|  |
| --- |
|  |
| Dated 20[\*] |
|  |
|  |
| (1) *[ESCo]*  AND  (2) *[Contractor]* |
|
|  |
| |  | | --- | | GREEN HEAT NETWORK FUND  DRAFT: DESIGN, BUILD, OPERATE AND MAINTAIN AGREEMENT | |
|  |
|  |
|  |
|  |

# Version Control

|  |  |  |  |
| --- | --- | --- | --- |
| **Version number** | **Date of issue** | **Author** | **Comment** |
| 1.0 (internal) |  | Lux Nova Partners | Initial/internal draft |
| 2.0 (external) | 31 July 2019 | Lux Nova Partners | Draft issued for focused consultation |
| 3.0 | 16 October 2019 | Lux Nova Partners | Marked up following responses to consultation meeting on 19.09.19 |
| 4.0 | 13 December 2019 | Lux Nova Partners | Marked up after responses to wider consultation which closed on 17.11.2019 |
| 5.0 | 15 January 2020 | Lux Nova Partners | Marked up following comments from BEIS |
| 6.0 | 29 November 2022 | Lux Nova Partners | Update of statutory references and drafting tidy ups |

*GUIDANCE NOTE*

*This Design, Build, Operate & Maintain Agreement is not necessarily relevant to every district heating scheme.*

*However, it may be relevant to a district heating scheme where an energy supplier (ESCo) wishes to appoint a single contractor to design and build and to operate and maintain its district heating infrastructure.*

*Under this Agreement, ESCo is outsourcing to a single Contractor:*

* *design and build of a district heating scheme;*
* *(at ESCo’s option) design and build of network extensions;*
* *a range of operation and maintenance services in respect of the above infrastructure, as well as secondary network which are taken over.*

*At the time of writing, truly integrated Design, Build, Operate and Maintain contracts are rarely (if at all) used in the UK for district heating networks. So, this Design, Build, Operate and Maintain Agreement uses an umbrella approach to provide an interface between:*

* *design and build terms, using any one of a number of existing and recognised industry standard forms (such as those provided by JCT, NEC, IMECHE, etc), and the form selected is likely to depend on the experience and preferences of the project team;*
* *operation and maintenance terms on a more bespoke (but industry recognisable) form (per our template Operation & Maintenance Agreement).*

*Although a separate contract form is used for the design and build component compared to the operate and maintain component, the Design, Build, Operate and Maintain Agreement acts as a bridge between them. Some work will inevitably be required to ensure that the provisions of the design and build component and operation and maintenance components fit together adequately. For example, this will require alignment of approach to dispute resolution.*

*How this Agreement fits together, and might fit into a project structuring is illustrated in the following diagram:*

*The proven advantage of this umbrella approach is that it gives ESCo/the project sponsor a single contract counterparty, with single point of recourse across both elements, whilst allowing ESCo/the project sponsor to engage with the market on terms that the market is more familiar. This should increase the likelihood of good engagement in any procurement. However, it is unavoidable that a reasonable amount of further tailoring will be required to make use of this umbrella agreement, to tie the chosen design & build terms in with the Operation & Maintenance Agreement.*

*The structuring assumption and risk allocation underlying this Design, Build, Operate and Maintain 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 Design, Build, Operate and Maintain 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.*

**Table of Contents**

[1. Interpretation 1](#_Toc25911446)

[2. Precedence of provisions 6](#_Toc25911447)

[3. Commencement and duration 6](#_Toc25911448)

[4. Design appointment 6](#_Toc25911449)

[5. Appointment to perform the Works 7](#_Toc25911450)

[6. Appointment to perform the Services 7](#_Toc25911451)

[7. Appointment to perform Extension Works 7](#_Toc25911452)

[8. Compliance with Assumed Contracts 8](#_Toc25911453)

[9. Insurance 8](#_Toc25911454)

[10. Defects 9](#_Toc25911455)

[11. Performance Security 10](#_Toc25911456)

[12. Sub-contracting, delegation and assignment 10](#_Toc25911457)

[13. Marketing and publicity 12](#_Toc25911458)

[14. Confidentiality 12](#_Toc25911459)

[15. Warranties and representations 13](#_Toc25911460)

[16. Compliance and change in laws 14](#_Toc25911461)

[17. Force majeure 15](#_Toc25911462)

[18. Insurance 15](#_Toc25911463)

[19. Termination 15](#_Toc25911464)

[20. Consequences of termination and survival 16](#_Toc25911465)

[21. Dispute Resolution Procedure 17](#_Toc25911466)

[22. Conflict 17](#_Toc25911467)

[23. Assignment and other dealings 17](#_Toc25911468)

[24. Variation 18](#_Toc25911469)

[25. Waiver 18](#_Toc25911470)

[26. Rights and remedies 18](#_Toc25911471)

[27. No partnership or agency 18](#_Toc25911472)

[28. Announcements 18](#_Toc25911473)

[29. Severance 18](#_Toc25911474)

[30. Further assurance 18](#_Toc25911475)

[31. Entire agreement 18](#_Toc25911476)

[32. Third party rights 19](#_Toc25911477)

[33. Notices 19](#_Toc25911478)

[34. Counterparts 19](#_Toc25911479)

[35. Governing law 20](#_Toc25911480)

[36. Jurisdiction 20](#_Toc25911481)

[Schedule 1 – Performance Specification 21](#_Toc25911482)

[Annex 1 – Design & Build terms 22](#_Toc25911483)

[Annex 2 – Operation & Maintenance Terms 23](#_Toc25911484)

[Annex 3 – Extension Terms 24](#_Toc25911485)

[Annex 4 – Form of Extension instruction 25](#_Toc25911486)

[Annex 5 – Form of Direct Agreement 26](#_Toc25911487)

[Annex 6 – Form(s) of performance security 27](#_Toc25911488)

[Annex 7 – Insurance 28](#_Toc25911489)

[Annex 8 – Drawings 29](#_Toc25911490)

[Annex 9 – Preliminaries 30](#_Toc25911491)

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

each a “**Party**” and together “**the Parties**”.

