

Date January 2010



**(1) THE DARTFORD BOROUGH COUNCIL**

**-and-**

**(2) ORCHARD THEATRE DARTFORD LIMITED**

**AGREEMENT**

relating to the provision of Theatre Management Services - The Orchard Theatre Dartford

Head of Legal Services  
Civic Centre Home Gardens Dartford Kent DA1 1DR  
LS257el

## **OPERATIVE PROVISIONS**

### **Part 1 General Provisions**

- 1 Definitions and Interpretations
- 2 Term
- 3 Contractor's Status (Principal) - Agency
- 4 Authority's Obligations
- 5 Entire Agreement
- 6 Scope of Agreement
- 7 Notices
- 8 Mistakes in Information
- 9 Conflicts of Interest
- 10 Fraud/Whistleblowing

### **Part 2 Provision of the Services**

- 11 The Services
- 11.A Programme of Replacement and Renewal Works
- 11B Improvement Works
- 12 Repairing and Maintenance Obligations
- 13 Standard of Work
- 14 Employees/TUPE
- 15 Contractor's Staff
- 16 Inspection of Premises
- 17 Lease to occupy the Premises
- 18 Authority Property
- 19 Sub-contracting for the delivery of the Services
- 20 Logo
- 20A Advertising and Gratuities

### **Part 3 Payment and Price**

- 21 Price
- 22 Payment and Tax
- 22A Stamp Duty and Legal Fees

- 23 Recovery of Sums Due
- 24 Price Adjustment on Extension of Term
- 25 Euro/Currency
- 26 Change of Law

#### **Part 4 Statutory Obligations and Regulations**

- 27 Prevention of Corruption
- 28 Discrimination
- 29 The Contracts (Rights of Third Parties) Act 1999
- 30 Environmental Requirements
- 31 Health and Safety
- 32 Safeguarding Children and Vulnerable Adults
- 32A Business Continuity/Civil Contingencies
- 32B Human Rights
- 32C Services Complaints
- 32D Bye-laws [clause not applicable]
- 32E Contracts Standing Orders and Financial Regulations

#### **Part 5 Protection of Information**

- 33 Data Protection Act
- 34 Confidentiality
- 35 Freedom of Information
- 36 Security of Confidential Information
- 37 Publicity and Media
- 38 Security of Premises
- 39 Intellectual Property Rights
- 40 Audit and the Audit Commission

#### **Part 6 Control of the Agreement**

- 41 Assignment and Sub-Contracting
- 42 Waiver
- 43 Variation of the Services
- 44 Severability

- 45 Remedies in the Event of Inadequate Performance
- 46 Remedies Cumulative
- 47 Monitoring of Performance
- 48 Possible Extension of Term
- 49 Novation

## **Part 7 Liabilities**

- 50 Indemnity and Insurance
- 51 Professional Indemnity
- 52 Warranties and Representations

## **Part 8 Default, Disruption and Termination**

- 53 Termination on Change of Control and Insolvency
- 54 Termination on Default
- 55 Break
- 56 Consequences of Termination
- 57 Disruption
- 58 Recovery upon Termination
- 59 Force Majeure

## **Part 9 Best Value Duty**

- 60 Authority's Best Value Duty
- 61 Customer Satisfaction Survey
- 62 Annual Service Report and Annual Service Plan

## **Part 10 Disputes and Law**

- 63 Governing Law
- 64 Dispute/Resolution

## **SCHEDULES**

First Schedule - Specification Schedule

Second Schedule - Pricing Schedule

Third Schedule - Monitoring Schedule

Fourth Schedule - Commercially Sensitive Information Schedule

Fifth Schedule – Contracts to be Administered

Sixth Schedule – Authority Property Schedule

Seventh Schedule – Transferring Employees Schedule

Eighth Schedule – Lease

Ninth Schedule – Premises Licence

Tenth Schedule - Warranties (by the Authority)

Eleventh Schedule - Programme of Replacement and Renewal Works

Twelfth Schedule - Improvement Works

**THIS AGREEMENT** is made on January 2010

**BETWEEN**

- (1) **THE DARTFORD BOROUGH COUNCIL** of Civic Centre Home Gardens Dartford Kent DA1 1DR (the “Authority”); and
- (2) **ORCHARD THEATRE DARTFORD LIMITED** (company registered number 06794025) whose registered office is at 1 Conduit Street London W1S 2XA (the “Contractor”).

**RECITALS:**

- (A) The Authority pursuant to Section 145 of the Local Government Act 1972 provides a theatre for the giving of entertainments.
- (B) The Authority agrees that the Contractor exercises such of the Authority’s management functions as herein specified in relation to the theatre so specified.
- (C) The Authority and the Contractor have agreed that the Contractor shall provide and the Authority shall co-operate with it in providing the Services in the manner and upon the terms hereinafter set out.

**Part 1 - Preliminary**

**1. Definitions and Interpretations**

1.1 In the Agreement unless the context otherwise requires the following terms shall have the meanings given to them below:

“Agreement” means this agreement between the Authority and the Contractor consisting of these clauses and the Contract Documents

“Approval” and “Approved” means the written consent of the Contract Manager and/or under the terms of the Lease

“Authority Property” means any property, other than real property, issued or made available to the Contractor by the Authority in connection with the Undertaking listed respectively in the Sixth Schedule hereto marked ‘The Orchard Assets by

Type' together with any other property as may be agreed between the Contractor and the Authority in writing prior to the Commencement Date

1.1.1 "Best Value Duty" means the Authority's duty pursuant to section 3(1) of the Local Government Act 1999 to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness

"Commencement Date" means the date of the Agreement

"Commercially Sensitive Information" means the subset of Confidential Information listed in the Commercially Sensitive Information Schedule comprised of information:

(a) which is provided by the Contractor to the Authority in confidence for the period set out in that Schedule; and/or

(b) that constitutes a trade secret

"Commercially Sensitive Information Schedule" means the Fourth Schedule containing a list of the Commercially Sensitive Information

"Computer Systems" means the computer hardware systems owned leased and/or operated from time to time by the Authority or any third party either wholly or partially in relation to the provision of the Undertaking and as are scheduled as Authority Property

"Confidential Information" means any information which has been designated as confidential by either Party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information which relates to the business, affairs, properties, assets, trading practices, Services, developments, trade secrets, Intellectual Property Rights, know-how, personnel, customers and suppliers of either Party, all personal data and sensitive personal data within the meaning of the Data Protection Act 1998 and the Commercially Sensitive Information

“Contracts to be Administered” means the contracts for goods and/or services relating to the Undertaking detailed in the Fifth Schedule hereto and any replacements thereof or additions thereto as notified by the Authority to the Contractor

“Contract Documents” means this Agreement the Specification the Form of Tender the Invitation to Tender and the Contractor’s Submission

“Contract Manager” means the person for the time being appointed by the Authority as being authorised to administer the Agreement on behalf of the Authority or such person as may be nominated by the Contract Manager to act on its behalf

“Contract Standard” means such standard as complies in each and every respect with all relevant provisions of the Agreement and to the extent that no criteria are stated in the Agreement the standard is to be to the reasonable satisfaction of the Authority having regard to the standard of provision of the Services which was observed by the Authority before the Commencement Date

“Contracting Authority” means any contracting authority as defined in regulation 3 of the Public Contracts Regulations 2006 other than the Authority

“Contractor’s Representative” means the individual authorised to act on behalf of the Contractor for the purposes of the Agreement

“Contractor’s Submission” means the Contractor’s submission annexed to this Agreement as part of the Fourth Schedule

“Criminal Records Bureau” means the bureau established pursuant to Part V of the Police Act 1997

“Customer Satisfaction Survey” has the meaning given to it in clause 61.1.

“Customer Satisfaction Survey Date” means the Anniversary of the Commencement Date in each year of the Term



“Data” means any information or data howsoever stored compiled by or on behalf of the Authority in connection with the Services

“Default” means any breach of the obligations of either Party (including but not limited to fundamental breach or breach of a fundamental term) or any default, act, omission, negligence or statement of either Party, its employees, agents or sub-contractors in connection with or in relation to the subject matter of the Agreement and/or Lease and in respect of which such Party is liable to the other

“Enabling Acts” means all those Acts which enable the Authority to enter into this Agreement including but not limited to the Local Government Act 1972 and the Local Authority (Goods and Services) Act 1970

“Equipment” means the Contractor’s equipment, plant, materials, and such other items or resources supplied and used by the Contractor in the performance of its obligations under the Agreement

“Environmental Information Regulations” means the Environmental Information Regulations 2004

“Extension” means the extension of the Term agreed in accordance with clause 48

“External Audit” means the independent external audit of the external accounts of the Authority prepared in accordance with the Accounts and Audit Regulations 2003 and all other activities (statutory or otherwise) carried out by the Authority’s external auditors

“FOIA” means the Freedom of Information Act 2000 and any subordinate legislation made under this Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such legislation

“Force Majeure” means any event or occurrence which is outside the reasonable control of the Party concerned, and which is not attributable to any act or failure to take preventative action by the Party concerned, including (but not limited to)

governmental regulations, fire, flood, or any disaster. It does not include any industrial action occurring amongst the Staff or any staff of any sub-contractor

“Form of Tender” means the Form of Tender annexed to this Agreement at Annex I and including all documents attached therewith

