in response to an Emergency.

**Energy Centre(s):** means the plant room(s) within which the Energy Centre Plant and Equipment [shall be installed]/ [is housed], as outlined in [ ] on plan(s) [ ] as set out under Schedule 2 (Plans) and [constructed]/ [provided] in accordance with the Energy Centre Specification.

**Energy Centre Lease(s)**: means the lease(s) of the Energy Centre(s) granted by the Developer to ESCo in accordance with Clause 9 (Ownership and Access) substantially in the form set out under Schedule 11 (Energy Centre Lease).

**Energy Centre Specification:** means the specification to which the Energy Centres must be built and delivered by the Developer, as detailed in Schedule 4 (Technical Specifications).

**Energy Plant and Equipment:** means the heating facilities, plant and equipment to be installed in the Energy Centre for the purposes of production and delivery of Heat and production of Electricity, more fully described in Schedule 6 (Works) and the Energy Plant and Equipment Specification together with any plant and equipment within the associated chimney stack and/or ventilation shaft situated in the Energy Centre.

**Energy Plant and Equipment Specification** means the specification for the Energy Centre Plant and Equipment, as detailed in Schedule 4 (Technical Specifications).

**[Energy Strategy:** means the strategy required to be implemented pursuant to the Planning Permission for [ ] and any subsequent Planning Permission and developed pursuant to Clause 6 (ESCo Obligations)][[23]](#footnote-24)

**Energy System**: means:

1. the Heat Distribution Network;
2. the Energy Plant and Equipment;
3. the Residential HIUs;
4. the Commercial Unit Heat Exchangers;
5. the CIUs;
6. the Customer Meters;
7. any Temporary Heat Solutions; and
8. [where applicable, the Electricity Network].

**Environment:** means all or any of the following media, namely air, water (including without limitation water in drains and sewers) or land (including without limitation such media within buildings or other natural or man‑made structures, above, on or below ground) and any living organisms (including man) or ecosystems supported by such media.

**Environmental Laws:** means all applicable Law relating to human health, the Environment or any Hazardous Substance.

**Environmental Permits:** means all Authorisations required under Environmental Laws for the carrying out of the Parties' respective obligations under this Agreement (as appropriate).

**ESCo:** means the entity identified as such in the recitals to this Agreement.

**ESCo Authorisations:** means any Authorisations, other than the Developer Authorisations, required for the delivery of the ESCo Works or the Operation and Maintenance Services.

**ESCo Cap on Liability:** means the cap on liability specified in Clause 21.6 (Limitations on Liability).

**ESCo Cure Period:** means a reasonable time limit agreed between the Parties in accordance with Clause 25.1.1 (Notice of Defective Performance) within which the Developer must take action to remedy a breach.

**ESCo Delay Damages:** means [ ][[24]](#footnote-25)

**ESCo Programme of Works:** has the meaning given in Schedule 6 (Works Obligations).

**ESCo Related Parties:**  means ESCo's employees, subcontractors, agents, ESCo Representatives and Affiliates.

1. **ESCo’s Representative:** means the person appointed by ESCo pursuant to Clause 19 (Representatives).

**ESCo Services:** means the Operation and Maintenance Services, the Customer Services (as defined under the Framework Supply Agreement) and the Heat Supply.

**ESCo Termination Grounds:** means:

1. the Developer is in material or persistent breach of its obligations which substantially prevents ESCo from performing its obligations or exercising its rights under this Agreement or a Customer Supply Agreement and such breach is notified by ESCo to the Developer and:-
	1. where the breach is capable of remedy:-
		1. the Developer has failed to put forward a reasonable programme setting out how it proposes to remedy the breach (the “**Developer Cure Programme**”) or commence remedying the breaches specified in such notification within the Developer Cure Period; or
		2. the Developer has put forward a Developer Cure Programme but has materially failed to remedy the breaches specified in such notification in accordance with the Developer Cure Period; and/or
	2. where the breach is not capable of remedy:-
		1. it would be unreasonable to expect ESCo to accept financial compensation for such default (where applicable); and
		2. such breach has given ESCo reasonable grounds to believe that the Developer is incapable of properly fulfilling its obligations pursuant to this Agreement; and/or
2. a Major Default is caused by a breach of this Agreement by the Developer and which is not capable of remedy, and in respect of which:-
	1. it would be unreasonable to expect ESCo to accept financial compensation for such default (where applicable); and
	2. such Major Default has given ESCo reasonable grounds to believe that the Developer is manifestly incapable of properly fulfilling its obligations pursuant to this Agreement; and/or
3. an Insolvency Event occurs in relation to the Developer; and/or
4. the aggregate liability of the Developer to ESCo arising out of or in connection with this Agreement and with respect to any and all claims and costs arising out of or under this Agreement or arising out of the performance or non‑performance of any other obligation of the Developer in connection with this Agreement, including any non‑contractual obligations arising from this Agreement, exceeds the Developer Cap on Liability.

**ESCo Warning Notice:** has the meaning given under Clause 25.2 (Right to Service Warning Notice).

1. **ESCo Works:** means those works set out under Schedule 6Part 2 (ESCo Works).

**Expiry Date:[[25]](#footnote-26)** means the date [ ] years from the Effective Date, as may be extended in accordance with Clause 2 (Commencement and duration).

**[Execution Date[[26]](#footnote-27):** means the date of this Agreement.]

**Final Termination Notice:** means a notice served pursuant to Clause 25.3.1 (Timing of Service of Final Termination Notice).

**[FOI[[27]](#footnote-28):** means the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act].

**Force Majeure Event:** means the occurrence after the date of this Agreement of any event beyond the reasonable control of a Party which cannot reasonably be avoided or overcome by that Party and which is not attributable to the acts or omissions of that Party or its Related Party, including (but not limited to):-

1. war, hostilities (whether war be declared or not), invasions, act of foreign enemies, civil war, sabotage, piracy;
2. rebellion, terrorism, revolution, insurrection, military or usurped power, riot, civil commotion or disorder;
3. ionising radiation or contamination by radio‑activity, except as may be attributable to ESCo and/or an ESCo Related Party or the Developer and/or a Developer Related Party is the source or cause of such radiation or contamination;
4. chemical or biological contamination of the Energy System and/or the communal energy supply from any of the events referred to in paragraph (a) above; or
5. contamination, the presence of which was caused by the release, discharge, spillage or deposit of that contamination by a third party;
6. operation of the forces of nature such as earthquake, hurricane, lightning, typhoon or volcanic activity;
7. explosions, fires or destruction of plant, machinery or premises;
8. acts, inactions, defaults or restraint of a statutory undertaking, government or public authority, whether lawful or unlawful, except for:-
	1. acts for which the relevant Party has assumed the risk by virtue of other provisions of this Agreement;
	2. acts for which the relevant Party should reasonably have anticipated and mitigated; and
	3. any lack of Authorisation, licence or approval necessary for the performance of this Agreement which is to be issued by any public authority unless ESCo or the Developer (as applicable) has failed to apply for any such Authorisation in accordance with Good Industry Practice;
9. strikes, lockouts or labour disputes generally affecting the construction industry or energy generation industry or any supply chain related to or, service or supply to such industries, or a significant sector of any of them;
10. the discovery of fossils, antiquities or unexploded ordnance at the Development;
11. failure or interruption of supply of the following: electricity utility and/or electrical connections, or the failure of gas supply serving the Energy Centre(s); and
12. an event of Force Majeure under the Energy Centre Lease;
13. which directly causes either Party to be unable to comply with all or a material part of its obligations under this Agreement provided that it shall not include events or circumstances which delay or prevent the ability of the Relevant Party to make any payments when due under this Agreement.

**Good Industry Practice**: those practices, methods, specifications and standards which comply with Law and that a competent and experienced contractor in the district heating industry would be expected to use and/or adopt in relation to the provision of comparable works and services which are substantially similar to the works and/or services (as applicable) or the relevant part of them to be delivered pursuant to this Agreement, having regard to factors such as the nature and size of the parties, the Service Levels, the Term, the pricing structure and any other relevant factors.

**Group**: in relation to a company, that company, any subsidiary or holding company [from time to time **OR** at the date of this Agreement] of that company, and any subsidiary [from time to time **OR** at the date of this Agreement] of a holding company of that company.

**Group Company**: in relation to a company, any member of its Group.

**Guaranteed Standards for Heat Supply:** means the standards set out in in the Customer Supply Agreements.

**Hazardous Substances:** means any substances whether in solid, liquid or gaseous form, which are capable of causing harm to human health or to the Environment whether alone or in combination with any other substances.

**Heat Capacity:** means the maximum amount of Heat Supply required at each Connection measured in kWh/ annum as set out in the relevant Connection Notice.

**Heat Charges:** means the Standing Charge and the Variable Charge.

**Heat Distribution Network**: means the heating supply network, comprising of the Primary Distribution Network and the Secondary Distribution Network, as further detailed in the Heat Distribution Network Specification and pursuant to Schedule 5 (Design and Delivery Process), which provides the Heat Supply from the Energy Centres to the relevant Connection Points, Residential HIUs and Commercial Unit Heat Exchangers.

**Heat Distribution Network Specification**: means the specification for the Heat Distribution Network as detailed in Schedule 4 (Technical Specifications).

**Heat Supply**: the supply of heat generated by the Energy Plant and Equipment or any Temporary Heat Solution to Customers, enabled by the Heat Distribution Network, and **Heat** shall be construed accordingly.

**Heat Trust Scheme:** means the voluntary scheme established to protect the interests of householders and micro businesses connected to heat networks in the UK, including the Heat Trust Scheme Rules and the Scheme Bye-Laws (at https://www.heattrust.org/the-scheme-rules), or any equivalent replacement scheme thereof.

**HIU Specification:** means the specification for the Residential HIU as detailed in Schedule 4 (Technical Specifications).

**Holding Company**: has the meaning give in clause 1.5 (Interpretation).

**Indirect Loss** means loss of profit or revenue, loss of opportunity, loss of use, loss of production, loss of contract or loss of goodwill, the cost of obtaining any new financing or maintaining any existing financing (including the making of any scheduled or other repayment or prepayment of debt and the payment of any other costs, fees or expenses incurred in connection with the obtaining or maintaining of financing) or any other indirect or consequential loss or damage, but for the avoidance of doubt, shall not include:

1. any amounts expressly payable under this Agreement including (without limitation) in relation to Connection Charges, termination or a Project Variation;
2. any Delay Damages, costs, losses or damage in the form of reasonable interest, break costs or similar charges, or compensation payments a Party is bound to pay to a third party under a valid, enforceable and pre‑existing contract with such third party as a direct result of any breach of this Agreement by the other Party (and for the avoidance of doubt, such contracts include Customer Supply Agreements); and
3. as loss of profit, loss of use, loss of production, loss of opportunity or loss of contracts (or the opportunity to contract) in respect of any breach by the Developer of its obligations under Clause 5 (Exclusivity).

**Insolvency Event**: in respect of either Party:

1. other than for the purposes of a bona fide reconstruction or amalgamation, such Party passing a resolution for its winding up, or a court of competent jurisdiction making an order for it to be wound up or dissolved, or that Party being otherwise dissolved; or
2. the appointment of an administrator of, or the making of an administration order in relation to, either Party, or the appointment of a receiver or administrative receiver of, or an encumbrancer taking possession of or selling, the whole or any part of the entity's undertaking, assets, rights or revenue; or
3. that Party entering into an arrangement, compromise or composition in satisfaction of its debts with its creditors or any class of them, or taking steps to obtain a moratorium, or making an application to a court of competent jurisdiction for protection from its creditors; or
4. that Party being unable to pay its debts, or being capable of being deemed unable to pay its debts, within the meaning of section 123 of the Insolvency Act 1986 (as may be updated from time to time); or
5. that Party entering into any arrangement, compromise or composition in satisfaction of its debts with its creditors.

**Insured Risks:** means such risks in relation to the Energy System and the Developer as the Parties shall be required to insure against pursuant to Clause 23 (Insurance) and Schedule 6Part 55 (Insurance).

**IPRs**: any and all intellectual property rights of any nature anywhere in the world whether registered, registrable or otherwise, including patents, utility models, trade marks, registered designs and domain names, applications for any of the foregoing, trade or business names, goodwill, copyright and rights in the nature of copyright, design rights, rights in databases, moral rights, know-how and any other intellectual property rights which subsist in computer software, computer programs, websites, documents, information, techniques, business methods, drawings, logos, instruction manuals, lists and procedures and particulars of customers, marketing methods and procedures and advertising literature, including the "look and feel" of any websites.

**Key Performance Indicator:** means an indicator of ESCo performance as set out under Schedule 11 (Key Performance Indicators) of the Framework Supply Agreement.

**Law:** means any law applicable in England and shall include common law, statute, statutory instrument, proclamation, by‑law, directive, decision, regulation, rule, order, notice, rule of court, instrument, or delegated or subordinate legislation and any enforceable community right within the meaning of section 2 of the European Communities Act 1972 in the United Kingdom, together with any applicable guidance, direction or determination with which ESCo is bound to comply to the extent that the same are published and publicly available or the existence or contents of them have been notified to them and any applicable judgement of a relevant court of law which is binding in England and Wales.

**Leases:** means the Energy Centre Lease[s] and Substation Lease[s] as relevant.

**Loss(es):** means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses) and charges whether arising under statute, contract or at common law, or in connection with judgments, proceedings, internal costs or demands (excluding Indirect Losses ), but, for the avoidance of doubt Losses shall include  [*Insert losses to be covered*] and any costs and/or losses which a Party is entitled to recover pursuant to the terms of this Agreement. *[Drafting Note: The Parties may want to consider specifying which losses they want to be covered].*

**Major Default:** means:

1. a material or persistent breach by ESCo of its obligations pursuant to Clause 7 (ESCo’s Obligations) which materially affects the delivery of the ESCo Works and/or the delivery of a Connection in accordance with the requirements of this Agreement; and/or
2. failure by either Party to make any payments due to the other within [sixty (60)  Business Days] after the date of service of any written demand for payment (which demand may only be made after the date on which the relevant amount became due) unless such failure or delay is permitted under the terms of this Agreement, including where the relevant payment or the amount thereof is the subject of a dispute between the Parties; and/or
3. a material breach of the Energy Centre Lease(s); and/or
4. [ ][[28]](#footnote-29).

**Milestones:** means the milestones agreed in accordance with paragraph [ ], Part [ ] of Schedule 6 (Works Obligations).

**Month**: a calendar month, and monthly: shall be interpreted accordingly.

**Notice:** has the meaning given in Clause 38 (Notices) and **Notify** shall be construed accordingly.

**Notice of Defective Performance:** has the meaning given under Clause 23.1 (Termination).

**Operation and Maintenance Manuals:** means the operation and maintenance manuals for the [Secondary Distribution Network]/ [Energy System][[29]](#footnote-30) as provided to ESCo by the Developer during the [Acceptance testing]/[Adoption testing] procedures set out under [Schedule 7 (Acceptance Procedure)]/ [Schedule 8 (Adoption Procedure)].

**Operation and Maintenance Services:** means the operation and maintenance of the [Energy System][[30]](#footnote-31) as set out under Schedule 7 (Operation and Maintenance).

**Operational Period:** means, for each part of the Energy System, the period commencing on [either] Practical Completion, [or Acceptance] / [or Adoption] of the relevant part of the Energy System and ending upon the Expiry Date or Termination Date (as applicable).

**Outline Planning Permission:** means an outline planning permission for the Development (or part thereof) granted by the local planning authority or by the Secretary of State pursuant to a Planning Application for outline planning permission;

**Parent Company Guarantee:** means a guarantee between the parent of ESCo or the parent of the Developer (as the context requires) guaranteeing the performance of the respective parties’ obligations under this Agreement.

**Party** or **Parties:** means ESCo and/or the Developer individually or collectively as the context requires.

**Performance Forecast:** has the meaning given in paragraph 4 of Schedule 12 (Governance, Monitoring and Reporting).

**Personal Data**: has the meaning given to that term in the Data Protection Legislation in force from time to time.

**Planning Agreement:** means any agreement for the Development entered into pursuant to any one or more of the following:

1. section 106 of the Town and Country Planning Act 1990; or
2. section 111 Local Government Act 1972; or
3. sections 38, 184 or 278 Highways Act 1980; or
4. section 33 Local Government (Miscellaneous Provisions) Act 1982; or
5. section 98 or 104 Water Industry Act 1991; or
6. section 2 of the Local Government Act 2000;

or any agreement which is required as a condition to obtaining an [Outline Planning Permission] and/or a [Detailed Planning Permission].

**Planning Application:** means an application for Outline Planning Permission and/or Detailed Planning Permission for the Development or a Plot Development (as relevant).

**Planning Permissions:** means any Outline Planning Permission and/or Detailed Planning Permission

**Plot Connection:** means the physical connection of a Plot Development to the Connection Point (Plot) to enable a Heat Supply to be provided to that Plot Development.

**Plot Developer:** means a third party developer which owns or shall own a Plot Development.

**Plot Development:** means an area of the Development which is or shall be owned by a third party and identified in the Development Plan.

**Plot Heat Substation:** means a plant room located on a Plot Development, within which the Connection Point (Plot) and all relevant ancillary equipment and infrastructure is housed.

**[Plot Heat Substation Lease:** means a lease of the Plot Heat Substation, granted pursuant to the Connection and Supply Agreement (Plot/ Building)][[31]](#footnote-32).

**Practical Completion:** has the meaning given in Schedule 6 (Works Obligations).

**Practical Completion Certificate:** has the meaning given in Schedule 6 (Works Obligations).

**Primary Distribution Network:** means the network of pipes and other ancillary equipment that transfers Heat from the Energy Plant and Equipment to the relevant Connection Point and which will form part of the Heat Distribution Network as further detailed in the Heat Distribution Network Specification.

**Programmed Connection Date:** means the Connection Dates set out in the [Developer Delivery Programme]

**Project:** has the meaning given in the Recitals.

**Project Agreements:** means:

1. this Agreement;
2. the Framework Supply Agreement;
3. the Lease(s);
4. each of the Connection and Supply Agreements (Plot/ Building); and
5. [*other ancillary agreements].*

**Project Variation:** has the meaning given under Clause 29 (Variation) and where designated as such under this Agreement.

**Recognised Investment Exchange** has the meaning given to it in section 285 of the Financial Services and Markets Act 2000.

**Registered Provider:** has the meaning given under the Housing and Regeneration Act 2008 as may be updated from time to time.

**[Registered Provider]/[[Plot] Developer Void] Heat Supply Agreement** means an agreement for the Heat Supply to a [Registered Provider]/[[Plot] Developer], in the form set out under Schedule 6 (Customer Supply Agreements) of the Framework Supply Agreement.]

**Regulatory Body**: any government department and regulatory, statutory and any other entity, committee and body which, whether under statute, rules, regulations, code of practice or otherwise, is entitled by any applicable Law to supervise, regulate, investigate or influence the matters dealt with in this Agreement.

**Relevant Authority:** means any court with the relevant jurisdiction and any local, national or supranational agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom which has jurisdiction arising out of or in connection with the Development Site and/or the Energy System, including the Heat Trust, Ofgem and the Land Registry.

**Representatives**: Developer’s Representatives and/or ESCo’s Representatives.

**[Requests for Information:** shall have the meaning set out in the FOIA.]

**Required Insurances:** means the insurances required to be taken out by ESCo and the Developer (respectively) as set out under Schedule 14 (Insurances).

**Reserved Matters:** means, in relation to the Planning Permission or Planning Application, or in relation to planning conditions, any of the following matters in respect of which details have not been given in the application, which may include (without limitation):-

1. siting,
2. design,
3. external appearance,
4. means of access, and
5. the landscaping of the development.

**Residential HIU:** mean the equipment Installed at each Residential Unit used for the transfer of Heat from the Secondary Distribution Network to the Tertiary Heating System within a Residential Unit, as more fully described in the HIU Specification.

**Residential Unit:** mean self‑contained units of residential accommodation in respect of which an individual Residential Unit Supply Agreement has been or will be entered into.

**Satisfactory Planning Permission:** means a Planning Permission in respect of which the Challenge Period has expired (and with any proceedings having finally been determined such that the Planning Permission has been upheld and may be implemented) and which does not:-

1. impose on ESCo by way of condition or other obligation any of the following requirements:-
	1. a requirement to obtain the agreement of a third party in respect of land outside the Energy Centre(s) other than:-
		1. statutory undertakers in respect of any utility; or
		2. a highway authority; or
	2. a requirement to carry out off‑site works or incur off-site expenditures; and
2. contain a planning condition which has a material adverse impact on the ESCo Works or the ESCo Services, the delivery of Heat Supply [or Electricity Supply] in accordance with Schedule 6 (Works Obligations) and Schedule 7 (ESCo Services) or the Framework Supply Agreement as relevant.

**Secondary Distribution Network:** means the network of pipes and other ancillary equipment that transfers Heat from the relevant Connection Point [up to and including] Residential HIUs and Commercial Unit Heat Exchangers as further detailed in the Heat Distribution Network Specification.

**[Security:** means a mortgage, assignment, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect].

**Service Readiness:** means in respect of any Plot Development or Commercial Building the stage at which the relevant ESCo Works have been completed in accordance with the requirements of this Agreement (including the completion of HIU commissioning in accordance with Good Industry Practice) so that the Connection can be completed and ESCo can provide the Heat Supply, [the Electricity Supply] and the ESCo Services to the Customers in accordance with the Framework Supply Agreement.

**Service Readiness Date:** the date on which the Developer, Plot Developer or Commercial Customer (as relevant) requires Service Readiness.

**Service Period:** means a continuous period of twelve (12) months or part thereof ending on [31 March].

**Site:** means the site on which the Development is located as identified on the Development Plan.

**Site Rules:** means all reasonable rules, instructions, policies and procedures relating to access, security and safety at the Development [as set out under Schedule 6Part 4 [which have been communicated to ESCo in writing by the Developer from time to time].

**Substation:** means a [Plot Heat Substation] [or a] [Commercial Building Heat Substation] [as the context requires][[32]](#footnote-33).

**Substation Lease:** means a [Plot Heat Substation Lease] [or a] [Commercial Building Heat Substation Lease] [as relevant].

**Substation Specification:** means the specification to which the Substations must be built and delivered by the relevant Plot Developer or Commercial Building Customer, as detailed in Schedule 4 (Technical Specifications).

**Sufficient Security:** means either:

1. a bond or equivalent form of Security from a reputable financial institution (approved by ESCo or the Developer (as the context requires), such approval not to be unreasonably withheld or delayed), in a form reasonably satisfactory to ESCo or the Developer (as the context requires), in an amount equivalent to the [ESCo Cap on Liability or the Developer Cap on Liability (as the context requires)][[33]](#footnote-34); or
2. a guarantee in a form approved by ESCo or the Developer (as the context requires), such approval not to be unreasonably withheld or delayed.

**Standing Charge:** means the charge for maintenance and replacement of components of the Energy System charged to Customers under Customer Supply Agreements, regulated in accordance with the Framework Supply Agreement.

**Tax:** means any kind of tax, duty, levy or other charge whether or not similar to any in force at the Effective Date and whether imposed by a local, governmental or other Regulatory Body in the United Kingdom or elsewhere.

**Technical Specifications[[34]](#footnote-35):** means the:

1. Energy Plant and Equipment Specification;
2. Energy Centre Specification;
3. Heat Distribution Network Specification;
4. Substation Specification;
5. [HIU Specification];
6. [Commercial Unit Heat Exchanger Specification];
7. [Customer Meter Specification];
8. Tertiary Heating Systems Technical Specification; [and]
9. [Electricity Network Specifications];

as set out under Schedule 4 (Technical Specifications).

**Temporary Heat Solution:** any temporary heat solution provided by ESCo pursuant to the Framework Supply Agreement for the provision of heating to Customers when heat supplies from the Energy Plant and Equipment (or the Heat Distribution Network as relevant) are temporarily unavailable. *[Drafting Note:* *Parties will need to consider what temporary heating solutions, or storage solutions that mitigate against supply interruptions, will be appropriate for any particular district heating system/scheme.]*

**Temporary Heat Solution Works:** any works undertaken by ESCo pursuant to this Agreement which constructs and connects any Temporary Heat Solution to the Heat Distribution Network as further set out under Schedule 6 (Works Obligations).

**Termination Compensation**: means any payments from ESCo to the Developer or the Developer to ESCo pursuant to Schedule 16 (Arrangements on Termination and Expiry).

**Termination Date**: has the meaning given under Schedule 16 (Arrangements on Termination and Expiry)].

**Termination Notice**: any notice to terminate this Agreement which is given by either Party in accordance with Clause 23.1 (Termination).

**Tertiary Heating System:** means the network of internal pipes and other ancillary equipment located within each Residential Unit that transfers Heat around the Residential Unit from a Residential HIU and its isolation valves, to be designed and installed by the Developer, in compliance with the Tertiary Heating Systems Technical Specification and subject to acceptance by ESCo of the design in accordance with Paragraph [ ] of Schedule 5 (Design and Delivery Process).

**Tertiary Heating Systems Technical Specification:**  means the design guidance for the Tertiary Heating System as set out under Schedule 4 (Technical Specifications).

**Third Party:** means a third party who is not a Party to this Agreement, but shall not include Affiliates of ESCo or the Developer.

**Third Party Subcontractor:** means a works sub-contractor (of any tier) which is not an Affiliate and is not in the same group of companies as the Developer or ESCo (as the context requires), which is undertaking Works in a value greater than [£250,000].

**[TUPE[[35]](#footnote-36):** means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (246/2006) and/or any other regulations enacted for the purposes of implementing the EC Acquired Rights Directive 77/187 (as amended) into English Law.]

**Unit:** means a Commercial Unit or a Residential Unit as the context requires.

**Unsuitable Entity:** means any person:-

1. who has a material interest in the production, distribution or sale of tobacco products, munitions, alcoholic drinks and/or pornography;
2. whose activities are in the reasonable opinion of the Developer, incompatible with the provision of the ESCo Works in the area; or
3. whose activities, in the reasonable opinion of the Developer, pose or could pose a threat to security.

**Variable Charge**: mean the variable kWh charge for Heat consumed, charged to Customers under Customer Supply Agreements, regulated in accordance with the Framework Supply Agreement.

**VAT**: value added tax as provided for in the Value Added Tax Act 1994.

**Voids**: means any Residential Unit which remains unsold or unlet for any reason on the first development and/or letting.

**Works**: means the Developer Works or the ESCo Works as appropriate.

* 1. Clause, Schedule and paragraph headings shall not affect the interpretation of this Agreement.
	2. The Schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement. Any reference to this Agreement includes the Schedules.
	3. A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.
	4. A reference to **holding company** or a **subsidiary** means a holding company or a subsidiary (as the case may be) as defined in section 1159 of the Companies Act 2006 [and a company shall be treated, for the purposes only of the membership requirement contained in subsections 1159(1)(b) and (c), as a member of another company even if its shares in that other company are registered in the name of:
		1. another person (or its nominee), whether by way of security or in connection with the taking of security; or
		2. its nominee.
	5. [For the purposes of determining whether a limited liability partnership is a subsidiary of a company or another limited liability partnership, section 1159 of the Companies Act 2006 shall be amended so that: (a) references in sub sections 1159(1)(a) and (c) to voting rights are to the members' rights to vote on all or substantially all matters which are decided by a vote of the members of the limited liability partnership; and (b) the reference in section 1159(1)(b) to the right to appoint or remove a majority of its board of directors is to the right to appoint or remove members holding a majority of the voting rights.]
	6. Unless the context requires otherwise, words in the singular include the plural and in the plural include the singular.
	7. Unless the context requires otherwise, a reference to one gender shall include a reference to the other genders.
	8. A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.
	9. A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.
	10. [A reference to **writing** or **written** includes fax [and email **OR** but not email]][[36]](#footnote-37).
	11. A reference to **this Agreement** or to any other agreement or document referred to in this Agreement is a reference to this Agreement or such other agreement as varied or novated (in each case, other than in breach of the provisions of this Agreement) from time to time.
	12. References to clauses and Schedules are to the clauses and Schedules to this Agreement and references to paragraphs are to paragraphs of the relevant Schedule.
	13. If there is an inconsistency between the clauses and Schedules respectively, the provisions in the clauses shall prevail in preference to the Schedules..
	14. Any words following the terms **including**, **include**, **in particular**, for example or any other similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or terms preceding those terms.
1. [Conditions Precedent[[37]](#footnote-38)
	1. Save in relation to this Clause 2 and Clause 17 (Confidentiality), Clause 18 (Warranties and Representations), Clause 22 (Limitations on Liability), Clause 27 (Dispute Resolution Procedure), Clause 28 (Assignment and Other Dealings), Clause 38 (Notices), Clause 40 (Governing Law), Clause 41 (Jurisdiction) which will take effect on the Execution Date, this Agreement is conditional upon the satisfaction of the Conditions Precedent (or waiver by the Party entitled to the benefit of the relevant Condition Precedent) by the CP Longstop Date.
	2. The CP Longstop Date may be extended with the written agreement of both the Parties and (if relevant) in accordance with Schedule 1 (Conditions Precedent).
	3. Save as determined in accordance with Schedule 11.8, if the Conditions Precedent have not been satisfied by the CP Longstop Date, either Party shall be entitled to terminate this Agreement by serving written notice to the other Party to that effect, and upon service of such notice, this Agreement will terminate within [sixty (60)] days, but without prejudice to any claims available to any Party in respect of any prior breach.
	4. Each Party shall use its reasonable endeavours to ensure that the Conditions Precedent are discharged by the CP Longstop Date and shall co‑operate with and assist the other Party in seeking to achieve such discharge.
	5. As soon as reasonably practicable following satisfaction of the last of the Conditions Precedent, the Developer shall provide formal written confirmation to ESCo that the Conditions Precedent have been satisfied and the date of such confirmation shall be the Effective Date.]
2. Commencement, duration and extension of term
	1. This Agreement shall take effect on the Effective Date and shall continue until the earlier of:
		1. the Expiry Date [(as may be extended in accordance with Part 1 (Renewal and Retender)[[38]](#footnote-39) of Schedule 16 (Arrangements on Termination and Expiry)); or
		2. the Termination Date;

(the “**Term**”)

* 1. Upon Termination or Expiry the provisions of Clause 26 (Consequences of Termination or Expiry) shall apply.
1. The Framework Supply Agreement

The Parties agree that the Framework Supply Agreement shall be entered into [simultaneously with this Agreement]/[no later than the first Service Readiness Date] [[39]](#footnote-40) and shall govern the manner in which ESCo shall deliver the Heat Supply and Customer Services.