**Recitals**

1. ESCo is developing a district heat network [and electricity network] to serve heat [and electricity] to consumers in [ ].
2. [Following a tender exercise,] the Contractor has been selected by ESCo to design, build, operate and maintain the Energy System on a single point redress basis.
3. The Contractor has available the necessary resources, knowledge and experience required to design, build, operate and maintain the Energy System.
4. ESCo wishes to appoint the Contractor to design, build, operate and maintain the Energy System under a single contract but making use of an industry standard form of design and build contract.
5. Accordingly, this Agreement incorporates:
   1. Design & Build Terms: set out in Annex 1,
   2. Operation & Maintenance Terms: set out in Annex 2,
   3. Extension Terms: set out in Annex 3,
   4. as well as other terms generally applicable to the Works & Services to be performed by the Contractor.

**Agreed Terms**

1. Interpretation

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

Definitions:

**Accept** and **Accepting:** have the meaning given to them in the Operation & Maintenance Terms**.**

**Applicable Law**: has the meaning given to it in the Operation & Maintenance Terms.

**Approved Sub-contractor:** means a sub-contractor meeting ESCo’s reasonable requirements with respect to technical competence, financial standing and reputation.

**Assumed Contracts:** means [. ][[1]](#footnote-1).

**Business Day**: has the meaning given to it in the Operation & Maintenance Terms.

**Change in Law**: has the meaning given to it in the Operation & Maintenance Terms.

**Change of Control**: has the meaning given to it in the Operation & Maintenance Terms.

**Charges**: means the charges payable by ESCo to the Contractor under this Agreement.

**[Conditions Precedent:** mean [. ][[2]](#footnote-2)]

**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.

**Contractor Insurances:** means those insurances set out under Annex 7 *(Insurance)*.

**Contractor's Personnel**: all employees, staff, other workers, agents, contractors and consultants of the Contractor who are engaged from time to time in the discharge of the Contractor’s obligations under this Agreement.

**Contractor's Representative**: has the meaning given to it in the Operation & Maintenance Terms.

**Control**: has the meaning given to it in the Operation & Maintenance Terms.

**[CP Longstop Date:** means [*insert date*][[3]](#footnote-3).

**Customer**: has the meaning given to it in the Operation & Maintenance Terms.

**Design & Build Terms:** means the terms and conditions of contract set out in Annex 1 *(Design & Build Terms)*[[4]](#footnote-4), applicable to the Works.

**Detailed Design:** means the detailed design of the Energy System undertaken by the Contractor pursuant to the Design & Build Terms.

**Direct Agreement:** means a direct agreement between ESCo and an Approved Sub-contractor in the form set out in Annex 5 *(Direct Agreement),* subject to such reasonable amendments as may be requested by the Approved Sub-Contractor and approved by ESCo (such consent not to be unreasonably withheld or delayed).

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

**Dispute Resolution Procedure**: the dispute resolution procedure set out in clause 21 (*Dispute resolution procedure*).

**Documentation**: all technical specifications, user manuals, operating manuals, process definitions and procedures, and all such other documentation as:

1. is required to be supplied by the Contractor to ESCo to enable it to use the Services; and
2. is required to be developed by the Contractor in order to provide the Services.

**Effective Date**: the date of this Agreement.

**[Electricity Network:** *[insert description]***.]**

**Energy:** has the meaning given to it in the Operation & Maintenance Terms.

**Energy Centre:** has the meaning given to it in the Operation & Maintenance Terms.**Energy System**: has the meaning given to it in the Operation & Maintenance Terms.

**ESCo's Representatives**: has the meaning given to it in the Operation & Maintenance Terms.

**Exit Plan**: has the meaning given to it in the Operation & Maintenance Terms.

**Extension:** means any addition to the Energy System constructed either:

1. by the Contractor pursuant to an Extension Works Instruction; or
2. a third-party contractor appointed by ESCo on terms disclosed to the Contractor in accordance with the terms of the Operation & Maintenance Terms.

**Extension Terms:** means the terms and conditions set out in Annex 3 *(Extension Terms),* applicable to any Extension Works.

**Extension Works:** means any works and/or services for the extension of the Energy System instructed by ESCo under this Agreement (including any variation instructed pursuant to this Agreement).

**Extension Works Instruction:** means an instruction in the form set out at Annex 4 *(Extension Works Instruction)* issued by ESCo pursuant to clause 7 *(Appointment to undertake the Extension Works)* for the Contractor to perform Extension Works.

**Extension Works Tender Invitation:** has the meaning given under clause 7 *(Appointment to undertake the Extension Works)*.

**Force Majeure Event**: has the meaning given to it in the Operation & Maintenance Terms.

**Heat:** has the meaning given to it in the Operation & Maintenance Terms.

**Heat Distribution Network:** means[*insert description*].

**[Initial Electricity Network:** means [*describe initial electricity network which is to be designed and built by the Contractor, anticipating this will be for a lump sum***]**.