“General Change in Law” means a change in Law which comes into effect after the Commencement Date, where the change is of a general legislative nature (including taxation or duties of any sort affecting the Contractor) or which would affect or relate to a comparable supply of services of the same or a similar nature to the supply of the Services

“Good Industry Practice” means using standards, practices, methods and procedures conforming to the law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person or body engaged in a similar type of undertaking under the same or similar circumstances

“Improvement Works” means improvement works to Equipment and/or Premises (internal and external) referred to in clause 11.B. and the Twelfth Schedule

“Information” has the meaning given under section 84 of the Freedom of Information Act 2000

“Intellectual Property Rights” means patents, inventions, trade marks, service marks, logos, design rights (whether registrable or otherwise), applications for any of the foregoing, copyright, database rights, domain names, trade or business names, moral rights and other similar rights or obligations whether registrable or not in any country (including but not limited to the United Kingdom) and the right to sue for passing off

“Internal Audit” means an internal independent appraisal of control systems and quality performance within the Authority including the examination and evaluation of and reporting on internal controls relating to (a) the proper economic and efficient use of Authority resources and (b) all matters connected with financial probity

“Invitation to Tender” means an invitation for tenderers to bid for the Services required by the Authority

“Know - how” means all information (including that comprised in or derived from data disks tapes manuals source codes flow charts catalogues and instructions) relating to the Services provided

“Law” means any applicable Act of Parliament, sub-ordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, exercise of the Royal Prerogative, enforceable community right within the meaning of Section 2 of the European Communities Act 1972, bye-law, regulatory policy, guidance or industry code, judgement of a relevant court of law, or directives or requirements of any Regulatory Body of which the Contractor is bound to comply

“Lease” means the lease in substantially the form of the draft annexed to this Agreement at the Eighth Schedule

“Location” means The Orchard Theatre Dartford DA1 1ED where the Services are to be performed by the Contractor or to which goods equipment and materials are to be delivered or stored or work is to be executed by the Contractor or where documents or records are held or stored by or on behalf of the Contractor in connection with the provision of the Services

“Monitoring Schedule” means the Third Schedule containing details of the monitoring arrangements

“Month” means calendar month

“Named Employee” has the meaning given to it in clause 32.1

“Party” means a party to the Agreement and “Parties” shall be construed accordingly

“Premises” means all those premises to be leased to the Contractor as specified in the Eighth Schedule

“Price” means the price exclusive of any applicable Tax, payable to the Contractor by the Authority under the Agreement, as set out in the Pricing Schedule, for the full and proper performance by the Contractor of its obligations under the Agreement but before taking into account the effect of any adjustment of price in accordance with clause 24

“Pricing Schedule” means the Second Schedule containing details of the Price

“Programme of Replacement and Renewal Works” means repairs and renewals to Equipment and/or Premises (internal and external) referred to in clause 11.A.1 and the Eleventh Schedule (for the avoidance of doubt the Programme of Replacement and Renewal Works is in addition to the repair and maintenance obligations set out in the Lease)

“Rebate” means the sum to be paid to the Authority by the Contractor as provided in the Pricing Schedule and clause 21.4

“Regulatory Bodies” means those government departments and regulatory statutory and other entities, committees, ombudsmen and bodies which, whether under statute, rules, regulations, codes of practice or otherwise, are entitled to regulate, investigate, or influence the matters dealt with in the Agreement or any other affairs of the Authority and “Regulatory Body” shall be construed accordingly

“Replacement Contractor” means any third party Contractor appointed by the Authority from time to time, to provide any services which are substantially similar to any of the Services, and which the Authority receives in substitution for any of the Services following the expiry, termination or partial termination of the Agreement, whether those services are provided by the Authority internally and/or by any third party

“Requests for Information” shall have the meaning set out in FOIA or any apparent request for information under the FOIA or the Environmental Information Regulations

“CPI” means the United Kingdom Consumer Prices Index (CHZQ) or in the event that the basis of calculation of such Index shall change or of such Index ceases to be published (as to which the Authority’s reasonable decision shall be conclusive) such other published index of retail prices or the value of money as the Authority and the Contractor may agree **PROVIDED THAT** in the event that agreement cannot be reached within 28 days of the decision by the Authority the CPI shall be determined by an expert in accordance with clause

“Schedule” means a schedule attached to the Agreement

“Services” means the services to be provided as specified in the Specification

“Services Improvement Notice” has the meaning given in clause 62.3

“Specification” means the description of the Services to be provided under the Agreement and attached as the First Schedule

“Specific Change in Law” means a change in Law which comes into effect after the Commencement Date that relates specifically to the business of the Authority, and which would not affect a comparable supply of services of the same or a similar nature to the supply of the Services

“Staff” means all persons employed by the Contractor to perform the Agreement together with the Contractor’s servants, agents and sub-contractors used in the performance of the Agreement

“State” has the meaning given to it in Regulation 4(4) of the Public Contracts Regulations 2006

“Tax” means value added tax at the rate in force when the supply is made and includes any similar tax from time to time replacing it or of a similar fiscal nature

“Tender” means the Contractor’s response to the Invitation to Tender

“Term” means the period of duration of the Agreement in accordance with clause 2.1

“Transferring Employees” means the employees occupying the posts listed in the Seventh Schedule together with any replacement employees for any whose contracts terminate before the Commencement Date appointed by the Authority in accordance with the provisions of clause 14

“TUPE” means the Transfer of Undertakings (Protection of Employment) Regulations 2006

“Undertaking” means all of the undertaking of the provision of theatre management services carried on at and out of the Premises by the Authority its servants or agents immediately before the Commencement Date

“Users” means a reasonably representative sample of those users who consume or benefit from the Services

“Variation” has the meaning given to it in clause 43.1

“Working Day” means a day (other than a Saturday or Sunday) on which banks are open for domestic business in England

1.2 In the Agreement except where the context otherwise requires:

- (a) the terms and expressions set out in clause 1.1 shall have the meanings ascribed therein;
- (b) words importing the singular meaning include where the context so admits the plural meaning and vice versa;
- (c) words importing the masculine include the feminine and the neuter;
- (d) reference to a clause is a reference to the whole of that clause unless stated otherwise;
- (e) references to any statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended by any subsequent enactment, modification, order, regulation or instrument as subsequently amended or re-enacted;

- (f) references to any person shall include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assignees or transferees;
- (g) the words “include”, “includes” and “including” are to be construed as if they were immediately followed by the words “without limitation”;
- (h) headings are included in the Agreement for ease of reference only and shall not affect the interpretation or construction of the Agreement.

## **2 Term**

- 2.1 Subject to clause 2.2, the term of the Agreement shall be (20) twenty years (from the Commencement Date) unless it is otherwise terminated in accordance with the Agreement, or otherwise lawfully terminated.
- 2.2 The Authority may seek to extend the Term in accordance with clause 48. During the extension, the obligations under the Agreement shall continue (subject to any Variation) or adjustment to the Price pursuant to clause 24 until the expiry of the period specified in accordance with clause 48.

## **3 Contractor’s Status (Principal) - Agency**

- 3.1 In carrying out the Services the Contractor shall be acting as principal and not as the agent of the Authority.
- 3.2 Accordingly:
  - (a) the Contractor shall not (and shall procure that the Staff do not) say or do anything that might lead any other person to believe that the Contractor is acting as the agent of the Authority otherwise than in circumstances expressly permitted or required by this Agreement;
  - (b) the Contractor shall not nor shall it in any circumstances hold itself out as being authorised to enter into any contract or other agreement on behalf of

the Authority nor shall it purport to bind the Authority to the performance variation release or discharge of any obligation whatsoever;

- (c) the Contractor is not nor shall it hold itself out as being authorised to make representations to third parties pledge the credit of the Authority in any way or give any warranties on behalf of the Authority;
- (d) the Contractor has not and shall not in any circumstances hold itself out as having any power to make vary discharge or waive any legislation regulation or bye – law whatsoever except as expressly permitted by the Authority;
- (e) nothing in the Agreement shall impose any liability on the Authority in respect of any liability incurred by the Contractor to any other person but this shall not be taken to exclude or limit any liability of the Authority to the Contractor that may arise by virtue of either a breach of the Agreement or by negligence on the part of the Authority, the Authority's employees, servants or agents.

#### **4 Authority's Obligations**

- 4.1 Save as otherwise expressly provided, the obligations of the Authority under the Agreement are obligations of the Authority in its capacity as a contracting counterparty and nothing in the Agreement shall operate as an obligation upon, or in any other way fetter or constrain the Authority in any other capacity, nor shall the exercise by the Authority of its duties and powers in any other capacity lead to any liability under the Agreement (howsoever arising) on the part of the Authority to the Contractor.

#### **5 Entire Agreement**

- 5.1 The Agreement constitutes the entire agreement between the Parties relating to the subject matter of the Agreement. The Agreement supersedes all prior negotiations, representations and undertakings, whether written or oral, except that this clause shall not exclude liability in respect of any fraudulent misrepresentation.



5.2 In the event of and only to the extent of any conflict between the body of the Agreement, Specification, Invitation to Tender, Contractor's Submission and other documents referred to or attached to the Agreement, the conflict shall be resolved in accordance with the following order of precedence:

- (1) the body of the Agreement shall prevail over;
- (2) the Schedules
- (3) the Invitation to Tender
- (4) the Contractor's Submission
- (5) any other document referred to in the Agreement

Unless expressly agreed, a document varied pursuant to clause 43 shall not take higher precedence than specified here.