1. Exclusivity
	1. The Developer hereby grants ESCo the right, on an exclusive basis in relation to the Development to Connect the Development to the Energy System, subject to and in accordance with the terms of this Agreement.
	2. Subject to Clause 5.3 and to the extent permitted by Law, as a condition of this Agreement, the Developer warrants, represents and, for the duration of the Term, undertakes that:
		1. it shall not install, use or enable or facilitate the installation or use of any form of gas supply, any gas-fired appliance (except appliances used for any purpose other than the generation or conveyance of heating and/or hot water), any boilers, any electric storage heaters, any heat microgeneration equipment (including solar thermal panels and/or ground, water or air source heat pumps) or any other alternative central heating or hot water system for the supply of space and/or water heating to any part of the Development while a Heat Supply for such purpose is intended to be made available pursuant to the Framework Supply Agreement to that part of the Development using the Energy System; and
		2. it shall ensure that no Plot Developments, Commercial Buildings or Units are connected to any public gas distribution network on their first development, sale and/or letting.
	3. The restriction under Clause 5.2 shall not apply in relation to:
		1. the provision of heating or hot water to any temporary buildings that are used for construction purposes, which means any structure installed on the premises at the Development and occupied as part of the construction process which is intended to be removed when construction ceases, including, without limitation, site offices, canteens and mess rooms, drying and changing rooms, rest rooms, wash rooms and toilets;
		2. [in relation to the supply of gas for cooking [in any Commercial Unit]];
		3. [where the annual heating demand of a Unit or Commercial Building is less than [ ] kWth];
		4. [ ][[40]](#footnote-41).
2. Mutual Obligations
	1. Each Party agrees:
		1. to co‑operate with the other Party, at its own expense, in the fulfilment of the purposes and intent of this Agreement, provided that nothing in this Clause 6.1.1 shall relieve a Party from complying with its obligations under this Agreement or oblige a Party to fulfil another Party's obligations; and
		2. use all reasonable endeavours to procure the co‑operation between Developer Related Parties and ESCo Related Parties for the purposes of the Parties complying with their respective obligations under this Agreement.
	2. In performing their respective obligations under this Agreement, each Party shall act, and shall use all reasonable endeavours to procure that each ESCo Related Party (in the case of ESCo) or each Developer Related Party (in the case of the Developer) acts, in good faith, in accordance with Good Industry Practice and in compliance with the Site Rules.
	3. Without prejudice to either Party's obligations under Clauses 6.1 and 6.2, each Party shall use all reasonable endeavours to minimise interference with the activities of the other Party at the Development.
	4. The Parties shall comply with their respective obligations under the Leases (subject to, and in accordance with, this Agreement).
	5. The Parties shall comply with their respective obligations set out under Schedule 12 (Governance, Monitoring and reporting).
	6. The Parties shall comply with their respective obligations under the CDM Regulations and shall co-operate in order to facilitate the compliance of the other Party with such Regulations.
	7. Each Party (the "**First Party**") shall indemnify the other Party (the "**Second Party**") in respect of any Losses suffered or incurred by the Second Party as a result of a breach by the Second Party of the CDM Regulations, to the extent such Losses were caused by the act or omission of the First Party.
	8. The Parties acknowledge and agree that ESCo shall not be responsible for the construction, installation or ownership of any Tertiary Heating System, which shall be the responsibility of the Developer, the relevant Customer and/or the relevant Registered Provider (as applicable).
	9. Without limiting the operation of any other provision of this Agreement, each Party ensures that it shall, and procure that any person appointed by it to undertake such obligations shall, at all times:
		1. provide Competent Persons to perform its obligations under this Agreement;
		2. take all precautions necessary for the protection of itself, its contractors or sub-contractors (of any tier) and any other persons invited onto or otherwise on the Leased or Licensed areas.
3. ESCo’s Obligations
	1. ESCo shall, at its own cost (save to the extent that ESCo is entitled to make charges to the Developer under, or to Customers pursuant to, this Agreement):
		1. perform all of its obligations set out in this Agreement and the Schedules hereto and shall not by action or inaction impede the Developer in the performance of its obligations under this Agreement;
		2. give such assistance as the Developer reasonably requires to evidence to the Local Planning Authority that the Energy System as designed and at the relevant dates of Connection is compliant with all Authorisations in accordance with Clause 20 (Compliance and Change in Laws);
		3. obtain all ESCo Authorisations;
		4. [warrant that in the preparation of the Technical Specifications it has exercised and shall continue to exercise all the reasonable skill, care and diligence to be expected of a prudent competent and properly qualified professional designer experienced in the delivery of design for projects of equivalent size, scope, nature and complexity and in a location similar to the Development, and, for the avoidance of doubt, shall accept all risk in the adequacy of such Technical Specifications meeting the requirements of this Agreement] [[41]](#footnote-42);
		5. [ensure that the Energy System is designed, constructed and installed, in such a manner as to:
			1. minimise energy losses from the Heat Distribution Network; and
			2. ensure optimal and efficient operation of the Energy Plant and Equipment which:
				1. maximises useful energy output;
				2. minimises energy losses; and
				3. is Carbon Compliant and minimises carbon emissions within the context of the technical solution detailed in the [Technical Specifications*]; [Drafting Note: Parties may want to consider setting out specified output criteria.]; and*
			3. be capable of being operated in accordance with the Technical Specifications and Good Industry Practice for a period of at least five (5) years from the Expiry Date] [[42]](#footnote-43); [*Drafting Note: Parties to consider amendments to cater for arrangements post Expiry Date – e.g. ESCo can undertake a survey at Developer’s cost to confirm that the Energy System is being maintained in accordance with Good Industry Practice.]*
		6. [undertake the design, delivery, construction, installation and commissioning of the ESCo Works in accordance with accordance with the terms of this Agreement, including without limitation, Schedule 4 (Technical Specifications), Schedule 5 (Design & Delivery Process) and Schedule 6 (Works Obligations)] [[43]](#footnote-44);
		7. [Adopt the [Energy System]/ [Secondary Distribution Network] in accordance with the terms of Schedule 8 (Adoption Procedure)];
		8. [Accept the [Secondary Distribution Network] in accordance with the terms of Schedule 7 (Acceptance Procedure)];
		9. ensure that the Energy System is operated and maintained at ESCo’s costs (subject to Clause 20 (Compliance and Change in Laws), Clause 29 (Variation) and charges made to Customers in accordance with the Framework Supply Agreement):
			1. in accordance with this Agreement including without limitation [Schedule 4 (Technical Specifications)][[44]](#footnote-45), [Schedule 7 (Operation and Maintenance)][[45]](#footnote-46), the Leases, Good Industry Practice and any reasonable instructions given by the Developer from time to time relating to ESCo’s performance of its obligations under this Agreement;
			2. so as to comply and enable the Developer to comply with the provisions of the Planning Permissions;
			3. in a manner that is efficient, effective and safe and does not or is not likely to be injurious to health or to cause Loss to property; and
			4. in order to meet the service levels required under the Framework Supply Agreement and the Customer Supply Agreements;
		10. not cause or permit to be caused any physical damage to any part of the Development or any assets or other property of the Developer and shall promptly make good any Loss caused in breach of this Clause 7.1.10 to the reasonable satisfaction of the Developer;
		11. ensure that there is sufficient resilience in the design, construction and operation of the Energy System to ensure that the Key Performance Indicators can be met under the Framework Supply Agreement; and
		12. [provide a Parent Company Guarantee in a form satisfactory to the Developer (acting reasonably)][[46]](#footnote-47).

*[Drafting Note: Payment security might be required of either party (e.g. a contractor  might require payment security from its employer if the employer is thinly capitalised raising concerns about the employer’s ability to meet its payment obligations  or an ESCo might require a performance bond from a contractor to reduce the risk of contractor non-performance/payment, particularly where the contractor is thinly capitalised or the ESCo business is very cash-flow sensitive).  The form of such payment security (e.g. parent company guarantee, performance bonds, letter of credit) will depend on the circumstances of each individual case.  Parties to consider need for payment security and what form of payment security is most appropriate given the circumstances.]*

* 1. **[Private Wire Network[[47]](#footnote-48)**
		1. [ESCo/ The Developer] shall design, construct and lay the Electricity Network from the Energy Centre Plant and Equipment [at the cost of [ESCo/ the Developer]] in accordance with the Electricity Network Specification, to [ ] and any other Commercial Customers requiring electricity supply.
		2. Following Practical Completion of the Electricity Network, ESCo shall undertake all such tests as are reasonably necessary to ensure the safety and operability of the Electricity Network. Following the satisfactory completion of such tests, ESCo shall [adopt and] take full title and risk in the Electricity Network. If any of the relevant tests fail, ESCo shall [be entitled to request that the Developer, at its own cost] rectify any deficiency in the Electricity Network and the tests and rectification process shall be re-run until the tests are satisfactorily passed.
		3. Nothing in this provision shall require ESCo to obtain an Electricity Supply Licence, and it is acknowledged that such Electricity Supply shall be made pursuant to Supply Licence Exemptions A or C (pursuant to Schedule 4 of the Electricity (Class Exemption from the Requirement for a Licence) Regulations 2001), unless and until ESCo obtains, in its complete discretion, an Electricity Supply Licence.] [*Drafting Note: Parties to consider any further amendments where ESCo is also providing electricity supply].*
1. Developer Obligations
	1. The Developer shall:-
		1. [Develop the Development in accordance with the Development Plan, the Developer Delivery Programme, the Outline Planning Permission, the Detailed Planning Permission, the Planning Agreements, the Energy Strategy and all Law and Authorisations][[48]](#footnote-49);
		2. perform all of its obligations set out in this Agreement and the schedules hereto and shall not by action or inaction impede ESCo in the performance of its obligations under this Agreement;
		3. [undertake or procure the design, delivery, construction, installation and commissioning of the Developer Works in accordance with accordance with the terms of this Agreement, including without limitation, the Development Plan, the Developer Delivery Programme, Schedule 4 (Technical Specifications), Schedule 5 (Design & Delivery Process) and Schedule 6 (Works Obligations)][[49]](#footnote-50);
		4. [comply with its obligations in relation to Adoption under Schedule 8 (Adoption Procedure)];
		5. [provide ESCo with regular updates of the number, type, size and expected build completion dates of all of the Plot Developments, Commercial Buildings and Units, including any changes to the Developer Delivery Programme and shall use its reasonable endeavours to notify ESCo promptly (and, in any event, within ten (10) Business Days of it becoming aware) of any material change in the use or operation of the Development that is likely to have an impact on the heat demand, the Development Plan, the Developer Delivery Programme, the Specifications, any part of the Energy System or the ESCo Works];[[50]](#footnote-51)
		6. not cause or permit to be caused any physical damage to any part of the Energy System, or any assets or other property of ESCo and shall reimburse ESCo for any reasonably incurred costs in relation to making good such Loss suffered by ESCo and caused in breach of this Clause 8.1.6;
		7. procure and pay for the installation of suitable utilities, in accordance with Schedule 6Part 1 (Developer Works), to serve the Energy Centres, the Substations and the HIU’s, including putting in place appropriate connection and supply agreements with network operators, but for the avoidance of doubt, the costs of using such utilities, being the ongoing costs of gas, water, electricity and sewerage, shall be borne by ESCo;
		8. [procure that each of its Third Party Sub-Contractors provides a collateral warranty for the benefit of ESCo (in the form set out Schedule 6Part 5 (Collateral Warranty) or an equivalent form, to the satisfaction of ESCo (acting reasonably)) in respect of the [Secondary Distribution Network] [and [ *insert relevant element of the Energy System*]][[51]](#footnote-52);
		9. [provide a Parent Company Guarantee in a form satisfactory to ESCo (acting reasonably)][[52]](#footnote-53). *[Drafting Note: See Note at 7.1.12 above.]*
2. Ownership and access
	1. The Parties acknowledge and agree that [following Adoption] title to the Energy System shall vest in ESCo [,subject to Termination in accordance with this terms of this Agreement][[53]](#footnote-54).
	2. The Parties acknowledge that ESCo shall be granted access rights for construction of the ESCo Works and provision of the ESCo Services, Heat Supply [and Electricity Supply] under the Framework Supply Agreement, pursuant to this Clause 9 and the Leases.
	3. The Developer shall:
		1. grant, or procure that there is granted to ESCo the Leases [or (as the case may be) Deeds of Variation of the relevant Lease][[54]](#footnote-55) [(i) relating to any part of the Energy System which is to be Adopted on or prior to that part of the Energy System being Adopted]; and (ii) relating to the Energy Centres and Substations (as relevant), on Practical Completion of such Energy Centres and Substations (as relevant), and thereafter comply with the terms of such Leases and [Deeds of Variation];
		2. use all reasonable endeavours to agree (acting reasonably) with ESCo, the route of the Easement Corridor (as defined in the Leases) consistent with the Development Plan and Schedule 5 (Design and Delivery Process) across the Development for the purposes of the Leases [and the Deeds of Variation] as soon as reasonably practicable [and shall enter into Deed of Variation in respect of the relevant Lease to replace the plan of the Easement Corridor set out therein with a revised and updated plan setting out the extended Easement Corridor, which deed of variation shall be registered at the Land Registry];
		3. grant (and hereby grants):
			1. a licence to ESCo that will give ESCo and the ESCo Related Parties free, safe and reasonably uninterrupted access to those parts of the Development necessary for ESCo to undertake the ESCo Works (the “**Licence**”), (subject to ESCo and the ESCo Related Parties complying with all relevant Site Rules, CDM Regulations and health and safety obligations) including:-
				1. at any time for any purpose required by Law; and
				2. in accordance with this Agreement and the ESCo Programme of Works for the purpose of undertaking the ESCo Works; and
		4. The Developer shall provide ESCo with access to and use of areas of reasonable size and physical location on the Development for use as a laydown and loading areas in connection with the ESCo Works.
	4. The Developer covenants (on behalf of itself and any landlord under the Lease) that:
		1. ESCo will acquire a good title pursuant to any Leases granted in accordance with this Agreement which is capable of protection by way of registration at the Land Registry free from any onerous encumbrances and/or any other third party rights which could or do materially affect ESCo's ability to observe and perform any of its obligations under the Lease;
		2. it and/or any superior landlord in respect of any Lease granted or varied in accordance with this Agreement has consented or will consent to the grant or variation of the Lease;
		3. it shall at all times observe, perform and comply with all of its obligations as tenant under any superior lease granted to it by a superior landlord in respect of any demised premises to which a Lease is granted to ESCo relates and, at the written request of ESCo, enforce its rights thereunder insofar as they relate to such demised premises; and
		4. it has the benefit of any Authorisations which may be required in order to allow ESCo to procure registration of the Leases (or any relevant deed of variation in respect of a Lease) at the Land Registry within the appropriate timeframes following the grant (or variation) of each Lease, and the Developer shall (or shall procure that the relevant landlord shall) use reasonable endeavours to assist ESCo in dealing with any requisitions from the Land Registry that are applicable to the grantor in order to procure such registration.
	5. ESCo shall:
		1. subject to Clause 9.6, accept the grant of the Leases and Deeds of Variation relating to the Energy Centres and Substations (as relevant), on Practical Completion of the Energy Centres and Substations (as relevant);
		2. use all reasonable endeavours to agree (acting reasonably) with the Developer, the route of the Easement Corridor (as defined in the Leases) consistent with the Development Plan and Schedule 5 (Design and Delivery Process) across the Development for the purposes of the Leases [and the Deeds of Variation] as soon as reasonably practicable;
		3. where it exercises its rights under this clause:
			1. comply with all applicable Laws, Authorisations and the terms of the Leases and Deeds of Variation;
			2. obey the reasonable instructions of the Developer consistent with the Agreement;
			3. comply with all rules, policies and procedures of the Developer relating to health and safety which have been communicated to the ESCo in writing at or before the time of execution of this Agreement and in particular the ESCo shall ensure that each of the ESCo Parties who has access to the Development prior to completion of the design, construction, installation, fit out and commissioning of the ESCo Works shall carry a Construction Skills Certificate Scheme card at an appropriate level and comply with the site health and safety and access requirements of the principal contractor; and
			4. ensure that as little disruption as possible to the activities of the Developer is caused by the exercise of such rights;
			5. comply at all times with the Site Rules.
		4. procure that, subject to complying with all relevant safety procedures previously notified in writing, the Developer and the Developer Related Parties shall have access at all reasonable times to the areas demised by the Leases, with one full working day’s prior Notice to ESCo, for the purpose of general inspection and to ascertain generally that the provisions of this Agreement and the Leases are being complied with, subject and without prejudice to the terms of the Leases; and
		5. procure that, subject to complying with all relevant safety procedures, a Competent Person from the Developer and/or the Developer Related Party is provided with access as soon as practicable, but in any event within four (4) hours, to the areas demised by the Leases without prior notice to ESCo, for the purpose of resolving issues that could be deemed an Emergency.
	6. ESCo shall not be obliged to accept the grant of any Lease [or Deed of Variation] unless:
		1. all consents required from third parties for the grant and subsequent registration of the relevant Lease have been provided to ESCo, in a form satisfactory to ESCo (acting reasonably);
		2. in relation to any restrictions on title noted in the relevant Proprietorship Register, all necessary certificates, deeds of covenant or RX4s as are required for the registration of the relevant Lease at the Land Registry have been provided to ESCo in a form satisfactory to ESCo (acting reasonably);
		3. at the date of the grant of the relevant Lease, [the Developer has evidenced to the reasonable satisfaction of ESCo][[55]](#footnote-56) [ESCo is satisfied][[56]](#footnote-57) (acting reasonably) that the relevant landlord’s title is not encumbered by any matter which would prevent nor does it lack any right which would prevent:
			1. the grant of the relevant Lease;
			2. the use permitted by the relevant Lease; or
			3. the exercise of the rights granted by the relevant Lease by ESCo,

provided that where the title is encumbered or lacks a right as described above, the Developer may satisfy this condition by way of title indemnity insurance on terms and for a sum in each case acceptable to ESCo acting reasonably; and

* + 1. the Developer provides replies acceptable to ESCo acting reasonably to all reasonable enquiries and pre-completion requisitions raised by ESCo or ESCo’s solicitors prior to the completion of any Lease or Deed of Variation.
	1. In relation to each Lease:
		1. in accordance with the provisions of section 38(A) of the Landlord and Tenant Act 1954, the Developer (on behalf of itself and any landlord under the Lease) and ESCo have agreed that the provisions of sections 24 to 28 of that Act shall be excluded in relation to the tenancy created by the Lease;
		2. the Developer (as the landlord under the Lease) or the landlord under the Lease has served on ESCo a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (the "**Order**"); and
		3. the requirements specified in Schedule 2 to the Order have been met in that ESCo has made the appropriate declaration in the form, or substantially in the form, set out in Schedule 2 to the Order.
	2. If, for any reason, ESCo is not able to exercise the relevant property rights as required to be granted (or procured) by the Developer in respect of the Development in order to perform any of its obligations under this Agreement, ESCo shall be relieved of the relevant obligations until such time as it is able to exercise the relevant rights [and a Compensation Event shall be deemed to have occurred][[57]](#footnote-58).
1. Environmental Matters
	1. The Parties acknowledge that this Clause 10.1 is an agreement on liabilities for the purposes of exclusion from and apportionment and attribution of liability for remediation of contaminated land (in terms of paragraphs 7.29 and 7.30 of the Statutory Guidance issued under section 78A(2), (5) and (6) of Part IIA of the Environmental Protection Act 1990 (Agreements on Liabilities) (Defra publication entitled "Contaminated Land Statutory Guidance April 2012")) to the extent and effect that any enforcing authority shall give effect to the relevant provisions of this Clause 10.1.
	2. ESCo and the Developer shall co-operate with each other with respect to their obligations under this Clause 10.1.
	3. Any Party may notify any relevant enforcing authority of the terms of this Agreement. The Parties must do all necessary things and execute any further documents as such authority may require in order to give effect to this Clause 10.
	4. **Developer Responsibility**
		1. Notwithstanding any covenant, provision or obligation contained in this Agreement or elsewhere, but subject always to Clause 10.5.1, the Parties agree that:
			1. the Developer shall be solely responsible for and shall undertake (at its sole cost) any remediation of the Environment in relation to the Development (including, for the avoidance of doubt, the Energy Centre, the Substations and the land which is subject to each Lease and Easement but save where ESCo is in breach of Clause 10.5; and
			2. ESCo shall have no liability in relation to any Hazardous Substances present in, on, at, under, around or migrating to or from the Development (including, for the avoidance of doubt, the Energy Centres, Substations and the land which is subject to each Lease and Easement) and the Developer agrees to indemnify and hold harmless ESCo against all Losses related to, or arising out of, such Hazardous Substances (including, without limitation, liabilities arising out of claims by any third party or action taken by any Relevant Authority or remedial works taken to avoid such formal claim or action) and including in respect of the removal, cleaning and remediation by ESCo (or on ESCo's behalf) of any soil, building material, structure and the Environment that is contaminated by said Hazardous Substances.
		2. The Developer agrees that in undertaking the Developer Works and any remediation works required by Clause 10.4.1, the Developer shall carry out such works or procure that they are carried out in accordance with Good Industry Practice and to the standard required by all relevant Environmental Laws and Environmental Permits.
		3. ESCo shall, as soon as reasonably practicable after becoming aware, advise the Developer of any relevant Environmental Laws and Environmental Permits having been breached as a result of the Developer Works or any remediation works undertaken by the Developer pursuant to Clause 10.4.2 or in relation to any Developer Works and the Developer will remedy the breach (at its sole cost) and shall be liable for, indemnify and hold harmless ESCo against any Losses arising from the Developer's breach.
	5. **ESCo Responsibility**
		1. The Developer shall, as soon as reasonably practicable after becoming aware, advise ESCo of any relevant Environmental Laws and Environmental Permits having been breached as a result of the ESCo Works, ESCo Services, Heat Supply [or Electricity Supply] and ESCo will, remedy the breach (at its sole cost) and shall be liable for, indemnify and hold harmless ESCo against any Losses arising from the Developer's breach.
		2. ESCo shall be responsible for any Hazardous Substances created by ESCo and brought into the Energy Centres, Substations and/or the land which is subject to each Lease or Easement which subsequently is deposited or spilled on and/or released or escapes into the Environment at and around the Energy System the presence of which is caused by, or attributable to the acts or omissions of, ESCo and/or any ESCo Affiliate ("**ESCo Contamination**"), and ESCo agrees to indemnify and hold harmless the Developer against all Losses related to, or arising out of, damage to the Environment caused by such ESCo Contamination (including, without limitation, liabilities arising out of any claims by a third party, action taken by any Relevant Authority and/or remedial works undertaken by the Developer to avoid further damage to the Environment and/or to remove any Hazardous Substances).
2. Connection and supply arrangements
	1. The Developer and ESCo shall comply with all obligations relating to Connections set out under this Clause 11.
	2. Subject to Clause 11.4, as a condition of this Agreement, the Developer:
		1. shall not sell, transfer, lease or otherwise dispose of a Plot Development to a Plot Developer without first procuring that a Connection and Supply Agreement (Plot/ Building) is entered into by such Plot Developer pursuant to Schedule 10Part 1 (Connection Process).
		2. shall not sell, transfer, lease or otherwise dispose of a Commercial Building to a Commercial Customer, without first procuring that a Connection and Supply Agreement (Plot/ Building) is entered into by such Commercial Customer, pursuant to Schedule 10Part 1 (Connection Process).
	3. ESCo shall be required on request by the Developer pursuant to Schedule 10Part 1 (Connection Process), to enter into:
		1. a Connection and Supply Agreement (Plot/ Building) with a Plot Developer; and
		2. a Connection and Supply Agreement (Plot/ Building) with a Commercial Building Customer.
	4. The Developer shall not be required to comply with Clause 11.2 where:
		1. the restriction is deemed unlawful;
		2. a Developer Warning Notice has been served (provided that where a Final Termination Notice is not subsequently served within 3 months of service of such Developer Warning Notice, the Developer shall be forthwith required to comply with Clause 11.2);
		3. the Plot Development is land:-
			1. on which no development space requiring heating of any form is to be delivered;
			2. on which development space requiring some form of heating is to be delivered but [*include any additional relevant carve out]*
		4. [the Commercial Building is one which shall consume less than [ ] kWth.]
		5. the Parties agree in writing that it is not appropriate to require a Connection.
	5. The Developer shall in respect of a Plot Connection:
		1. enter into a Registered Provider Heat Supply Agreement with ESCo where the Developer is a Registered Provider in respect of Residential Units within the relevant Plot Development; or
		2. procure that where there is a third party Registered Provider in respect of Residential Units within the relevant Plot Development, such other Registered Provider enters into a Registered Provider Heat Supply Agreement with ESCo; or
		3. [enter into a [Plot] Developer Void Heat Supply Agreement with ESCo where the Developer is a Landlord of Residential Units within the relevant Plot Development which are let under leases or tenancy agreements with terms of less than [seven (7)] years][[58]](#footnote-59);
		4. in all other circumstances, comply with its obligations under Clause [9.2] (Supply Arrangements) of the Framework Supply Agreement.
3. Charging and invoicing
	1. Due Date

Payments shall be due on the dates or within the time periods stated in this Agreement or, if not stated, shall be due on the date 30 days after agreement or determination of the sum payable.

* 1. Business Days

If any payment to be made by a Party to the other Party would become due on a day which is not a Business Day, it shall be paid on the next Business Day.

* 1. Interest
		1. If either Party fails to pay any amount payable by it under this Agreement to the other Party on its due date, interest shall accrue on the overdue amount:-
			1. daily;
			2. from the due date until the date of payment; and
			3. at three per cent per annum above the Base Rate.
		2. Any interest accruing under this Clause 12 shall be:-
			1. compounded with the overdue amount on the last day of each month; and
			2. immediately payable by the Party on demand.
	2. Interest on disputed amounts

In the event that any payment is the subject of a bona fide unresolved Dispute that has been notified by one Party to the other Party in accordance with Clause 27 (Dispute Resolution Procedure) then Clauses 12.3.1 and 12.3.2 shall only apply to the disputed amount finally resolved to be due and payable.

* 1. Scheme for Construction Contracts

If it is determined that this Agreement is one to which the Housing Grants Construction and Regeneration Act 1996 applies, the provisions of this Clause 12 shall be supplemented and/or substituted (as appropriate) by the relevant provisions of the Scheme for Construction Contracts (England and Wales) Regulations (as amended).

1. Compensation And Relief events
	1. Subject to Clause 13.5, to the extent that either Party is impaired or prevented from performing any of its obligations under this Agreement due to a Compensation Event, such affected Party (“the claiming party”) shall be entitled to:
		1. relief from its obligations under this Agreement;
		2. a fair and reasonable extension of time;
		3. payment of reasonable additional costs incurred;
		4. in respect of delays to Service Readiness of any Plot Development or Commercial Building such that the relevant Programmed Connection Date cannot be achieved, Delay Damages; *[Drafting Note: Parties to consider what delay damages will be payable given their particular circumstances.]*

except to the extent caused or contributed to by the affected Party, its agents or contractors.