**Initial Heat Distribution Network:** means [*describe initial heat network which is to be designed and built by the Contractor, anticipating this will be for a lump sum*].

**Initial Term**: has the meaning given to it in the Operation & Maintenance Terms.

**Insolvency Event**: has the meaning given to it in the Operation & Maintenance Terms.

**IPRs**: has the meaning given to it in the Operation & Maintenance Terms.

**Longstop Date:** means [*insert date*][[5]](#footnote-5).

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

**O&M Sub-contract:** means a sub-contract in respect of the performance of the Services entered into by the Contractor in accordance with clause 12.2.3.

**Operation & Maintenance Terms:** means the terms and conditions set out in Annex 2, applicable to the Operation & Maintenance Service.

**Performance Specification:** means the specification for the Energy System provided by ESCo, as set out in Schedule 1 *(Performance Specification).*

**Planning Design:** means the design required to be undertaken by the Contractor pursuant to the Design & Build Terms in order to progress the planning application for the Energy System in order to obtain planning approval (but, for the avoidance of doubt, shall not include Detailed Design).

**Practical Completion:** has the meaning given to it in the Design & Build Terms.

**Preliminaries:** means the preliminaries document as set out in Annex 9.

**Pricing Schedule:** means, as appropriate, the pricing schedule relevant to the Design & Build Terms, the Operation & Maintenance Terms or the Extension Terms, as annexed to those terms.

**Representatives**: ESCo's Representatives and/or the Contractor's Representatives.

**Services:** has the meaning given to it in the Operation & Maintenance Terms.

**Services Commencement Date:** means the date of Practical Completion of the Energy System (including where relevant the Initial Heat Distribution Network [and the Initial Electricity Network]) or such later date as may be notified to the Contractor in accordance with clause 6.2.

**Takeover:** has the meaning given to it in the Operation & Maintenance Terms.

**Term**: has the meaning given to it in the Operation & Maintenance Terms.

**Termination Date**: has the meaning given to it in the Operation & Maintenance Terms.

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

**Works**: means the works and services required to deliver the Energy System, as defined in the Design & Build Terms (including any variation instructed pursuant to this Agreement).

**Works & Services**: means the Works, the Extension Works and the Services.

* 1. Clause, Schedule and paragraph headings shall not affect the interpretation of this Agreement.
  2. The Schedules and Annexes 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 and Annexes.
  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].

[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.]

* 1. Unless the context requires otherwise, words in the singular include the plural and in the plural include the singular.
  2. Unless the context requires otherwise, a reference to one gender shall include a reference to the other genders.
  3. A reference to a statute or statutory provision or subordinate legislation is a reference to it as amended, extended or re-enacted from time to time.
  4. A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.
  5. [A reference to **writing** or **written** includes email]].
  6. 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.
  7. References to clauses, Schedules and Annexes are to the clauses, Schedules and Annexes of this Agreement and references to paragraphs are to paragraphs of the relevant schedule.
  8. 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. Precedence of provisions
   1. In the case of any conflict between any provision in this Agreement, any one of the Design & Build Terms, the Operation & Maintenance Terms, and/ or the Extension Terms and any other provision in any of those terms, the documents shall take precedence in the following order:
      1. The clauses in the main body of this Agreement;
      2. the Design & Build Terms and within the Design & Build Terms:
         1. the [*specify form of contract being used*];
         2. the Preliminaries;
         3. the Performance Specification; and
         4. the Pricing Schedule;
      3. the Operation & Maintenance Terms; and
      4. the Extension Terms and within the Extension Terms:
         1. the [*specify form of contract being used*];
         2. the Preliminaries;
         3. the Performance Specification; and
         4. the Pricing Schedule[[6]](#footnote-6).
   2. Any conflict between a Pricing Schedule and the Performance Specification, the Preliminaries or any other provision of this Agreement shall be highlighted by the Contractor to ESCo.
   3. In respect of any dispute that arises in connection with the application of this clause 2 or on any other matter under this Agreement, the provisions of clause 21 (*Dispute Resolution Procedure*) shall apply. *[Drafting Note: This HNIP form of DBOM (between ESCo and DBOM Contractor) uses an umbrella approach so as to incorporate  (i) design and build works under one of the existing and recognised standard forms of contract – e.g. JCT, NEC, IMECHE etc - for the design and build element of the works; and (ii) operation and maintenance terms (which could take the form of the 07 HNIP Operation and Maintenance Agreement). Clause 2.1 provides an order of precedence in the event there are conflicting provisions between the various contracts. Parties will need to consider carefully suitable alignment of the provisions of each component of the DBOM. This may include using an order of precedence under Clause 2.1. This will include Parties needing to give careful consideration as to how disputes under the various contract limbs are dealt with and how the provisions of each limb interacts with any statutory rights – such as those relating to construction disputes under the Housing Grants, Construction and Regeneration Act 1996.]*
2. Commencement and duration
   1. Subject to clause 3.2, this Agreement shall take effect on the Effective Date and shall continue until the expiry of the Initial Term unless terminated early or extended in accordance with 3.7.
   2. [Save in relation to this Clause 3 and Clauses [ ] which will take effect on the Effective 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.
   3. The CP Longstop Date may be extended with the written agreement of both the Parties.
   4. 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.
   5. 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.
   6. As soon as reasonably practicable following satisfaction of the last of the Conditions Precedent, the ESCo shall provide formal written confirmation to the Contractor that the Conditions Precedent have been satisfied and the date of such confirmation shall be the Effective Date.**][[7]](#footnote-7)**
   7. The provisions of clause 2.2 *(Commencement and Duration)* of the Operation & Maintenance Terms shall apply to the extension of this Agreement.
3. Design appointment
   1. The Contractor shall perform the Planning Design and the Detailed Design in accordance with the Design & Build Terms.
4. Appointment to perform the Works
   1. The Contractor shall be under no obligation to perform any Works (other than the Planning Design and Detailed Design), and ESCo shall have no obligation to pay for any such Works, or have any other obligation in respect of the Works or under the Design & Build Terms, unless and until ESCo has served notice on the Contractor to commence the Works pursuant to the Design & Build Terms.
   2. Subject to clause 5.3, upon service of notice from ESCo pursuant to clause 5.1:
      1. the Parties shall be bound by the Design & Build Terms; and
      2. the Contractor shall, within [INSERT] Business Days of receipt of such notice commence performance of the Works in accordance with the Design & Build Terms.
   3. **[Longstop Date]**