5.3 The Agreement may be executed in counterparts, each of which when executed and delivered shall constitute an original but all counterparts together shall constitute one and the same instrument.

## **6 Scope of Agreement**

6.1 Nothing in the Agreement shall be construed as creating a partnership or a contract of employment between the Authority and the Contractor.

## **7 Notices**

7.1 Except as otherwise expressly provided within the Agreement, no notice or other communication from one Party to the other shall have any validity under the Agreement unless made in writing by or on behalf of the Party concerned.

7.2 Any notice or other communication which is to be given by either Party to the other shall be given by letter (sent by hand, post, registered post or by the recorded delivery service), by facsimile transmission (confirmed in either case by

letter sent by registered post). Such letters shall be addressed to the other Party in the manner referred to in clause 7.3. Provided the relevant communication is not returned as undelivered, the notice or communication shall be deemed to have been given 2 Working Days after the day on which the letter was posted, or 4 hours, in the case of facsimile transmission or sooner where the other Party acknowledges receipt of such letters or facsimile transmission.

7.3 For the purposes of clause 7.2, the address of each Party shall be:

(a) For the Authority:

Head of Legal Services, Dartford Borough Council, Civic Centre, Home Gardens, Dartford, Kent DA1 1DR

Tel: 01322 343634

Fax: 01322 343422:

(b) For the Contractor:

The Managing Director, Orchard Theatre Dartford Limited, Holborn Hall, 193 – 197 High Holborn, London WC1V 7BD

Tel: 0207 025 0670

Fax: 0207 404 9865

7.4 Either Party may change its address for service by serving a notice in accordance with this clause.

## **8 Mistakes in Information**

8.1 The Contractor shall be responsible for the accuracy of all documentation and information supplied to the Authority by the Contractor in connection with the provision of the Services and shall pay the Authority any extra costs occasioned by any discrepancies, errors or omissions therein.

## **9 Conflicts of Interest**

9.1 The Contractor shall take appropriate steps to ensure that neither the Contractor nor any employee, servant, agent, supplier or sub-contractor is placed in a position where in the reasonable opinion of the Authority there is or may be an

actual conflict, or a potential conflict, between the pecuniary or personal interests of the Contractor or such persons and the duties owed to the Authority under the provisions of the Agreement. The Contractor will disclose to the Authority full particulars of any such conflict of interest which may arise.

9.2 The provisions of this clause shall apply during the continuance of the Agreement and for a period of *two* years after its termination.

## **10 Fraud/Whistleblowing**

10.1 The Contractor shall take all reasonable steps, in accordance with Good Industry Practice, to prevent any fraudulent activity by Staff, the Contractor (including its shareholders, members, directors) and/or any of the Contractor's suppliers, in connection with the receipt of monies from the Authority. The Contractor shall notify the Authority immediately if it has reason to suspect that any such fraud has occurred or is occurring or is likely to occur.

10.2 The Contractor shall ensure that Staff are made aware of the Authority's policy on whistleblowing and that the details of this policy are fully explained to them and the Contractor shall provide the Authority with evidence of doing so upon request.

## **Part 2 – The Provision of the Services**

### **11 The Services**

11.1 The Contractor shall provide the Services:

- (a) in a continuously efficient and effective manner, to the Contract Standard and to the reasonable satisfaction of the Contract Manager;
- (b) safely and in a manner that is not, or is not likely to be, injurious to health or detrimental to the environment or to the image and reputation of the Authority.

11.2 The Contractor shall carry out the Services:

- (a) in compliance with such policies and requirements of the Authority as may be set out in the Specification Schedule, or from time to time be notified in writing to the Contractor by the Contract Manager.
  - (b) with reasonable skill, care and diligence, and in all respects in compliance with the Agreement.
- 11.3 The Contractor shall not act, or knowingly permit, require or allow any other person or body to act, whether in the performance of the Services or otherwise, in any way that may or does jeopardise:
  - (a) the Lease or any other licence, or other agreement made between the Authority and the Contractor relating to the use or occupation of the Premises;
  - (b) the performance of any contract entered into by the Authority (other than this Agreement,) or the performance of any work carried out or to be carried out by the Authority on any part of the Premises or Authority Property,  
  
other than in accordance with a provision of this Agreement expressly authorising any such action.
- 11.4 The Contractor shall at all times deliver the Services in accordance with the Law.
- 11.5 The Contractor shall in no circumstances without the express prior written permission of the Authority use the Premises or Authority Property other than to provide the Services in accordance with the Agreement.
- 11.6 The Contractor shall inform the Contract Manager promptly and confirm in writing if the Contractor is unable or fails to provide the Services or any part thereof, or if the Contractor is aware of anything which prevents or hinders or which may prevent or hinder the Contractor from complying with the Agreement provided always that the provision of information under this clause 11.6 shall not in any way release or excuse the Contractor from any of its obligations under the Agreement.

11.7 In the event that the Authority notifies the Contractor of the Authority's reasonably held opinion that any part of the Services do not meet the requirements of the Agreement or differ in any way from those requirements, and this is other than as a result of default or negligence on the part of the Authority, clause 45 (Remedies in the event of inadequate performance) shall apply.

#### **11.A. Programme of Replacement and Renewals Works**

11.A.1 The Authority shall implement the Programme of Replacement and Renewal Works as set out in the Eleventh Schedule within (3) three years of the Commencement Date. The costs of implementing the Programme of Replacement and Renewal Works shall be borne by the Authority, to a maximum of (£350,000) three hundred and fifty thousand pounds. The detailed specification for the Programme of Replacement and Renewal Works shall be determined by the Authority in consultation with the Contractor.

#### **11.B. Improvement Works**

11.B.1 The Contractor shall implement the Improvement Works as set out in the Lease within (1) one year of the Commencement Date. The costs of implementing the Improvement Works shall be borne by the Authority, to a maximum of (£350,000) three hundred and fifty thousand pounds as detailed in the Twelfth Schedule.

### **12 Authority's access to the Premises**

12.1 The Contractor shall grant to the Authority access to and the use of the Premises for two days' in any given year as may be required by the Authority for election and related purposes (Parliamentary, European and Local Government elections) subject to the Authority where practicable, giving to the Contractor no less than 6 (six) months' notice in writing in accordance with clause 7.

12.2 The right of the Authority to require the use of the Premises in the circumstances referred to in clause 12.1 shall be exercised notwithstanding any pre-existing agreement which may exist between the Contractor and a third party for the hire of the Premises.

12.3 The Authority (and such other persons as may be authorised by it for that purpose) shall have full right and liberty to enter upon the Premises at any time for the purposes of inspecting, examining and/or monitoring the Services.

### **13 Repairing and Maintenance Obligations**

For the periods commencing with and following the 6<sup>th</sup> (sixth) anniversary of this Agreement the obligations of the Parties for the repair and maintenance of the Premises and the Authority Property shall be as set out in the Lease.

### **14 Employees/TUPE**

14.1 The Parties acknowledge that TUPE applies for the purposes of the Agreement and that for the purposes of TUPE the contracts of employment between the Authority and the Transferring Employees (except in so far as such contracts relate to any occupational pension scheme as defined in regulation 10 of TUPE) transfer and they shall have effect the day following the Commencement Date as if originally made between the Contractor and the Transferring Employees.

14.2 The Authority hereby represents warrants and undertakes to the Contractor in the terms set out in the Tenth Schedule relating to the existing Transferring Employees and warrants and undertakes that such are true and accurate in all respects and further agrees to provide before the Commencement Date warranties covering substantially the same matters in relation to any Transferring Employees appointed between the date when tenders are invited and the Commencement Date and to provide to the Contractor upon written request any additional information relating to the Transferring Employees reasonably required by the Contractor to enable it to discharge its obligations pursuant to TUPE.

14.3 The Authority shall use its reasonable endeavours to retain the services of the Transferring Employees to the intent that their respective contracts of employment shall be continued to the Commencement Date and then be transferred to the Contractor by virtue of TUPE. The Authority shall pending the Commencement Date consult the Contractor before terminating or varying the contracts of employment of any of the Transferring Employees and obtain the Contractor's consent to any such variation (such consent not to be unreasonably withheld or

delayed) and where replacement staff are employed to fill a vacancy the Authority shall consult with the Contactor and obtain its consent to the terms of the employment of such replacement staff (such consent not to be unreasonably withheld or delayed).

14.4 Without prejudice to the provisions of clause 14.7 the Authority shall be responsible for all salaries and other emoluments including but without limitation holiday pay tax and National Insurance payments allowances and contributions to retirement benefit schemes in respect of the Transferring Employees up to but not including the Commencement Date and all requisite apportionments shall be made.

14.5 The Contractor shall have regard to the Code of Practice on Workforce Matters in Local Authority Service Contracts and any subsequent code of practice that may be issued in relation to such workforce matters. The Contractor shall apply the principles set out in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and the annex to it - A Fair Deal for Staff Pensions.