* 1. To obtain relief from obligations, an extension of time and/or claim compensation and/or claim Delay Damages the claiming Party must:
		1. as soon as practicable, and in any event within ten (10) Business Days after it became aware that the Compensation Event has caused or is likely to cause delay to achieving Service Readiness by the Programmed Connection Date, breach of an obligation under this Agreement and/or the claiming Party to incur costs, give to the other Party a Notice of its claim for an extension of time to the relevant Programmed Connection Date and / or payment of compensation and/or Delay Damages;
		2. within ten (10) Business Days of receipt by the other Party of the Notice referred to in clause 13.2.1 above, give full details of the Compensation Event and the extension of time and/or compensation and/or Delay Damages to be claimed; and
		3. demonstrate to the reasonable satisfaction of the other Party that:
			1. the Compensation Event was the direct cause of the claim for relief, compensation and/or any delay in the achievement of the Connection Date; and
			2. the relief, compensation and/or time lost, could not reasonably be expected to be mitigated by the claiming Party acting in accordance with Good Industry Practice.
	2. In the event that the claiming Party has complied with its obligations in clause 13.2 above, then:
		1. in the case of a delay:
			1. the relevant Connection Date(s) shall be postponed by such period of time as shall be reasonable taking into account the effect of the delay;
			2. Delay Damages shall be payable from the date of the Programmed Connection Date until Service Readiness of the relevant Plot Development or Commercial Building has been achieved, provided that ESCo shall have no liability to pay Developer Delay Damages where ESCo is able to provide satisfactory alternative Temporary Heating services to Customers;
			3. provided that where the delay is longer than [ ] months, the delay shall be considered to be a Project Variation and the Change Control Procedure shall apply; and
			4. the Parties acknowledge and agree that subject to Clause 13.3.1(c) above and clause 25 (Default, Cure and Termination), this Clause 13 shall be the claiming Party’s sole and exclusive remedy under this Agreement or as a matter of Law in connection with a failure by either Party to achieve Service Readiness by the Programmed Connection Date;
		2. in the case of an additional cost being incurred or Delay Damages being claimed by the claiming Party, the other Party shall compensate the claiming Party within [30] days of receipt of a written demand from the claiming Party supported by all relevant information; and
		3. the other Party shall give the claiming Party relief from its obligations under this Agreement.
	3. In the event that information is provided after the dates referred to in clause 13.2 above, then the claiming Party shall not be entitled to any relief, extension of time, compensation or Delay Damages in respect of the period for which the information is delayed.
	4. Other than in respect of a delay to a Connection Date, during any period of an event falling under Clause 13.1 in which the Heat Supply is affected, ESCo shall comply with its obligations to Customers in relation to the Heat Supply in accordance with the relevant Customer Supply Agreement.
	5. Each of the Parties shall use reasonable efforts to mitigate the impact of a Compensation Event and to remedy its inability to perform.
	6. If, after any payment of compensation and/or Delay Damages pursuant to Clause 13.3.2 it is determined pursuant to Clause 26.3 (Dispute Resolution) that the claiming Party was not entitled to such compensation and/or Delay Damages, then:
		1. the compensation and/or Delay Damages previously paid or allowed to which the claiming Party was not entitled shall be refunded or re-credited to the other Party; and
		2. interest shall accrue on such amount on a daily basis at three per cent (3%) from the date when such payment was paid or allowed (as appropriate).
1. Intellectual Property
	1. [Subject to clause 15 (Grant of licences)]:
		1. The Developer shall not acquire any right, title or interest in or to the IPRs of ESCo or its licensors, including ESCo’s Background IPRs; and
		2. ESCo shall not acquire any right, title or interest in or to the IPRs of the Developer or its licensors, including the Developer’s Background IPRs.
	2. Where either Party acquires, by operation of law, title to IPRs of the other referred to in clause 14.1, and this acquisition is inconsistent with the allocation of title set out in that clause 14.1, such IPRs shall be assigned by it to the other Party on the request of the other Party, whenever that request is made.
2. [Grant of licences
	1. The Developer grants to ESCo a royalty-free, non-exclusive, non-transferable licence during the Term to use the Developer’s Data, including the right to grant sub-licences to its subcontractors, provided that any relevant subcontractor has entered into a confidentiality undertaking with ESCo in a form reasonably acceptable to the Developer.
	2. ESCo grants to the Developer a royalty-free, non-exclusive, non-transferable licence during the Term to use ESCo’s Data, including the right to grant sub-licences to its subcontractors, provided that any relevant subcontractor has entered into a confidentiality undertaking with the Developer in a form reasonably acceptable to ESCo.
	3. The licences granted in clause 15.1 and clause 15.2 are granted solely to the extent necessary for the performance of the Works in accordance with this Agreement. Neither Party shall use the licensed materials for any other purpose.
	4. Neither Party shall have any right to use any of the other Party’s names, logos or trade marks on any of its products or services without the other Party’s prior written consent.
	5. In the event of the termination or expiry of this Agreement, the licence referred to in clause 15.1 and any licence granted in accordance with clause 15.4 shall terminate automatically and ESCo shall deliver to the Developer all material licensed to ESCo pursuant to clause 15.1 or clause 15.4 in its possession or control. However, the licences granted pursuant to clause 15.2 shall continue in full force and effect].
3. Data processing
	1. The Parties shall at all times handle and use all Personal Data they acquire under or in connection with this Agreement in accordance with all applicable Data Protection Legislation.
	2. Without prejudice to Clause 16.1, if any Personal Data is transferred from one Party to the other in connection with performance of this Agreement then each of the Parties shall comply with Schedule 12 (Data processing), which sets out in further detail the legal obligations of the Parties in relation to such a transfer under Data Protection Legislation, taking into account related guidance from regulators, as at the date of this Agreement.
	3. ESCo shall update the Data Protection Protocol from time to time to reflect any relevant Change in Law as it relates to applicable Data Protection Legislation, taking into account related guidance from regulators.
4. Confidentiality
	1. **Duty of confidentiality**

Save as provided by Clause 17.2 each Party shall:

* + 1. keep confidential all Confidential Information it receives or obtains; and
		2. exercise in respect of the Confidential Information the same controls as that Party employs to protect its own Confidential Information.
	1. **Permitted Disclosure**

A Party (the **Disclosing Party**) may disclose or permit the disclosure of Confidential Information:

* + 1. to its employees to the extent that it is reasonably necessary and to any person (including insurance, legal, technical and financial advisers, auditors and accountants) engaged in providing any goods, works or services to the Disclosing Party in connection with and for the purposes of this contract;
		2. in the case of the heat supplier to any replacement heat supplier or any entity engaged or which may be engaged on or following the termination of this contract to perform any of the obligations of the heat supplier under this contract;
		3. to the extent that the confidential information:
			1. has become publicly available or generally known to the public at the time of such disclosure otherwise than as a result of a breach of this Clause 17.
			2. was already in the unrestricted possession of the Disclosing Party prior to receiving or obtaining such confidential information as a result of entering into or performing this contract; and
			3. was lawfully received or obtained by the Disclosing Party from any person without restriction on its use or disclosure;
		4. to enable a determination to be made under Clause 27 (Dispute Resolution Procedure).
		5. when required to do so in any jurisdiction:
			1. by Law;
			2. by or pursuant to the rules or any order of any court, tribunal or agency of competent jurisdiction; or
			3. by any securities exchange, Recognised Investment Exchange or regulatory or governmental body having jurisdiction over it wherever situated;
		6. to any regulatory or governmental body (including any Regulatory Body) in any jurisdiction and having jurisdiction over:
			1. the Disclosing Party; or
			2. the obtaining, monitoring and/or enforcement of any Authorisation;
		7. to enable any registration or recording of any Authorisation;
		8. to a relevant tax authority in any jurisdiction to the extent required for the proper management of the taxation affairs of the Disclosing Party;
		9. to insurers for the purpose of obtaining any insurances;
		10. if such disclosure is expressly permitted by some other provision of this Agreement or if the other Party has given prior written approval to the disclosure (such approval not to be unreasonably withheld or delayed).
	1. **Obligations preserved**
		1. Subject to Clause 17.3.2 and Clause 17.4 if a Party is required to disclose Confidential Information in a manner permitted by Clause 17.2.2, or Clause 17.2.9 then it shall:
			1. inform the person to whom Confidential Information is to be disclosed of the restrictions contained in this Agreement; and
			2. ensure that such person shall observe such restrictions notwithstanding that such person is not Party to this Agreement.
		2. For the avoidance of doubt, a Party is deemed to have satisfied its obligation in Clause 17.3.1(b) if, prior to the disclosure of the Confidential Information, it enters into a contract with the person referred to in Clause 17.3.1(b) which contains an equivalent confidentiality arrangement to this Clause 17.
	2. **Consultation**
		1. If a Party is required to disclose Confidential Information in a manner permitted by Clause 17.2.5, Clause 17.2.6, or Clause 17.2.8, it shall insofar as reasonably practicable:
			1. provide the other Party with advance notice of the requirement and a copy of the information to be disclosed; and
			2. permit the other Party to make representations or objections in relation to it and take into account such reasonable representations and objections that the other Party shall make.
	3. **Exploitation of information**

No Party shall make use of this Agreement or any information (including Confidential Information) issued or provided by or on behalf of either Party in connection with this Agreement otherwise than for the purposes of this Agreement, except with the written consent of the other Party.

* 1. **Continuance of obligations**

The obligations in this Clause 17 shall continue to apply after termination of this Agreement.

* 1. **Return or destruction of confidential information**

Subject to the Developer’s need to have all information necessary to enable the on-going operation and maintenance of the Energy System and the on-going provision of the Heat Supply, on termination of this Agreement for any reason each Party shall, to the extent requested by the other Party who provided them and without retaining copies, destroy all documents or other records containing confidential information or return them to the other Party.

* 1. **Enforcement rights of Parties regarding confidential information**

Each Party accepts and agrees that any Confidential Information received or obtained by that Party as a result of entering into or performing this contract is, by its nature, valuable proprietary commercial information, the misuse of or unauthorised disclosure of which would be likely to cause considerable and uncompensatable damage to the Party from whom that information was received or obtained and accordingly the Parties agree that, without prejudice to any other rights or remedies which may be available in respect of any breach of this Agreement that are expressly provided for in this Agreement, each Party will be entitled to relief by way of injunction, including any interim injunction available from any competent court having jurisdiction over its terms.

1. Warranties and representations
	1. Each Party represents and warrants to the other Party as at the date of this Agreement and throughout the term of this Agreement that:-
		1. it is a corporation (which for the purposes of this Clause 18.1 includes a limited liability partnership), duly incorporated and validly existing under the law of its jurisdiction of incorporation;
		2. it has the power to sue and be sued in its own name and to own its assets and carry on its business as that business is being and will be conducted;
		3. the obligations expressed to be assumed by it in this Agreement are legal, valid, binding and enforceable obligations;
		4. the entry into and performance by it of, and the transactions contemplated by, this Agreement and the Project Agreements do not and will not conflict with:-
			1. any Law or Authorisation applicable to it or binding on its assets;
			2. its constitutional documents; or
			3. any agreement or instrument binding upon it or any of its assets;
		5. it has the power to enter into, perform and deliver, and has taken all necessary action to authorise its entry into, performance and delivery of, this Agreement, the Project Agreements and the transactions contemplated by each of them;
		6. all Authorisations required or desirable:-
			1. to enable it lawfully to enter into, exercise its rights and comply with its obligations in this Agreement and the Project Agreements;
			2. to make this Agreement and the Project Agreements admissible in evidence in its jurisdiction of incorporation; and
			3. to enable it to carry on its business, trade and ordinary activities

have been obtained or effected and are in full force and effect;

* + 1. no claim exists or is being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of the knowledge of that Party, pending or threatened against it or any of its assets directly used in relation to or under the Project Agreements, which will or might have a material adverse effect on the ability of that Party to perform its obligations under this Agreement or any of the Project Agreements; and
		2. no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of that Party, threatened) for its winding‑up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its assets or revenues,

and each Party relies upon the warranties and representations given by the other Party pursuant to this Clause 18.1. *[Drafting Note: Parties to consider amendments required where ESCo does not have full design risk ownership responsibility, and also any amendments that may be required to cater for changes in planning permissions.]*

* 1. Subject to Clause 21.6 (Limitations on Liability) the only claim, right or remedy available to a Party for a breach of warranty or representation expressly set out in this Agreement shall be damages for breach of contract.
	2. Each Party waives all claims, rights and remedies for all representations:-
		1. made to it by any person before entering into this Agreement and each of the Project Agreements; and
		2. not set out in this Agreement or the Project Agreements.
	3. Save as expressly provided in this Agreement and without limiting the operation of Clause 18.6, no warranty, condition, undertaking or term, express or implied, statutory or otherwise, as to the performance of the obligations of any Party pursuant to this Agreement is given or assumed by it, and all such warranties, conditions, undertakings and terms are hereby expressly excluded.
	4. Each Party acknowledges that, in deciding to enter into this Agreement and the Project Agreements, it has not relied on any such representation.
	5. All warranties, conditions and terms which would otherwise be implied into this Agreement by reason of it being a contract for the supply of a service within the meaning of section 12 of the Supply of Goods and Services Act 1982 are hereby expressly excluded.
	6. No Party is dealing as a consumer within the meaning of section 12 of the Unfair Contract Terms Act 1977, nor is this Agreement on any Party's written standard terms of business within the meaning of section 3(1) of the Unfair Contract Terms Act 1977.
	7. This Clause 18 does not exclude or restrict liability for fraudulent misrepresentation or fraudulent concealment.
1. Representatives
	1. Appointment of representatives
		1. The Developer shall appoint up to two Developer Representative(s), the identity of whom shall be subject to the approval of ESCo (such approval not to be unreasonably withheld or delayed) to act in connection with this Agreement.
		2. ESCo shall appoint up to two ESCo Representative(s), the identity of whom shall be subject to the prior approval of the Developer (such approval not to be unreasonably withheld or delayed), to act in connection with this Agreement.
	2. Appointment of successors to representatives
		1. Without prejudice to Clause 19.1.1, the Developer may terminate the appointment of the Developer Representative(s) at any time and shall appoint a successor.
		2. Without prejudice to Clause 19.1.2, ESCo may terminate the appointment of the ESCo Representative(s) at any time and shall appointment a successor.
		3. The Developer and ESCo shall at any time be each entitled to appoint a temporary replacement Representative(s) for a period not exceeding twenty (20) Business Days by Notice to the other Party.
	3. Authority of representatives
		1. The Developer Representative(s) shall have full authority to act on behalf of the Developer for all purposes arising out of or in connection with this Agreement. ESCo and the ESCo Representative(s) shall be entitled to treat any act of the Developer Representative(s) arising out of or in connection with this Agreement as being expressly authorised by the Developer (save where the Developer has notified ESCo in writing that such authority has been limited or revoked) and ESCo shall not be required to determine whether any express authority has in fact been given.
		2. The ESCo Representative(s) shall have full authority to act on behalf of ESCo for all purposes arising out of or in connection with this Agreement. The Developer and the Developer Representative(s) shall be entitled to treat any act of the ESCo Representative(s) arising out of or in connection with this Agreement as being expressly authorised by ESCo (save where ESCo has notified the Developer in writing that such authority has been limited or revoked) and the Developer shall not be required to determine whether any express authority has in fact been given.
	4. Notices

Any notice, information, instructions or public communication given to:-

* + 1. the Developer Representative(s) shall be given in writing in accordance with Clause 38 (Notices) and shall be deemed to have been given to the Developer; and
		2. the ESCo Representative(s) shall be given in writing in accordance with Clause 38 (Notices) and shall be deemed to have been given to ESCo.
1. Compliance and change in laws
	1. In performing its obligations under this Agreement, each of the Parties shall comply with all Laws and shall:
		1. inform the other as soon as it becomes aware of any changes in the Laws that may impact the provision of the Works;
		2. provide the other with timely details of measures it proposes to take and changes it proposes to make to comply with any such changes;
		3. consult with the other, and if possible agree with other, on the manner, form and timing of changes it proposes to make to meet those changes in the Laws;
		4. only implement any such changes in accordance with the Change Control Procedure; and
		5. use all reasonable endeavours to minimise any disruption caused by any changes in applicable Laws introduced pursuant to this Clause 20.
2. Force majeure
	1. Subject to the remaining provisions of this clause 21, neither Party to this Agreement shall in any circumstances be liable to the other for any delay or non-performance of its obligations under this Agreement to the extent that such delay or non-performance is due to a Force Majeure Event.
	2. In the event that either Party is delayed or prevented from or hindered in performing its obligations under this Agreement by a Force Majeure Event, such party shall:
		1. give notice in writing of such delay or prevention to the other Party as soon as reasonably possible, stating the commencement date and extent of such delay or prevention, the cause of the delay or prevention and its estimated duration;
		2. use all reasonable endeavours to mitigate the effects of such delay or prevention on the performance of its obligations under this Agreement; and
		3. resume performance of its obligations as soon as reasonably possible after the removal of the cause of the delay or prevention.
	3. A Party cannot claim relief if the Force Majeure Event is attributable to that Party's wilful act, neglect or failure to take reasonable precautions against the relevant Force Majeure Event.
	4. As soon as practicable following the affected Party's notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and to facilitate the continued performance of this Agreement. The affected party shall take or procure the taking of all steps to overcome or minimise the consequences of the Force Majeure Event in accordance with Good Industry Practice.
	5. The affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the affected Party to be unable to comply with its obligations under this Agreement. Following such notification, this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event unless agreed otherwise by the Parties.
	6. The Parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure.
	7. If, in the circumstances referred to in this Clause 21, the Parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 21.6, and the Force Majeure continues for more than [nine (9)] calendar months from the date on which the Affected Party served Notice on the other Parties in accordance with Clause 21.2.1 (“**Prolonged Force Majeure**”), any Party may, at any time whilst the event of Force Majeure continues, terminate this Agreement by Notice to the other, whereupon the provisions of Paragraph 2.5 of Schedule 16 (Arrangements on Termination) shall apply.
3. Limitations on liability
	1. General
		1. Each Party acknowledges and agrees that:
			1. without limiting the operation of Clause 22.1.1(b), the provisions of this Clause 22 are fair and reasonable having regard to the circumstances as at the date hereof and have been subject to full negotiation;
			2. this Agreement satisfies the requirement of reasonableness within the meaning of sections 2(2) and 11 of the Unfair Contract Terms Act 1977; and
			3. the limitations of liability set out in Clauses 22.2 and 22.3 shall, as they apply to a Party, apply to any indemnities given by that Party under this Agreement. *[Drafting Note: The Parties may want to consider whether they want to carve out any indemnities from the liability caps.]*
		2. No Party shall be liable to the other under or in connection with this Agreement (including under the Leases and whether in contract, negligence or otherwise) for any Indirect Losses.
	2. Liability of Developer**[[59]](#footnote-60)**
		1. The Developer's liability to ESCo howsoever arising out of or in connection with this Agreement (including under the Leases and whether in contract, negligence or otherwise) shall:
			1. [in respect of any Losses recoverable by it under any of the insurances required pursuant to Clause 23 (Insurance), be the amount recovered by the Developer under such insurances or that would have been recoverable but for breach by the Developer of its obligations under Clause 23 (Insurance)]; *[Drafting Note: Parties to consider according to the particular circumstances. Parties to consider what losses they would want to claim for and which of these would be recoverable under insurance policies.]*
			2. in the case of loss of or damage to physical property, not exceed [ ] ([ ] pounds Sterling) per incident or series of related incidents; or
			3. in the case of all other Losses, not exceed in aggregate [ ] ([ ] pounds Sterling)

(together, the "**Developer Cap on** Liability").

* + 1. The Developer may at any time request an increase in the Developer Cap on Liability by giving written Notice to ESCo of such increase sought, provided that the Developer Cap on Liability shall only be increased with ESCo’s consent (not to be unreasonably withheld or delayed).
	1. Liability of ESCo**[[60]](#footnote-61)**
		1. ESCo's liability to the Developer howsoever arising out of or in connection with this Agreement (including under the Leases and whether in contract, negligence or otherwise) shall:
			1. [in respect of any Losses recoverable by it under any of the insurances required pursuant to Clause 23 (Insurance), be the amount recovered by ESCo under such insurances or that would have been recoverable but for breach by ESCo of its obligations under Clause 23 (Insurance)]; *[Drafting Note: Parties to consider according to the particular circumstances. Parties to consider what losses they would want to claim for and which of these would be recoverable under insurance policies.]*
			2. in the case of loss of or damage to physical property, not exceed [ ] ([ ] pounds Sterling) per incident or series of related incidents; or
			3. in the case of all other Losses, not exceed in aggregate [ ] ([ ] pounds Sterling).

(together the "**ESCo Cap on Liability**").

* + 1. ESCo may at any time request an increase in the ESCo Cap on Liability by giving written Notice to the Developer of such increase sought, provided that the ESCo Cap on Liability shall only be increased with the Developer's consent (not to be unreasonably withheld or delayed).
	1. General exclusions
		1. No provision of this Agreement or any of the Project Agreements shall limit the liability of either Party to the other Party in respect of:-
			1. death or personal injury resulting from the negligence of a Party or any of its officers, employees or agents; and
			2. any Losses resulting from the wilful default of, or fraudulent misrepresentation or fraudulent concealment by, that Party; and
		2. Neither Party shall have any liability to the other Party for any Losses to the extent that the Losses were caused by a breach by that other Party.
		3. To the extent permitted by any applicable Law, neither Party shall be liable to the other under this Agreement for any Indirect Losses.
		4. In respect of any Loss suffered by ESCo in respect of which it has a cause of action against the Developer under any [Plot] Developer Void Heat Supply Agreement or Customer under a Customer Supply Agreement, ESCo shall have no separate cause or right of action against the Developer under this Agreement in respect of the same Loss .
		5. The Developer Cap on Liability shall not limit the liability of the Developer to ESCo to make payment of the [Connection Charges].
1. Insurance
	1. ESCo shall take out and maintain (or procure the taking out and maintenance of) the insurances described in Schedule 14 (Insurances) and any other insurances as may be required by Law.
	2. Developer shall take out and maintain (or procure the taking out and maintenance of) the insurances described in Schedule 14 (Insurances) and any other insurances as may be required by Law.
	3. No Party to this Agreement shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co‑insured or additional insured person.
	4. Each Party shall provide the Other Party on request:-
		1. reasonable evidence that cover is in place; and
		2. reasonable evidence that the premiums payable under all insurance policies have been paid.
	5. If the Developer Works in relation to the Energy Centre(s) [or Substations] or any part of them are damaged or destroyed by any of the Insured Risks before Practical Completion the Developer shall rebuild, repair or otherwise reinstate the relevant part (which may if appropriate be the whole) of the Developer Works in a good and substantial manner in accordance with the terms of this Agreement.
	6. Reinstatement

All insurance proceeds received under any policy maintained by ESCo referred to in this Clause 23 insofar as they relate to damage to the Energy System or any part thereof shall be applied to repair, reinstate and replace each part or parts of the Energy System in respect of which the proceeds were received, as soon as is reasonably practicable.

1. **Mitigation and Setoff**
	1. Mitigation

If either Party incurs any Loss, for any cause arising out of or in relation to this Agreement or any of the Project Agreements, that Party shall take such steps as are reasonable in order to mitigate such Loss.

* 1. Right of set‑off

Whenever any amount shall be agreed or determined to be payable by a Party under this Agreement, such amount may be deducted from or reduced by the amount then due to that Party by the other under this Agreement.

1. Default, Cure and Termination
	1. Notice of Defective Performance

If ESCo is in Major Default of this Agreement, then the Developer, acting reasonably, may issue a Notice specifying that, in its opinion, ESCo's failure to perform its obligations under this Agreement amounts to a Major Default (a "**Notice of Defective Performance**") and giving the reasons for this and, where the position is capable of being rectified, either:-

* + 1. specifying a reasonable time limit within which ESCo must commence and complete rectification action to rectify the position (the "**ESCo Cure Period**"); or
		2. notifying ESCo that the Developer shall undertake remedial action itself in accordance with paragraph [ ] Schedule 6Part 2 (Works Obligations), provided the criteria set out therein are satisfied.
	1. Right to Serve Warning Notice
		1. If ESCo Termination Grounds occur then ESCo may, in its discretion at any time within three months of the relevant occurrence of ESCo Termination Grounds, give written Notice (an "**ESCo Warning Notice**") to the Developer of its right to terminate this Agreement.
		2. If Developer Termination Grounds occur then the Developer may, in its discretion at any time within three months of the relevant occurrence of Developer Termination Grounds, give written Notice (a "**Developer Warning Notice**") to ESCo of its right to terminate this Agreement.
	2. Timing of Service of Final Termination Notice
		1. Notwithstanding service of an ESCo Warning Notice by ESCo or a Developer Warning Notice by the Developer, this Agreement will only terminate after service of a further notice (a "**Final Termination Notice**") by ESCo (where an ESCo Warning Notice was served) or the Developer (where a Developer Warning Notice was served) confirming that it wishes to proceed with termination of this Agreement and subject to the remaining provisions of this Agreement, including any provisions of Schedule 16 (Arrangements on Termination).
		2. Any such Final Termination Notice, if to be served, must be served within three months of service of the ESCo Warning Notice or Developer Warning Notice (as the case may be). Following service of a Final Termination Notice, this Agreement shall terminate on the Termination Date save to the extent necessary to give effect to any enduring obligations which expressly survive such termination and without prejudice to the provisions of Clause 26 (Consequences of Termination or Expiry).
	3. Exclusive grounds of termination
		1. The Developer agrees and acknowledges that its right to terminate this Agreement pursuant to the provisions of Clause 25.3 shall be the sole grounds upon which the Developer may terminate this Agreement due to breach of this Agreement by ESCo.
		2. ESCo agrees and acknowledges that its right to terminate this Agreement pursuant to the provisions of Clause 25.3 shall be the sole grounds upon which ESCo may terminate this Agreement due to breach of this Agreement by the Developer.
	4. **Termination of the Framework Supply Agreement**[[61]](#footnote-62)

In the event that the Framework Supply Agreement is terminated, this Agreement shall terminate forthwith.

1. Consequences of termination or expiry[[62]](#footnote-63)
	1. On Termination or Expiry of this Agreement, the provisions of Schedule 16 (Arrangements on Termination and Expiry) shall apply.
	2. **Continuing Provisions**

Save as otherwise expressly provided in this Agreement the Expiry or Termination of this Agreement shall be without prejudice to:

* + 1. any antecedent or accrued rights, reliefs, remedies or liabilities arising out of or in connection with this Agreement prior to or as at the Expiry Date or Termination Date (as applicable);
		2. any rights of the Parties under any provision of this Agreement which is expressed to survive Termination or which is required to give effect to such termination or the consequences of such Termination;
		3. the continuing rights and obligations of the Parties under Clause 17 (Confidentiality), Clause 21.6 (Limitations on Liability), Clause 24 (Mitigation and Setoff), this Clause 26 (Consequences of Termination or Expiry), Clause 27 (Dispute Resolution Procedure) Clause 38 (Notices), Clause 40 (Governing Law) and Clause 41 (Jurisdiction).
	1. **Exit Plan**
		1. Without prejudice to any relevant provisions in the Leases, where this Agreement is terminated by either Party pursuant to clauses 25.2 and 25.3 then the Parties shall agree and implement a plan (the “**Exit Plan**”) containing an exit strategy pursuant to which ESCo will transfer, relinquish and/or assign (as applicable) all the relevant rights, interests and duties under this Agreement or arising from it. The Exit Plan shall be prepared and implemented in accordance with this clause 26 and shall cover and include the following:
			1. transfer procedures to ensure a smooth handover of operation;
			2. [the provision of documentation and any plant and equipment to enable the continued operation, maintenance, repair and extensions of the Energy System];[[63]](#footnote-64)
			3. interfacing with the Project Agreements;
			4. any additional services and/or assistance reasonably required by the Developer subject to clause 26.3.2;
			5. the Termination Compensation; and
			6. evidence from ESCo that the Energy System is in full working order or in the event that the Energy System is not in full working order, the inclusion by ESCo of a proposed schedule of remedial works to be undertaken by ESCo at its own cost in accordance with Schedule 16Part 3 (Transitional Arrangements) ESCo shall prepare and provide to the Developer not later than [twenty (20)] Business Days after the date of termination a proposed Exit Plan.
		2. Not later than [ten (10)] Business Days following receipt by the Developer of ESCo's proposed Exit Plan in accordance withclause 26.3.1(f) the Parties shall meet to discuss and agree the Exit Plan, acting reasonably and in good faith. The Exit Plan shall set out the proposed exit strategy including details of the scope of any additional services to be provided by ESCo and requested by the Developer pursuant to 26.3.1(d) in order to implement the Exit Plan together with details of the Termination Compensation payable by the Developer to ESCo pursuant to Schedule 16 (Arrangements on Termination).
		3. Unless otherwise requested by the Developer, ESCo shall comply with the provisions of the agreed Exit Plan until the transfer, relinquishment and/or assignment of rights, interests and duties under this Agreement or arising from it has been completed in accordance with the provisions of the Exit Plan and all obligations therein have been satisfied by ESCo, as certified in writing by the Developer.
		4. [During the period of negotiation and implementation of the Exit Plan, ESCo shall at its own cost continue to operate and maintain the Energy System in accordance with the terms of this Agreement without disruption, unless otherwise instructed by the Developer. If ESCo fails to meet its obligations under this clause 26.3.4, the Developer may, in its discretion, carry out these obligations, or engage any other person to carry out these obligations, and ESCo shall:
			1. co-operate with, and provide reasonable assistance and necessary rights of access to the Developer and any person engaged by the Developer in the carrying out of ESCo's obligations pursuant to this clause 26.3.4; and
			2. without prejudice to the operation of Clause 3 (Commencement, Duration and Extension of Term) but subject to clause 22.4 (General Exclusions) and 24 (Mitigation and Setoff) immediately on demand indemnify the Developer against any Loss directly arising from ESCo's failure to meet its obligations under this clause 26.3.4]; [[64]](#footnote-65).
		5. If:
			1. the Parties are unable to agree the provisions of the Exit Plan within [ten (10)] Business Days following the date of the meeting pursuant to clause 26.3.2; or
			2. ESCo fails to fully implement the Exit Plan in accordance withclause 26.3.3,

then the Developer alone shall devise an appropriate exit strategy pursuant to which ESCo shall, by a date instructed by the Developer, transfer, relinquish and/or assign (as applicable) all rights, interests and duties under this Agreement or arising from it and ESCo shall comply with any reasonable instructions from the Developer in order to implement such exit strategy. *[Drafting Note: Parties may want to consider amending to take account of the cause of termination. For example, if termination occurs as a result of Developer breach, then Developer may not be entitled to develop appropriate exit strategy where the Parties cannot agree an Exit Plan.]*

* 1. Employees
		1. The provisions of this clause 26.4 shall apply to the extent that TUPE applies to ESCo’s employees engaged in provision or performance of any task in discharge of ESCo's obligations pursuant to this Agreement.
		2. For the purposes of this clause 26.4, "**Transferring Employees**" shall mean those employees wholly or mainly engaged in the provision of any task in discharge of ESCo’s obligations under this Agreement as the case may be as immediately before the Expiry Date or Termination Date whose employment transfers to the party to whom the obligations to provide heat transfer as appropriate pursuant to TUPE. Upon expiry or termination of this Agreement for whatever reason (such date being termed the "**Transfer Date**"), the provisions of this clause 26.4 shall apply.
		3. ESCo shall or shall procure that all wages, salaries and other benefits of the Transferring Employees and other employees or former employees of ESCo (who had been engaged in the provision of any obligations under this Agreement) and all PAYE tax deductions, pension contributions and national insurance contributions relating thereto in respect of the employment of the Transferring Employees and such other employees or former employees of ESCo up to the Transfer Date, are satisfied.
1. Dispute Resolution Procedure
	1. If a dispute arises out of or in connection with this Agreement or the performance, validity or enforceability of it (**Dispute**), then [, except as expressly provided in this Agreement,] the Parties shall follow the procedure set out in this clause:
		1. either Party shall give to the other written notice of the Dispute, setting out its nature and full particulars (**Dispute Notice**), together with relevant supporting documents. On service of the Dispute Notice, the [EMPLOYEE TITLE] of [Party 1] and [EMPLOYEE TITLE] of [Party 2] shall attempt in good faith to resolve the Dispute;
		2. if the [EMPLOYEE TITLE] of [Party 1] and [EMPLOYEE TITLE] of [Party 2] are for any reason unable to resolve the Dispute within [30] days of service of the Dispute Notice, the Dispute shall be referred to the [SENIOR OFFICER TITLE] of [Party 1] and [SENIOR OFFICER TITLE] of [Party 2] who shall attempt in good faith to resolve it; and
		3. if the [SENIOR OFFICER TITLE] of [Party 1] and [SENIOR OFFICER TITLE] of [Party 2] are for any reason unable to resolve the Dispute within [30] days of it being referred to them, the Parties agree to enter into mediation in good faith to settle the dispute in accordance with [the CEDR Model Mediation Procedure **OR** OTHER PROCEDURE]. Unless otherwise agreed between the Parties within [NUMBER] days of service of the Dispute Notice, the mediator shall be nominated by [CEDR **OR** OTHER BODY **OR** OTHER PERSON]. To initiate the mediation, a Party must serve notice in writing (**ADR notice**) to the other Party to the Dispute, referring the dispute to mediation. [A copy of the ADR notice should be sent to [CEDR **OR** OTHER PROVIDER]]. Unless otherwise agreed between the Parties, the mediation will start not later than [NUMBER] days after the date of the ADR notice.
	2. The commencement of mediation shall not prevent the Parties commencing or continuing court proceedings in relation to the Dispute under Clause 41 (Jurisdiction) which clause shall apply at all times.

OR

No Party may commence any court proceedings under Clause 41 (Jurisdiction) relation to the whole or part of the Dispute until [NUMBER] days after service of the ADR notice, provided that the right to issue proceedings is not prejudiced by a delay.]