[If ESCo has not served notice on the Contractor to commence the Works, pursuant to clause 5.1 by the Longstop Date, either Party may terminate this Agreement on not less than [INSERT] Business Days’ prior written notice to the other.]

1. Appointment to perform the Services
   1. The Contractor shall be under no obligation to perform the Services under the Operation & Maintenance Terms and ESCo shall have no obligation to pay for any such Services, or have any other obligation in respect of the Services or under the Operation & Maintenance Terms, until the Services Commencement Date.
   2. [ESCo may at any time defer the Services Commencement Date by serving not less than [INSERT] Business Days notice on the Contractor of a new Services Commencement Date][[8]](#footnote-8).
   3. From the Services Commencement Date, each Party shall perform their respective obligations and shall enjoy their respective rights as set out in the Operation & Maintenance Terms in respect of the Works including (without limitation):
      1. Accepting the Works; and
      2. operating and maintaining the Works,

each in accordance with the Operation & Maintenance Terms.

* 1. ESCo may instruct the Contractor to Takeover or Accept (as relevant) and to provide the Services in respect of any Extension Works (whether or not such Extension Works were performed by the Contractor) whereupon the Operation & Maintenance Terms shall apply to such Extension.

1. Appointment to perform Extension Works
   1. ESCo may require works to be carried out to design and build an Extension and may issue to the Contractor, in such form as it sees fit, an invitation to tender for such works (an “**Extension Works Tender Invitation**”), based upon the rates and conditions set out in the Extension Terms.
   2. If ESCo issues an Extension Works Tender Invitation to the Contractor, the Contractor will respond in the manner and within the timeframe specified therein.
   3. On receipt by ESCo of the Contractor’s tender response to any Extension Works Tender Invitation, ESCo may:
      1. invite the Contractor to clarify and/or amend its tender;
      2. accept the Contractor’s tender by issuing an Extension Works Instruction Notice in the form provided at Annex 4 *(Form of Extension Works Instruction);* or
      3. reject the Contractor’s tender.
   4. If ESCo seeks clarification and/or amendment of the Contractor’s tender, the Contractor will endeavour to comply with ESCo’s reasonable requests and will re-issue its tender as required and in any event within [INSERT] Business Days of such request or such other period as may be specified by ESCo.
   5. On receipt by ESCo of any amended tender or tender clarification from the Contractor, the provisions of clause 7.3 will apply mutatis mutandis to that amended or clarified tender.
   6. If ESCo issues an Extension Works Instruction Notice in accordance with clause 7.3.2, the Extension Terms, as may have been amended by the Extension Works Instruction Notice, shall apply to the relevant Extension Works and each Party shall be bound by the Extension Terms (as so amended) in respect of such Extension Works.
   7. The Contractor shall be under no obligation to perform any Extension Works and ESCo shall have no obligation to pay for any Extension Works, or have any other obligation in respect of any Extension Works or under the Extension Terms, unless and until ESCo has issued an Extension Works Instruction Notice.
   8. The Contractor acknowledges that nothing in this Agreement is intended to give the Contractor exclusivity over any opportunity to construct any Extension.
2. Compliance with Assumed Contracts
   1. The Contractor acknowledges that it has full knowledge of the Assumed Contracts which have been disclosed to it and agrees that it shall not do anything or omit to do anything that would cause ESCo to breach any term of any of the Assumed Contracts [and that it shall be responsible for discharging ESCo’s obligations thereunder].
   2. [The Parties shall discuss and agree in good faith any necessary Relief Event or Compensation Event under (and as defined in) the Design & Build Terms or the Operation & Maintenance Terms, in the event that the Contractor’s performance under this Agreement is impeded as a direct result of the Contractor’s compliance with clause 8.1.]
3. Insurance
   1. The Contractor shall, at its cost, ensure that there is put and kept in full force and effect from the Effective Date, the Contractor Insurances, in no lesser sums than the levels and cover as set out in Annex 7 *(Insurance)* and the levels and extent of cover shall be reviewed annually throughout the term of this Agreement to ensure they are at appropriate levels and for appropriate risk over the period of this Agreement, together with all insurance required by statute and shall on request provide ESCo with copies of such insurance policies or other such evidence of insurance as may be reasonably required.
   2. The Contractor shall provide a copy to ESCo of any written notices of cancellation, non-renewal or amendment to any of the policies in Annex 7 *(Insurance)*.
   3. The Contractor shall not to do anything to vitiate the Contractor Insurances.
   4. All insurance proceeds received under the insurance policy referred to in Annex 7 *(Insurances)* shall be applied in the repair, reinstatement or replacement of each and every part of the Energy System in respect of which the proceeds were received.
4. Defects
   1. Notwithstanding anything to the contrary in the Operation & Maintenance Terms, all repairs or replacement in relation to the Energy System required to be undertaken by the Contractor in order to comply with the Operation & Maintenance Terms shall be undertaken by the Contractor, at its own cost, where:
      1. the defect or component failing giving rise to the need to undertake such repair or replacement:
         1. arises due to a defect in the Works carried out by the Contractor or any Contractor Personnel pursuant to the Design & Build Terms; and
         2. was discovered prior to (or was reasonably discoverable prior to) the expiry of [INSERT] years from the Services Commencement Date;
      2. the defect or component failing giving rise to the need to undertake such repair or replacement:
         1. arises due to a defect in any Extension Works carried out by the Contractor pursuant to an Extension Works Instruction Notice; and
         2. was discovered prior to (or was reasonably discoverable prior to) the expiry of [INSERT] years from the relevant Practical Completion date of such Extension Works.
   2. In all other circumstances, the responsibility and liability for costs of repairs, modifications or replacements arising due to defects or otherwise, shall be governed in accordance with the Operation & Maintenance Terms.