- 14.6 The Contractor shall employ all the Transferring Employees on broadly comparable terms and conditions as to pension and death in service benefits and it is acknowledged by the Contractor that [some of] the Transferring Employees are members of the Kent County Council statutory superannuation scheme.
- 14.7 The Authority shall indemnify the Contractor from and against all losses, costs, claims, demands, actions, fines, penalties, liabilities and expenses (including legal expenses), which the Contractor shall take all reasonable steps to mitigate, in connection with or as a result of any claim or demand arising out of:
- 14.7.1 anything done or omitted to be done prior to the Commencement Date by or on behalf of the Authority in respect of any contract of employment or any collective agreement or any persons employed in the Undertaking which notwithstanding that it relates to employment prior to the Commencement Date is deemed by reason of transfer of the Undertaking pursuant to this Agreement to have been done or omitted to be done in relation to the Contractor in accordance with TUPE;
  - 14.7.2 the Authority's failure to pay any of the Transferring Employees any sums properly due in respect of the period prior to the Commencement Date;
  - 14.7.3 any claims by any Trade Union staff association or staff body recognised by the Authority in respect of all or any of the Transferring Employees arising out of the Authority's failure prior to the Commencement Date to comply with its legal obligations in relation to information and consultation to or with such Trade Unions or staff associations or bodies save insofar as any such failure results from a failure by the Contractor to provide information pursuant to regulations 11 (employee liability information) of TUPE.
- 14.8 The Contractor shall indemnify and hold harmless the Authority from and against all losses, costs, claims, demands, actions, fines, penalties, awards, liabilities and expenses (including legal expenses) arising from:
- 14.8.1 any claim by a Transferring Employee that in consequence of the transfer of the Undertaking to the Contractor there has been or will be a substantial change in such Transferring Employee's working conditions to his/her detriment;



- 14.8.2 any claim made against the Authority under regulation 13 of TUPE (consulting and informing representatives) which results from a failure by the Contractor to supply information to the Authority pursuant to regulation 11 of TUPE (employee liability information);
- 14.8.3 any act or omission of the Contractor in relation to any Transferring Employee occurring on or after the Commencement Date and any claim for redundancy payments or protective awards and any liability for wrongful dismissal or unfair dismissal or otherwise in connection with the transfer of the employment of the Transferring Employees to the Contractor;
- 14.8.4 any failure by the Contractor to provide broadly comparable retirement or death in service benefits for or in respect of any Transferring Employees as such person would have been entitled to immediately before the Commencement Date;
- 14.8.5 the employment or termination of employment of any of the Transferring Employees (whether or not terminated by notice and, if so terminated, whenever that notice expires);
- 14.8.6 any claim by a Transferring Employee that such person is entitled for any reason to take early retirement benefits pursuant to the terms of any pension scheme in which the Authority or the subsequent transferee is not then participating, or pursuant to the Transferring Employee's terms and conditions of employment.

14.9 The Contractor shall:

- 14.9.1 prior to the Commencement Date provide to the Authority for approval the staffing structure it proposes to implement in order to deliver the Services (such approval not to be unreasonably withheld or delayed if the proposed structure adequately reflects the legal entitlements and legitimate interests of the Transferring Employees);
- 14.9.2 provide all Transferring Employees with employment in delivering the Services under this Agreement; and

- 14.9.3 (subject to clause 14.10) use its reasonable endeavours to maintain during the Term the staffing structure approved by the Authority.
- 14.10.1 The Contractor shall not make significant amendments to the said staffing structure during the Term without the prior written approval of the Contract Manager (such approval not to be unreasonably withheld or delayed).
- 14.10.2 The Contractor shall notify the Contract Manager in writing of any amendment in the said staffing structure during the Term whether or not they fall within the provision of clause 14.10.1.
- 14.11.1 During the period of six months preceding the expiry of this Agreement or on the Authority having given notice to terminate the Agreement or the Contractor stops trading the Contractor shall within 20 Working Days of the written request of the Contract Manager fully and accurately disclose to the Authority for the purposes of regulation 11 of TUPE all information relating to its employees engaged in providing the Services under the Agreement.
- 14.11.2 The Contractor shall permit the Authority to use the information referred to in clause 14.11.1 for the purposes of TUPE and of re-tendering. The Contractor shall co-operate with the re-tendering of the Agreement by allowing the transferee to communicate with and meet the affected employees and/or their representatives.
- 14.11.3 In the event that the information provided by the Contractor in accordance with clause 14.11.1 becomes inaccurate whether due to changes to the employment and personnel details of the affected employees made subsequent to the original provision of such information or by reason of the Contractor becoming aware that the information originally given was inaccurate the Contractor shall notify the Authority of the inaccuracies and provide the amended information.
- 14.12 The Contractor shall prior to the Commencement Date provide the Authority:
- 14.12.1. sufficient satisfactory information to enable the Authority to comply with its obligations under regulation 13 of TUPE including but without limitation details of (a) the legal economic and social implications of the transfer of the Undertaking for the Transferring Employees and other affected employees (b) the measures which the Contractor envisages will be

taken in connection with these Transferring Employees and (c) the reason for such measures;

14.12.2. details of any current relationship with a recognised Trade Unions and details of any claims made against the Contractor in the two (2) years prior to the Commencement Date by or on behalf of employees.

14.13 The provisions of this clause 14 shall apply during the Term and for a period of 6 (six) years after its termination.

## **15 Contractor's Staff**

15.1 The Contractor shall provide such personnel as are necessary to ensure that it is able to ensure the due, proper and safe performance of the Services throughout the Term.

15.2 The Contractor shall ensure that the Services are provided at all times and in all respects to the Contract Standard including (but without prejudice to the generality of the foregoing) during periods of absence of any of its personnel due to holidays, sickness or otherwise. The Contractor shall use reasonable endeavours to provide a stable workforce, and to promptly replace persons who cease to be in its employment or under its control.

15.3 The Contractor shall, in addition to the Contractor's Representative, provide sufficient supervision by persons having adequate knowledge of the operations to be carried out and services to be provided to ensure that personnel engaged in and about the performance of the Services are at all times adequately supervised and instructed, and properly perform their duties to the Contract Standard.

15.4 The Contractor shall ensure that all Staff perform their duties in a courteous, reasonable and helpful manner at all times, and in full co-operation with the Contract Manager and any other duly authorised representative of the Authority.

- 15.5 If and when directed by the Authority, the Contractor shall provide a list of the names and addresses of all persons who it is expected may require admission in connection with the Agreement to any premises occupied by or on behalf of the Authority, specifying the capacities in which they are concerned with the Agreement and giving such other particulars as the Authority may reasonably desire.
- 15.6 The Staff engaged within the boundaries of the Premises, shall comply with such rules, regulations and requirements (including those relating to security arrangements) as may be in force from time to time for the conduct of personnel when at that establishment and when outside that establishment.
- 15.7 The Authority may require the Contractor to undertake criminal records certificate checks with the Criminal Records Bureau for Staff employed or engaged in the provision of the Services in posts as set out in clause 32.

## **16 Inspection of Premises**

- 16.1 The Contractor is deemed to have inspected the Premises before tendering so as to have understood the nature and extent of the Agreement to be carried out and be satisfied in relation to all matters connected with the performance of the Agreement.

## **17 Lease to occupy the Premises [check against lease]**

- 17.1 The Authority and the Contractor shall on the date of the Agreement execute the Lease in the form of lease set out in Eighth Schedule.
- 17.2 The Contractor shall operate and deliver the Services from the Premises.
- 17.3 The Premises shall be used by the Contractor solely for the purpose of performing its obligations under the Agreement. The Contractor shall have the use of the Premises as tenant and shall vacate the same on completion, termination or abandonment of the Agreement in accordance with the Lease.

- 17.4 The Contractor shall not use the Premises for any purpose or activity other than the provision of the Services.
- 17.5 The Contractor shall (and shall ensure that it's Staff) observe and comply with the Premises Licence set out in the Ninth Schedule and such other rules and regulations in relation thereto as may be in force at any time for the use of the Premises as determined by the Authority under the Licensing Act 2003.
- 17.6 The Contractor hereby expressly warrants and confirms that it has no interest in the Premises or any part thereof except and to the extent to which such interest arises under this Agreement and the Lease.

## **18 Authority Property**

- 18.1 Where the Authority for the purpose of this Agreement issues Authority Property free of charge to the Contractor such property shall be and remain the property of the Authority. The Contractor shall not have a lien on the Authority Property and the Contractor shall take all reasonable steps to ensure that the title of the Authority to such Authority Property and the exclusion of any such lien are brought to the notice of all sub-contractors and other persons dealing with the Agreement.
- 18.2 Subject to clause 11.A.1 any Authority Property made available or otherwise received by the Contractor shall be deemed to be in good condition when received by or on behalf of the Contractor unless the Contractor notifies the Authority otherwise within 5 Working Days of receipt.
- 18.3 Subject to Clause 11.A.1 the Contractor shall maintain all Authority Property in good order and condition, excluding fair wear and tear, and shall use Authority Property solely in connection with the Agreement and for no other purpose without prior Approval.
- 18.4 The Contractor shall ensure the security of all Authority Property, whilst in the Contractor's possession, either on its premises or elsewhere during the performance of the Agreement, in accordance with the Authority's reasonable security requirements as notified from time to time.

18.5 The Contractor shall be liable for any and all loss of or damage (excluding fair wear and tear) to any Authority Property, unless the Contractor is able to demonstrate that such loss or damage was caused by the negligence or default of the Authority. The Contractor's liability set out in this clause shall be reduced to the extent that such loss or damage was contributed to by the negligence or default of the Authority. The Contractor shall inform the Contract Manager within 2 Working Days of becoming aware of any material defects appearing in or losses or damage occurring to Authority Property made available for the purposes of the Agreement.