1. Assignment and other dealings
	1. ESCo shall not assign, novate, transfer or dispose of any of its rights and/or obligations under this Agreement, the Framework Supply Agreement[[65]](#footnote-66) or any of the Leases or Customer Supply Agreements without the Developer's consent, unless such assignment, novation, transfer or disposal is to an entity that:
		1. simultaneously accepts a transfer of the whole of ESCo's rights and obligations under this Agreement, including legal and beneficial title to and interest in the Energy System, and the Framework Supply Agreement and the Leases and the Customer Supply Agreements;
		2. in the Developer’s reasonable opinion, has sufficient financial standing or Sufficient Security has been provided;
		3. demonstrates to the Developer’s reasonable satisfaction, has or has procured, adequate administrative and technical resources and expertise to perform its obligations under this Agreement as ESCo;
		4. is not an Unsuitable Entity.
	2. The Developer shall not assign, novate, transfer or dispose of any of its rights and/or obligations under this Agreement, any of the Leases or Customer Supply Agreements without ESCo’s consent, unless such assignment, novation, transfer or disposal [(a) occurs after the completion and/or sale of all parts of the Development and the obligations of clause 11.1 (Connection and Supply Arrangements) have been complied with; and][[66]](#footnote-67) (b) is to an entity that:
		1. simultaneously accepts a transfer of the whole of the Developer’s rights and obligations under this Agreement, and legal and beneficial title to and interest in the Framework Supply Agreement, the Leases and the Customer Supply Agreements;
		2. in ESCo's reasonable opinion, has sufficient financial standing or has Sufficient Security has been provided;
		3. demonstrates to ESCo's reasonable satisfaction, has or has procured the technical resources to perform its obligations under this Agreement.
	3. Either Party may subcontract any of its obligations under this Agreement to any third party (including, without limitation, any Affiliate of such Party), provided that such Party shall remain liable in accordance with this Agreement for the acts and omissions of any such subcontractor.
	4. In the event of a Change of Control of either Party which adversely changes the financial covenant strength of such party, the other Party may

[review the adequacy of the Parent Company Guarantee provided pursuant to Clause 7.1.12 (ESCo Obligations) or 8.1.9 (Developer Obligations) (as relevant) and (acting reasonably) may require a substitute performance security (whether by way of a substitute guarantee, a bond, a bank guarantee or letter of credit or other form of security) to replace or supplement the Parent Company Guarantee already provided pursuant to Clause 7.1.12 (ESCo Obligations) or 8.1.9 (Developer Obligations) (Developer Obligations)] [[67]](#footnote-68)/

[(acting reasonably) require the provision of a Parent Company Guarantee or another form of security (whether by way of a bond, a bank guarantee or letter of credit or other form of security).][[68]](#footnote-69)

1. Variation
	1. Either Party shall be entitled to request an amendment, change, revision or variation to this Agreement which shall be subject to the Change Control Procedure.
	2. Without prejudice to Schedule 15 (Change Procedure), no variation of this Agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).
2. Waiver

No failure or delay by a Party to exercise any right or remedy provided under this Agreement or by Law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

1. Rights and remedies

[Except as expressly provided in this Agreement, the **OR** The] rights and remedies of the Parties provided under this Agreement are in addition to, and not exclusive of, any of its rights or remedies provided by law.

1. No partnership or agency
	1. Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the Parties, constitute any Party the agent of another Party, or authorise any Party to make or enter into any commitments for or on behalf of any other Party.
	2. Each Party confirms it is acting on its own behalf and not for the benefit of any other person.
2. Publicity
	1. Approval of marketing material
		1. All media releases, public announcements and public disclosures by the Parties in relation to or in connection with this Agreement, the Project Agreements or their subject matter, including but not limited to promotional material (but not including any site specific marketing materials relating specifically to clients, any announcement intended solely for internal distribution or any disclosure required by legal, accounting or regulatory requirements), shall be co‑ordinated with and approved in the first instance by the Developer’s Representative and ESCo’s Representative prior to release. Such consent shall not be unreasonably withheld or delayed and shall be deemed to have been given by any Party which fails to Notify the other Parties of its refusal to grant approval within 10 Business Days.
		2. For the avoidance of doubt, nothing in this Clause 33 shall restrict the Developer's right to publicise or make any announcement about the Development provided that no reference is made to this Agreement, the Project Agreements or the subject matter of any of those agreements, or to the involvement of ESCo, otherwise than in accordance with Clause 33.1.
3. Severance
	1. If any provision or part-provision of this Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this Agreement.
	2. If any provision or part-provision of this Agreement is deemed deleted under clause 34.1 the parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.
4. Further assurance

[At its own expense, each **OR** Each] Party shall, and shall use all reasonable endeavours to procure that any necessary third party shall, [promptly] execute and deliver such documents and perform such acts as may [reasonably] be required for the purpose of giving full effect to this Agreement.

1. Entire agreement
	1. Other than in relation to the Project Agreements, this Agreement constitutes the entire agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
	2. Each Party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement. Subject to Clause 18.8 (Warranties and Representation) each Party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Agreement.
2. Third party rights
	1. This Agreement does not give rise to any rights under the Contracts (Rights of Third parties) Act 1999 to enforce any terms of this Agreement.
	2. The rights of the parties to rescind or vary this Agreement are not subject to the consent of any other person.
3. Notices
	1. A notice or communication given to a Party under or in connection with this Agreement shall be in writing and sent to such Party at the address [or email address] given in this Agreement or as otherwise notified in writing to [the **OR** each] other Party.
	2. This clause 38.2 sets out the delivery methods for sending a notice to a Party under this Agreement and, for each delivery methods, the date and time when the notice is deemed to have been received or given (provided that all other requirements of this clause have been satisfied and subject to the provision in clause 38.3:
		1. if delivered by hand, on signature of a delivery receipt[ or at the time the notice is left at the address];
		2. if sent by [pre-paid first class post or other[ next working day delivery service[ providing proof of [postage **OR** delivery]] at 9.00am on the [second] Business Day after posting[ or at the time recorded by the delivery service];
		3. if sent by pre-paid airmail [providing proof of [postage **OR** delivery]], at [9.00am on the [fifth] Business Day after posting[ or at the time recorded by the delivery service] OR [INSERT TIME AND DATE]; [or]
		4. [if sent by email, at the time of transmission; [or]]
		5. [if sent by fax, at the time of transmission.]
	3. If deemed receipt under clause 38.2 would occur outside business hours in the place of receipt, it shall be deferred until business hours resume. In this clause 38.3, business hours means 9.00am to 5.00pm Monday to Friday on a day that is not a public holiday in the place of receipt.
	4. This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.
	5. [A notice given under this Agreement is not valid if sent by email.]
4. Counterparts
	1. This Agreement may be executed in any number of counterparts, each of which when executed [and delivered] shall constitute a duplicate original, but all the counterparts shall together constitute the one Agreement.
	2. [Transmission of [an executed counterpart of this Agreement (but for the avoidance of doubt not just a signature page) **OR** the executed signature page of a counterpart of this Agreement] by email (in PDF, JPEG or other agreed format) shall take effect as delivery of an executed counterpart of this Agreement. If either method of delivery is adopted, without prejudice to the validity of the agreement thus made, each Party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.]
	3. [No counterpart shall be effective until each Party has executed [and delivered] at least one counterpart.]
5. Governing law

This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the Law of England and Wales.

1. Jurisdiction

Each Party irrevocably agrees that the courts of England and Wales shall have [exclusive **OR** non-exclusive] jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Agreement or its subject matter or formation.

1. – Conditions Precedent
	* + 1. COnditions precedent
				1. The Developer shall use reasonable endeavours to discharge the Conditions Precedent, and in particular shall take all appropriate action to enable any application for judicial review to be challenged by the appropriate authority, and shall keep ESCo fully informed of all action it may take in order to do so.
				2. ESCo shall provide information that is reasonably requested by the Developer to assist with the Planning Permission applications and any appeal pursuant to paragraph 1.4.1.
				3. If any application is made for judicial review of either or both of the Planning Permissions, each Party shall:-

keep the other Party fully informed of all relevant information with respect to the challenge, including all correspondence, notifications, instructions to and advice of counsel, evidence of expert and other witnesses, and the dates of any enquiry hearing or for the submission of written representations;

allow the other Party to attend at conferences with counsel and other relevant meetings; and

have due regard to the reasonable requirements of the other Party.

* + - * 1. In the event that a Planning Permissions contains a planning condition falling under limb (b) of the definition of Satisfactory Planning Permission, the Developer shall be entitled (in its absolute discretion) to either:

appeal such planning condition; or

agree with ESCo such measures that need to be taken to satisfy the planning condition in accordance with paragraph 1.5.

* + - * 1. The Parties shall (acting reasonably) agree the methods to be undertaken in order to satisfy the planning conditions, including (without limitation) by way of re-design and amendments to relevant Technical Specifications. ESCo shall use reasonable endeavours to mitigate such costs and, following this exercise, the reasonable costs of any such re-design and/ or amendments and/ or alternative measures (including the additional cost of ESCo Works and/ or ESCo Services) shall be agreed between the Parties (acting reasonably) and shall be recovered by ESCo by way of:

the Connection Charges; and/or

such alternative payment method as is agreed between the Parties at the time.

* + - * 1. Following the satisfaction of any planning conditions that fall under paragraph 1.4 and agreement between the Parties in writing as to the way in which ESCo shall recover its costs pursuant to paragraph 1.5, the Planning Permissions shall (subject to limb (a) of the definition of Satisfactory Planning Permission) be deemed to be Satisfactory Planning Permissions.
				2. If the Conditions Precedent have not been discharged before the CP Longstop Date, then, subject to paragraph 1.8 of this Schedule 1, this Agreement is to become capable of termination under Clause 2.3.
				3. If at the CP Longstop Date:-

the Planning Permissions have been awarded but the challenge period of six weeks in respect of the latest of the Planning Permissions to be granted has not expired, the CP Longstop Date shall be extended to the date six weeks after such grant; and

any proceedings are then in progress in respect of any application for judicial review, then this Agreement may not be terminated under Clause 2.3 unless and until the proceedings have been concluded on a basis that one or both of the Planning Permissions have not been left in place in substantially the same form as initially granted.

1. - Plans
2. - Programmes
3. - Technical Specifications
	* 1. : Energy Plant and Equipment Specification;

*[Insert detailed specification]* *OR [Insert outcomes-based approach]*

* + 1. : Energy Centre Specification;

*[Insert detailed specification] OR [Insert outcomes-based approach]*

* + 1. : Heat Distribution Network Specification;

*[Insert detailed specification] OR [Insert outcomes-based approach]*

* + 1. : Substation Specification;

*[Insert detailed specification] OR [Insert outcomes-based approach]*

* + 1. : [HIU Specification];

*[Insert detailed specification] OR [Insert outcomes-based approach]*

* + 1. : [Commercial Unit Heat Exchanger Specification];

*[Insert detailed specification] OR [Insert outcomes-based approach]*

* + 1. : [Customer Meter Specification];

*[Insert detailed specification] OR [Insert outcomes-based approach]*

* + 1. : Tertiary Heating Systems Technical Specification;

*[Insert detailed specification] OR [Insert outcomes-based approach]*

* + 1. : [Electricity Network Specifications]

*[Insert detailed specification] OR [Insert outcomes-based approach]*

* + 1. : Drawings

*[Drafting Note: Parties should consider whether to set out a detailed specification (which assumes the Developer has in-house resource or appointed technical consultants to draw this up) or whether, instead, merely to set out contractually required outcomes. Adopting either approach, care will need to be taken in setting out these requirements]*

1. – Design & Delivery Process

 *[Include appropriate detail of Design & Delivery Process to be undertaken]*

1. - Works Obligations
	* 1. : Developer Works

*[Include appropriate detail of Developer Works to be undertaken]*

* + 1. : ESCo Works

*[Include appropriate detail of ESCo Works to be undertaken]*

* + 1. : General Works requirements[[69]](#footnote-70)
			1. General
				1. **Compliance with Site Rules**

This Part 3 shall apply in respect of all ESCo Works provided that if there is a conflict between the terms of this Part 3 and the Site Rules, the Site Rules shall in all cases take precedence.

* + - * 1. **Use of the Site**

ESCo shall:

not use the Site for any purpose other than that of carrying out the ESCo Works and those works contemplated under this Agreement and any Customer Supply Agreement;

not display advertisements on the Site nor permit advertisements to be displayed without the prior written consent of the Developer;

[arrange deliveries to ensure that there is no need to store excess materials on site];

provide reasonable details of its health and safety information and policies, quality information, contact information and such other matters as the Developer may from time to time reasonably request and shall, once such information has been provided, promptly inform the Developer of any material changes thereto].

* + - 1. Access and Vehicles
				1. ESCo shall:

ensure that vehicles and staff enter the Site as directed by the Developer;

ascertain and comply with all police and traffic regulations and directions, particularly those relating to parking, loading and unloading of vehicles and skips at the Site; and

ensure that ESCo’s Staff are notified of, and comply with, such regulations and directions;

arrange deliveries of materials and plant, including the delivery and removal of rubbish skips, to take into account any reasonable restrictions on parking and the passage of vehicles at the Site and obtain approval from the Developer for the times of deliveries and removal of rubbish, such approval not to be unreasonably withheld or delayed.

* + - 1. Required Equipment

ESCo shall at its own expense provide all its own tools, access equipment and personal protection equipment necessary to perform the ESCo Works (including, without limitation, any works to be performed at height) in conformity with good working practice and ESCo shall use reasonable endeavours to ensure that its staff make full use of such personal protection equipment as the circumstances demand. Where it is part of the Site Rules that such items of equipment are worn, the Developer shall have the right to require removal from the Site of any person not complying with such rules in this respect.

* + - 1. Lifting Operations
				1. Prior to ESCo undertaking any lifting operation by the use of a machine, it shall produce for inspection by the Developer:

the appropriate statutory inspection reports and/or certificates in respect of the machine;

evidence that the operator of any crane or lifting machine is trained and competent;

detailed information on the manner in which the lifting operations are to be carried out and the equipment to be used.

* + - * 1. ESCo shall consult with the Developer before carrying out any lifting operations with a crane or lifting machine to ensure that:

the ground or place where the crane or lifting machine is standing is suitable and will withstand the weight imposed on it; and

no part of the crane or lifting machine is likely to foul overhead gantries, pipelines, electric lines or adjacent electrical conductors.

* + - 1. Trespass and Nuisance
				1. ESCo shall prevent the its staff accessing:

any part of the Site beyond those areas ESCo is entitled to access pursuant to the terms of this Agreement; or

any part of the Site to which access is not reasonably necessary in connection with ESCo Works being performed, without the prior written consent of the Developer. Only designated entrances and approaches to the area of working shall be used.

* + - * 1. ESCo all ensure thatthe ESCo Works are conducted in such a way as to, and shall take all necessary precautions to, prevent any disturbance, inconvenience or nuisance to the occupiers and users of the Site and adjoining buildings and to the public in general, consulting with and following the directions of the Developer in all cases where noisy or otherwise disruptive working may need to be performed. The obligations in this paragraph 5.2 shall not apply to the extent that it is necessary for ESCo to carry out Emergency Works on Site, provided that ESCo shall nevertheless be required to take reasonable steps to minimise any disturbance which may be caused by such Emergency Works.
				2. ESCo shall ensure that all measures to control the emission of dust or fumes produced by its operations on Site required under or by virtue of any enactment or regulation, are strictly complied with.
			1. Noise Control

In accordance with the Control of Noise at Work Regulations 2005, ESCo shall not commence any operation that will result in any person on the Site being exposed to the lower exposure action value (as referred to in such Regulations) or above without first carrying out the risk assessment required by the said Regulations and identifying the measures which need to be taken to meet the requirements of the said Regulations and informing the Developer in writing accordingly.

* + - 1. Pest Control

ESCo shall ensure that the risk of infestation at the Site is minimised by adequate arrangements for disposal of food waste and other matters attractive to pests which are brought onto the Site by ESCo.

* + - 1. Removal of Rubbish

ESCo shall take all reasonable steps to ensure that the Site is free from all surplus materials, rubbish and debris arising from the execution of the ESCo Works.

* + - 1. Facilities on Site
				1. ESCo shall be responsible for unloading, placing in, removing from store and hoisting all of its own materials including the provision of all necessary unloading and lifting facilities and equipment.
				2. Electric power shall be made available at the Site to ESCo [at no cost to ESCo] with access to such electric power for use as necessary on Site, exclusively to enable ESCo to carry out the ESCo Works and comply with its obligations under this Agreement, including that for use in its own stores if such are provided.
				3. Where necessary for the carrying out of the ESCo Works, [ESCo]/the [Developer] shall provide and be responsible for the maintenance of temporary electricity supplies from the point of connection to the electricity supply.
				4. Water and drainage shall be made available at the Site to ESCo [at no cost to ESCo] with access to such water and drainage for use as necessary on Site, exclusively to enable ESCo to carry out the ESCo Works and comply with its obligations under this Agreement.
				5. Where necessary for the carrying out of the ESCo Works, [ESCo]/[the Developer] shall provide and be responsible for the maintenance of temporary water supplies and drainage together with necessary temporary receptacles and plumbing from a source to be agreed with the Developer.
				6. ESCo shall ensure that its staff at all times whilst employed or engaged on the Site have identification which clearly identifies them as ESCo’s staff.
			2. Surveillance Equipment

ESCo acknowledges and agrees that surveillance equipment is in operation at the Site and that its employees will be subject to monitoring via such equipment while at the Site.

* + - 1. Industrial Relations

### The Developer shall neither encourage nor discourage the participation by ESCo’s staff in an appropriate trade union or staff association.

### ESCo shall use reasonable endeavours to ensure, so far as is reasonably practicable and only to the extent that ESCo is able to do so in accordance with the Law, that if its employees wish to conduct or engage in any industrial relations activities or trade union meetings they do so elsewhere than on the Site and that no trade union or similar posters and/or notices are displayed by its employees anywhere on the Site.

* + - 1. Safety, Health and Welfare
				1. The Developer shall provide all necessary welfare facilities for ESCo’s staff.
				2. ESCo shall be responsible for its and its staff’s observance of all safety precautions including those required by an Act of Parliament (whether general, local or personal) or any regulation working rules or bye-law of any local authority or body necessary or desirable for the protection of itself, its staff and any other person.
				3. ESCo shall ensure that it and all of its staff are conversant with and abide by all of the Developer’s safety, fire and security policies and procedures including any requirement to operate permit to work procedures to the extent that these have been provided to ESCo by the Developer in writing.
				4. ESCo shall ensure that petroleum products and other inflammable or vaporising liquids, gases or solids shall only be used in accordance with the manufacturer’s recommendations and the regulations applicable to the storage and use of these products at the Site and where applicable to the ESCo Works, and shall ensure that when such products are not in use ESCo shall remove them from the area of the ESCo Works to a safe place of storage.
				5. ESCo shall safeguard and take all necessary precautions against damage by fire or explosion when the execution of the ESCo Works may involve the presence of flame or sparks. Where the carrying out of the ESCo Works may involve the presence of heat (other than the Heat), flame or sparks, and the Developer is operating such a system, ESCo must apply to the Developer for a ‘Hot Works Permit’ and such permit must be granted before the ‘hot works’ are carried out.
				6. ESCo shall ensure that it and its staff are familiar with all fire precautions, fire alarms, means of escape, emergency evacuation procedures, security requirements and safety procedures in force at the Site, and that fire exits are kept clear at all times, to the extent that such procedures have been notified to ESCo by the Developer in writing. ESCo shall notify the Developer immediately of the occurrence of any incident at the Site requiring the help or attention of the police, fire brigade, ambulance or other emergency service and as soon as possible after such incident shall provide the Developer with full written details of the incident.
				7. Before leaving the Site ESCo shall ensure on each occasion that naked lights and other ignition sources have been extinguished and electrical apparatus where practicable are switched off.
				8. Sufficient, suitable and adequately maintained fire extinguishers shall be provided by the Developer for use by ESCo in relation to the ESCo Works, to the extent that the need for such fire extinguishers arises directly in connection with the performance of the ESCo Works and not the ordinary operation of the Development.
				9. All prime movers, transmission machinery and dangerous parts of machinery shall be securely fenced by ESCo in accordance with statutory requirements. ESCo shall make arrangements for compliance with this requirement prior to bringing any such plant or machinery on to the Site.
			2. Existing Service Installations
				1. In this paragraph, ‘Service Installations’ means gas mains, water mains, electricity and control cables and wires, sewers, drains, culverts and ditches and other forms of mains and/or services; anything associated therewith including lagging and protective covering, brackets, posts, fittings, foundations and supporting structures, but excluding the Energy System.
				2. ESCo shall:

not use or interfere with the existing Service Installations without the prior written consent of the Developer, such consent not to be unreasonably withheld or delayed, and, where applicable, of services and utility authorities and/or private owners, such consent shall not be unreasonably withheld or delayed; and

inform its staff of the details and locations of existing Service Installations as appropriate and draw their attention to the attendant risks and danger.

* + - * 1. ESCo shall immediately notify the Developer in writing of any damage caused to public or private services by any action or failure to act of any of its staff or which otherwise comes to its attention.
			1. Other Contractors[[70]](#footnote-71)
				1. ESCo acknowledges that other contractors and/or the Developer’s staff and/or contractors and/or sub-contractors may be working on the Site and ESCo may in such cases be required to work in close co-operation with such persons.
				2. ESCo and the Developer shall where reasonably possible ensure that all of their staff co-operate and liaise with and do not obstruct any other contractors from time to time carrying out duties on or in the vicinity of the Site.
				3. The Developer shall take reasonable steps to procure that any other contractors from time to time carrying out duties on or in the vicinity of the Site liaise with and, where reasonably possible, attempt to minimise any disruption that the carrying out of their duties may cause to ESCo in performing its obligations under this Agreement on or in the vicinity of the Site.
		1. : Site Rules

*[Insert relevant development site rules]*

* + 1. : Form of Collateral Warranty

**[CONTRACTOR]**

‑ and ‑

**[BENEFICIARY]**

**DEED OF COLLATERAL WARRANTY**

‑relating to‑

[   ]

**THIS DEED** is made on 20[ ]

**BETWEEN:**

1. **[BENEFICIARY]** (Company Number: [ ]), whose registered office is at [ ] (the **"Beneficiary"**, which expression shall include its successors and assigns);
2. **[CONTRACTOR]** [(Company Number: [ ]), whose registered office is at [ ]](the **"Contractor"**)

**WHEREAS:**

1. The Contractor has entered into an appointment dated *[insert date of the Appointment]* (the **"Appointment"** which term shall include any amendments or revisions thereto from time to time and any new or replacement appointment created by the novation of the Appointment) with *[- insert relevant party]* (Company Number: *[insert the relevant party’s company number]*) whose registered office is at *[insert the relevant party’s registered address]* (the **"Employer")**, which term shall include its permitted assignees or transferees under the Appointment)] for the provision of *[state nature of Contractor’s professional services/ works ] [*works]/[services] set out therein (the **"[Works]/[Services]"**) in connection with the [ ] district heating scheme (the “**Project**”).
2. The Beneficiary has, as *[insert the nature of the Beneficiary's interest in the Project]*, an interest in the Project.
3. The Contractor has agreed to provide this Deed in favour of the Beneficiary.

**NOW**, in consideration of the payment of Ten Pounds (£10) by the Beneficiary to the Contractor (receipt of which is hereby acknowledged by the Contractor), **THIS DEED WITNESSES** as follows:

* + - 1. INTERPRETATION
				1. Unless the context otherwise requires, terms or phrases which are defined in the Connection and Adoption Agreement shall have the same meanings in this Deed, and a reference to a statute, statutory instrument or other subordinate legislation (**"legislation"**) is to such legislation as amended and in force from time to time, including any legislation which re-enacts or consolidates it, with or without modification.
				2. The following definitions shall apply to this Deed:

"**Documents**" means all designs, drawings, models, plans, specifications, design details, photographs, brochures, reports, notes of meetings, CAD materials, calculations, schedules, programmes, bills of quantities, budgets and any other materials provided in connection with the [Works]/ [Services] and all updates, amendments, additions and revisions to them and any works, designs, or inventions incorporated or referred to in them for any purpose relating to the [Works]/ [Services].

"**Prohibited Materials**" means substances which are either (i)  identified as potentially hazardous in the BCO report entitled ‘Good Practice in the Selection of Construction Materials’ (current edition), other than in accordance with the recommendations as to good practice contained in section 2 of that report; or (ii) generally known at the time of use to be deleterious to health and safety or to durability in the particular circumstances in which they are used.

* + - 1. WARRANTY

The Contractor warrants and undertakes to the Beneficiary that, in respect of the [Works]/ [Services] and all other obligations performed and to be performed by the Contractor under the Appointment, it has exercised and shall continue to exercise all the reasonable skill, care and diligence to be expected of a prudent, competent and properly qualified district heating provider experienced in the provision of like [works]/[services] for a project of a size, scope, nature and complexity and in a location similar to the Project.

* + - 1. PROHIBITED MATERIALS

Without prejudice to the generality of clause 2, the Contractor further warrants and undertakes to the Beneficiary that (unless otherwise specifically instructed by the Employer) it has not specified, authorised for use or knowingly caused or allowed to be used, and shall continue not to specify, authorise for use or knowingly cause or allow to be used, in or in connection with the Project any Prohibited Materials.

* + - 1. COPYRIGHT LICENCE
				1. The Contractor with full title guarantee grants to the Beneficiary a royalty‑free, irrevocable, perpetual and non‑exclusive licence to use, adapt and copy the Documents for any purpose whatsoever relating to the Project or including without limitation the construction, completion, maintenance, letting, sale, promotion, modification, advertisement, reinstatement, refurbishment, repair, funding and mortgaging thereof. Such licence shall be transferable to third parties, and the Beneficiary shall be entitled to grant sub-licences. The Contractor shall not be liable to the Beneficiary for any negligent or improper use of the Documents or for any use of the same for purposes other than those for which the same were originally prepared or provided, which purposes shall be deemed to include any purpose permitted by this clause 4.1.
				2. The Contractor irrevocably waives, and shall procure that each of its sub-contractors shall irrevocably waive, any rights it or they may have under Chapter IV (Moral Rights) Part 1 of the Copyright Designs and Patents Act 1988 in relation to the Documents, and the Contractor shall obtain a written irrevocable waiver from its employees, and from the respective employees of each of its sub-contractors, of any such rights which they may have.
				3. The Contractor warrants and undertakes to the Beneficiary that in performing the [Works]/ [Services] it has not infringed and shall not infringe any copyright or any other intellectual property or design rights.
			2. INSURANCE

Without prejudice to its obligations under this Deed or otherwise at law, the Contractor shall effect and maintain professional indemnity insurance in full force and effect from the date on which it was first consulted and instructed in connection with the [Works]/ [Services] until the date which is twelve years after the date of practical completion of the Contractor Works in an amount of not less than [to be inserted] [(£[ ])] in respect of each and every claim or series of claims arising out of the same originating cause, provided such insurance is available at commercially reasonable rates and on commercially reasonable terms. As and when it is reasonably required to do so by the Beneficiary, the Contractor shall provide to the Beneficiary for inspection documentary evidence to show that such insurance is being properly maintained.

* + - 1. ENQUIRIES

The obligations and liabilities of the Contractor under this Deed will not be released, diminished or in any other way affected by any enquiry or inspection into any matter which may be made or carried out by or on behalf of the Developer, the Beneficiary or any third party or by the appointment of, or the failure to appoint, any person, firm or company to carry out any enquiry or inspection into or otherwise report on any matter, act or omission of any such person, firm or company, whether or not such act or omission might give rise to any independent liability of any such person, firm or company to the Developer, the Beneficiary or any third party.

* + - 1. ASSIGNMENT AND THIRD PARTY RIGHTS
				1. The benefit of this Deed and the rights arising hereunder (whether or not accrued) may be assigned by the Beneficiary on two occasions without the consent of the Contractor. The Contractor shall be given written notice of any such assignment. Except as provided in clause 7.2, no further assignments shall be permitted without the prior written consent of the Contractor (such consent not to be unreasonably withheld or delayed).
				2. Unless expressly stated in this Deed, nothing in this Deed confers or is intended to confer any rights on any third party pursuant to the Contracts (Rights of Third Parties) Act 1999.
			2. LIMITATION
				1. No action or proceedings under or in connection with this Deed shall be commenced against the Contractor in connection with the [Works]/ [Services] after the expiry of 12 years from the date of practical completion of the [Works]/ [Services].
				2. The Contractor shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Appointment and (subject to clause 10.2) to raise equivalent rights in defence of liability (but not any financial claims the Contractor may have against the Employer) to those that it would have had if the Beneficiary had been named as a joint employer with the Employer under the Appointment with the Contractor owing its duties to each employer separately.
			3. NOTICES

Any notice to be given by the Contractor shall be deemed to be duly given if it is delivered by hand at or sent by special delivery or recorded delivery to the Beneficiary at its registered office; and any notice given by the Beneficiary shall be deemed to be duly given if it is delivered by hand at or sent by special delivery or recorded delivery to the Contractor at its registered offices or such other address as the Contractor may notify to the Beneficiary in writing for such purpose. Any notice sent by special delivery or recorded delivery shall be deemed (subject to proof to the contrary) to have been received 48 hours after being posted.

* + - 1. GOVERNING LAW AND JURISDICTION
				1. This Deed and any non-contractual obligations arising out of or in relation to it shall be governed by English law. Subject to the right to enforce a judgment obtained in the English Courts in any other jurisdiction, the parties hereby irrevocably submit to the exclusive jurisdiction of the English Courts.
				2. Without prejudice to the generality of their powers, the English Courts shall have the power to open up, review and revise any decision, opinion, requirement, direction, certificate, valuation or notice (including any decision of an Adjudicator) and to determine all matters in dispute which shall have been submitted to the English Courts in the same manner as if no such decision, opinion, direction, certificate, valuation or notice had been given.
			2. [STEP IN][[71]](#footnote-72)

**IN WITNESS** whereof the parties hereto have executed and delivered this Deed on the date first before written.

1. - Acceptance Procedure[[72]](#footnote-73)
	* + 1. Interpretation and application
				1. In addition to the definitions set out in the defined terms of this Agreement, the following terms shall have the following meanings when used in this Schedule 7:

"**Acceptance Date**" means the date on which (i) the Secondary Distribution Network is accepted in accordance with paragraph 2.4.1, (ii) the Customer Meters and CIUs are accepted in accordance with paragraph 3.4.1, or (iii) the HIUs are accepted in accordance with paragraph 4.3.2 below.