*[Drafting Note: As stated above, this HNIP form of DBOM (between ESCo and DBOM Contractor) uses an umbrella approach for the design and build works and the operation and maintenance works.  Accordingly the DBOM incorporates the following terms which will be agreed/specified by ESCo and the DBOM Contractor in the schedules – design and build terms, operation and maintenance terms, extension terms and other terms generally applicable to the works and services to be performed by the DBOM Contractor.  The DBOM umbrella contract is set up to incorporate  design and build works under one of the existing and recognised standard forms of contract – e.g. JCT, NEC, IMECHE etc - for the design and build element of the works. This would usually cover the core network and energy centre(s). The design and build contracting approach might accommodate a lump sum appointment. Network extension design and build might need to be instructed under a different standard form (which the umbrella DBOM Contract also anticipates).  Operation and maintenance terms could take the form of the 07 HNIP Operation and Maintenance Agreement. The intention is that the DBOM Contractor will remain liable to ESCo for defects in the works that it designed and built when they transition into operational phase, whether core works or extensions. However, for the DBOM Contractor to take over responsibility for operation and maintenance of network extensions designed and built by third parties, these would need to pass through an adoption (“Acceptance” or “Takeover”) process.*

*These  forms of design and build and operation and maintenance contract include  liability exclusion and limitation  provisions which the parties (ESCo and DBOM Contractor) can amend so as to apportion appropriate risks and liabilities between themselves to reflect their particular circumstances.  ESCo and DBOM contractor may want to consider whether any additional provisions are necessary to cover other interface items as between  design and build , works and operation and maintenance works, or, in particular, works being done by  any design & build sub-contractor, any operation and maintenance  sub-contractor, and  any works being  undertaken by any of ESCO’s other contractors and how liabilities will be apportioned between such sub-contractors/ESCo contractor.]*

1. Performance Security
   1. Subject to Clause 11.2 and 11.3, the Contractor shall provide a Parent Company Guarantee to ESCo in the form set out in Annex 6 *(Form(s) of Performance Security)*.
   2. The Contractor shall provide evidence to the reasonable satisfaction of ESCo, that it, or the entity granting the Parent Company Guarantee (if the Contractor has a parent company) has sufficient financial standing, taking into account the size and value of the Works & Services performed pursuant to this Agreement and the consequences of failure of performance under this Agreement.
   3. In the event that ESCo is not satisfied (acting reasonably) that the financial standing of either the Contractor or (if relevant) the entity granting the Parent Company Guarantee is sufficient, the Contractor shall be required to provide a bond substantially in the form set out in Annex 6 (Form(s) of Performance Security) or equivalent form of security from a reputable financial institution, the provider of such bond and the form of such bond to be approved by ESCo (such approval not to be unreasonably withheld or delayed), in an amount equivalent to:
      1. [INSERT] pounds (£[INSERT]) prior to the Services Commencement Date;
      2. [INSERT] pounds (£[INSERT]) after the Services Commencement Date,

such amounts to be reviewed on an annual basis to reflect any change to the size and value of the Works & Services.

* 1. In the event of a Change of Control of the Contractor, ESCo may review the adequacy of the performance security provided pursuant to this clause 11 and (acting reasonably) may require the Contractor to provide 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 any performance security already provided pursuant to this clause 11.