## **19 Sub-Contracting for the delivery of the Services**

19.1 Where the Contractor enters into a sub-contract with a supplier or contractor for the purpose of performing the Agreement, it shall cause a term to be included in such a sub-contract which requires payment to be made of undisputed sums by the Contractor to the sub-contractor within a specified period not exceeding 30 days from the receipt of a valid invoice, as defined by the sub-contract requirements.

## **20 Logo**

20.1 The Contractor may subject to the prior written consent of the Contract Manager (such consent to be in the absolute discretion of the Contract Manager) use the Authority's logo in connection with the provision of the Services **PROVIDED THAT** such logo shall only be used in conjunction with and shall be no less prominent than the logo of the Contractor

## **20A Advertising and Gratuities**

The Contractor shall not and shall ensure that none of the Staff shall solicit or accept any gratuity or other form of reward in respect of any of the Services.

## **Part 3 – Payment and Price**

## **21 Price**

- 21.1 In consideration of the performance of the Contractor's obligations under the Agreement by the Contractor, the Authority shall pay the Price in accordance with clause 22 and the Pricing Schedule.
- 21.2 In the event that the cost to the Contractor of performing its obligations under the Agreement increases or decreases as a result of a change of Law, the provisions of clause 26 shall apply.
- 21.3 The Authority shall pay the Contractor, on the production of a valid Tax invoice, in addition to the Price, a sum equal to the Tax chargeable on the value of the Services provided in accordance with the Agreement.
- 21.4 Where the circumstances permit and as provided in the Pricing Schedule the Contractor shall pay the Rebate to the Authority within 28 days of the delivery of the Contractor's accounts to the Authority.

## **22 Payment and Tax**

- 22.1 The Authority shall pay to the Contractor the sums referred to in paragraph 1 of the Pricing Schedule.
- 22.2 Tax, where applicable, shall be shown separately on valid Tax invoices as a strictly net extra charge.
- 22.3 The Contractor shall not suspend the supply of the Services unless the Contractor is entitled to terminate the Agreement under clause 54.3 for failure to pay undisputed charges.

## **22A Stamp Duty and Legal Fees**

The Parties shall each bear their own legal and other fees in relation to the preparation and submission of tender documents and any formal contract documents arising therefrom.

## **23 Recovery of Sums Due**

- 23.1 Wherever under the Agreement any sum of money is recoverable from or payable by the Contractor (including any sum which the Contractor is liable to pay to the Authority in respect of any breach of the Agreement), the Authority may following 7 days written notice deduct that sum from any sum then due, or which at any later time may become due to the Contractor under the Agreement or under any other agreement or contract with the Authority.
- 23.2 Any overpayment by either Party, whether of the Price or of Tax, shall be a sum of money recoverable by the Party who made the overpayment from the Party in receipt of the overpayment.
- 23.3 The Contractor shall make any payments due to the Authority without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise unless the Contractor has a valid court order requiring an amount equal to such deduction to be paid by the Authority to the Contractor.

## **24 Price adjustment on Extension**

- 24.1 In the event of a possible Extension, the Authority reserves the right to review any charges payable to the Contractor for the provision of Services beyond the Term.
- 24.2 If the Authority approaches the Contractor in accordance with clause 48 concerning an Extension, the Authority and the Contractor must agree the Price to be payable to the Contractor for the provision of any services during the Extension, at least 6 (six) months prior to the end of the Term.
- 24.4 Any increase in the charges during an Extension will not exceed the percentage change in the CPI between the Commencement Date and the date 6 (six) months] before the end of the Term.

## **25 Euro/Currency**

- 25.1 Any legislative requirement to account for the Services in euro or other currency (or to prepare for such accounting) instead of and/or in addition to sterling, shall be implemented by the Contractor at nil charge to the Authority.



25.2 The Authority shall provide all reasonable assistance to facilitate compliance by the Contractor under clause 25.1.

## **26 Change of Law**

26.1 The Contractor shall neither be relieved of its obligations to perform the Services in accordance with the terms of the Agreement nor be entitled to an increase in the Price and/or any charges payable by the Contractor as the result of:

(a) a General Change in Law; or

(b) a Specific Change in Law where the effect of that Specific Change in Law on the Services is known at the Commencement Date whether by publication of a Bill, as part of a Government Departmental Consultation paper, a draft Statutory Instrument, a proposal in the Official Journal of the European Union or otherwise.

26.2 If a Specific Change in Law occurs or will occur during the Term (other than those referred to in clause 26.1) or during any extension agreed pursuant to clause 24, the Contractor shall notify the Authority of the likely effects of that change, including:

(a) whether any change is required to the Services, the Price or the Agreement; and

(b) whether any relief from compliance with the Contractor's obligations is required, including any obligation to achieve any milestones or to meet any service level requirements at any time.

26.3 As soon as practicable after any notification in accordance with clause 26.2 the Parties shall discuss and agree the matters referred to in that clause and any ways in which the Contractor can mitigate the effect of the Specific Change of Law, including:

- (a) providing evidence that the Contractor has minimised any increase in costs or maximised any reduction in costs, including in respect of the costs of its subcontractors;
- (b) demonstrating that a foreseeable Specific Change in Law had been taken into account by the Contractor before it occurred;
- (c) giving evidence as to how the Specific Change in Law has affected the cost of providing the Services; and
- (d) demonstrating that any expenditure that has been avoided has been taken into account in amending the Price.

26.4 Any increase in the Price or relief from the Contractor's obligations agreed by the Parties pursuant to this clause 26 shall be implemented in accordance with clause 43.

#### **Part 4 - Statutory Obligations, Codes of Practice and Regulations**

##### **27 Prevention of Corruption**

27.1 The Contractor shall not offer or give, or agree to give, to any employee, agent, servant or representative of the Authority any gift or consideration of any kind as an inducement or reward for doing, refraining from doing, or for having done or refrained from doing, any act in relation to the obtaining or execution of the Agreement or any other contract with the Authority, or for showing or refraining from showing favour or disfavour to any person in relation to the Agreement or any such contract. The attention of the Contractor is drawn to the criminal offences under the Prevention of Corruption Acts 1889 to 1916.

27.2 The Contractor warrants that it has not paid commission or has agreed to pay any commission to any employee or representative of the Authority by the Contractor or on the Contractor's behalf.

27.3 Where the Contractor or Contractor's employees, servants, sub-contractors, suppliers or agents or anyone acting on the Contractor's behalf, engages in

conduct prohibited by clauses 27.1 or 27.2 in relation to this or any other contract with the Authority, the Authority has the right to:

- (a) terminate the Agreement and recover from the Contractor the amount of any loss suffered by the Authority resulting from the termination, including the cost reasonably incurred by the Authority of making other arrangements for the provision of the Services and any additional expenditure incurred by the Authority throughout the remainder of the Term; or
- (b) recover in full from the Contractor any other loss sustained by the Authority in consequence of any breach of this clause, whether or not the Agreement has been terminated.

## **28 Discrimination**

- 28.1 The Contractor shall not unlawfully discriminate against any person within the meaning and scope of any law, enactment, order, or regulation relating to discrimination and, accordingly, shall not treat one group of people less favourably than others whether by reason of sex, colour, race, nationality, ethnic group, regional or national origin, age, marital status, disability, political or religious belief, sexuality or class, whether in decisions to recruit, train or promote its Staff and/or in the delivery of the Services.
- 28.2 The Contractor shall, for purposes of ensuring compliance with this clause 28, in relation to Staff, observe as far as possible the provisions of the Commission for Equality and Human Rights Code of Practice in Employment, including, but not limited to, those provisions recommending the adoption, implementation, and monitoring of an equal opportunities policy.
- 28.3 The Contractor shall comply with the provisions of Section 71(1) of the Race Relations Act 1976 as amended as if the Contractor were a body within the meaning of Schedule 1A to the 1976 Act (or any European equivalent which shall be deemed to include without limitation an obligation to have due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups.)

- 28.4 The Contractor shall ensure that delivery of the Services reflects the Authority's view as to what shall be necessary to secure compliance with equalities legislation and shall protect the equalities of users by promoting the Authority's equalities culture through the exercise of care, skill and diligence in the delivery of the Services. Any decisions relating to equalities shall be referred to the Contract Manager for determination.
- 28.5 The Contractor shall notify the Contract Manager forthwith in writing as soon as it becomes aware of any investigation of or proceedings brought against the Contractor for unlawful discrimination.
- 28.6 Where any investigation is conducted or proceedings are brought for unlawful discrimination which arise directly or indirectly out of any act or omission of the Contractor, or Staff, and where there is a finding against the Contractor in such investigation or proceedings, the Contractor shall indemnify the Authority with respect to all costs, charges and expenses (including legal and administrative expenses) arising out of or in connection with any such investigation or proceedings and such other financial redress to cover any payment the Authority may have been ordered or required to pay to a third party.
- 28.7 Where in connection with this Agreement the Contractor or Staff are required to carry out work on the Premises or alongside the Authority's employees on any other premises, the Contractor shall comply with the Authority's policies on equalities and diversity.
- 28.8 The Contractor shall set out its policy on race relations:
- 28.8.1 in instructions to those concerned with recruitment, training and promotion;
  - 28.8.2 in documents available to Staff, recognised trade unions or other representative groups of Staff;
  - 28.8.3 in recruitment advertisements and other literature.