“**Acceptance Information**” means the information provided to ESCo respectively pursuant to paragraphs 2.1, 3.1 and 4.1 below.

“**ESCo’s Agent”** means any agent or sub-contractor appointed by ESCo to carry out the Acceptance procedure on ESCo’s behalf, the identity of which and contact details of which shall be notified to the Developer.

 “**Initial Commissioning[[73]](#footnote-74)**” means, as the context requires, the initial commissioning of (i) the Secondary Distribution Network (ii) the Customer Meters and CIUs, or (iii) the HIUs, by the Developer in accordance with relevant British Standards, CIBSE and BSRIA guidance documentation as relevant to the commissioning of the Secondary Distribution Network and associated Customer Meters, CIUs and the HIUs.

**“Initial Inspection”** means, as the context requires, the initial inspection of (i) the Secondary Distribution Network (ii) the Customer Meters and CIUs, or (iii) the HIUs, in accordance with the Technical Specifications.

“**Final Commissioning**” means, as the context requires, the final commissioning of (i) the Secondary Distribution Network (ii) the Customer Meters and CIUs, or (iii) the HIUs, in accordance with the Technical Specifications, including demonstrating the operation of the control and monitoring systems of the Secondary Distribution Network, Customer Meters, CIUs and the HIUs.

**“Final Inspection”** means, as the context requires, the final inspection of (i) the Secondary Distribution Network, (ii) the Customer Meters and CIUs, or (iii) the HIUs, in accordance with the Technical Specifications.

“**Meter Asset Register**” means a comprehensive register of the Customer Meters[[74]](#footnote-75).

“**Non-Conformities**” means any:

1. items of the Secondary Distribution Network that do not comply with the Technical Specifications; or
2. failure to provide the Acceptance Information.

“**Rectification Plan**” means a plan agreed between ESCo and the Developer in accordance with the terms of this Schedule 7 setting out any agreed remedial works and/or actions in respect of the Non-Conformities in (i) the Secondary Distribution Network, (ii) the Customer Meters and CIUs, or (iii) the HIUs.

“**Schedule of** **Non-Conformities”** means a document drawn up by ESCo after inspecting the Secondary Distribution Network, the Customer Meters, or the HIUs, setting out a list of Non-Conformities in (i) the Secondary Distribution Network, (ii) the Customer Meters and CIUs, or (iii) the HIUs.

* + - 1. SECONDARY DISTRIBUTION NETWORK

Inspection and Information

The Developer shall give ESCo and ESCo’s Agent not less than [twenty one (21)] calendar days prior of the commencement of the installation of the Secondary Distribution Network and shall provide to ESCo and ESCo’s Agent a drawing (or drawings) of the Secondary Distribution Network in AutoCAD and pdf that clearly shows:

those parts of the Secondary Distribution Network which can be visually inspected without excavation or removal of panels or flooring (other than panels or flooring designed to be capable of removal for inspection or similar purposes) or other substantial interference with any fixed structure. These areas shall be designated on such plan as “not concealed”; and

those parts of the Secondary Distribution Network which cannot be visually inspected without excavation or removal of panels or flooring (other than panels or flooring designed to be capable of removal for inspection) or other substantial interference with any fixed structure. These areas shall be designated as “concealed”.

During the installation, the Developer shall give at least [five (5)] Business Days’ notice to ESCo and ESCo’s Agent prior to any part of the Secondary Distribution Network being concealed to allow ESCo and ESCo’s Agent to inspect those parts of the Secondary Distribution Network being concealed. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and ESCo’s Agent and their representatives on such inspection. If ESCo and/or ESCo’s Agent declines to attend or does not attend on the agreed date, then the Developer may proceed with the concealment of the installation.

For the purposes of setting quality standards early, ESCo and/or ESCo’s Agent shall undertake an Initial Inspection of the Secondary Distribution Network and highlight where the Secondary Distribution Network has Non-Conformities. The Developer shall give ESCo and ESCo’s Agent not less than [twenty one (21)] days' notice of this requirement and shall grant ESCo and/or ESCo’s Agent all access reasonably necessary for ESCo and/or ESCo’s Agent to undertake the Initial Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and/or ESCo’s Agent and their representatives on such Initial Inspection.

Not later than [fourteen (14)] days before the commencement of the Final Commissioning of the Secondary Distribution Network, the Developer shall provide ESCo and ESCo’s Agent with the following information in relation to the Initial Commissioning of the Secondary Distribution Network:

installation drawings in pdf and AutoCAD format to reflect the status of the installation at that time;

pressure testing records; and

flushing records.

The Developer shall give ESCo and ESCo’s Agent not less than [twenty one (21)] calendar days’ notice of completion of the Final Commissioning activities. On completion of the Final Commissioning, ESCo and/or ESCo’s Agent shall undertake the Final Inspection of the Secondary Distribution Network, to assess whether the Secondary Distribution Network has been designed and installed in accordance with the Technical Specifications and is free from any Non-Conformities. The Developer shall grant ESCo and ESCo’s Agent all access reasonably necessary for ESCo and/or ESCo’s Agent to undertake the Final Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and/or ESCo’s Agent and their representatives on such inspection.

Not later than [fourteen (14)] days before the Final Inspection, the Developer shall provide ESCo and ESCo’s Agent with the information listed in paragraph 2.1.4 (to the extent it has not already provided the same to ESCo and ESCo’s Agent) and the following information in relation to the Secondary Distribution Network subject to the Final Inspection:

as built drawings in pdf and AutoCAD format;

pressure testing records;

flushing records;

operation and maintenance manuals, including manufacturers’ literature;

the diameter, material type, leakage detection functionality (if present) and insulation details of the pipe and pipeline ancillaries;

details of any pipe supports where such supports are installed including,

details of all pipe entries through structures, including sealing details; and

the location and type of each valve.

The Developer shall provide ESCo and ESCo’s Agent with any updated information listed in paragraph 2.1.6 above if such information is updated, or if new information is available, before the date ESCo commences delivery of Heat Supply and provision of the ESCo Services.

Defects and Non-Conformities

Not later than [seven (7)] days after the Initial Inspection (if it has been requested by the Developer), ESCo or ESCo’s Agent shall provide an initial Schedule of Non-Conformities to the Developer.

Not later than [seven (7)] days after the Final Inspection, ESCo or ESCo’s Agent shall provide a final Schedule of Non-Conformities to the Developer.

Rectification Plan

Within [fourteen (14)] days of ESCo or ESCo’s Agent providing the Developer with the final Schedule of Non-Conformities in accordance with paragraph 2.2.2 above, the Parties shall meet to mutually agree a Rectification Plan setting out the Non-Conformities and the agreed remedial works and/or actions that the Developer (or its agents) shall take in respect of the Non-Conformities, including any agreed time scales or other terms.

If, within [twenty one (21)] days of receipt of the final Schedule of Non-Conformities, the Developer and ESCo do not agree a Rectification Plan, either Party may invoke the dispute resolution procedure in Clause 27 (Dispute Resolution Procedure).

Acceptance

Once:

the final Rectification Plan has been agreed or determined pursuant to paragraph 2.3 above; and

access rights have been granted pursuant to Clause 9 (Ownership and Access) in relation to the Secondary Distribution Network;

the Developer and ESCo shall sign an acceptance certificate confirming that ESCo agrees to commence ESCo Services in respect of the Secondary Distribution Network or, as the case may be, subject to the Developer carrying out, or procuring the carrying out of, its obligations under the Rectification Plan, provided that ESCo shall not be obliged to commence the ESCo Services if any Non-Conformities pose a health and safety risk until such Non-Conformities are remedied by the Developer. *[Drafting Note: Consider any specific circumstances when ESCo would not want to sign acceptance certificate – e.g. critical defect in the Secondary Distribution Network. See also clause 13 (Compensation and Relief Events) under which ESCo can claim relief if a defect is discovered in the Secondary Distribution Network.]*

Remedial Action

The Developer undertakes to carry out all of its obligations under the Rectification Plan within the timescales set out in the Rectification Plan and to grant ESCo and/or ESCo’s Agent all access reasonably necessary for ESCo to inspect the Secondary Distribution Network to confirm that the Developers obligations under the Rectification Plan have been carried out to ESCo’s reasonable satisfaction. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

Until the Developer has carried out its obligations under the Rectification Plan, ESCo shall be relieved from performing those elements of the ESCo Services that ESCo is reasonably prevented from carrying out until such obligations are performed.

If the Developer fails to carry out any of its obligations under the Rectification Plan within the timescales set out in the Rectification Plan the Developer shall be liable for all reasonable Losses that ESCo incurs as a direct result. If such failure persists for more than sixty (60) days after an initial written notice from ESCo to the Developer of the Developer’s failure to carry out the relevant obligations under the Rectification Plan ESCo may perform, or procure that a third party performs, the relevant obligations under the Rectification Plan and the Developer shall be liable for ESCo’s reasonable Losses incurred when doing so.

* + - 1. customer meters and CIUs

Inspection and Information

For the purposes of setting quality standards early, ESCo shall undertake an Initial Inspection of a sample of Customer Meters and CIUs (no greater than [ ( )] Customer Meters and CIUs), installed with the Secondary Distribution Network, and highlight where the Customer Meters and/or CIUs have Non-Conformities. The Developer shall give ESCo not less than twenty one (21) days' notice of this requirement and shall grant ESCo all access reasonably necessary for ESCo to undertake the Initial Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

Not later than [fourteen (14)] days before the commencement of the Final Commissioning of the Customer Meters and CIUs installed with the Secondary Distribution Network, the Developer shall provide ESCo with the following information in relation to the Initial Commissioning of the Customer Meters and CIUs:

MBus wiring schematic;

MBus wiring route drawings;

Meter Asset Register;

Electrical test records for MBus wiring and power cabling to the CIU; and

operation and maintenance manuals, including manufacturers’ literature of Customer Meters.

When requested by the Developer by giving not less than [twenty one (21)] days’ notice, ESCo shall witness the Final Commissioning of the Customer Meters and CIUs installed with the Secondary Distribution Network, to assess whether the Customer Meters and CIUs have been designed and installed in accordance with the Technical Specifications and are free from any Non-Conformities. The Developer shall grant ESCo all access reasonably necessary for ESCo to undertake the Final Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives witnessing the Final Commissioning.

The Developer shall provide ESCo with any updated information listed in 3.1.2 above in respect of the Customer Meters and CIUs accepted by ESCo if such information is updated, or if new information is available, before the date ESCo commences the ESCo Services.

Defects and Non-Conformities

Not later than [seven (7)] days after the Initial Inspection of the Customer Meters and CIUs installed with the Secondary Distribution Network, (if it has been requested by the Developer), ESCo shall provide an initial Schedule of Non-Conformities to the Developer for the Customer Meters and CIUs inspected.

Not later than [seven (7)] days after the Final Commissioning of the Customer Meters and CIUs installed with the Secondary Distribution Network, ESCo shall provide a final Schedule of Non-Conformities to the Developer, clearly scheduling which Customer Meters and/or CIUs have Non-Conformities.

Rectification Plan

Within [fourteen (14)] days of ESCo providing the Developer with the final Schedule of Non-Conformities for the Customer Meters and CIUs in accordance with paragraph 3.2.2 above, the Parties shall meet to mutually agree a Rectification Plan setting out the Non-Conformities and the agreed remedial works and/or actions that the Developer (or its agents) shall take in respect of the Non-Conformities.

If, within [twenty one (21)] days of receipt of the final Schedule of Non-Conformities, the Developer and ESCo do not agree a Rectification Plan, either Party may invoke the dispute resolution procedure in Clause 27 (Dispute Resolution Procedure).

Acceptance

Once the Rectification Plan has been agreed or determined pursuant to paragraph 3.3 above, the Developer and ESCo shall sign an acceptance certificate confirming that ESCo accepts the installation of the Customer Meters and CIUs installed with the Secondary Distribution Network, excluding those Customer Meters and/or CIUs scheduled as having Non-Conformities pursuant to clause 3.2 above.

Remedial Action

The Developer undertakes to carry out all of its obligations under the Rectification Plan and to grant ESCo all access reasonably necessary for ESCo to inspect the Customer Meters and CIUs to confirm that the Developers obligations under the Rectification Plan have been carried out to ESCo's reasonable satisfaction. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

ESCo shall accept the inclusion of those Customer Meters and CIUs scheduled as having Non-Conformities preventing them being part of ESCo Services once the Developer has carried out its obligations for that Customer Meter or CIU under the Rectification Plan.

If the Developer fails to carry out any of its obligations under the Rectification Plan within the timescales set out in the Rectification Plan, the Developer shall be liable for all reasonable Losses that ESCo incurs as a direct result. If such failure persists for more than [sixty (60)] days after an initial written notice from ESCo to the Developer of the Developer’s failure to carry out the relevant obligations under the Rectification Plan ESCo may perform, or procure that a third party performs, the relevant obligations under the Rectification Plan and the Developer shall be liable for ESCo’s reasonable Losses incurred when doing so.

* + - 1. Heat Interface Units

Inspection and Information

For the purposes of setting quality standards early, ESCo shall undertake an Initial Inspection of a sample of HIUs (no greater than [ ( )] HIUs) installed with the Secondary Distribution Network, and highlight where they have Non-Conformities. The Developer shall give ESCo not less than [twenty one (21)] days' notice of this requirement and shall grant ESCo all access reasonably necessary for ESCo to undertake the Initial Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

Not later than [fourteen (14)] days before the commencement of the Final Inspection of the HIUs installed with the Secondary Distribution Network, the Developer shall provide ESCo with the following information in relation to the HIUs:

as built drawings in pdf and AutoCAD format of each type of HIU;

pressure testing records of the tertiary (within Unit) network;

flushing records of the tertiary (within Unit) network;

Evidence that tertiary (within Unit) network water has been chemically treated;

electrical testing records and certificates of the HIU;

operation and maintenance manuals, including manufacturers’ literature of the HIU; and

control system operation manual of the HIU.

Serial numbers of each HIU inclusive of heat meter housed within it and the property address or Plot Development reference.

When requested by the Developer by giving not less than [twenty one (21)] days’ notice, ESCo shall undertake the Final Inspection of the HIUs installed with the Secondary Distribution Network, to assess whether the HIUs are free from any Non-Conformities. The Developer shall grant ESCo all access reasonably necessary for ESCo to witness the Final Commissioning. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives witnessing the Final Inspection.

The Developer shall provide ESCo with any updated information listed in 4.1.2 above if such information is updated, or if new information is available, before the date ESCo commences the Secondary Distribution Network Services.

Defects and Non-Conformities

Not later than [seven (7)] days after the Initial Inspection (if it has been requested by the Developer), ESCo shall provide an initial Schedule of Non-Conformities to the Developer.

Not later than [seven (7)] days after the Final Inspection, ESCo shall provide a final Schedule of Non-Conformities to the Developer clearly scheduling which HIUs have Non-Conformities.

Rectification Plan

Within [fourteen (14)] days of ESCo providing the Developer with the final Schedule of Non-Conformities for the HIUs in accordance with paragraph 4.2.2 above, the Parties shall meet to mutually agree a Rectification Plan setting out the Non-Conformities and the agreed remedial works and/or actions that the Developer (or its agents) shall take in respect of the Non-Conformities, including any agreed time scales or other terms.

If, within [twenty one (21)] days of receipt of the final Schedule of Non-Conformities, the Developer and ESCo do not agree a Rectification Plan, either Party may invoke the dispute resolution procedure in Clause 27 (Dispute Resolution Procedure).

Acceptance

Once the Rectification Plan has been agreed or determined pursuant to paragraphs 4.3 above, the Developer and ESCo shall sign an acceptance certificate confirming that ESCo accepts the installation of the HIUs installed with the Secondary Distribution Network, subject to the Developer carrying out, or procuring the carrying out of, its obligations under the Rectification Plan.

Remedial Action

The Developer undertakes to carry out all of its obligations under the Rectification Plan within the timescales set out in the Rectification Plan and to grant ESCo and/or ESCo’s Agent all access reasonably necessary for ESCo and/or ESCo’s Agent to inspect the HIUs to confirm that the Developers obligations under the Rectification Plan have been carried out to ESCo’s and/or ESCo’s Agent’s reasonable satisfaction. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and/or ESCo’s Agent and their representatives on such inspection.

Until the Developer has carried out its obligations under the Rectification Plan, ESCo shall be relieved from performing those elements of the ESCo Services on the relevant HIUs that ESCo is reasonably prevented from carrying out until such obligations are performed.

If the Developer fails to carry out any of its obligations under the Rectification Plan within the timescales set out in the Rectification Plan, the Developer shall be liable for all reasonable Losses that ESCo incurs as a direct result (and for the avoidance of doubt, such costs shall include those of ESCo’s Agent). If such failure persists for more than [sixty (60)] days after an initial written notice from ESCo and/or ESCo’s Agent to the Developer of the Developer’s failure to carry out the relevant obligations under the Rectification Plan ESCo and/or ESCo’s Agent may perform, or procure that a third party performs, the relevant obligations under the Rectification Plan and the Developer shall be liable for ESCo’s reasonable Losses incurred when doing so.

1. – Adoption Procedure[[75]](#footnote-76)
	* + 1. Interpretation and application
				1. In addition to the definitions set out in the defined terms of this Agreement, the following terms shall have the following meanings when used in this Schedule 8:

"**Adoption Information**" means the information provided to ESCo pursuant to paragraphs 2.1.5, 2.1.7, 3.1.5, 3.1.7, 4.1.5 and 4.1.7] below.

“**ESCo’s Agent”** means any agent or sub-contractor appointed by ESCo to carry out the Adoption procedure on ESCo’s behalf, the identity of which and contact details of which shall be notified to the Developer.

"**Initial Commissioning[[76]](#footnote-77)**" means, as the context requires, the initial commissioning of [(i) the Energy Plant and Equipment, (ii) the Primary Distribution Network, and (iii) the Secondary Distribution Network][[77]](#footnote-78), by the Developer in accordance with relevant British Standards, CIBSE and BSRIA guidance documentation, and ADE guidance documentation as relevant.

**“Initial Inspection”** means, as the context requires, the initial inspection of [(i) the Energy Plant and Equipment, (ii) the Primary Distribution Network, and (iii) the Secondary Distribution Network] in accordance with the Technical Specifications.

"**Final Commissioning**" means, as the context requires, the final commissioning of [(i) the Energy Plant and Equipment, (ii) the Primary Distribution Network, and (iii) the Secondary Distribution Network], in accordance with the Technical Specification, including demonstrating the operation of the control and monitoring systems of the [Energy Plant and Equipment, the Primary Distribution Network and the Secondary Distribution Network], and including a system proving period of at least [2 weeks] after completion of all testing and commissioning.

**“Final Inspection”** means, as the context requires, the final inspection of of [(i) the Energy Plant and Equipment, (ii) the Primary Distribution Network, and (iii) the Secondary Distribution Network] in accordance with the Technical Specification.

"**Non-Conformities**" means any:

1. items of [(i) the Energy Plant and Equipment, (ii) the Primary Distribution Network, and (iii) the Secondary Distribution Network] that do not comply with the Technical Specification; or
2. failure to provide the Adoption Information.

"**Rectification Plan**" means a plan agreed between ESCo and the Developer in accordance with the terms of this Schedule 8 setting out any agreed remedial works and/or actions in respect of the Non-Conformities in the [(i) the Energy Plant and Equipment, (ii) the Primary Distribution Network, and (iii) the Secondary Distribution Network].

"**Schedule of** **Non-Conformities"** means a document drawn up by ESCo after inspecting the Secondary Distribution Network, setting out a list of Non-Conformities in the Secondary Distribution Network.

* + - 1. ENERGY CENTRE PLANT and equipment

Inspection and Information

During the installation, the Developer shall give at least [five (5)] Business Days’ notice to ESCo prior to any part of the Energy Centre Plant and Equipment being concealed, to allow ESCo to inspect those parts of the Energy Centre Plant and Equipment being concealed. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection. If ESCo declines to attend or does not attend on the agreed date, then the Developer may proceed with the concealment of the installation.

For the purposes of setting quality standards early, ESCo shall undertake an Initial Inspection of the Energy Centre Plant and Equipment and highlight where the Energy Centre Plant and Equipment has Non-Conformities. The Developer shall give ESCo not less than [fourteen (14)] days' notice of this requirement and shall grant ESCo all access reasonably necessary for ESCo to undertake the Initial Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

Not later than [fourteen (14)] days before the commencement of the Initial Commissioning of the Energy Centre Plant and Equipment the Developer shall provide ESCo with the following information:

installation drawings in pdf and AutoCAD format to reflect the status of the installation at that time;

manufacturers’ testing and commissioning records; and

method statements for the proposed testing for review.

Upon completion of the Initial Commissioning of the Energy Centre Plant and Equipment the Developer shall invite ESCo to witness the Initial Commissioning of the Energy Centre Plant and Equipment.

Not later than [fourteen (14)] days before the commencement of the Final Commissioning of the Energy Centre Plant and Equipment the Developer shall provide ESCo with the following information:

updated installation drawings in pdf and AutoCAD format to reflect the status of the installation at that time;

testing and commissioning records; and

method statements for the proposed testing and commissioning for review.

Upon completion of the Final Commissioning of the Energy Centre Plant and Equipment the Developer shall invite ESCo to witness the Final Commissioning of the Energy Centre Plant and Equipment.

Not later than [fourteen (14)] days before the Final Inspection, the Developer shall provide ESCo with the information listed in paragraph 2.1.5 (to the extent it has not already provided the same to ESCo) and the following information in relation to the Energy Centre Plant and Equipment, subject to the Final Inspection:

as built drawings in pdf and AutoCAD format;

testing and commissioning records

Health and Safety information, including a copy of the Health and Safety File in accordance with the CDM Regulations, including residual risks for operation, maintenance and decommissioning; and

operation and maintenance manuals, including manufacturers’ literature specific to the plant and system installed

manufacturers’ and installers’ guarantees and warranties;

Building Regulation consents and approvals;

all documents to be referenced and recorded on a records log; and

two copies of all information to be provided on CD.

The Developer shall give ESCo not less than [fourteen (14)] calendar days’ notice of completion of the Final Commissioning activities. On completion of the Final Commissioning, ESCo shall, undertake the Final Inspection of the Energy Centre Plant and Equipment, to assess whether the Energy Centre Plant and Equipment has been designed and installed in accordance with the Technical Specification and is free from any Non-Conformities. The Developer shall grant ESCo all access reasonably necessary for ESCo and/or ESCo’s Agent to undertake the Final Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

The Developer shall promptly provide ESCo and ESCo’s Agent with any updated information listed in paragraph 2.1.7 above if such information is updated, or if new information is available, before the date ESCo commences delivery of Heat Supply and provision of the ESCo Services.

Defects and Non-Conformities

Not later than [seven (7)] days after the Initial Inspection of the Energy Centre Plant and Equipment (if it has been requested by the Developer), ESCo shall provide an initial Schedule of Non-Conformities to the Developer for the Energy Centre Plant and Equipment inspected.

Not later than [seven (7)] days after the Final Commissioning of the Energy Centre Plant and Equipment, ESCo shall provide a final Schedule of Non-Conformities to the Developer, clearly scheduling which elements of the Energy Centre Plant and Equipment have Non-Conformities.

Rectification Plan

Within [fifteen (15)] Business Days of ESCo providing the Developer with the final Schedule of Non-Conformities for the Energy Centre Plant and Equipment in accordance with paragraph 2.2.2 above, the Parties shall meet to mutually agree a Rectification Plan setting out the Non-Conformities and the agreed remedial works and/or actions that the Developer (or its agents) shall take in respect of the Non-Conformities.

If, within [twenty one (21)] days of receipt of the final Schedule of Non-Conformities, the Developer and ESCo do not agree a Rectification Plan, either Party may invoke the dispute resolution procedure in Clause 27 (Dispute Resolution Procedure).

Adoption

Once the final Rectification Plan has been agreed or determined pursuant to paragraph 2.3.1 above, the Developer and ESCo shall sign an Adoption certificate confirming that ESCo agrees to adopt the Energy Centre Plant and Equipment, subject to the Developer carrying out, or procuring the carrying out of, its obligations under the Rectification Plan, provided that ESCo shall not be obliged to Adopt the Energy Centre Plant and Equipment if any Non-Conformities pose a health and safety risk or material risk to providing Heat Supply or the ESCo Services until such Non-Conformities are remedied by the Developer.

Remedial Action

The Developer undertakes to carry out all of its obligations under the Rectification Plan and to grant ESCo all access reasonably necessary for ESCo to inspect the Energy Centre Plant and Equipment, to confirm that the Developers obligations under the Rectification Plan have been carried out to ESCo's reasonable satisfaction. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

Until the Developer has carried out its obligations under the Rectification Plan, ESCo shall be relieved from delivery of the Heat Supply and/or performing those elements of ESCo Services that ESCo is reasonably prevented from carrying out until such obligations are performed.

If the Developer fails to carry out any of its obligations under the Rectification Plan within the timescales set out in the Rectification Plan, the Developer shall be liable for all reasonable Losses that ESCo incurs as a direct result. If such failure persists for more than [sixty (60)] days after an initial written notice from ESCo to the Developer of the Developer’s failure to carry out the relevant obligations under the Rectification Plan ESCo may perform, or procure that a third party performs, the relevant obligations under the Rectification Plan and the Developer shall be liable for ESCo’s reasonable Losses incurred when doing so.

* + - 1. PRIMARY Distribution Network

Inspection and Information

During the installation, the Developer shall give at least [five (5)] Business Days’ notice to ESCo prior to any section of the Primary Distribution Network being concealed and/or completed, to allow ESCo to inspect those parts of the Primary Distribution Network being concealed and/or completed. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection. If ESCo declines to attend or does not attend on the agreed date, then the Developer may proceed with the concealment and/or completion of the installation.

For the purposes of setting quality standards early, ESCo shall undertake an Initial Inspection of the Primary Distribution Network and highlight where the Primary Distribution Network has Non-Conformities. The Developer shall give ESCo not less than [fourteen (14)] days' notice of this requirement and shall grant ESCo all access reasonably necessary for ESCo to undertake the Initial Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany the ESCo and its representatives on such inspection.

Not later than [fourteen (14)] days before the commencement of the Initial Commissioning of the Primary Distribution Network the Developer shall provide ESCo with the following information:

installation drawings in pdf and AutoCAD format to reflect the status of the installation at that time;

manufacturers’ testing and commissioning records; and

method statements for the proposed testing for review.

Upon completion of the Initial Commissioning of the Primary Distribution Network the Developer shall invite ESCo to witness the Initial Commissioning of the Primary Distribution Network.

Not later than [fourteen (14)] days before the commencement of the Final Commissioning of the Primary Distribution Network the Developer shall provide ESCo with the following information:

updated installation drawings in pdf and AutoCAD format to reflect the status of the installation at that time;

testing and commissioning records; and

method statements for the proposed testing and commissioning for review.

Upon completion of the Final Commissioning of the Primary Distribution Network the Developer shall invite ESCo to witness the Final Commissioning of the Primary Distribution Network.

Not later than [fourteen (14)] days before the Final Inspection, the Developer shall provide ESCo with the information listed in paragraph 3.1.5 (to the extent it has not already provided the same to ESCo) and the following information in relation to the Primary Distribution Network, subject to the Final Inspection:

as built drawings in pdf and AutoCAD format;

testing and commissioning records

Health and Safety information, including a copy of the Health and Safety File in accordance with the CDM Regulations, including residual risks for operation, maintenance and decommissioning; and

operation and maintenance manuals, including manufacturers’ literature specific to the plant and system installed

manufacturers’ and installers’ guarantees and warranties;

Building Regulation consents and approvals;

all documents to be referenced and recorded on a records log; and

two copies of all information to be provided on CD.

The Developer shall give ESCo not less than [fourteen (14)] calendar days’ notice of completion of the Final Commissioning activities. On completion of the Final Commissioning, ESCo shall, undertake the Final Inspection of the Primary Distribution Network, to assess whether the Primary Distribution Network has been designed and installed in accordance with the Technical Specification and is free from any Non-Conformities. The Developer shall grant ESCo all access reasonably necessary for ESCo and/or ESCo’s Agent to undertake the Final Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

The Developer shall promptly provide ESCo and ESCo’s Agent with any updated information listed in paragraph 3.1.7 above if such information is updated, or if new information is available, before the date ESCo commences delivery of Heat Supply and provision of the ESCo Services.

Defects and Non-Conformities

Not later than [seven (7)] days after the Initial Inspection of the Primary Distribution Network (if it has been requested by the Developer), ESCo shall provide an initial Schedule of Non-Conformities to the Developer for the Primary Distribution Network inspected.

Not later than [seven (7)] days after the Final Commissioning of the Primary Distribution Network, ESCo shall provide a final Schedule of Non-Conformities to the Developer, clearly scheduling which elements of the Primary Distribution Network have Non-Conformities.

Rectification Plan

Within [fifteen (15)] Business Days of ESCo providing the Developer with the final Schedule of Non-Conformities for the Primary Distribution Network in accordance with paragraph 4.2.2 above, the Parties shall meet to mutually agree a Rectification Plan setting out the Non-Conformities and the agreed remedial works and/or actions that the Developer (or its agents) shall take in respect of the Non-Conformities.

If, within [twenty one (21)] days of receipt of the final Schedule of Non-Conformities, the Developer and ESCo do not agree a Rectification Plan, either Party may invoke the dispute resolution procedure in Clause 27 (Dispute Resolution Procedure).

Adoption

Once the final Rectification Plan has been agreed or determined pursuant to paragraph 3.3.1 above, the Developer and ESCo shall sign an Adoption certificate confirming that ESCo agrees to adopt the Primary Distribution Network, subject to the Developer carrying out, or procuring the carrying out of, its obligations under the Rectification Plan, provided that ESCo shall not be obliged to Adopt the Primary Distribution Network if any Non-Conformities pose a health and safety risk or material risk to providing Heat Supply or the ESCo Services until such Non-Conformities are remedied by the Developer.

Remedial Action

The Developer undertakes to carry out all of its obligations under the Rectification Plan and to grant ESCo all access reasonably necessary for ESCo to inspect the Primary Distribution Network, to confirm that the Developers obligations under the Rectification Plan have been carried out to ESCo's reasonable satisfaction. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

Until the Developer has carried out its obligations under the Rectification Plan, ESCo shall be relieved from delivery of the Heat Supply and/or performing those elements of the ESCo Services that ESCo is reasonably prevented from carrying out until such obligations are performed.