*[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. Sub-contracting, delegation and assignment
   1. ESCo shall be permitted to assign any of its rights and sub-contract any of its obligations under this Agreement without the prior consent of the Contractor. Upon any assignment, ESCo, the Contractor and the assignee shall execute and deliver such documents as are reasonably acceptable to the signatories thereof, which documents shall include a release of the assignor of its obligations, covenants and responsibilities hereunder and an assumption by the assignee of such obligations.
   2. The Contractor shall be permitted to sub-contract its obligations under this Agreement provided that:
      1. such sub-contracting is only to an Approved Sub-Contractor;
      2. the terms of any sub-contract shall be subject to the prior approval of ESCo (such approval not to be unreasonably withheld or delayed) and any such sub-contract contains provisions which allow the Contractor to terminate such agreement upon the occurrence of any event of termination hereunder;
      3. where such sub-contracting is in relation to materially all of the Services, such sub-contracting is in the form of the Operation & Maintenance Terms (the “**O&M Sub-contract**”), or in relation to materially all of the Works, such sub-contracting is in the form of the Design & Build Terms (the “**Design & Build Sub-contract**”), in either case with only such modifications as are required to:
         1. reflect the counterparty identities and as are approved in writing by ESCo; and
         2. such modifications as are required to incorporate relevant terms of this Agreement;
      4. the sub-contractor enters into a Direct Agreement with ESCo, and:
         1. the sub-contractor acknowledges that ESCo shall have the right under such Direct Agreement to pay the sub-contractor directly in discharge of the Contractor’s payment obligation to the sub-contractor under the O&M Sub-contract or Design & Build Sub-contract, as applicable;
         2. the Contractor acknowledges that such payment shall discharge ESCo’s obligation to pay the Contractor the relevant sum under this Agreement; and
         3. ESCo shall be granted the right (but not an obligation) pursuant to that Direct Agreement to request novation of the O&M Sub-contract or Design & Build Sub-contract from the Contractor to a replacement contractor following termination of this Agreement for any reason;
      5. ESCo is provided with performance security, in respect of the sub-contractor’s obligations, substantially in the form set out in Annex 6 *(Form(s) of Performance Security)* to this Agreement and as reasonably acceptable to ESCo;
   3. where such sub-contracting is in relation to any elements of design and build where the sub-contract value over the term of the sub-contract is over [•] pounds (£[•]) or any elements of operation and maintenance where the sub-contract value over the term of the sub-contract is over [•] (£[•]):
      1. the Contractor shall provide details of the identity of the sub-contractor to ESCo; and
      2. the sub-contractor in each case shall enter into a collateral warranty with ESCo in the form set out in the Design & Build Terms, the Operation & Maintenance Terms or the Extension Terms (as relevant).
   4. **Change of Control**

The Contractor shall inform ESCo of any proposed Change of Control of which it becomes aware and shall provide such information as ESCo may reasonably require in relation to such Change of Control.

1. Marketing and publicity
   1. The Contractor shall not (and shall ensure that no Contractor Personnel shall):
      1. represent, directly or indirectly, that any product or service provided has been endorsed or approved by or is in any way associated with ESCo;
      2. use in advertising, publicity or any other communication (whether written, electronic or by any other means), the name of the project;
      3. publish or issue any statement about the Contractor's provision of products or services to ESCo;
      4. exhibit, erect or attach to any part of the site where the Works & Services are performed, or any other premises belonging to ESCo any signs, advertisements or notices,

except in any case where there has been specific written approval of ESCo (and then only in relation to the specific matters so approved and to the extent that ESCo is entitled to give such approval).

* 1. The Contractor shall take the following steps to prevent any Sub-contractor from carrying out any of the activities prohibited by Clause 13.1 (the "**Prohibited Publicity Activities**"):
     1. inform any Sub-Contractor of the Prohibited Publicity Activities; and
     2. monitor the marketing and other activities of each Sub-Contractor and immediately notify the Employer, providing full written particulars, as soon as it becomes aware that a Sub-Contractor is carrying out, has carried out or plans to carry out any of the Prohibited Publicity Activities.