- 28.9 The Contractor shall observe as far as possible the Authority's Procurement Equality Standard and the Commission for Equality and Human Rights Guidance on Race Equality and Procurement in Local Government.
- 28.10 The Contractor shall provide such information as the Authority may reasonably request for the purpose of assessing the Contractor's compliance with this clause 28.
- 28.11 In the event that the Contractor enters into a subcontract in connection with this Agreement, it shall impose obligations on its subcontractors in terms substantially similar to those imposed on it pursuant to this clause 28.
- 28.12 The Contractor may from time to time be required by the Contract Manager to monitor its workforce gender and ethnic origin.
- 28.13 Pursuant to Regulation 46 of the Public Contracts Regulations 2006, the Contractor shall not discriminate in seeking offers in relation to, or in awarding, a contract for the purchase or hire of goods on the grounds:
- (a) of nationality, against a person who is a national of and established in a relevant State; or
  - (b) that the goods to be supplied under the contract originate in another relevant State.
- 28.14 Where the Contractor commits a breach of this clause 28 which amounts to a failure to comply with equalities legislation, the provisions of clause 51 shall apply.
- 28.15 The Contractor shall take all reasonable steps to secure the observance of this clause 28 by the Staff employed in the provision of the Services.

## **29 The Contracts (Rights of Third Parties) Act 1999**

- 29.1 No person who is not a Party to the Agreement (including without limitation any employee, officer, agent, representative, or sub-contractor of either the Authority or the Contractor) shall have any right to enforce any term of the Agreement, which expressly or by implication, confers a benefit on him without the prior

agreement in writing of both Parties, which agreement should specifically refer to the clause 29. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

### **30 Environmental Requirements**

30.1 The Contractor shall, when working on the Premises, perform the Agreement in accordance with the Authority's environmental policy, which is to conserve energy, water, wood, paper and other resources, reduce waste and phase out the use of ozone depleting substances and minimise the release of greenhouse gases, volatile organic compounds and other substances damaging to health and the environment.

### **31 Health and Safety**

31.1 The Contractor shall ensure in performing the Services that its Staff and any other person acting on its behalf adopt safe methods of work in order to protect the health and safety of:

31.1.1 the Staff

31.1.2 the Authority's employees

31.1.3 the employees of any sub-contractor or other person working on behalf of the Contractor

31.1.4 patrons of the Premises

31.1.5 any other person including but without limitation members of the public

31.2 The Contractor shall promptly notify the Authority of any health and safety hazards which may arise in connection with the performance of the Agreement. The Authority shall promptly notify the Contractor of any health and safety hazards which may exist or arise at the Premises and which may affect the Contractor in the performance of the Agreement.

31.3 Subject to clause 31.4 the Contractor shall adopt safe methods of work and shall comply with any health and safety measures implemented by the Authority and with the requirements of the Health and Safety at Work etc. Act 1974 and any of the persons referred to in clause 31.1.

- 31.4 The Contractor shall notify the Authority immediately in the event of any incident occurring in the performance of the Agreement on the Premises where that incident causes any personal injury or damage to property which could give rise to personal injury.
- 31.5 The Contractor shall adopt its own procedures or codes of practice for ensuring health and safety of persons referred to in clause 31.1 which shall be compatible with and no less stringent than those contained in the Authority's health and safety measures and shall on or before the Commencement Date notify the Contract Manager of the same.
- 31.6 The Contractor shall ensure that its health and safety policy statement (as required by the Health and Safety at Work etc Act 1974) is made available to the Authority on request.

## **32 Safeguarding Children and/or Vulnerable Adults**

- 32.1 The Contractor shall comply with the staff vetting procedures referred to in this clause 32 in respect of Staff employed or engaged in the provision of the Services in posts which involve close contact with, or substantial access to, children (including children's records) and vulnerable adults (the Controlled Activity).
- 32.2 The Contractor confirms that all Staff working in the Controlled Activity have been vetted and recruited on a basis that is equivalent to and no less strict than the Staff Vetting Procedures.

### **32.3 Staff Vetting Procedures - Recruitment of Staff**

- (a) each prospective employee's employment history shall be scrutinised and references taken up, including asking most recent former employers whether they have made a referral of misconduct to the Independent Safeguarding Authority (ISA) for possible barring;
- (b) each prospective employee shall be asked whether he/she has any convictions;

- (c) each prospective employee shall be asked whether he/she is subject to monitoring i.e. cleared by the ISA to work;
- (d) a check equivalent to an enhanced criminal record certificate check shall be undertaken through the Criminal Records Bureau for each prospective employee which shall include respectively, searches of the Children's Barred List and the Adult's Barred List held by the ISA under s.2 of the Safeguarding Vulnerable Groups Act 2006.
- (e) a copy of the results of such checks shall be notified to the Authority.

32.4 The Contractor shall procure that no person who discloses any convictions, or who is found to have any convictions following the results of a Criminal Records Bureau check referred to in clause 32.3(d), is employed or engaged by the Contractor or on the Contractor's behalf without the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).

32.5 The Contractor shall procure that the Authority is notified of any member of Staff who, subsequent to his/her commencement of employment as a member of Staff, is barred or not subject to monitoring by the ISA or receives a conviction or whose previous convictions become known to the Contractor (or any employee of a sub-contractor involved in the provision of the Services).

32.6 The Authority may require the Contractor to undertake criminal records certificate checks with the Criminal Records Bureau for Staff employed or engaged in the provision of the Services in posts which **do not** involve close contact with, or substantial access to, children and vulnerable adults. A copy of the results of such checks shall be notified to the Authority.

32.7 The Authority and the Contractor shall comply with the Code of Practice for Registered Persons and other Recipients of Disclosure Information as may be issued from time to time by the Criminal Records Bureau or any successor to that body.

32.8 The Contractor shall bear the cost of any notice, instruction or decision of the Authority under this clause 32.



## **32A Business Continuity/Civil Contingencies**

- 32.A.1 The Contractor shall make and submit for the approval of the Contract Manager its own emergency plan and business continuity plan to correspond with and in response to the Authority's Co-ordination Plan for Major Emergencies. The Contractor shall make itself familiar with the requirements of the Authority's Plan which is available on application to the Contract Manager.
- 32.A.2 The Contractor shall:
- 32.A.2.1 upon request, disclose to the Authority the contents of its business continuity plan (including any revisions made to it from time to time);
  - 32.A.2.2 permit the Authority at its discretion from time to time to monitor its business continuity plan;
  - 32.A.2.3 immediately notify the Authority if any incident occurs which activates its business continuity plan (such notification to be given prior to the issue of any notification to the press or other media);
  - 32.A.2.4 provide the Authority with details of how it managed any incident which resulted in the activation of its business continuity plan and any consequential amendments made to its processes and/or procedures;
  - 32.A.2.5 at its own cost train Staff in the requirements of its business continuity plan.
- 32.A.3 The Contract Manager reserves the right to suspend all or any of the Services and/or prioritise the Services if it he/she deems that Staff and Equipment are required for any emergency whether actual or potential.
- 32.A.4 The Contractor shall permit the Authority to use the Premises and such of the Staff and Equipment at any time and in such manner as may be required by the Contract Manager to enable the Authority to carry out its Co-ordination Plan for Major Emergencies in a situation which, in the opinion of the Contract Manager

amounts to a possible, potential, or actual emergency or disaster. The Authority shall propose an adjustment to the Price in accordance with clause 43.

32.A.5 The Contractor shall participate in training programmes/exercises relating to the Authority's Co-ordination Plan for Major Emergencies as instructed by the Contract Manager. The Authority shall propose an adjustment to the Price in accordance with clause 43.

32.A.6 The Contractor shall provide the name, address and telephone number of a responsible person who can be contacted at any time out of normal working hours to respond to any instructions from the Contract Manager in connection with the Authority's Co-ordination Plan for Major Emergencies. Such person shall be authorised by the Contractor to call upon Staff and Equipment as may be reasonably required by the Contract Manager.

## **32B Human Rights**

32.B.1 The Authority has obligations to promote and protect human rights and must act in a way that is compatible with the European Convention on Human Rights when providing a service or making decisions about individuals - this means treating individuals fairly, with dignity and respect, while also safeguarding the rights of the wider community (the Human Rights Framework).

32.B.2 The Contractor shall apply the Human Rights Framework in the provision of the Services.

## **32C Services Complaints**

The Contractor shall co-operate with the Authority in responding to Local Government Ombudsman complaints and/or complaints under the Authority's Corporate Complaints Procedure in relation to the Services. The Contractor shall pay to the Authority within 14 days of demand any payment made by the Authority to a complainant and/or any other costs incurred by the Authority as a result of fault by the Contractor.

### **32D Bye-laws – Clause not applicable**

~~32D.1 The Authority shall make copies of bye-laws available to the Contractor.~~

~~32D.2 The Contractor shall co-operate with the Authority in seeking to ensure that the Authority's byelaws in relation to [detail relevant byelaws] are complied with.~~

~~32D.3 The Contractor shall not enforce any byelaw where it shall be unlawful for a private person so to do.~~

### **32E Contracts Standing Orders and Financial Regulations**

32E.1 The Agreement shall be subject to the Authority's Standing Orders and Financial Regulations current at the date of the Agreement.