If the Developer fails to carry out any of its obligations under the Rectification Plan within the timescales set out in the Rectification Plan, the Developer shall be liable for all reasonable Losses that ESCo incurs as a direct result. If such failure persists for more than [sixty (60)] days after an initial written notice from ESCo to the Developer of the Developer’s failure to carry out the relevant obligations under the Rectification Plan ESCo may perform, or procure that a third party performs, the relevant obligations under the Rectification Plan and the Developer shall be liable for ESCo’s reasonable Losses incurred when doing so.

* + - 1. Secondary Distribution Network

Inspection and Information

During the installation, the Developer shall give at least [five (5)] Business Days’ notice to ESCo prior to any section of the Secondary Distribution Network being concealed and/or completed, to allow ESCo to inspect those parts of the Secondary Distribution Network being concealed and/or completed. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection. If ESCo declines to attend or does not attend on the agreed date, then the Developer may proceed with the concealment and/or completion of the installation.

For the purposes of setting quality standards early, ESCo shall undertake an Initial Inspection of the Secondary Distribution Network and highlight where the Secondary Distribution Network has Non-Conformities. The Developer shall give ESCo not less than [fourteen (14)] days' notice of this requirement and shall grant ESCo all access reasonably necessary for ESCo to undertake the Initial Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

Not later than [fourteen (14)] days before the commencement of the Initial Commissioning of the Secondary Distribution Network the Developer shall provide ESCo with the following information:

installation drawings in pdf and AutoCAD format to reflect the status of the installation at that time;

manufacturers’ testing and commissioning records; and

method statements for the proposed testing for review.

Upon completion of the Initial Commissioning of the Secondary Distribution Network the Developer shall invite ESCo to witness the Initial Commissioning of the Secondary Distribution Network.

Not later than [fourteen (14)] days before the commencement of the Final Commissioning of the Secondary Distribution Network the Developer shall provide ESCo with the following information:

updated installation drawings in pdf and AutoCAD format to reflect the status of the installation at that time;

testing and commissioning records; and

method statements for the proposed testing and commissioning for review.

Upon completion of the Final Commissioning of the Secondary Distribution Network the Developer shall invite ESCo to witness the Final Commissioning of the Secondary Distribution Network.

Not later than [fourteen (14)] days before the Final Inspection, the Developer shall provide ESCo with the information listed in paragraph 4.1.5 (to the extent it has not already provided the same to ESCo) and the following information in relation to the Secondary Distribution Network, subject to the Final Inspection:

as built drawings in pdf and AutoCAD format;

testing and commissioning records

Health and Safety information, including a copy of the Health and Safety File in accordance with the CDM Regulations, including residual risks for operation, maintenance and decommissioning; and

operation and maintenance manuals, including manufacturers’ literature specific to the plant and system installed

manufacturers’ and installers’ guarantees and warranties;

Building Regulation consents and approvals;

all documents to be referenced and recorded on a records log; and

two copies of all information to be provided on CD.

The Developer shall give ESCo not less than [fourteen (14)] calendar days’ notice of completion of the Final Commissioning activities. On completion of the Final Commissioning, ESCo shall, undertake the Final Inspection of the Secondary Distribution Network, to assess whether the Secondary Distribution Network has been designed and installed in accordance with the Technical Specification and is free from any Non-Conformities. The Developer shall grant ESCo all access reasonably necessary for ESCo and/or ESCo’s Agent to undertake the Final Inspection. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

The Developer shall promptly provide ESCo and ESCo’s Agent with any updated information listed in paragraph 4.1.7 above if such information is updated, or if new information is available, before the date on which ESCo commences delivery of Heat Supply and provision of the ESCo Services.

Defects and Non-Conformities

Not later than [seven (7)] days after the Initial Inspection of the Secondary Distribution Network (if it has been requested by the Developer), ESCo shall provide an initial Schedule of Non-Conformities to the Developer for the Secondary Distribution Network inspected.

Not later than [seven (7)] days after the Final Commissioning of the Secondary Distribution Network, ESCo shall provide a final Schedule of Non-Conformities to the Developer, clearly scheduling which elements of the Secondary Distribution Network have Non-Conformities.

Rectification Plan

Within [fifteen (15)] Business Days of ESCo providing the Developer with the final Schedule of Non-Conformities for the Secondary Distribution Network in accordance with paragraph 4.2.2 above, the Parties shall meet to mutually agree a Rectification Plan setting out the Non-Conformities and the agreed remedial works and/or actions that the Developer (or its agents) shall take in respect of the Non-Conformities.

If, within [twenty one (21)] days of receipt of the final Schedule of Non-Conformities, the Developer and ESCo do not agree a Rectification Plan, either Party may invoke the dispute resolution procedure in Clause 27 (Dispute Resolution Procedure).

Adoption

Once the final Rectification Plan has been agreed or determined pursuant to paragraph 4.3.1 above, the Developer and ESCo shall sign an Adoption certificate confirming that ESCo agrees to adopt the Secondary Distribution Network, subject to the Developer carrying out, or procuring the carrying out of, its obligations under the Rectification Plan, provided that ESCo shall not be obliged to Adopt the Secondary Distribution Network if any Non-Conformities pose a health and safety risk or material risk to providing Heat Supply or the ESCo Services until such Non-Conformities are remedied by the Developer.

Remedial Action

The Developer undertakes to carry out all of its obligations under the Rectification Plan and to grant ESCo all access reasonably necessary for ESCo to inspect the Secondary Distribution Network, to confirm that the Developers obligations under the Rectification Plan have been carried out to ESCo's reasonable satisfaction. ESCo agrees that a representative of the Developer shall be permitted to accompany ESCo and its representatives on such inspection.

Until the Developer has carried out its obligations under the Rectification Plan, ESCo shall be relieved from delivery of the Heat Supply and/or performing those elements of the ESCo Services that ESCo is reasonably prevented from carrying out until such obligations are performed.

If the Developer fails to carry out any of its obligations under the Rectification Plan within the timescales set out in the Rectification Plan, the Developer shall be liable for all reasonable Losses that ESCo incurs as a direct result. If such failure persists for more than [sixty (60)] days after an initial written notice from ESCo to the Developer of the Developer’s failure to carry out the relevant obligations under the Rectification Plan ESCo may perform, or procure that a third party performs, the relevant obligations under the Rectification Plan and the Developer shall be liable for ESCo’s reasonable Losses incurred when doing so.

1. - Operation and Maintenance Services

1. **operation and maintenance[[78]](#footnote-79)**

ESCo shall:

* 1. [operate and maintain the Energy System in accordance with the provisions of this Agreement and the Project Agreements, including:-
		1. the replacement of any plant or equipment forming part of the Energy System as necessary, in order for it to comply with its obligations under this Agreement and the Project Agreements;
		2. [ *Include relevant detail* ]][[79]](#footnote-80)
	2. procure that its obligations are carried out:-
		1. in accordance with this Agreement and Good Industry Practice;
		2. in compliance at all times with all applicable Laws and Authorisations;
		3. in a manner:-
			1. which as a minimum meets the Service Levels set out under Schedule 11 of (Key Performance Indicators) of the Framework Supply Agreement and the Heat Trust Scheme Rules; *[Drafting Note: ESCo will need to ensure that there is a system in place to monitor Heat Trust Scheme Rules and to amend the relevant agreements(within a reasonable period) following changes to the Heat Trust Scheme Rules].*
			2. which meets minimum and maximum flow temperatures in accordance with the design and generally reflecting Good Industry Practice:
			3. so as to enable the Energy System to be kept safe, secure and in good working order and condition;
			4. so as to comply with the Planning Permissions (as may be varied or updated and as Notified to ESCo);
	3. provide suitably qualified, experienced and Competent Persons to perform its obligations under this Agreement and the Project Agreements;
	4. take all precautions necessary for the protection of itself, its contractors or sub‑contractors (of any tier) and any other persons invited onto or otherwise in the Energy Centre;
	5. generally co‑operate with the Developer and in the interests of proper management of the Development as the Developer shall reasonably request from time to time;
	6. [be responsible for payment of any business rates applied to the Energy System][[80]](#footnote-81);
	7. submit to the Developer, on a bi-annual basis or, where this is not possible, upon reasonable prior Notice, details of planned and scheduled outages provided always that ESCo will preserve the Heat Supply made to Customers in accordance with this Agreement and the Customer Supply Agreements;
	8. *[Include other relevant requirements].*
1. - Connections
	* 1. : Connection Process[[81]](#footnote-82)
			1. service of connection notice
				1. The Developer shall notify ESCo when the Developer, a Plot Developer or a Commercial Building Customer requires a Connection, no later than [ ][[82]](#footnote-83) and shall provide to ESCo the following information:-

the Connection Date for the Commercial Building Connection or Plot Connection (as relevant);

the Heat Capacity required;

the number of Residential Units (if relevant);

the number of Commercial Units (if relevant);

the indicative programme for delivery of the Commercial Building or Plot Development (as relevant);

the required Service Readiness Date;

the plans of the location of the Plot Development or Commercial Building and the pipework route to the relevant Connection Point, consistent with the Development Plan;

an indicative layout of the relevant Plot Development or Commercial Building, to include floor areas;

evidence that the party with whom ESCo shall enter into the Connection and Supply Agreement (Plot/ Building) with, shall acquire prior to entry into such agreements, appropriate title to develop the relevant Plot Development or Commercial Building and shall be legally entitled to grant the relevant access rights to ESCo in order for ESCo to comply with its obligations under such agreements

details of the financial standing of the party with whom ESCo shall enter into the Connection and Supply Agreement (Plot/ Building) with and any Sufficient Security to be offered to ESCo in respect of the obligations of such party under such agreements; and

[ ][[83]](#footnote-84)

(the “**Connection Notice**”).

* + - * 1. Within [fifteen (15)] Business Days of service of a Connection Notice, ESCo shall provide the Developer with the following details:

the calculation of the relevant Connection Charges;

details of the works to be carried out by ESCo and the works that must be performed by the Plot Developer or the Commercial Building Customer (as relevant) to complete the Connection;

a programme for the relevant works, including dates for commencement and completion of[[84]](#footnote-85):-

[any branches of the Primary Distribution Network serving the Plot Development or Commercial Building];

[the Plot Heat Substation or Commercial Building Heat Substation];

[the fit out of the Plot Heat Substation or Commercial Building Heat Substation];

[any Secondary Distribution Network within the buildings on the Plot Development or the Commercial Building];

[the Plot Connection or the Commercial Building Connection];

[ ][[85]](#footnote-86)

any access rights or property rights needed by ESCo in order to undertake the relevant works on the Plot Development or in relation to the Commercial Building;

details of all Authorisations or consents required to effect the relevant Connection, together with details of who is responsible for applying and obtaining the Authorisation or consent;

the applicable Heat Charge at the Connection Date;

[details of the routing of any Electricity Network and any relevant works required for the delivery of the Electricity Supply];

any other assumptions or clarifications, or special conditions.

(together, the “**Connection Details**”)

* + - 1. entry into Connection and Supply Agreement (Plot/ Building)
				1. Subject to paragraphs 2.2, ESCo shall and the Developer shall procure that the Plot Developer or Commercial Customer (as relevant) enters into a Connection and Supply Agreement (Plot/ Building) substantially in the form[[86]](#footnote-87) set out in Part 3 of this Schedule 10 within [ ( ) ] Business Days of ESCo's notification of the Connection Details.
				2. The Developer and ESCo agree and the Developer shall procure that prior to entering into a Connection and Supply Agreement (Plot/ Building):

the Plot Developer or Commercial Customer (as relevant) shall serve on ESCo a notice (in relation to the tenancy to be granted by the Plot Heat Substation Lease or Commercial Building Heat Substation Lease (as relevant), (the "**LTA Notice**") in accordance with the requirements of s38(A)(3)(a) of the Landlord and Tenant Act 1954. The LTA Notice shall be in a form complying with the requirements of Schedule 1 to the Regulatory Reform (Business Tenancies)(England and Wales) Order 2003 (the "Order");

ESCo, or a person duly authorised by ESCo shall, in relation to the LTA Notice, make a statutory declaration (the "**Declaration**") in a form complying with the requirements of Schedule 2 of the Order;

where the Declaration is made by a person other than ESCo, the declarant shall be duly authorised by ESCo to make the Declaration on ESCo’s behalf;

in order to exclude the provisions of sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 in relation to the tenancy created by the Plot Heat Substation Lease or Commercial Building Heat Substation Lease (as relevant)

* + - * 1. Without prejudice to paragraph 2.1, should ESCo or the Plot Developer or Commercial Customer (as relevant) wish to vary the terms of the Connection and Supply Agreement (Plot/ Building), ESCo shall, and the Developer shall use all reasonable endeavours to ensure that the Plot Developer or Commercial Customer (as relevant) shall, negotiate in good faith and agree the terms of any such variation.
		1. : Connection Charges

*[Set out the Parameters for calculating the Connection Charges].*

* + 1. : Form of Connection and Supply Agreement (Plot/ Building)
1. - Energy Centre Lease
	* 1. : Energy Centre Lease
		2. : Deed of Variation (Easement)

1. – Data Processing
	* + 1. DEFINITIONS
				1. In addition to the definitions set out elsewhere in this Agreement, in this Schedule the following words shall have the following meaning:

**Agreed Purposes:** for ESCo shall be to identify, and set up and manage accounts for, tenants of Units, including:

1. setting up tenants of Unit's accounts and making any changes to the terms of providing the services;
2. identifying tenants of Units when tenants of Relevant Units makes enquiries;
3. market research and providing tenants of Units with up-to-date information on the services which ESCo provides;
4. providing information to tenants of Units about other relevant services provided by ESCo and any Affiliate of ESCo;
5. billing and debt recovery;
6. prevention of fraud or Loss;
7. quality assurance (including recording communications with tenants of Units);
8. checks with credit reference agencies (who will keep a record of the search); and
9. identifying any vulnerable customers for the purposes of registration on ESCo’s priority Services Register and access to support services and help.

**Agreed Purposes**: for the Developer shall be:

1. to enable the Developer to discharge its obligations under this Agreement;
2. to enable ESCo to connect the Unit to the Heat Distribution Network and provide the Heat Supply to the Customer moving into the Unit; and
3. to enable the Customer occupying the Unit to comply with the terms of their agreement with the Customer and the terms of their Residential Heat Supply Agreement with ESCo.

**Controller, data controller, processor, data processor, data subject, processing and appropriate technical and organisational measures:**shall have the meanings given to them in the Data Protection Legislation in force at the time.

**Permitted Recipients:**means the parties to this Agreement, any Affiliates of each Party, the employees and contract workers of each Party, any third parties engaged by each Party to perform obligations in connection with this Agreement and credit reference and fraud prevention agencies.

**Shared Personal Data:** means the Personal Data that may be shared between the parties under this Agreement, which shall be confined to the following categories of information relevant to the following categories of data subject:

1. Category of data subject: Individuals occupying the Units – including freehold, leasehold and shared ownership tenants (current and outgoing tenants);
2. Types of personal data: name, address, phone number, heat use data, KYC data (e.g. recent utility bills/ council tax bills).
	* + 1. Shared Personal Data
				1. This paragraph sets out the framework for the sharing of Personal Data between the Parties as data controllers.
				2. Each Party acknowledges that from time to time one Party will need to disclose Shared Personal Data to the other Party as data controller for the Agreed Purposes. The parties acknowledge that as at the date of this Agreement the parties do not consider that either of them acts as data processor for the other, and if that changes during the term of this Agreement then they will need to agree a separate data processing agreement as required by Data Protection Legislation. *[Drafting Note: Parties may want to consider provisions regarding control of shared personal data and also the appointment of third party data processors].*
			2. Particular obligations relating to data sharing
				1. Each Party shall:

ensure that it has any necessary notices and consents are in place to enable lawful transfer of the Shared Personal Data to the other Party and their Permitted Recipients for the Agreed Purposes;

process the Shared Personal Data only for the Agreed Purposes;

not disclose or allow access to the Shared Personal Data to anyone other than the Permitted Recipients;

ensure that all Permitted Recipients are subject to written contractual obligations concerning the Shared Personal Data (including obligations of confidentiality) which are no less onerous than those imposed by this Agreement;

ensure that it has in place appropriate technical and organisational measures to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data.

not transfer any Shared Personal Data outside the EEA unless (i) the transfer is to a country approved by the European Commission as providing adequate protection pursuant to Article 45 GDPR; (ii) there are appropriate safeguards in place pursuant to Article 46 GDPR; or (iii) one of the derogations for specific situations in Article 49 GDPR applies to the transfer. *[Drafting Note: Parties may want to consider additional obligations regarding data sharing].*

* + - 1. Mutual assistance
				1. Each Party shall assist the other in complying with all applicable requirements of the Data Protection Legislation. In particular, each Party shall:

promptly inform the other Party about the receipt of any data subject access request in relation to Shared Personal Data received from the other Party;

provide the other Party with reasonable assistance in complying with any data subject access request in relation to Shared Personal Data received from that other Party;

not disclose or release any Shared Personal Data received from the other Party in response to a data subject access request without first consulting the other Party wherever possible;

assist the other Party, at the cost of the other Party, in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;

notify the other Party without undue delay on becoming aware of any breach of the Data Protection Legislation in relation to Shared Personal Data received from the other Party; and

maintain complete and accurate records and information to demonstrate its compliance with this Schedule.

* + - 1. Indemnity

Each Party shall indemnify the otherfrom and against all Losses suffered or incurred by the other Party and arising out of or in connection with any breach by that Party or any sub-contractors of this Schedule.

1. - Governance, Monitoring and Reporting
	* 1. : Monitoring and Reporting
2. **Annual Report[[87]](#footnote-88)**
	1. ESCo shall, by 30 April each year during the term of this Agreement, provide the Developer with an annual report containing details of the following matters for the previous year, that year being the period from 1 April in the preceding calendar year to 31 March in the current calendar year:
		1. progress reports on the ESCo Works as against the agreed ESCo Programme of Works;
		2. the [CHPQA index]/[carbon intensity] of the Energy System;
		3. details of any material changes made to the Energy System;
		4. a report reasonably demonstrating compliance with Clause 7.1.5 (ESCo’s Obligations) including calculated CO2 equivalent emissions data including the carbon intensity of heat delivered to each Connection applying carbon factors as applicable at the time of the [Planning Permission]/[Connection];
		5. reasonable details of any connection of the Energy System with any premises or networks outside the Development, to the extent not otherwise contemplated in this Agreement.
3. **QUARTERLY PERFORMANCE REPORT**
	1. ESCo shall compile and submit in writing each quarter a performance report that contains as a minimum the following information for the preceding calendar quarter in relation to the Energy System:
		1. the amounts of, electricity, gas, water and any other fuels and utilities consumed and their cost for the period;
		2. a report on maintenance and repairs carried out during the period and intended to be carried out in the following three months.
		3. any business rates or other charges levied on ESCo in relation to the Energy System.
		4. a record of incidents during the quarter including:
			1. any meter found to be faulty, specifying the location of the meter, the cause of the fault and the action taken;
			2. any breakdown that occurred, specifying the cause, duration, impact and the action taken;
			3. any asset damaged, lost or stolen during the period, identifying the asset; and
			4. any other event that affected the delivery of Heat Supply to any Connection on the Development.
4. **Performance Forecast**
	1. ESCo shall, by 30 April each year during the term of this Agreement, provide the Developer with a forecast (the "**Performance Forecast**") of the following matters for the next financial year, being 1 May until the following 30 April:-
		1. expected progress of the ESCo Works and any proposed deviations as against the ESCo Programme of Works;
		2. details of all proposed repairs, maintenance and material changes to be undertaken in respect of the Energy System (including any sections of the Heat Distribution Network and HIUs constructed in relation to a Connection); and
		3. reasonable details of any proposed connection of the Energy System with any premises or networks outside the Development, to the extent not otherwise contemplated in this Agreement.
5. **Developer Forecast**
	1. The Developer shall by 30 April each year during the term of this Agreement, provide ESCo with a forecast of the following matters for the next financial year, being 1 May until the following 30 April:
		1. the updated Developer Delivery Programme;
		2. any expected changes in the use or operation of the Development likely to have an impact on the Heat Supply and/or the Energy System including but not limited to changes to the intended use of the Development and any other activities which may impact upon the routing or installation of the Heat Distribution Network.
		3. : Governance[[88]](#footnote-89)
			1. Meetings
				1. ESCo Representative(s) and the Developer Representative(s) shall schedule and attend a meeting not less than once every:

[three (3)] months during the undertaking of the ESCo Works;

thereafter, [six (6)] months during the remainder of the Term.

* + - * 1. The Developer Representative(s) shall be responsible for taking meeting minutes at each meeting held between the Parties, unless otherwise agreed. The Developer Representative(s) shall circulate meeting minutes of each of the meetings to the Parties within two (2) Business Days of the relevant meeting.
				2. Any matter requiring Notice by one Party to the other under this Agreement shall, irrespective of being referred to in any meeting or the minutes thereof, be Notified separately from the relevant meeting in accordance with the terms of this Agreement.
			1. LIAISON COMMITTEE
				1. ESCo and the Developer shall establish and maintain throughout the term of the Agreement a joint liaison committee that will have the following functions:

to provide a means for the joint review of issues relating to all day to day aspects of the performance of the Agreement;

to provide a forum for joint strategic decisions including considering actual and anticipated changes to the market of ESCo and the Developer and to consider possible variations to the Agreement to reflect those changes; and

in certain circumstances, pursuant to Clause 25.1 (Dispute Resolution) to provide a means of resolving disputes or disagreements between the parties amicably.

1. - Insurances
	* 1. : DEVELOPER INSURANCES
2. **CONTRACTOR'S ALL RISKS INSURANCE**
	1. Insured parties
		1. The Developer
		2. ESCo
		3. Contractors and sub-contractors and consultants to the Developer of any tier to the extent to which that interest is required to be insured jointly with that of the insured by the terms of any contract or agreement entered into between such party and the insured in connection with the Developer.
		4. Insurers have noted a waiver of subrogation against ESCo.
	2. Insured Interest

All works and materials of any nature forming the Developer Works.

* 1. Coverage

All risks of physical loss or damage to the Developer Works including terrorism and defects in design.

* 1. Limit

Full reinstatement value of the Developer Works calculated as at the time of the relevant occurrence.

* 1. Period of Insurance

From the date of commencement of any Developer Works until practical completion of the Developer Works, followed by 24 months defects liability cover.

1. **PROPERTY DAMAGE**
	1. Insured parties

The Developer

* 1. Insured Property

All property of whatsoever kind that is the responsibility of the Developer to deliver pursuant to this Agreement and the Leases.

* 1. Coverage
		1. All risks of physical loss or damage including terrorism.
		2. Extension to include machinery breakdown cover.
	2. Limit

Full reinstatement value.

* 1. **Period of insurance**

From the date of practical completion (in accordance with the relevant construction contract(s)) of the Developer Works until termination of this Agreement.

1. **THIRD PARTY LIABILITY INSURANCE (DURING CONSTRUCTION PHASE)**
	1. Insured parties
		1. The Developer
		2. ESCo
		3. Contractors and sub-contractors and consultants to the Developer of any tier to the extent to which that interest is required to be insured jointly with that of the insured by the terms of any contract or agreement entered into between such party and the insured in connection with the Developer.
	2. Insured interest
		1. Death and personal injury of third parties.
		2. Damage or loss to third party property.
		3. Legal risks (e.g. nuisance claims).
	3. Coverage

Third party death and bodily injury, loss of or damage to third party real or personal property arising out of or in the course of or by reason of the performance by the Developer its subcontractors, agents or any party authorised by it under this Agreement or the Leases save for property insured under the Contractor's All Risks Policy.

* 1. Limit

[ ] (£[ ]) each and every claim arising out of any one occurrence or series of occurrences.

* 1. Period of insurance

From the date of date of commencement of any Developer Works until practical completion (in accordance with the relevant construction contract(s)) of the Developer Works, followed by 24 months defects liability cover.

1. **Third party LIABILITY insurance (during operational Period)**
	1. Insured parties

The Developer

* 1. Insured interest
		1. Death and personal injury of third parties.
		2. Damage or loss to third party property.
		3. Legal risks (e.g. nuisance claims).
	2. Coverage

Third party death and bodily injury, loss of or damage to third party real or personal property arising out of or in the course of or by reason of the performance by the Developer, its subcontractors, agents or any party authorised by it under this Agreement, save for property insured under the Property Damage Policy.

* 1. Limit

[ ] (£[ )] for each and every claim arising out of any one occurrence or series of occurrences.

* 1. Period of insurance

From the date of practical completion of the Developer Works until the Expiry or Termination of this Agreement.

1. **professional indemnity insurance (during CONSTRUCTION PHASE)**
	1. Insured parties

Developer.

* 1. Insured interest

Any design and/or specification works which are the responsibility of the Developer

* 1. Coverage

Legal liability for breach of professional duties in relation to works which are the responsibility of the Developer

* 1. Limit

[ ] (£[ ]) in the aggregate during each annual policy period.

* 1. Period of insurance

From the date of commencement of the Developer Works and from the date of practical completion of the Developer Works until twelve (12) years following practical completion of the Developer Works in respect of the last Plot Development to be developed.

1. **professional indemnity insurance (during OPERATIONAL PHASE)**
	1. Insured parties

Developer.

* 1. Insured interest

Any design and/or specification works or services which are the responsibility of the Developer

* 1. Coverage

Legal liability for breach of professional duties in relation to works or services which are the responsibility of the Developer

* 1. Limit

[ ] (£[ ]) in the aggregate during each annual policy period.

* 1. Period of insurance

From the date of practical completion of the Developer Works until Expiry or Termination of this Agreement.

* + 1. : ESCo INSURANCES
1. **Contractor's All Risks Insurance**
	1. Insured parties
		1. ESCo.
		2. The Developer.
		3. Contractors and sub‑contractors and consultants to ESCo of any tier.
	2. Insured Interest

All works and materials of any nature forming the ESCo Works.

* 1. Coverage

All risks of physical loss or damage to the ESCo Works including terrorism.

* 1. Limit

Full reinstatement value of the ESCo Works calculated as at the time of the relevant occurrence.

* 1. Period of Insurance

From the date of commencement of any ESCo Works until Practical Completion of the ESCo Works.

1. **Property damage**
	1. Insured parties

ESCo.

* 1. Additional Insured

The Developer.

Tenants and/or occupants of the buildings which the insured property is situate (or in the alternative, a waiver of subrogation in such individuals favour).

* 1. Insured Property

All property of whatsoever kind that is the responsibility of ESCo to deliver or Adopt pursuant to this Agreement and the Project Agreements.

* 1. Coverage
		1. All risks of physical loss or damage including terrorism.
		2. Extension to include machinery breakdown cover.
	2. Limit

Full reinstatement value of the insured value of the insured property.

* 1. Period of insurance

From the date of Practical Completion of the ESCo Works or the date of Adoption (as relevant) until the expiry or early termination of this Agreement.

1. **Third party insurance (during construction Period)**
	1. Insured parties

ESCo.

* 1. Additional Insured
		1. The Developer.
		2. Contractors and sub‑contractors and consultants to ESCo of any tier.
	2. Insured interest
		1. Death and personal injury of third parties.
		2. Damage or loss to third party property.
		3. Legal risks (eg nuisance claims).
	3. Coverage

Third party death and bodily injury, loss of or damage to third party real or personal property arising out of or in the course of or by reason of the performance by ESCo, its sub-contactors, agents or any party authorised by it under this Agreement or the Project Agreements, save for property insured under the Contractor's All Risks Policy.

* 1. Limit

[ ] (£[ ]) each and every claim arising out of any one occurrence or series of occurrences.

* 1. Period of insurance

From the date of commencement of any ESCo Works until Practical Completion of the ESCo Works.

1. **Third party insurance (during operational Period)**
	1. Insured parties

ESCo.

* 1. Additional insureds

The **Developer**.

* 1. Insured interest
		1. Death and personal injury of third parties.
		2. Damage or loss to third party property.
		3. Legal risks (eg nuisance claims).
	2. Coverage

Third party death and bodily injury, loss of or damage to third party real or personal property arising out of or in the course of or by reason of the performance by ESCo, its sub-contractors, agents or any party authorised by it under this Agreement or the Project Agreements save for property insured under the Property Damage Policy.

* 1. Limit

[ ] (£[ ]) each and every claim arising out of any one occurrence or series of occurrences.

* 1. Period of insurance

From the date of Practical Completion of the ESCo Works until the expiry or early termination of this Agreement.

1. **professional indemnity insurance (during CONSTRUCTION PHASE)**
	1. Insured parties

ESCo.

* 1. Insured interest

Any design and/or specification works which are the responsibility of ESCo

* 1. Coverage

Legal liability for breach of professional duties in relation to works which are the responsibility of ESCo

* 1. Limit

[ ] (£[ ])) each and every claim arising out of any one occurrence or series of occurrences.

* 1. **Period of insurance**

From the date of Practical Completion of the ESCo Works until the expiry or early termination of this Agreement.

1. - Change Procedure
	* 1. : Variation Requests
		2. DEFINITIONS
			1. In this Schedule 15 the following terms shall, unless otherwise defined in this Agreement or the context otherwise requires, have the following meanings:

|  |  |
| --- | --- |
| "**Consequential Change**" | has the meaning given in paragraph 2.7.11; |
| "**Developer Notice of Variation**" | has the meaning given in paragraph 2.1; |
| "**Developer Variation**" | means any Project Variation which is proposed by the Developerpursuant to paragraph 2; |
| "**Developer Variation Objection Notice**" | has the meaning given in paragraph 2.3.1; |
| "**Developer Variation Order**" | has the meaning given in paragraph 2.9.4(a); |
| "**ESCo Notice of Variation**" | has the meaning given in paragraph 3.1; |
| "**ESCo Variation**" | means any Project Variation proposed by ESCo pursuant to paragraph 3; and |
| "**Estimated Change in Costs**" | means the aggregate of any estimated additional costs to be incurred by ESCo or the Developerin carrying out the relevant obligations under this Agreement (whether construction, design, installation, operation, maintenance or supply services) as varied if the Proposed Variation is implemented, less the aggregate of any estimated reduction of such costs; |
| "**Estimated Change in Profit**" | means the aggregate of any estimated reduction in ESCo's expected financial return in connection with this Agreement and the provision of the ESCo Services (including, without limitation, any decrease in revenue receivable by way of Heat Charges [or Electricity Charges] pursuant to the Framework Supply Agreement); |
| "**Lump Sum Payments**" | means payments of sums of money by either or both Parties to the other for a DeveloperVariation or ESCo Variation against a timetable to be agreed between the Parties in accordance with this Schedule 15 or determined pursuant to the Dispute Resolution Procedure; |
| "**Outline Proposal**" | has the meaning given in paragraph 2.5; |
| "**Pricing Change**" | has the meaning given in paragraph 2.7.10; |
| “**Project Variation”** | means any change to anticipated heat loads, the Development Plan, the Developer Delivery Programme, any Technical Specifications, any ESCo Works or Developer Works or any other change which has an impact on any part of the Energy System. |
| "**Proposed Budget**" | has the meaning given in paragraph 2.6.1; |
| "**Proposed Variation**" | means a variation proposed in either a Developer Notice of Variation or an ESCo Notice of Variation (as applicable); and |
| "**Variation Report**" | has the meaning given in paragraph 2.6.2 (Outline Proposal/Variation Report). |

* + 1. DEVELOPER VARIATION
			1. Scope of Developer Variation

If the Developer wishes to request a Developer Variation (other than as a result of a Change in Law, in which case the provisions of Part 2 of this Schedule 15 shall apply), the Developer shall serve on ESCo a written notice (a "**Developer Notice of Variation**") in accordance with this Schedule 15 (provided that the Developer may not request a Developer Variation which may require anything to be performed by ESCo in a way which infringes any Law or Authorisations).