1. Confidentiality
   1. Except to the extent set out in this clause 14 (*Confidentiality*) or where disclosure is expressly permitted elsewhere in this Agreement, each Party shall:
      1. treat the other Party’s Confidential Information as confidential; and
      2. not disclose the other Party’s Confidential Information to any other person without the owner's prior written consent.
   2. Clause 14.1 shall not apply to the extent that:
      1. such information was in the possession of the Party making the disclosure, without obligation of confidentiality, prior to its disclosure; or
      2. such information was obtained from a third party without obligation of confidentiality; or
      3. such information was already in the public domain at the time of disclosure otherwise than through a breach of this Agreement; or
      4. such information was independently developed without access to the other Party’s Confidential Information.
   3. The Contractor may only disclose ESCo's Confidential Information to the Contractor's Personnel who are directly involved in the provision of the Services and who need to know the information. The Contractor shall ensure that such Contractor's Personnel are aware of, and comply with, these confidentiality obligations.
   4. The Contractor shall not, and shall procure that the Contractor's Personnel do not, use any of ESCo's Confidential Information received otherwise than for the purposes of this Agreement.
   5. The Contractor undertakes (except as may be required by law or in order to instruct professional advisers in connection with this Agreement) not to:
      1. disclose or permit disclosure of any details of this Agreement to the news media or any third party other than its Approved Sub-contractors; or
      2. disclose that ESCo is a customer or client of the Contractor; or
      3. use ESCo's name or brand in any promotion or marketing without the prior written consent of ESCo.
   6. [At the written request of ESCo, the Contractor shall procure that each member of the Contractor's Personnel identified in ESCo's request signs a confidentiality undertaking prior to commencing any work in connection with this Agreement.]
   7. Nothing in this clause 14 (*Confidentiality*) shall prevent either Party from using any techniques, ideas or know-how gained during the performance of this Agreement in the course of its normal business to the extent that this use does not result in a disclosure of the other Party’s Confidential Information or an infringement of IPRs.
   8. On the Termination Date, each Party shall:
      1. return to the other Party all documents and materials (and any copies) containing, reflecting, incorporating or based on the other Party’s Confidential Information;
      2. [at the election of the other Party ,] [return or] erase all the other Party’s Confidential Information from computer and communications systems and devices used by it, including such systems and data storage services provided by third parties (to the extent technically practicable); and
      3. certify in writing to the other Party that it has complied with the requirements of this clause, provided that a recipient Party may retain documents and materials containing, reflecting, incorporating or based on the other Party’s Confidential Information to the extent required by law or any applicable governmental or regulatory authority. The provisions of this clause shall continue to apply to any such documents and materials retained by a recipient Party .
   9. Except as expressly stated in this Agreement, no Party makes any express or implied warranty or representation concerning its Confidential Information.
2. Warranties and representations
   1. Each Party warrants, represents and undertakes that:
      1. it has full capacity and authority to enter into and to perform this Agreement;
      2. this Agreement is executed by a duly authorised representative of that Party ;
      3. there are no actions, suits or proceedings or regulatory investigations pending or, to that Party’s knowledge, threatened against or affecting that Party before any court or administrative body or arbitration tribunal that might affect the ability of that Party to meet and carry out its obligations under this Agreement;
      4. once duly executed, this Agreement will constitute its legal, valid and binding obligations;
      5. its Representative shall be authorised to carry out the matters for which they are expressed to be responsible;
      6. it will ensure that the other Party (or its nominee) shall acquire title to any assets sold or transferred to it (or its nominee) in the course of the provision of the Services or pursuant to the operation of the Exit Plan with full title guarantee and free from all encumbrances; and
      7. it will execute all documents and do all such acts as the other Party may require to perfect the assignment of any IPR pursuant to the operation of the Exit Plan.
   2. Save as provided in this Agreement, no representations, warranties or conditions are given or assumed by either Party in respect of any information which is provided by it to the other and any such representations, warranties or conditions are excluded, save to the extent that such exclusion is prohibited by law.
3. Compliance and change in laws
   1. In performing its obligations under this Agreement, each of the Parties shall comply with the Applicable Laws.
   2. With regard to compliance with Applicable Laws, each Party shall:
      1. inform the other as soon as it becomes aware of any changes in the Applicable Laws that may impact the provision of the Works & Services;
      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 Applicable 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 16.2 (*Changes in applicable law*).
   3. The Contractor shall only be entitled to an increase in the Charges as a result of a Change of Law in the circumstances expressly stated in the Design & Build Terms, Operation & Maintenance Terms or the Extension Terms. [*Drafting Note: Parties to consider any circumstances in which they would want to terminate following a change in law].*
4. Force majeure
   1. In respect of any Force Majeure Event impacting on the provision of the Works & Services, the Design & Build Terms shall apply to a Force Majeure Event affecting the Works, the Operation & Maintenance Terms shall apply to a Force Majeure Event affecting the Services, and the Extension Terms shall apply to any Force Majeure Event affecting any Network Extension Works.
5. Insurance
   1. The Contractor shall maintain in force at least the following insurance policies with reputable insurance companies to cover its relevant potential liabilities in connection with this Agreement:
      1. a public liability insurance policy with a limit of at least [£[•] million per claim];
      2. a professional indemnity insurance policy with a limit of at least [£[•] million per claim];
      3. employer's liability insurance with a limit of at least [£[•] million] for claims arising from a single event or series of related events in a single calendar year; and
      4. product liability insurance with a limit of at least [£[•] million] for claims arising from a single event or series of related events in a single calendar year.
   2. The Contractor shall ensure that ESCo's interest is noted on each insurance policy, or that a generic interest clause has been included. At the written request of ESCo, the Contractor shall provide ESCo with a copy of each insurance policy. On the renewal of each policy, the Contractor shall promptly send a copy of the receipt of the premium paid by the Contractor to ESCo.
   3. The Contractor shall, during the term of this Agreement, and for a period of one year after that:
      1. administer the insurance policies and the Contractor's relationship with its insurers at all times to preserve the benefits for ESCo set out in this Agreement;
      2. do nothing to invalidate any insurance policy or to prejudice ESCo's entitlement under those policies; and
      3. procure that the terms of such policies are not altered in such a way as to diminish the benefit of the policies for ESCo which are provided as at the Effective Date*. [Drafting Note: Parties’ liabilities to be considered in conjunction with insurance cover].*
6. Termination

Termination prior to Longstop

* + 1. ESCo reserves the right to terminate this Agreement at any time prior to serving notice pursuant to clause 5.1. Such termination shall be without prejudice to ESCo’s obligation to pay for any Detailed Design and/or Planning Design undertaken by the Contractor as at the date of termination, in accordance with the Design & Build Terms.
    2. Either Party shall have a right to terminate this Agreement in accordance with clause 5.3 (Longstop Date).

Termination under Design & Build Terms

In the event that either Party serves a termination notice under the provisions of the Design & Build Terms, upon the date on which termination under such notice is effective, this Agreement shall automatically terminate.

Termination under Operation & Maintenance Terms

In the event that either Party serves a termination notice under the provisions of the Operation & Maintenance Terms, upon the date on which termination under such notice is effective, this Agreement shall terminate automatically.

Termination under the Extension Terms

In the even that either Party serves a termination notice under the provisions of the Extension Terms, such notice shall only be effective to terminate the Contractor’s appointment in respect of the relevant Extension unless termination is also triggered under another provision of this clause 19.