## **Part 5 - Protection of Information**

### **33 Data Protection Act**

33.1 The Contractor shall (and shall procure that any of its Staff involved in the provision of the Services) comply with its obligations under the Data Protection Act 1998 ("DPA") (including where appropriate obtaining registration thereunder) and the Computer Misuse Act 1990 insofar as the performance of this Agreement gives rise to obligations under DPA.

33.2 Notwithstanding the general obligation in clause 33.1, where the Contractor is processing personal data (as defined by the DPA) as a data processor for the Authority (as defined by the DPA) the Contractor shall ensure that it has in place appropriate technical and contractual measures to ensure the security of the personal data (and to guard against unauthorised or unlawful processing of the personal data and against accidental loss or destruction of, or damage to, the personal data), as required under the Seventh Data Protection Principle in Schedule 1 to the DPA; and

(a) provide the Authority with such information as the Authority may reasonably require to satisfy itself that the Contractor is complying with its obligations under the DPA;

(b) promptly notify the Authority of any breach of the security measures required to be put in place pursuant to clause 33.2; and

(c) ensure it does not knowingly or negligently do or omit to do anything which places the Authority in breach of the Authority's obligations under the DPA.

33.3 The provisions of this clause shall apply during the continuance of the Agreement and 6 (six) years after its expiry or termination.

### **34 Confidentiality**

34.1 Each Party:-

(a) shall treat all Confidential Information belonging to the other Party as confidential and safeguard it accordingly; and

(b) shall not disclose any Confidential Information belonging to the other Party to any other person without the prior written consent of the other Party, except to such persons and to such extent as may be necessary for the performance of the Agreement or except where disclosure is otherwise expressly permitted by the provisions of the Agreement.

34.2 The Contractor shall take all necessary precautions to ensure that all Confidential Information obtained from the Authority under or in connection with the Agreement:

(a) is given only to such of the Staff and professional advisors or consultants engaged to advise it in connection with the Agreement as is strictly necessary for the performance of the Agreement and only to the extent necessary for the performance of the Agreement;

(b) is treated as confidential and not disclosed (without prior Approval) or used by any Staff or such professional advisors or consultants otherwise than for the purposes of the Agreement.

34.3 The Contractor shall ensure that Staff or its professional advisors or consultants are aware of the Contractor's confidentiality obligations under the Agreement.

34.4 The Contractor shall not use any Confidential Information it receives from the Authority otherwise than for the purposes of the Agreement.

34.5 The provisions of clauses 34.1 to 34.4 shall not apply to any Confidential Information received by one Party from the other:

(a) which is or becomes public knowledge (otherwise than by breach of this clause);

(b) which was in the possession of the receiving Party, without restriction as to its disclosure, before receiving it from the disclosing Party;

(c) which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;

(d) is independently developed without access to the Confidential Information; or

(e) which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the Party making the disclosure, including any requirements for disclosure under the FOIA or the Environmental Information Regulations pursuant to clause 35.

34.6 Nothing in this clause shall prevent the Authority:

(a) disclosing any Confidential Information for the purpose of:

(i) the examination and certification of the Authority's accounts; or

(ii) any examination of the economy, efficiency and effectiveness with which the Authority has used its resources; or

(b) disclosing any Confidential Information obtained from the Contractor:

(i) to any government department or any other Contracting Authority. All government departments or Contracting Authorities receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other government departments or other Contracting Authorities on the basis that the information is confidential and is not to be disclosed to a third party which is not part of any government department or any Contracting Authority; or

(ii) to any person engaged in providing any services to the Authority for any purpose relating to or ancillary to the Agreement;

provided that in disclosing information under sub-paragraph (b) the Authority discloses only the information which is strictly necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.

34.7 Nothing in this clause shall prevent either Party from using any techniques, ideas or Know-How gained during the performance of the Agreement in the course of its normal business, to the extent that this does not result in a disclosure of Confidential Information or an infringement of Intellectual Property Rights.

34.8 The provisions of this clause shall apply during the continuance of the Agreement and 6 (six) years after its expiry or termination.

## **35 Freedom of Information**

35.1 The Contractor acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and cooperate with the Authority (at the Contractor's expense) to enable the Authority to comply with these Information disclosure requirements.

35.2 The Contractor shall and shall procure that its sub-contractors shall:

(a) transfer the Request for Information to the Authority as soon as practicable after receipt and in any event within two Working Days of receiving a Request for Information;

- (b) provide the Authority with a copy of all Information in its possession or power in the form that the Authority requires within five Working Days (or such other period as the Authority may specify) of the Authority requesting that Information; and
- (c) provide all necessary assistance as reasonably requested by the Authority to enable the Authority to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA [or regulation 5 of the Environmental Information Regulations].

35.3 The Authority shall be responsible for determining at its reasonable discretion whether the Commercially Sensitive Information and/or any other Information:

- (a) is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations;
- (b) is to be disclosed in response to a Request for Information, and in no event shall the Contractor respond directly to a Request for Information unless expressly authorised to do so by the Authority.

35.4 The Contractor acknowledges that the Authority may, acting in accordance with the Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part 1 of FOIA (issued under section 45 of the FOIA, November 2004), be obliged under the FOIA or the Environmental Information Regulations to disclose Information following consultation with the Contractor and having taken its views into account.

35.5 The Contractor shall ensure that all Information produced in the course of the Agreement or relating to the Agreement is retained for disclosure and shall permit the Authority to inspect such records as requested from time to time.

35.6 The Contractor acknowledges that any lists or schedules (Fourth Schedule) provided by it outlining Confidential Information are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with clause 35.4.

## **36 Security of Confidential Information**

- 36.1 In order to ensure that no unauthorised person gains access to any Confidential Information or any data obtained in the performance of the Agreement, the Contractor undertakes to maintain security systems approved by the Authority.
- 36.2 The Contractor will immediately notify the Authority of any breach of security in relation to Confidential Information and all data obtained in the performance of the Agreement and will keep a record of such breaches. The Contractor will use its reasonable endeavours to recover such Confidential Information or data however it may be recorded. This obligation is in addition to the Contractor's obligations under clause 34. The Contractor will co-operate with the Authority in any investigation that the Authority reasonably considers necessary to undertake as a result of any breach of security in relation to Confidential Information or data.

## **37 Publicity and Media**

- 37.1 Without prejudice to the Authority's obligations under the FOIA, neither Party shall make any press announcements or publicise the Agreement or any part thereof in any way, except with the written consent of the other Party (such consent not to be unreasonably withheld or delayed).
- 37.2 Both Parties shall take all reasonable steps to ensure the observance of the provisions of clause 37.1 by all their servants, employees, agents, professional advisors and consultants. The Contractor shall take all reasonable steps to ensure the observance of the provisions of clause 37.1 by its sub-contractors.

## **38 Security of Premises**

- 38.1 The Contractor shall be responsible for maintaining the security of the Premises in accordance with the Lease. The Contractor shall comply with all reasonable security requirements of the Authority while on the Premises, and shall procure that all of its employees, agents, servants and sub-contractors shall likewise comply with such requirements.



## **39 Intellectual Property Rights**

39.1 All Intellectual Property Rights in any specifications, instructions, plans, data, drawings, databases, patents, patterns, models, designs or other material:

(a) furnished to or made available to the Contractor by the Authority shall remain the property of the Authority;

(b) prepared by or for the Contractor for use, or intended use, in relation to the performance of the Agreement shall belong to the Authority and the Contractor shall not, and shall procure that the Contractor's employees, servants, agents, suppliers and sub-contractors shall not, (except when necessary for the implementation of the Agreement) without prior Approval, use or disclose any such Intellectual Property Rights, or any other information (whether or not relevant to the Agreement) which the Contractor may obtain in performing the Agreement except information which is in the public domain.

39.2 It is a condition of the Agreement that the Services will not infringe any Intellectual Property Rights of any third party and the Contractor shall during and after the Term to the extent that a claim arises during the Term indemnify and keep indemnified the Authority against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and other liabilities which the Authority may suffer or incur as a result of or in connection with any breach of this clause, except where any such claim relates to:

(a) designs furnished by the Authority;

(b) the use of data supplied by the Authority which is not required to be verified by the Contractor under any provision of the Agreement.

39.3 The Authority shall notify the Contractor in writing of any claim or demand brought against the Authority for infringement or alleged infringement of any Intellectual Property Right in materials supplied or licensed by the Contractor. The Contractor shall at its own expense conduct all negotiations and any litigation arising in connection with such claim against the Authority for breach of Intellectual Property

Rights in materials supplied or licensed by the Contractor, provided always that the Contractor:

- (a) shall consult the Authority on all substantive issues which arise during the conduct of such litigation and negotiations;
- (b) shall take due and proper account of the interests of the Authority in relation thereto; and
- (c) shall not settle or compromise any such claim without the Authority's prior written consent (not to be unreasonably withheld or delayed).

39.4 The Authority shall at the request of the Contractor afford to the Contractor all reasonable assistance for the purpose of contesting any claim or demand made or action brought against the Authority or the Contractor for infringement or alleged infringement of any Intellectual Property Right in connection with the performance of the Agreement and shall be repaid all costs and expenses (including, but not limited to, legal costs and disbursements) incurred in doing so. Such costs and expenses shall not be repaid where they are incurred in relation to a claim, demand or action which relates to the matters in clause 39.3(a) and (b),

39.5 The Authority shall not make any admissions which may be prejudicial to the defence or settlement of any claim, demand or action for infringement or alleged infringement of any Intellectual Property Right by the Authority or the Contractor in connection with the performance of the Agreement.