* + - 1. Developer Notice of Variation

If the Developer requires a Developer Variation, it shall serve on ESCo a Developer Notice of Variation setting out:

* + - * 1. the date of the Developer Notice of Variation;
				2. the reason for the Developer Variation;
				3. sufficient details of the Developer Variation to enable ESCo to calculate and provide the Estimated Change in Costs and any Estimated Change in Profit in accordance with paragraph 2.7;
				4. full details of any change required to the Connection, the Services or the Service Levels including any impact on the Customer Services or the Heat Supply to be delivered pursuant to the Framework Supply Agreement;
				5. whether the Developer Variation also constitutes a Developer Variation pursuant to the Framework Supply Agreement;
				6. the date by which the Developer wishes the Developer Variation to have been implemented;
				7. the reasonable date by which ESCo is required to submit its Outline Proposal, being not less than twenty (20) Business Days after the date of service of the Developer Notice of Variation or, if ESCo issues a Developer Variation Objection Notice pursuant to paragraph 2.3.1, not less than ten (10) Business Days after the date of agreement or determination that such objections are not valid; and
				8. any other information that the Developer reasonably considers would assist ESCo in preparing its Variation Report including action the Developer proposes to take.
			1. Developer Variation Objection Notice
				1. Within fifteen (15) Business Days of receiving a Developer Notice of Variation ESCo shall either confirm in writing to the Developer that it will prepare an Outline Proposal for the Developer or issue a notice setting out in detail the grounds on which ESCo objects to the proposed Developer Variation (a **"Developer** **Variation Objection Notice**"), provided that ESCo shall only be entitled to object to a Developer Variation if:

the Developer Variation is not technologically feasible in the reasonable opinion of ESCo;

the Developer Variation would, if implemented, contravene any Law or Authorisations or require anything to be performed by ESCo in a manner which is inconsistent with Good Industry Practice;

the Developer Variation would, if implemented, cause an unacceptable health and safety risk to ESCo, an ESCo Related Party, the Developer, a Developer Related Party or any third parties;

it is not possible to implement the Developer Variation within the period of time specified in the Developer Notice of Variation;

the Developer Variation would, if implemented, cause any Authorisations to be revoked or not renewed or unobtainable (which are not reasonably likely, on a balance of probabilities, to be capable of modification);

the Developer Variation would, if implemented, result in ESCo being in breach of, or have a material adverse effect on the ability of ESCo to perform, its obligations under any agreement to which it is a party; and/or

the Developer Variation would, if implemented, result in a reduction in ESCo's expected financial return in connection with this Agreement (including by way of any decrease in Heat Charges) which is not compensated by the Developer’s payment to ESCo of Lump Sum Payments, including any increase to any amounts payable by ESCo to the Developer pursuant to this Agreement or any decrease to any amounts payable by the Developer to ESCo pursuant to this Agreement.

* + - 1. Dealing with Objections
				1. If the Developer disagrees with the objections raised by ESCo, the Parties shall meet with a view to establishing whether the objections are valid. If, within ten (10) Business Days of receipt of any Developer Variation Objection Notice, the validity or otherwise of ESCo's objections remains to be agreed, either Party may refer the question of validity to the Dispute Resolution Procedure.
				2. The Parties shall act reasonably and in good faith to endeavour to agree amendments to the Developer Notice of Variation such as to resolve ESCo’s objections.
				3. If the Developer agrees with the objections in the Developer Variation Objection Notice, or it is determined under the Dispute Resolution Procedure that the objections in the Developer Variation Objection Notice are valid, the proposed Developer Notice of Variation shall be deemed to be withdrawn.
				4. The Parties shall bear their own costs incurred in the process of dealing with any Developer Variation Objection Notice under paragraph 2.3 and this paragraph 2.4.
			2. Outline Proposal
				1. If, following the issue by the Developer of a Developer Notice of Variation:

ESCo does not issue a **Developer** Variation Objection Notice under paragraph 2.3 withinthe period specified in that paragraph; or

it is either agreed or determined under paragraph 2.4 that the objections set out in a Developer Variation Objection Notice are not valid,

then ESCo shall as soon as reasonably practicable and in any event by the date specified in the Developer Notice of Variation issue a proposal to the Developer in accordance with paragraph 2.6 (an "**Outline Proposal**").

* + - * 1. The Outline Proposal shall specify an estimate of the price, a provisional timetable and a summary of the method of implementation of the Developer Variation and shall be accompanied by a suggested budget for ESCo to develop the Variation Report.
			1. Variation Report
				1. If, having considered the Outline Proposal, the Developer wishes to proceed with the Developer Variation, it shall notify ESCo and confirm (acting reasonably) either that the suggested budget for ESCo to develop the Variation Report is agreed by the Developer or propose an alternative budget (the "**Proposed Budget**").
				2. Following the notification referred to in paragraph 2.6.1, ESCo shall as soon a reasonably practicable issue a report to the Developer in accordance with paragraph 2.7 (a "**Variation Report**"). ESCo shall keep the Developer informed as to the costs reasonably and properly incurred in preparing the Variation Report and also ten (10) Business Days before the anticipated date when those costs exceed the Proposed Budget. If the costs incurred by ESCo in preparing the Variation Report exceed the Proposed Budget, the Developer shall (acting reasonably):

inform ESCo that it is increasing the amount of the Proposed Budget; or

withdraw the request for the Developer Variation.

* + - 1. Contents of Variation Report

The Variation Report shall include details of the following:

* + - * 1. the date of the relevant Developer Notice of Variation or ESCo Notice of Variation (as applicable);
				2. ESCo's opinion on any impact of the Proposed Variation on the date of completion of any Works;
				3. ESCo's opinion on any other anticipated impact of the Proposed Variation on the ESCo Services;
				4. any amendment required to specific, listed Clauses and/or Schedules of this Agreement as a result of the Proposed Variation;
				5. any Estimated Change in Costs that would result from the Proposed Variation, including:

details of the derivation of the Estimated Change in Costs arising from the Proposed Variation; and

evidence that ESCo and its subcontractors have used and will use reasonable endeavours to minimise any increase in costs and maximise any reduction in costs;

* + - * 1. any Estimated Change in Profit that would result from the ProposedVariation;
				2. ESCo's proposals for Lump Sum Payments to be made by either or both Parties to the other in connection with the ProposedVariation in order to:

reimburse the Developer for any Estimated Change in Costs (where the relevant costs are expected to decrease as a result of the Proposed Variation);

reimburse ESCo for any Estimated Change in Costs (where the relevant costs are expected to increase as a result of the Proposed Variation); and/or

compensate ESCo for any Estimated Change in Profit that would result from the Proposed Variation,

including details in relation to the timing of payment of any such Lump Sum Payments (reflecting (to the extent applicable) the amount and timing of any relevant capital expenditure to be incurred by ESCo in relation to the Proposed Variation);

* + - * 1. the proposed methods of certification of any works required in connection with the Proposed Variation;
				2. any Authorisations which, in the opinion of ESCo, will need to be obtained to give effect to the Proposed Variation including any such Authorisations which are required to be obtained or which it would be Good Industry Practice to obtain prior to the implementation of the Proposed Variation and the extent to which ESCo proposes that the implementation of the Proposed Variation should be conditional on any Authorisation being obtained;
				3. where the proposed Proposed Variation would result in a change to Heat Charges under the Framework Supply Agreement (a "**Pricing Change**"), a general description of the process to be applied pursuant to the Customer Supply Agreements in order to effect the Pricing Change under the Framework Supply Agreement;
				4. any other change to this Agreement (a "**Consequential Change**") which would result from or reasonably be required in order to facilitate the implementation of the proposed Proposed Variation (and if ESCo has identified any Consequential Change, it shall, in providing any information or estimates required pursuant to this paragraph 2.7, take into account and provide for and set out the anticipated effects of any such Consequential Change and references to any Proposed Variation in this paragraph 2 shall be deemed to include any Consequential Change and in particular for the purposes of acceptance or withdrawal, or agreement pursuant to paragraph 2.9, of the Proposed Variation, a Proposed Variation and any related Consequential Changes shall be treated as one Proposed Variation);
				5. the steps and measures (which shall be as detailed as reasonably practicable in the circumstances) ESCo intends to take in order to implement the Proposed Variation, including the length of time and programme for implementing the Proposed Variation, taking into account the length of time required to obtain any Authorisations identified pursuant to paragraph 2.7.9 and to implement any Consequential Change; and
				6. the identity of any subcontractors (if any) which ESCo intends to engage for the purposes of effecting the Proposed Variation.
			1. Additional Information
				1. The Developer may (subject to paragraph 2.6 at its own cost) request from ESCo such additional information as the Developer reasonably requires for the purposes of considering the Variation Report and shall make any such request as soon as reasonably practicable after receiving the Variation Report.
				2. ESCo shall provide any information requested by the Developer in accordance with paragraph 2.8.1 as soon as reasonably practicable after receiving such request.
			2. Agreeing the Variation Report
				1. As soon as reasonably practicable after the Developer receives the Variation Report or, if the Developer has requested additional information in accordance with paragraph 2.8.1, as soon as reasonably practicable after the Developer receives such additional information, the Parties shall meet to discuss and attempt to agree the issues set out in the Variation Report.
				2. The Parties shall act reasonably and in good faith to endeavour to agree amendments to the Variation Report such as to enable the Proposed Variation to proceed. Any agreed amendments shall be incorporated into the Variation Report.
				3. If the Parties cannot agree on the contents of the Variation Report within a period of forty (40) Business Days from the date of the Variation Report, either Party may refer the matter for resolution in accordance with the Dispute Resolution Procedure (on the basis of the principles described in this Schedule 15, including that ESCo should be in no better or worse position in respect of Estimated Changes in Costs and Estimated Changes in Profits).
				4. Within thirty (30) Business Days of a Variation Report being agreed or determined, the Developer shall:

issue to ESCo an order (a **"Developer Variation Order")** requiring ESCo to implement the Developer Variation in accordance with the Variation Report, as agreed or determined. The Developer and ESCo shall comply with the terms of any such Developer Variation Order; or

notify ESCo that it is withdrawing the Developer Notice of Variation.

* + - * 1. If the Developer does not comply with paragraphs 2.9.4 within the time period specified in that paragraph, it shall be deemed to have notified ESCo that it is withdrawing the DeveloperNotice of Variation.
			1. Implementation of Developer Variation
				1. Upon receipt of any DeveloperVariation Order (which ESCo shall review and confirm (by counter signature) as being in accordance with the agreed or determined Variation Report):

the Parties shall forthwith implement the relevant Developer Variation in accordance with the terms of the Variation Report, as agreed or determined, subject to any Authorisation being obtained where the Variation Report specifies that the implementation of the Developer Variation is conditional on such Authorisation;

this Agreement shall be deemed to be amended to the extent specified in the Variation Report (including where a Developer Variation has been issued pursuant to the Framework Supply Agreement pursuant to paragraph 2.10.1(d) which impacts on this Agreement), as agreed or determined;

(if applicable) the Framework Supply Agreement (pursuant to paragraph 2.10.1(c) of Schedule 13 (Change Procedure) of the Framework Supply Agreement) shall be deemed to be amended;

the Developer or ESCo shall make any Lump Sum Payments (and any other relevant payments) in accordance with the Variation Report, as agreed or determined (with no double counting to the extent that the Developer Variation is deemed an ESCo Variation under the Framework Supply Agreement);

the Developer Delivery Programme shall be adjusted in the manner agreed or determined.

* + - 1. Non-implementation of Developer Variation

The Developershall reimburse ESCo its reasonable costs properly incurred in preparing a Variation Report where the relevant DeveloperVariation is not implemented, other than where the reason for such non-implementation is that the costs of the DeveloperVariation as set out in the Variation Report are materially greater than or otherwise the timetable or methodology of the DeveloperVariation is materially different to those set out in the Outline Proposal as a result of the deliberate act or wilful default of ESCo.

* + 1. ESCo VARIATION
			1. Scope of ESCo Variation

If ESCo wishes to request an ESCo Variation (other than as a result of a Change in applicable Law in which case the provisions of Part 2 shall apply), it shall serve a notice on the Developer(an "**ESCo Notice of Variation**").

* + - 1. ESCo Notice of Variation

The ESCo Notice of Variation shall include all the information which ESCo is required to provide in a Variation Report, as detailed in paragraph 2.7, to the extent that such information is relevant to the proposed ESCo Variation and details of the following:

* + - * 1. ESCo's reasons for proposing the ESCo Variation;
				2. any date or dates by which any decision by the Developeris critical;
				3. full details of any change required to this Agreement; and
				4. whether the ESCo Variation also constitutes an ESCo Variation pursuant to the Framework Supply Agreement
			1. Evaluation of the ESCo Notice of Variation
				1. The Developershall evaluate the ESCo Notice of Variation in good faith taking into account all relevant issues, including:
				2. any Lump Sum Payments and/or any other relevant payments required to be made (and the proposed timing of payment of any such Lump Sum Payments and any other relevant payments);
				3. whether the ESCo Variation will affect the quality, timing and/or the likelihood of successful delivery of the Operation and Maintenance Services;
				4. whether the ESCo Variation will interfere with the relationship of the Developer with third parties; and/or
				5. whether the ESCo Variation materially affects the risks or costs to which the Developer, Customers and/or Registered Providers are exposed.
				6. As soon as reasonably practicable after the Developerreceives the ESCo Notice of Variation, the Parties shall meet to discuss and attempt to agree the issues set out in the ESCo Notice of Variation (or any modifications to it).
				7. As a result of the discussions undertaken pursuant to paragraph 3.3.2, ESCo may modify the ESCo Notice of Variation and shall notify the Developeras soon as reasonably practicable of any such modifications.
			2. Rejection of the ESCo Notice of Variation

Notwithstanding paragraph 3.3, the Developermay (acting reasonably and in good faith) reject the ESCo Notice of Variation by issuing a notice of objection to ESCo listing the specific provision of paragraph 3.3 which applies. If the Parties cannot agree that the grounds of objection are valid, either Party may refer the matter for resolution in accordance with the Dispute Resolution Procedure.

* + - 1. Acceptance of the ESCo Notice of Variation

The Developermay accept the ESCo Notice of Variation as modified pursuant to paragraph 3.3.3 (if applicable) by notifying ESCo (such acceptance not to be unreasonably withheld or delayed).

* + - 1. Implementation of ESCo Variation
				1. Upon receipt of notification from the Developerthat it accepts the ESCo Notice of Variation:
				2. the Parties shall forthwith implement the relevant ESCo Variation in accordance with the terms of the ESCo Notice of Variation as modified pursuant to paragraph 3.3.3 (if applicable), subject to any Authorisation being obtained where the ESCo Notice of Variation specifies that the implementation of the ESCo Variation is conditional on such Authorisation;
				3. this Agreement shall be deemed to be amended to the extent specified in the ESCo Notice of Variation as modified pursuant paragraph 3.3.3 (if applicable) (including where an ESCo Variation has been issued pursuant to the Framework Supply Agreement pursuant to paragraph 3.6.1(d); and
				4. (if applicable) the Framework Supply Agreement (pursuant to paragraph 3.6.1(c) of Schedule 13 (Change Procedure) of the Framework Supply Agreement) shall be deemed to be amended;
				5. the Developer or ESCo shall make any Lump Sum Payments in accordance with provisions specified in the ESCo Notice of Variation as modified pursuant to paragraph 3.3.3 (if applicable) (with no double counting to the extent that the ESCo Variation is deemed an ESCo Variation under the Framework Supply Agreement).
		1. : Change in Law
			1. **CHANGE IN LAW AFFECTING ESCo WORKS AND/OR** Operation and Maintenance **SERVICES**
				1. To the extent that any Change in Law requires:-

capital investment in the Energy System; and/or

increases the operational and/or maintenance costs of providing the Operation and Maintenance Services,

in order for the ESCo Works and/or Operation and Maintenance Services to comply with Law, ESCo shall notify the Developer of such Change in Law and shall provide an Impact Assessment in accordance with paragraph 1.3.1. [*Drafting Note: Parties to consider whether there are any circumstances when ESCo would want the right to terminate due to a change in law].*

* + - * 1. To the extent that any Change in Law increases the operational and/or maintenance costs of providing the ESCo Services in order for the ESCo Services to comply with Law, ESCo shall notify the Developer of such Change in Law pursuant to paragraph 1 of Part 2 (Change in Law) of Schedule 15 of the Framework Supply Agreement and shall provide an Impact Assessment in accordance with paragraph 1.3.1 of Part 2 (Change in Law) of Schedule 15 of the Framework Supply Agreement.
				2. **Impact Assessment**

ESCo shall provide, together with a notice of a Change in Law pursuant to paragraph 1.1 an Impact Assessment. In completing the Impact Assessment, ESCo shall act in good faith, be cognisant of procurement law and comply with Good Industry Practice with the objective of mitigating the overall costs of the Change in Law. The Impact Assessment shall set out sufficient detailed information regarding:

details of the impact of the Change in Law on the specification of the Energy System and the scope of the ESCo Works and/or the Operation and Maintenance Services and ESCo's ability to meet its other obligations under the Agreement and any variations that will be required as a result of that impact and including (without limitation) and on an open book basis:-

any variation to this Agreement or the Project Agreements;

any impact on the risk profile as a result of the Change in Law;

details of any changes to the insurance arrangements required to cover any additional (or reduced) risks associated with the Change in Law;

details of any sub‑contracts or any other contract arrangements or consents required as a result of the Change in Law;

any capital expenditure required as a result of the Change in Law;

any increase in costs of operation and/or maintenance costs of providing the Operation and Maintenance Services;

any alteration to the working practices of either Party;

a timetable for the implementation, together with details of any impact on the Developer Delivery Programme or ESCo Programme;

any impact on the Development or Developer Works being procured by the Developer;

evidence of the methods used or proposed methods to mitigate the impact of the Change in Law;

details of any relief from obligations under this Agreement required by ESCo;

any losses arising from Energy System inefficiencies directly caused by the Change in Law;

proposals in respect of the pass through of such costs to Customers and/or the Developer in accordance with paragraph 1.3.1; and

such other information as the Developer may reasonably request.

If the Developer considers that it requires further information regarding the Impact Assessment, then within ten (10) Business Days of receiving the Impact Assessment, it shall notify ESCo of this fact and detail the further information and/or additional time that it requires. If the Developer requests additional information, ESCo shall provide such additional information within ten (10) Business Days of receiving the Developer’s request.

For the avoidance of doubt any impact of a change in Heat demand arising from a Change in Law shall be borne by ESCo.

* + - * 1. **Costs and impacts of the Change in Law**

Following Notification pursuant to paragraphs 1.1 and 1.3.1, the Parties shall seek, acting reasonably and in good faith, to agree:

the quantum of costs evidenced by the Impact Assessment;

Subject to the allocation of costs pursuant to paragraph (c) below only, any agreed variation or modification of this Agreement or the Project Agreements which achieves as closely as possible the effect that the original provision would have achieved but for the Change in Law.

the allocation of the agreed costs, based on the following:

|  |  |  |
| --- | --- | --- |
|  | **Change in Law type** | **Costs to be passed to:** |
| **Customers (pursuant to the Framework Supply Agreement)** | **Developer**  | **ESCo** |
| 1.  |  |  |  |  |
|  |  |  |  |  |
| 3.  |  |  |  |  |

provided that any allocation of costs to Customers by ESCo shall be notified pursuant to paragraph 1.4 (Costs and impacts of the Change in Law) of Part 2 (Change in Law) of Schedule 15 (Change Protocol) of the Framework Supply Agreement.

* + - * 1. **Implementing the Change in Law**

Once agreed or determined in accordance with paragraph 1.3, ESCo shall carry out all necessary actions to implement the relevant Change in Law and may pass any additional costs associated with Changes in Law on to Customers in accordance with their Customer Supply Agreements pursuant to the Framework Supply Agreement or to the Developer pursuant to [a revised Connection Charge ][[89]](#footnote-90) in accordance with the allocations set out at paragraph 1.3.1 above.

In the event the Parties cannot agree then either Party shall be entitled to refer the matter to dispute resolution pursuant to Clause 25.1 (Dispute Resolution).

1. - Arrangements on Termination and Expiry
	* 1. : Retender

*[Drafting Note: Parties to consider in the context of the particular circumstances.]*

* + - 1. RENEWAL AND Retender
				1. **Renewal**

Subject to the Developer retendering (in its discretion) the Agreement pursuant to paragraph 1.2 (Retender) below, not later than [twenty four (24)] months prior to the Expiry Date, the Parties may renew this Agreement and the Framework Supply Agreement from the Expiry Date on such terms and conditions as the Parties then agree in writing. If the Parties fail to agree such renewal, this Agreement and the Framework Supply Agreement will terminate without notice on the Expiry Date.

If the Parties agree to extend the term of this Agreement and the Framework Supply Agreement, then, simultaneously with the document effecting such extension, the Parties shall execute further Leases substantially in the form originally executed by the Parties save that the term shall be equivalent to the term of the extension of this Agreement. The plans to be attached to any Lease or Deed of Variation shall, subject to the approval of ESCo (not to be unreasonably withheld or delayed), be such plans as shall be proposed by the Developer prior to the relevant Lease or Deed of Variation being completed.

Where the Developer and ESCo intend to renew this Agreement and the Framework Supply Agreement in accordance with Clause 3:

Then prior to such renewal, the Developer shall serve on ESCo a notice (in relation to the tenancy to be granted by the new lease pursuant to paragraph 1.1.2) (the "Notice") in accordance with the requirements of s38(A)(3)(a) of the Landlord and Tenant Act 1954.

The renewed agreement and new lease shall each contain a confirmation by ESCo that:

Before the date of the renewal:

the Developer served on ESCo a Notice dated [ ] in relation to the tenancy created by this new lease in a form complying with the requirements of Schedule 1 to the Regulatory Reform (Business Tenancies)(England and Wales) Order 2003 (the "Order"); and

ESCo, or a person duly authorised by ESCo, in relation to the Notice made a statutory declaration (the "Declaration") dated [ ] in a form complying with the requirements of Schedule 2 of the Order; and

where the Declaration was made by a person other than ESCo, the declarant was duly authorised by ESCo to make the Declaration on ESCo's behalf.

The Developer and ESCo agree to exclude the provisions of sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 in relation to the tenancy created by the new lease.

* + - * 1. **Retender**[[90]](#footnote-91)

At least [twenty four (24) months] prior to the Expiry Date, the Developer may conduct a competition with a view to entering into an agreement for the provision of the ESCo Services performed pursuant to the Framework Supply Agreement following the Expiry Date. To the extent permitted by law and subject to the Developer meeting ESCo's reasonable costs incurred, ESCo shall co‑operate with the Developer fully in such competition process including (without limitation) by:-

providing any information in the possession of ESCo which the Developer may reasonably require to conduct such competition but, to avoid doubt, information which is commercially sensitive to ESCo shall not be provided (and, for the purpose of this paragraph, commercially sensitive shall mean information which would, if disclosed to a competitor of ESCo, give that competitor a competitive advantage over ESCo and/or prejudice the business of ESCo but shall, to avoid doubt, exclude any information about revenues, Customer numbers, heat loads, quantities of fuel and water used, plant emissions and plant maintenance in respect of the Development); and

assisting the Developer by providing all (or any) participants in such competition process with reasonable access to the Energy System.

ESCo shall be entitled, but not required, to bid in any such competition conducted by the Developer.

If ESCo does not bid in the competition or bids and is unsuccessful, then, upon the Expiry Date, ESCo will, at the reasonably pre‑approved cost of the Developer, do all things and execute all documents reasonably necessary to effect the transfer of the Energy System, each Connection and Supply Agreement (Plot/ Building) and the Customer Supply Agreements, to the extent permitted by their terms, to the successful bidder in the competition, the Developer or such other entity as the Developer directs.

* + 1. : Termination and Expiry[[91]](#footnote-92)

*[Drafting Notes: Parties to consider in the context of the particular circumstances.]*

1. **Definitions and Interpretation**

In this Part 2 Schedule 16 the following terms and expressions shall have the following meanings unless the context otherwise requires:-

|  |  |
| --- | --- |
|  |  |
| "**Breakage Costs**" | means any Losses that have been or will be reasonably and properly incurred by ESCo as a direct result of termination of this Agreement, but only to the extent that:-(a) the Losses are incurred in connection with the Energy System in respect of the provision of the ESCo Services (pursuant to this Agreement and/or the Framework Supply Agreement) or completion of the ESCo Works, including: (i) any material or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred; (ii) any expenditure incurred in anticipation of the provision of the ESCo Services (pursuant to this Agreement and/or the Framework Supply Agreement) or completion of the ESCo Works in the future; (iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Energy System; and (iv) any redundancy payments;(b) the Losses incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms; and(c) ESCo and the relevant sub-contractors have each used its reasonable endeavours to mitigate the Losses;(d) no Loss of sub-contractor profit shall be included in the calculation of Losses.  |
| "**ESCo Termination Amount**" | means either the Highest Compliant Tender Price or the Residual Market Value Sum, less the aggregate of the following amounts (without any double counting):-(a) the Tender Costs; (b) amounts that the Developer is entitled to set‑off or deduct pursuant to the terms of this Agreement; and(c) [ ][[92]](#footnote-93) |
| "**Compliant Tender**" | means a tender that meets all of the Qualification Criteria |
| "**Compliant Tenderer**" | means a tenderer who submits a Compliant Tender |
| "**Developer Termination Amount**" | means the Residual Market Value Sum[[93]](#footnote-94) plus the aggregate of the following amounts (without any double counting):-(a) any Breakage Costs;(b) [ ][[94]](#footnote-95)Less(c) [ ][[95]](#footnote-96) |
| "**Final Termination Notice**" | has the meaning given in Clause 25.3 (Timing of Final Termination Notice) |
| "**Force Majeure Termination Sum**" | means the aggregate of:-(a) any Breakage Costs;(b) [ ][[96]](#footnote-97) |
| "**Highest Compliant Tender Price**" | means the price offered by the Compliant Tenderer (if any) with the highest tender price |
| "**Independent Expert**" | means an independent recognised expert in the district heating market with at least 10 years relevant experience and expertise in the fields of commodity markets and project financing with suitable qualifications from an industry recognised body and a minimum of [five million pounds (£5,000,000)] professional indemnity insurance, appointed jointly by ESCo and the Developer in accordance with paragraph 3 of this Schedule and where the identity of such Independent Expert cannot be agreed by the Parties, either Party may request the President for the time being of the Energy Institute to nominate an Independent Expert (and both Parties shall accept such nomination) |
| "**Residual Market Value Sum**" | means the amount determined in accordance with paragraph 3 that a third party would pay to the Developer as the market value for the provision of the Heat Supply utilising the Energy System |
| "**Liquid Market**" | means that there is at least two (2) willing parties who are capable of being a Suitable Substitute Provider in the market of district heating providers similar to this Agreement and the Framework Supply Agreement for the price that is likely to be achieved through a tender to be a reliable indicator of the amount at which an arrangement of this nature could be exchanged in an arms‑length transaction between informed and willing parties (other than in a forced or liquidated sale) |
| "**New Agreements**" | means an agreement on substantially the same terms and conditions as this Agreement and the Framework Supply Agreement at the Termination Date, but with the following amendments:-(a) if this Agreement is terminated prior to Practical Completion of the ESCo Works, then the ESCo Programme of Works and relevant Milestones shall be extended by such a period as to take account of ESCo default and its effect on the originally anticipated date of Practical Completion of the relevant works(b) any Developer Warning Notices which have accrued or been served pursuant to Clause 25.2 (Default, Cure and Termination) shall be cancelled; and(c) the terms of such New Agreements shall be equal to the term from the Termination Date until the Expiry Date |
| "**New ESCo**" | means the person who has offered the Highest Compliant Tender Price who has entered or who will enter into the New Agreements with the Developer |
| "**Qualification Criteria**" | means the criteria that the Developer requires tenderers to meet as part of the Tender Process, which shall be:-(a) bidding on the terms of the New Agreements (b) having the financial ability to pay the capital sum tendered for the New Agreements and the financial ability to deliver works and/or services equivalent to the ESCo Works and/or ESCo Services in accordance with the New Agreements(c) bidding on the basis of a single capital payment to be made on the date of the New Agreements(d) being a Suitable Substitute Provider and experienced in providing works and/or services of the nature envisaged under the New Agreements equivalent to the ESCo Works and/or ESCo Services and(e) any other reasonable tender criteria agreed by the Developer and ESCo (or in the absence of agreement as determined in accordance with the provisions of Clause 27 (Dispute Resolution Procedure)), including market standard provisions on confidentiality and non-collusion |
| "**Suitable Substitute Provider**" | means a person approved by the Developer (such approval not to be unreasonably withheld or delayed) as:-(a) having the legal capacity, power and authority to become a party to and perform obligations equivalent to the obligations of ESCo under this Agreement and the Framework Supply Agreement; and(b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub‑contracts) which are sufficient to enable it to perform the obligations of ESCo under this Agreement and the Framework Supply Agreement |
| "**Tender Costs**" | means the reasonable and proper costs of the Developer incurred in carrying out the Tender Process and/or in connection with the calculation of the Residual Market Value Sum, including the costs of appointment of the Independent Expert.  |
| "**Tender Process**" | means the process by which the Developer requests tenders from any parties interested in entering into the New Agreements, evaluates the responses from those interested parties and enters into the New Agreements with a New ESCo, in accordance with paragraph 4 (Retendering Process) |
| "**Tender Process Monitor**" | means the person, if any, appointed by ESCo pursuant to paragraph 4.4 (Retendering Process) |
| "**Termination Date**" | means:-(a) where the Developer has served a Final Termination Notice on ESCo and a Retendering Process has been followed pursuant to paragraph 4, the date that is the date of appointment of a New ESCo(b) where the Developer has served a Final Termination Notice on ESCo and the provisions of paragraph 5 apply, the date which is 30 days after the date upon which the Residual Market Value Sum is agreed or determined(c) where ESCo has served a Final Termination Notice on the Developer the date of such Final Termination Notice |
| "**Termination Payment**" | means:-(a) the ESCo Termination Amount; or(b) the Developer Termination Amount; or(c) the Force Majeure Termination Sum(as the case may be) agreed or determined in accordance with this Schedule 16) |