1. Consequences of termination and survival
   1. On any termination of this Agreement following the Services Commencement Date, the provisions of clause 32 (*Exit and Services transfer*) of the Operation & Maintenance Terms shall apply.
   2. On any termination of this Agreement, the termination provisions (including any provisions governing the payment of termination sums and survival of clauses) of the Design & Build Terms, the Operation & Maintenance Terms and the Extension Terms shall apply to the matters governed by those terms.
   3. On termination or expiry of this Agreement, the following provisions shall continue in force:
      1. Clause 1 (*Interpretation*);
      2. Clause 14 (*Confidentiality*);
      3. Clause 15.1.6 (*Representation relating to full title guarantee*) and clause 15.1.7 (*Perfection of assignment of IPRs*);
      4. Clause 18.3 (*Insurance*);
      5. Clause 20 (*Consequences of expiry and termination*);
      6. Clause 21 (*Dispute resolution procedure*);
      7. Clause 25 (*Waiver*);
      8. Clause 28 (*Announcements*);
      9. Clause 30 (*Further assurance*);
      10. Clause 31 (*Entire agreement*);
      11. Clause 32 (*Third party rights*);
      12. Clause 35 (*Governing law*);
      13. Clause 36 (*Jurisdiction*);
2. 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 [•] Business 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 [•] Business 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 [•] Business 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 [•] Business 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 35 (*Jurisdiction*) which clause shall apply at all times.

**OR**

No Party may commence any court proceedings under clause 35 (*Jurisdiction*) relation to the whole or part of the Dispute until [•] Business Days after service of the ADR notice, provided that the right to issue proceedings is not prejudiced by a delay.]

1. Conflict

Without prejudice to clause 2 (Precedence of Provisions), if there is an inconsistency between the clauses, Schedules and Annexes respectively, the provisions in the clauses shall prevail in preference to the Schedules and Annexes, and the provision of the Schedule shall prevail over the provisions of the Annex.

1. Assignment and other dealings
   1. ESCo may at any time assign, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any or all of its rights and obligations under this Agreement [, provided that it gives [prior] written notice of such dealing to the Contractor].
   2. The Contractor shall not assign, transfer, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any of its rights and obligations under this Agreement without the consent of the ESCo.
2. Variation

No variation of this Agreement shall be effective unless it is in writing and signed by the Parties (or their authorised representatives).

1. 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 ESCo 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. Announcements

No Party shall make, or permit any person to make, any public announcement concerning this Agreement without the prior written consent of the other Parties (such consent not to be unreasonably withheld or delayed), except as required by law, any governmental or regulatory authority (including, without limitation, any relevant securities exchange), any court or other authority of competent jurisdiction.

1. 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 29.1 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.
2. 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. 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.
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 the 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 33.2sets 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 33.3
      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;
   3. If deemed receipt under clause 33.2 would occur outside business hours in the place of receipt, it shall be deferred until business hours resume. In this clause 33.3, 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. – Performance Specification

[INSERT]

Annex 1 – Design & Build terms[[9]](#footnote-9)

[INSERT]

Annex 2 – Operation & Maintenance Terms[[10]](#footnote-10)

[INSERT]

Annex 3 – Extension Terms[[11]](#footnote-11)

[INSERT]

Annex 4 – Form of Extension instruction

[INSERT]

Annex 5 – Form of Direct Agreement

[INSERT]

Annex 6 – Form(s) of performance security

[INSERT]

Annex 7 – Insurance

[INSERT]

Annex 8 – Drawings

[INSERT]

Annex 9 – Preliminaries

[INSERT]

|  |  |
| --- | --- |
| Signed by [**ESCO**] in the presence of: | ....................................... |

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

[SIGNATURE OF WITNESS]

[NAME, ADDRESS AND OCCUPATION OF WITNESS]

|  |  |
| --- | --- |
| Signed by [**CONTRACTOR**] in the presence of: | ....................................... |

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

[SIGNATURE OF WITNESS]

[NAME, ADDRESS AND OCCUPATION OF WITNESS]

1. Include any contracts with which the Contractor must either not cause ESCo to breach or which the Contractor must comply with on behalf of the ESCo. [↑](#footnote-ref-1)
2. Include to the extent that there are CPs to the effectiveness of the substantive provisions of the DBOM (eg Planning Permissions). [↑](#footnote-ref-2)
3. Include an appropriate date, given expected Development build programme, obtaining of relevant CPs – eg Planning Permissions and any other relevant matters [↑](#footnote-ref-3)
4. Annex 1 should include the chosen form of design & build contract – eg from JCT, IMECHe, FIDIC, NEC, etc. together with any schedule of amendments to the standard form [↑](#footnote-ref-4)
5. Date within which ESCo must decide whether or not to proceed with Works, following development of detailed design. [↑](#footnote-ref-5)
6. Anticipating that there is likely to be a considerable time-lag between commencement of the agreement and instruction to undertake Extension Works, the Parties should consider appropriate indexation of the Pricing Schedule to the Extension Terms [↑](#footnote-ref-6)
7. Include to the extent required [↑](#footnote-ref-7)
8. Parties to consider any commercial/ financial consequences of delaying the Services Commencement Date. [↑](#footnote-ref-8)
9. Choice of design & build terms should anticipate delivery of priced works, which may be lump sum. [↑](#footnote-ref-9)
10. Insert O&M Agreement terms [↑](#footnote-ref-10)
11. Choice of terms should allow for repeated call-off of sectional works, which may be for lump sums tendered for each Extension or against a schedule of rates. Given likely time delay between appointment and calling for Extensions, appropriate indexation should be considered. [↑](#footnote-ref-11)