1. **Termination**
	1. Upon service of a Final Termination Notice by the Developer pursuant to Clause 25.3 (Timing of Final Termination Notice), the Developer shall within [ten (10)] Business Days of the Final Termination Notice serve written notice on ESCo electing (at the Developer’s discretion) to:
		1. require ESCo to transfer the Energy System to an Affiliate of the Developer, following which the Developer shall pay ESCo (or ESCo shall pay the Developer, as appropriate) the ESCo Termination Amount in accordance with paragraph 5 below, or
		2. where there is a Liquid Market, retender this Agreement and the Framework Supply Agreement, in which case paragraph 4 shall apply.
	2. Upon service of a Final Termination Notice by the Developer pursuant to Clause 25.3 (Timing of Final Termination Notice), and following establishment that there is no Liquid Market, the Developer shall direct ESCo to transfer the Energy System to any entity (including the Developer itself) as the Developer may elect, following which the Developer shall pay ESCo (or ESCo shall pay the Developer, as appropriate) the ESCo Termination Amount in accordance with paragraph 6 below.
	3. Subject to paragraph 2.4, upon service of a Final Termination Notice by ESCo pursuant to Clause 25.3 (Timing of Final Termination Notice), the Developer shall pay the Developer Termination Amount in accordance with paragraph 6 below.
	4. Where a Final Termination Notice is served by ESCo on the grounds stipulated in any of paragraph (c) of the definition of ESCo Termination Grounds and the Developer is able to procure a novation of this Agreement in accordance with Clause  28 (Assignment and Other Dealings) of this Agreement and a novation of the Leases, this Agreement and the Framework Supply Agreement shall be novated and no Developer Termination Amount shall be payable (but without prejudice to the provisions of Clause  25.3.2 (Default, Cure and Termination)).
	5. On termination of this Agreement or the Framework Supply Agreement pursuant to Clause 21.7 (Force Majeure) for reason of a Prolonged Force Majeure, then the Developer shall pay to ESCo the Force Majeure Termination Sum in accordance with paragraph 6 below.
2. **DETERMINING THE RESIDUAL MARKET VALUE SUM**
	1. Where the Developer requires the transfer of the Energy System pursuant to paragraph 2.1.1 or 2.2 above, the following procedure shall apply to determine the component of the ESCo Termination Amount that comprises the Residual Market Value Sum:-
		1. ESCo and the Developer shall jointly instruct the Independent Expert to determine the Residual Market Value Sum, within 20 (twenty) Business Days of their appointment, based on the following principles:
			1. taking into account the actual capital expenditure ESCo has expended in respect of the ESCo Works and the provision of the ESCo Services but only to the extent that (i) such expenditure has been expended in the manner contemplated in this Agreement; and (ii) has not been recovered by ESCo through Connection Charges and [ ][[97]](#footnote-98), in each case, up to the Termination Date;
			2. all forecast revenues and amounts to be received by ESCo under this Agreement and the Framework Supply Agreement (including all Heat Charges, Connection Charges, and [ ][[98]](#footnote-99)) which shall be calculated in nominal terms at current prices, and then adjusted for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Agreement and the Framework Supply Agreement;
			3. the total of all costs forecast to be incurred by the Developer as a result of termination, such costs to include (without double counting):
				1. an adjustment to account for the condition of the Energy System such that it is capable of continued operation to the standards required under this Agreement and the Framework Supply Agreement;
				2. a deduction for the amounts that the Developer is entitled to set‑off or deduct pursuant to the terms of this Agreement and the Framework Supply Agreement;
			4. such other matters as the Independent Expert may specify at the relevant time.
		2. Following determination of the Residual Market Value Sum, the Independent Expert shall provide the parties with the calculated ESCo Termination Amount.
		3. The Independent Expert's determination of the ESCo Termination Amount shall be binding on the Parties (save for any manifest error in such determination which shall be resolved pursuant to the Dispute Resolution Procedure or by agreement between the Parties).
3. **Retendering Process**
	1. If the Developer elects not to transfer the Energy System to an Affiliate pursuant to paragraph 2.1.1 above then, provided there is a Liquid Market, the Developer shall undertake the Tender Process in accordance with paragraph 4.2.
	2. The following provisions shall apply in respect of the Tender Process:-
		1. The objective of the Tender Process shall be to establish and for the Developer to pay to ESCo the Highest Compliant Tender Price, as a result of the Tender Process.
		2. The Developer shall ensure that at least three (3) parties who satisfy the Qualification Criteria are invited to submit tenders as part of the Tender Process unless ESCo consents to a lower number.
		3. The Developer shall use all reasonable endeavours to complete the Tender Process as soon as practicable.
		4. The Developer shall as soon as reasonably practicable notify ESCo of the Qualification Criteria and other requirements and terms of the Tender Process, including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms.
		5. The Developer shall carry out the Tender Process in an open, impartial and transparent manner to facilitate the intent of the provisions of this Schedule 16.
		6. The Developer shall request any information that is reasonably required as part of the Tender Process to be released which would otherwise be prevented under 17 (Confidentiality) and ESCo shall not unreasonably withhold or delay the release of such information, provided that ESCo shall not be required to provide or release any such information which is commercially sensitive to ESCo as defined in paragraph 4.3.
	3. For the purposes of paragraph 4.2.6, commercially sensitive shall mean information which could if disclosed to a competitor of ESCo could give that competitor a competitive advantage over ESCo and/or prejudice the business of ESCo.
	4. ESCo may, at its own cost, appoint an independent person to monitor the Tender Process (a "**Tender Process Monitor**") for the purpose of monitoring and reporting to ESCo on the Developer's compliance with the Tender Process and making representations to the Developer.
	5. The Tender Process Monitor shall enter into a confidentiality agreement with the Developer in a form reasonably acceptable to the Developer and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of all the tender documentation and bids and make representations to the Developer as to compliance with the Tender Process. The Developer shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by ESCo in the event that ESCo refers a dispute relating to the Adjusted Highest Complaint Tender Price to be determined in accordance with Clause 27 (Dispute Resolution Procedure).
	6. The Developer shall require bidders to bid on the basis that:-
		1. they will receive the benefit of any outstanding claims or amounts held under material damages insurance policies;
		2. [ ][[99]](#footnote-100)
	7. As soon as practicable after tenders have been received, the Developer shall (acting reasonably) review and assess the Compliant Tenders and shall notify ESCo of the Adjusted Highest Compliant Tender Price. Subject to paragraph 4.8 once the Adjusted Highest Compliant Tender Price is established the Developer shall enter into the New Agreements with the New ESCo and the provisions of paragraph 6 shall apply in respect of payment of the ESCo Termination Amount.
	8. Notwithstanding completion of the Tender Process, the Developer shall not be required to terminate this Agreement pursuant to a Final Termination Notice and accordingly not enter into the New Agreements with the New ESCo, but if the Developer elects not to terminate this Agreement (such election to be made within six months of the date of service of the Final Termination Notice) then the Developer shall be deemed to have waived its entitlement to terminate this Agreement (and the Framework Supply Agreement) pursuant to the Developer Termination Ground upon which the Final Termination Notice was served and any Developer Warning Notice which has been served pursuant to Clause 25.2 (Default, Cure and Termination) (and the equivalent provisions of the Framework Supply Agreement) shall be cancelled.
4. **No Bidders**

If following a Tender Process no bidders submitted bids the following provisions will apply:-

* + 1. the Developer can elect not to terminate this Agreement and the Framework Supply Agreement and if it does so elect within six months of the date of service of the Final Termination Notice then the Developer shall be deemed to have waived its entitlement to terminate this Agreement and the Framework Supply Agreement pursuant to the Developer Termination Ground upon which the Final Termination Notice was served and any Developer Warning Notices which have been served pursuant to Clause 25.2 (Default, Cure and Termination) (and the equivalent provisions of the Framework Supply Agreement) shall be cancelled; or
		2. the Developer can transfer the Energy System pursuant to paragraph 2.2 above.
1. **Calculation and Payment of Compensation Payments**
	1. The Parties shall seek to agree the amount of the Termination Payment as soon as reasonably practicable after service of a Final Termination Notice, and in particular:-
		1. shall, where the provisions of paragraph 4 apply, take all actions necessary to assist the Tender Process as soon as reasonably practicable and in any event within two months of service of the relevant Notice pursuant to paragraph 4.7;
		2. shall provide to the other Party as soon as reasonably practicable details of the relevant amounts claimed by it in relation to each of the costs elements necessary to calculate the ESCo Termination Amount together within reasonable supporting evidence justifying the relevant amount including a breakdown of each of the individual elements of such sum.
	2. If the ESCo Termination Amount as agreed or determined by the Independent Expert pursuant to paragraph 3 is zero, the Developer shall be entitled to terminate this Agreement on the Termination Date without making any payment to ESCo.
	3. If the ESCo Termination Amount as agreed or determined pursuant to paragraph 3 is negative, ESCo shall pay the Developer the relevant balance (subject to the limits on liability contained in Clause 22 (Limitation on Liability), within 21 days after the Termination Date.
	4. If the ESCo Termination Amount as agreed or determined pursuant to paragraph 3 or paragraph 4 is positive, the Developer shall be entitled to terminate this Agreement and the Framework Supply Agreement on the Termination Date and the Developer shall be required to pay the ESCo Termination Amount (subject to the limits on liability contained in Clause 22 (Limitation on Liability), within 21 days after the Termination Date.
	5. The Developer shall pay to ESCo the Developer Termination Amount agreed or determined pursuant to paragraph 6.1 within twenty (20) Business Days after the Termination Date.
	6. If either Party refers a Dispute relating to Termination Payment for determination in accordance with Clause 27 (Dispute Resolution Procedure) the Party who has served the Final Termination Notice shall be entitled to terminate this Agreement and the Framework Supply Agreement by serving twenty (20) Business Days further notice on the other Party at any time within twenty (20) Business Days of referral to an Expert pursuant to Clause 27 (Dispute Resolution Procedure) subject to:-
		1. payment of the undisputed amount of the Termination Payment on such date; and
		2. the Party providing to the other Party such security as is reasonably required by that other Party at the relevant time in relation to payment of any disputed element of the Termination Payment.

[*Drafting Note: In this Agreement, the ESCo Termination Amount (payable by the Developer to ESCo on termination by the Developer) is based on either (i) the highest tender price received by the Developer on a re-tendering; or (ii) the residual market value (i.e. the amount that a third party will pay to the Developer as the market value) – in both cases less any tender costs and amounts that the Developer is entitled to set-off. However, the Parties may want to consider alternative methods of calculating the ESCo Termination Amount].*

1. **Termination General**
	1. Any and all sums paid by the parties under this Schedule shall be in full and final settlement of each Party's rights and claims against the other for breaches and/or termination of this Agreement, the Framework Supply Agreement and any other Project Agreement (other than in relation to the Customer Supply Agreements) whether under contract, tort or otherwise, but without prejudice to any antecedent liability of any Party to the extent that this arose prior to the Termination Date (but not from the Termination Date itself) to the extent that such liability has not already been taken into account in determining or agreeing the Termination Payment.
	2. From the due date for payment of any undisputed Termination Payment to the date of payment of such Termination Payment interest shall accrue in accordance with the provisions of Clause 12.3 (Charging and Invoicing). Where the provisions of paragraph 6.5 apply and the determination of such Dispute is resolved in favour of the Party claiming a Termination Payment interest shall accrue on such amount from the relevant payment due date stipulated in paragraph 6.
	3. Where the Developer serves a Final Termination Notice and termination of this Agreement occurs prior to the date of Practical Completion of the [Energy Centre Works and the Primary Heat Network Works], ESCo shall on the Termination Date procure the transfer to, and there shall vest in, the Developer free from any encumbrances, charges or liens title in such part of the Energy System as shall have been Adopted or constructed (as relevant) and such items as shall have been procured or Adopted by ESCo if the Developer so elects.
	4. Where the Developer serves a Final Termination Notice and termination of this Agreement occurs following Practical Completion of the Energy Centre Works, the Primary Heat Network Works and the Secondary Heat Network Works, ESCo shall on the Termination Date simultaneously handover to or procure the handover to, and there shall vest in the Developer free from any encumbrances, charges or liens, title to, the Energy System.
	5. ESCo shall procure the grant to the Developer of an exclusive, royalty free license (carrying the right to grant sub‑licenses) to use the ESCo Works and/or the Energy System for the purposes of the design and construction of the Energy System, the operation, maintenance or improvement of the Energy System and/or the carrying out of operations the same as, or similar to, the operations to be carried out by ESCo pursuant to this Agreement.
	6. ESCo shall deliver to the Developer (as far as not already delivered to the Developer) where termination occurs on or after Practical Completion of the Energy Centre Works, the Primary Heat Network Works and the Secondary Heat Network Works and/or Service Readiness pursuant to the Framework Supply Agreement, one complete set of:-
		1. "**as built drawings**" showing all alterations made to the Energy System since the commencement of operation of the ESCo Services;
		2. maintenance, operation and training manuals for the Energy System; and
		3. such access codes, keys and passwords it has in its possession or control as may reasonably be required for the effective operation of the Energy System,

but where termination occurs prior to Practical Completion drawings showing the ESCo Works performed to the date of termination.

* 1. ESCo shall procure (and the Developer shall accept or shall procure that a third party accepts) that each Customer Supply Agreement and construction contract or subcontract entered into in relation to the Development shall be novated to either the Developer or to whom the Developer shall nominate.
	2. If as at the Termination Date any event has occurred which would trigger or has triggered a claim under any insurance policy maintained by ESCo (under this Agreement or the Framework Supply Agreement) which relates to damage to assets which has not been settled in full:-
		1. ESCo shall be entitled to claim and/or retain any insurance proceeds received or receivable on or after the Termination Date which relate to reinstatement works which have been carried out by ESCo;
		2. the Developer shall be entitled to any insurance proceeds received or receivable on or after the Termination Date which relate to reinstatement works which have not yet been completed.
		3. : Transitional Arrangements
			+ 1. For a period of not more than six months both before and after the Expiry Date or from the date of service of a Final Termination Notice until the Termination Date (as appropriate) (the "Transitional Period"), ESCo shall at the request of the Developer co‑operate with the Developer and any successor providing to the Developer services in the nature of any of that envisaged under this Agreement or the Framework Supply Agreement, to enable a smooth transfer of the manner in which the Heat Supply is provided and to avoid or mitigate insofar as reasonably practicable any inconvenience or any risk to the health and safety of Customers and members of the public and for that purpose ESCo shall not be required to transfer any Connection and Supply Agreement (Plot/ Building), Connection and Supply Agreement (Plot/ Building) or Customer Supply Agreement until the last day of the Transitional Period.
				2. *[Include any other relevant transitional arrangements]*

|  |  |
| --- | --- |
| Signed by **DEVELOPER** in the presence of: | ....................................... |

.......................................

[SIGNATURE OF WITNESS]

[NAME, ADDRESS AND OCCUPATION OF WITNESS]

|  |  |
| --- | --- |
| Signed by **ESCo** in the presence of: | ....................................... |

.......................................

[SIGNATURE OF WITNESS]

[NAME, ADDRESS AND OCCUPATION OF WITNESS]

1. Include any other properties to which heat is supplied by ESCo – eg schools, community centres etc. [↑](#footnote-ref-2)
2. Amend as appropriate depending on what components the Developer is designing and installing/ constructing. [↑](#footnote-ref-3)
3. Amend as appropriate depending on whether ESCo is accepting any components constructed and installed by the Developer (i.e. taking partial risk in, rather adopting and taking full risk) [↑](#footnote-ref-4)
4. Amend as appropriate depending on whether ESCo is adopting any components constructed and installed by the Developer (i.e. taking full risk in and ownership of) [↑](#footnote-ref-5)
5. Amend as appropriate dependent on the configuration of the Energy System/ whether ESCo is retaining title to all plant and equipment/ part following Adoption/ Acceptance. [↑](#footnote-ref-6)
6. Amend scope of services as appropriate. Where ESCo owns the relevant component of the Energy System, it is less common to include detailed O&M requirements. [↑](#footnote-ref-7)
7. Include where part of the Energy System (eg the Secondary Distribution Network) has been constructed by the Developer and will be accepted by (I.e. partial risk shall pass to) ESCo. Note that where there are distinct plots developed by third party Plot Developers, construction / acceptance of the Secondary Distribution Network will normally be pursuant to the relevant Connection and Supply Agreement for that plot. [↑](#footnote-ref-8)
8. Include where either part (eg the Secondary Distribution Network) or the whole of the Energy System has been constructed by the Developer and will be “adopted” by (I.e. full risk shall pass to) ESCo. [↑](#footnote-ref-9)
9. Include additional clause under ESCo Obligations if there are specific carbon requirements for the Development which are higher than those set out under regulation or legislation. [↑](#footnote-ref-10)
10. Drafting included to address the Agreement having been granted prior to Planning Permission for the Development having been granted. Appropriate tailoring will be required dependent on how Planning Permission will be obtained (in phases/ Outline, then Full etc). [↑](#footnote-ref-11)
11. Amend as appropriate to reflect technical solution. [↑](#footnote-ref-12)
12. Include to the extent relevant to the Development [↑](#footnote-ref-13)
13. Include as relevant, where a lease is being granted over substation space within a Commercial Building. [↑](#footnote-ref-14)
14. Where Common Parts are served by a separate meter, Developer (or relevant Landlord) should enter into Commercial Connection and Supply Agreement in relation to such Common Parts. [↑](#footnote-ref-15)
15. Include where the Developer is taking full title risk [↑](#footnote-ref-16)
16. List any project specific Compensation Events [↑](#footnote-ref-17)
17. Include to the extent that there are CPs to the effectiveness of the substantive provisions of the Connection and Adoption Agreement (eg Planning Permissions/ s20 Consultations). [↑](#footnote-ref-18)
18. Include an appropriate date, given expected Development build programme, obtaining of relevant CPs – eg Planning Permissions and any other relevant matters [↑](#footnote-ref-19)
19. Include specific authorisations for which the Developer is responsible – eg traffic related [↑](#footnote-ref-20)
20. Include appropriate delay damages payable to the Developer by ESCo on ESCo delay to the Connection Date for a relevant Plot Development/ Commercial Building. This could be based upon eg lost rental value/ need to provide temporary accommodate etc. [↑](#footnote-ref-21)
21. Include where planning permission is still to be obtained for the relevant developments being undertaken. [↑](#footnote-ref-22)
22. Insert to the extent relevant – i.e. ESCo will provide private wire electricity supplies to commercial customers on the Development. [↑](#footnote-ref-23)
23. Include to the extent relevant to the project. [↑](#footnote-ref-24)
24. Include appropriate delay damages payable to ESCo by the Developer on Developer delay to the Connection Date for a relevant Plot Development/ Commercial Building. This could be based upon a lost revenue calculation (netted against cost savings in relation to the delay – eg gas costs – and avoiding double counting in relation to costs payable pursuant to Clause 14 (Compensation and Relief events)). [↑](#footnote-ref-25)
25. Alternatively, a break right can be included for both parties at agreed intervals (eg at 40 years and every rolling 10 years thereafter). Note that this must tie in with the Framework Supply Agreement. [↑](#footnote-ref-26)
26. Include where there is a Conditions Precedent requirement. [↑](#footnote-ref-27)
27. Include to the extent that the Developer is subject to FOIA. [↑](#footnote-ref-28)
28. Include any other relevant events which should be deemed to be sufficiently severe to constitute “Major Default” [↑](#footnote-ref-29)
29. Insert as relevant with respect to elements of the Energy System that are being Adopted/ Accepted [↑](#footnote-ref-30)
30. Insert as relevant with respect to elements of the Energy System that are not owned by ESCo but which are operated and maintained by ESCo. [↑](#footnote-ref-31)
31. Include as relevant, where a lease is being granted over substation space within a Plot Development. [↑](#footnote-ref-32)
32. It is assumed that each Plot Development/ Building or Commercial Building will have its own substation room, within which the heat exchanger between the Primary Distribution Network and the Secondary Distribution Network will be housed. [↑](#footnote-ref-33)
33. Consider any alternative future debts that will be owed by the parties [↑](#footnote-ref-34)
34. The extent to which detailed specifications are developed for each component of the Energy System will depend on how prescriptive the parties need to be and at what point in time detailed design is completed. To the extent that any element of the Energy System is being Adopted or Accepted, a detailed Specification should be included or developed, against which the Adoption criteria will be judged. In addition, any substantive element of the Energy System that will ultimately be passed back/ owned by the Developer should also be built to agreed Specifications. [↑](#footnote-ref-35)
35. Include to the extent relevant. [↑](#footnote-ref-36)
36. Amend as appropriate [↑](#footnote-ref-37)
37. Include to the extent required. [↑](#footnote-ref-38)
38. Renewal and Retender provisions are provided for in Schedule 16. Include to the extent the parties wish the flexibility at the end of the term to either renew/ retender the contract. Note that such renewal or retender should be for the same term and on the same conditions as renewable or retender of the Framework Supply Agreement as the sets of Agreements are tied. If the Agreements are uncoupled, additional drafting will be required. [↑](#footnote-ref-39)
39. Consider appropriate timing. [↑](#footnote-ref-40)
40. Include any other Development specific exclusions [↑](#footnote-ref-41)
41. Consider whether appropriate. If the Development is being connected to an existing Energy System/ one which will be owned by ESCo in perpetuity (i.e. not handed back to the Developer after the end of the Term, this provision (other than in relation to the Carbon Compliance of the Connection) is unlikely to be necessary. [↑](#footnote-ref-42)
42. As per comment on clause 7.1.4 [↑](#footnote-ref-43)
43. As per comment on clause 7.1.4 [↑](#footnote-ref-44)
44. As per comment on clause 7.1.4 [↑](#footnote-ref-45)
45. As per comment on clause 7.1.4 [↑](#footnote-ref-46)
46. Include where ESCo is a shell company and additional security in relation to performance is required. [↑](#footnote-ref-47)
47. Include to the extent relevant [↑](#footnote-ref-48)
48. Include to the extent appropriate. If an Energy System is being connected to an existing Development (or vice versa) these requirements may not be relevant/ appropriate. [↑](#footnote-ref-49)
49. As per comment on clause 8.1.1 [↑](#footnote-ref-50)
50. As per comment on clause 8.1.1 [↑](#footnote-ref-51)
51. Include where the Developer is constructing elements of the Energy System which shall become owned by ESCo following Adoption. [↑](#footnote-ref-52)
52. Include where the Developer is a shell company and additional security in relation to performance is required. [↑](#footnote-ref-53)
53. Include where the Energy System reverts to the Developer on Termination. [↑](#footnote-ref-54)
54. Include where access to the Primary Distribution Network is required across the Developer’s land and an Easement (rather than a Lease) of the pipework route is desired. [↑](#footnote-ref-55)
55. Include where the Developer is undertaking title investigation [↑](#footnote-ref-56)
56. Include where ESCo is undertaking title investigation [↑](#footnote-ref-57)
57. Include to the extent it is commercially agreed that the Developer takes full title risk. [↑](#footnote-ref-58)
58. Include where there is a commercial agreement that the Plot Developer is responsible for residential unit void periods where leases/ tenancies are short term. [↑](#footnote-ref-59)
59. Consideration should be given to how these caps interrelate with the caps on liability under the Framework Supply Agreement (e.g. whether there is a global cap across all Project Agreements). [↑](#footnote-ref-60)
60. Comment as per Developer cap on liability [↑](#footnote-ref-61)
61. Consider whether following termination of the Framework Supply Agreement for ESCo poor performance, rather than terminating this Agreement, bulk supplies of heat could be made. Applicable where there is an off-site heat supply, this would enable a Developer to manage the onward supplies of heat and management of relationships with Customers on the Development. Provisions would need included in this Connection and Adoption Agreement to reflect bulk supplies to a specific connection point on the Development following termination of the Framework Supply Agreement, plus appropriate metering and billing for such supply. [↑](#footnote-ref-62)
62. Parties to consider according to their particular circumstances. [↑](#footnote-ref-63)
63. Applicable where the Energy System is transferred to the Developer following termination. [↑](#footnote-ref-64)
64. Applicable where the Energy System is transferred to the Developer following termination. [↑](#footnote-ref-65)
65. It is assumed that the Developer counterparty to the Connection and Adoption Agreement and the Framework Supply Agreement are the same. If the Developer entity is not the same, appropriate amendments will need made to the Agreements. [↑](#footnote-ref-66)
66. Include where commercially agreed. [↑](#footnote-ref-67)
67. Include where a PCG has already been provided (but is no longer sufficient given the Change of Control) [↑](#footnote-ref-68)
68. Include where a PCG has not previously been required, but given the Change of Control, is now deemed necessary. [↑](#footnote-ref-69)
69. Amend as appropriate – standard works provisions for a contractor undertaking works on a Development site have been included. [↑](#footnote-ref-70)
70. Consider whether a more detailed Interface Protocol may be required. [↑](#footnote-ref-71)
71. Include any appropriate step in rights – for example for the Developer on a termination event, or for a third party funder. [↑](#footnote-ref-72)
72. Include Schedule where title to elements of the Energy System are not being passed to ESCo and rather ESCo shall undertake operation and maintenance services. Drafting has been included for the Secondary Distribution Network, HIUs and Meters. Amend as appropriate (or delete the Schedule where no elements are being Accepted). [↑](#footnote-ref-73)
73. Initial and final commissioning included: delete as appropriate if procedure considered too administratively burdensome. [↑](#footnote-ref-74)
74. If required, include a detailed list of items required to be detailed, such as property address, manufacturer of meter, model, serial number, details of the automated reading system if installed etc. [↑](#footnote-ref-75)
75. Drafting has been included to accommodate Adoption of every element of the Energy System. Amend as appropriate (or delete the Schedule where all elements of the Energy System are constructed by ESCo and/or are being Accepted). [↑](#footnote-ref-76)
76. Initial and Final Commissioning included: delete Initial if considered unnecessary detail for required inspection process. [↑](#footnote-ref-77)
77. Include as appropriate, depending on which elements of the Energy System have been installed by the Developer and are to be adopted by ESCo. [↑](#footnote-ref-78)
78. Basic O&M provisions included: amend to include additional relevant requirements, taking in account that the Connection and Adoption Agreement, together with the Framework Supply Agreement are intended to be output based (i.e. delivery of Heat to Customers and achievement of the Service Levels). [↑](#footnote-ref-79)
79. Drafting may not be relevant for a Development connected to an off-site Energy System. [↑](#footnote-ref-80)
80. Responsibility for Business Rates to be commercially agreed. [↑](#footnote-ref-81)
81. A basic process is included in the drafting. Amend as appropriate to tie into eg planning processes for the relevant Plot Developments/ Commercial Building, wider programme details, any conditionalities on the requirements to enter into the Connection and Supply Agreement (Plot/ Building)s/ Connection and Supply Agreement (Plot/ Building)s (such as obtaining planning/ the financial standing of the relevant counterparty (etc)). [↑](#footnote-ref-82)
82. Include appropriate triggers for the various Connection and Supply Agreement (Plot/ Building)s. This could be tied to Planning/ Programmes. [↑](#footnote-ref-83)
83. Include any other relevant details required to be provided by the Developer prior to draw down of a Connection and Supply Agreement (Plot/ Building)/ Connection and Supply Agreement (Plot/ Building). [↑](#footnote-ref-84)
84. Include details as relevant [↑](#footnote-ref-85)
85. Include details of any other works required to be undertaken on the Plot/ within the Commercial Building to facilitate the Connection of the Plot Development/ Commercial Building to the Energy System. [↑](#footnote-ref-86)
86. Consider inclusion of any processes necessary to accommodate changes to the agreed forms of Connection and Supply Agreement (Plot/ Building)s (noting that the third party counterparties may require specific changes to suit their requirements). [↑](#footnote-ref-87)
87. Suggested details included for a CHP District Heating Scheme. Amend as appropriate for the relevant technology. [↑](#footnote-ref-88)
88. Amend as appropriate to reflect agreed processes for governance. [↑](#footnote-ref-89)
89. Include the relevant mechanism by which the Developer bears costs of a Change in Law [↑](#footnote-ref-90)
90. This assumes that the Energy System shall be transferred to the Developer on Expiry of the term. If this is not the case, delete this provision. [↑](#footnote-ref-91)
91. The drafting of this schedule assumes that the Energy System will be transferred to the Developer following termination or Expiry of the Connection and Adoption Agreement (and the Framework Supply Agreement) and that the Developer may retender for the provision of Heat Supplies utilising such Energy System. To the extent that the Connection is to an offsite energy source or where ESCo retains ownership of the Energy System notwithstanding Termination or Expiry of the Agreements, appropriate amends will need made to this Schedule, reflecting the physical and commercial arrangements. [↑](#footnote-ref-92)
92. Include any other amounts that are appropriate to deduct on a termination event for ESCo Default. This will depend on the wider commercial arrangements and the contributions made by the Developer (for example, Adoption Payments/ Connection Charges etc). [↑](#footnote-ref-93)
93. Consider whether to include any uplift to this amount to reflect lost profit/ compensation element. [↑](#footnote-ref-94)
94. Include any other amounts that should be due to ESCo on termination event for Developer Default. Again, this will depend on the wider commercial arrangements, including whether there is any third party debt which will require repayment. [↑](#footnote-ref-95)
95. Include any amounts properly due to the Developer, notwithstanding that termination in this scenario is due to Developer default. [↑](#footnote-ref-96)
96. Consider any additional amounts that would be properly due to ESCo on a Force Majeure termination, for example Outstanding Debt where there is a third party funder. [↑](#footnote-ref-97)
97. Include any other Capex payments made by the Developer, eg Adoption Charges [↑](#footnote-ref-98)
98. Include any other Capex payments made by the Developer, eg Adoption Charges [↑](#footnote-ref-99)
99. Consider any other relevant criteria. [↑](#footnote-ref-100)