39.6 If a claim, demand or action for infringement or alleged infringement of any Intellectual Property Right is made in connection with the Agreement or in the reasonable opinion of the Contractor is likely to be made, the Contractor may at its own expense and subject to the consent of the Authority (not to be unreasonably withheld or delayed) either:

- (a) modify any or all of the Services without reducing the performance or functionality of the same, or substitute alternative Services of equivalent performance and functionality, so as to avoid the infringement or the alleged

infringement, provided that the terms herein shall apply with any necessary changes to such modified Services or to the substitute Services; or

(b) procure a licence to use and provide the Services, which are the subject of the alleged infringement, on terms which are acceptable to the Authority.

39.7 At the termination of the Agreement the Contractor shall at the request of the Authority and in any event within 3 (three) months of such termination ensure the full transfer of all data and information in respect of the Services and all matters relating thereto to the Authority.

39.8 The Authority shall not be liable for any licence software contractual arrangement or other measure in relation to the Computer Systems and/or software and/or services in respect of either or both during or after this Agreement unless the same shall have been agreed by the Contract Manger beforehand in writing.

39.9 The provisions of this clause 39 shall apply during the continuance of the Agreement and 6 (six) years after its expiry or termination.

#### **40 Audit and the Audit Commission**

40.1 The Contractor shall keep and maintain until six years after the Agreement has been completed, or as long a period as may be agreed between the Parties, full and accurate records of the Agreement including the Services provided under it, all expenditure reimbursed by the Authority, and all payments made by the Authority. The Contractor shall on request afford the Authority or the Authority's representatives or the Audit Commission such access to those records as may be required by the Authority or the Audit Commission in connection with the Agreement.

### **Part 6 – Control of the Contract**

#### **41 Assignment and Sub-Contracting**

41.1 The Contractor shall not assign, sub-contract or in any other way dispose of the Agreement or any part of it without prior Approval. Sub-contracting any part of the

Agreement shall not relieve the Contractor of any obligation or duty attributable to the Contractor under the Agreement.

41.2 The Contractor shall be responsible for the acts and omissions of its sub-contractors as though they are its own.

41.3 Where the Authority has consented to the placing of sub-contracts, copies of each sub-contract shall, at the request of the Authority, be sent by the Contractor to the Authority within 5 (five) Working Days of such request.

## **42 Waiver**

42.1 The failure of either Party to insist upon strict performance of any provision of the Agreement or the failure of either Party to exercise any right or remedy shall not constitute a waiver of that right or remedy and shall not cause a diminution of the obligations established by the Agreement.

42.2 No waiver shall be effective unless it is expressly stated to be a waiver and communicated to the other Party in writing in accordance with the provisions of clause 7.

42.3 A waiver of any right or remedy arising from a breach of the Agreement shall not constitute a waiver of any right or remedy arising from any other or subsequent breach of the Agreement.

## **43 Variation of the Services**

43.1 The Authority reserves the right on giving reasonable written notice from time to time to require changes to the Services (whether by way of the removal of Services, the addition of new Services, or increasing or decreasing the Services or specifying the order in which the Services are to be performed or the locations where the Services are to be provided) for any reasons whatsoever **PROVIDED THAT** such addition, omission or variation does not amount to a material change to the Specification. Such a change is hereinafter called "a Variation".

43.2 Any such Variation shall be communicated in writing by the Contract Manager to the Contractor's Representative in accordance with the notice provisions of clause 7. All Variations shall be in the form of an addendum to the Agreement.

43.3 In the event of a Variation the Price may also be varied. Such Variation in the Price shall be calculated by the Authority and agreed in writing with the Contractor and shall be such amount as properly and fairly reflects the nature and extent of the Variation in all the circumstances. Failing agreement the matter shall be determined by negotiation or mediation in accordance with the provisions of clause 64.

43.4 The Contractor shall provide such information as may be reasonably required to enable such varied price to be calculated.

#### **44 Severability**

44.1 If any provision of the Agreement is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions of the Agreement shall continue in full force and effect as if the Agreement had been executed with the invalid, illegal or unenforceable provision eliminated.

#### **45 Remedies in the event of inadequate performance**

45.1 Where a complaint is received or a problem indicated in any Customer Satisfaction Survey about the standard of Services or about the way any Services have been delivered or work has been performed or about the materials or procedures used or about any other matter connected with the performance of the Agreement, then the Contract Manager shall take all reasonable steps to ascertain whether the complaint is valid. If the Contract Manager so decides, he may liaise with the Contractor's Representative to resolve the issue informally.

45.2 If the Contractor fails to respond to the reasonable satisfaction of the Contract Manager to the informal resolution initiated by the Contract Manager or otherwise to perform any of the Services to the reasonable satisfaction of the Authority and such failure is capable of remedy, then the Authority shall instruct the Contractor to

remedy the failure and the Contractor shall at its own cost and expense remedy such failure (and any damage resulting from such failure) within [10] Working Days or such other period of time as the Authority may direct.

45.3 In the event that:

(a) the Contractor fails to comply with clause 45.2 above and the failure, is materially adverse to the interests of the Authority or prevents the Authority from discharging a statutory duty; or

(b) the Contractor persistently fails to comply with clause 45.2 above,

the Authority reserves the right to invoke the provisions of clause 54.

45.4 In the event that the Authority is of the reasonable opinion that there has been a material breach of the Agreement by the Contractor, or the Contractor's performance of its obligations under the Agreement has failed to meet the requirements set out in the First Schedule, then the Authority may, without prejudice to its rights under clause 54 of the Agreement, do any of the following:

(a) make such deduction from the Price to be paid to the Contractor as the Authority shall reasonably determine to reflect sums paid or sums which would otherwise be payable in respect of such of the Services as the Contractor shall have failed to provide or performed inadequately;

(b) without terminating the Agreement, itself provide or procure the provision of part of the Services until such time as the Contractor shall have demonstrated to the reasonable satisfaction of the Authority that the Contractor will be able to perform such part of the Services in accordance with the Agreement;

(c) without terminating the whole of the Agreement, terminate the Agreement in respect of part of the Services only (whereupon a corresponding reduction in the Price shall be made) and thereafter itself provide or procure a third party to provide such part of the relevant Services; and/or

(d) terminate, in accordance with clause 54, the whole of the Agreement.

45.5 The Authority may charge to the Contractor any cost reasonably incurred by the Authority and any reasonable administration costs in respect of the provision of such part of the relevant Services by the Authority or by a third party to the extent that such costs exceed the Price which would otherwise have been payable to the Contractor for such part of the relevant Services and provided that the Authority uses its reasonable endeavours to mitigate any additional expenditure in obtaining replacement Services.

45.6 This clause 45 is subject always to the provisions of clause 64 (Dispute Resolution).

#### **46 Remedies Cumulative**

46.1 Except as otherwise expressly provided by the Agreement, all remedies available to either Party for breach of the Agreement are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.

#### **47 Monitoring of Performance**

47.1 The Contractor shall comply with the monitoring arrangements set out in Monitoring Schedule including, but not limited to, providing such data and information as the Contractor may be required to produce under the Agreement.

#### **48 Possible Extension of Term**

48.1 Subject to satisfactory performance by the Contractor during the Term, the Authority may wish to extend the Term for a further period of up to (5) five years. The aggregate duration of all Extensions to the Term shall not exceed (5) five years.

48.2 The Authority shall give at least three months' notice to the Contractor of its intention to extend the Term. The clauses in the Agreement shall apply throughout any Extensions unless otherwise stated to the contrary.

## **49 Novation**

- 49.1 The Authority shall be entitled to assign, novate or otherwise dispose of its rights and obligations under this Agreement or any part thereof to any Contracting Authority, private sector body or any other body established under statute ('Transferee') provided that any such assignment, novation or other disposal shall not increase the burden of the Contractor's obligations under this Agreement.
- 49.2 Each Party shall at its own cost and expense carry out, or use all reasonable endeavours to ensure the carrying out of, whatever further actions (including the execution of further documents) the other party reasonably requires from time to time for the purpose of giving that other party the full benefit of the provisions of this Agreement.
- 49.3 The Authority shall be entitled to disclose to any Transferee any Confidential Information of the Contractor which relates to the performance of the Agreement by the Contractor. In such circumstances the Authority shall authorise the Transferee to use such Confidential Information only for purposes relating to the performance of the Agreement and for no other purposes and shall take all reasonable steps to ensure that the Transferee accepts an obligation of confidence.

## **Part 7 - Liabilities**

### **50 Indemnity and Insurance**

- 50.1 Neither Party excludes or limits liability to the other Party for death or personal injury caused by its negligence or for any breach of any obligations implied by Section 2 of the Supply of Goods and Services Act 1982.
- 50.2 The Contractor shall indemnify and keep indemnified the Authority fully against all claims, proceedings, actions, damages, legal costs, expenses and any other liabilities whatsoever arising out of, in respect of or in connection with the Agreement including in respect of any death or personal injury, loss of or damage to property (including the Premises), financial loss arising from any advice given or omitted to be given by the Contractor, or any other loss which is caused directly or



indirectly by any act or omission of the Contractor. This clause shall not apply to the extent that the Contractor is able to demonstrate that such death or personal injury, or loss or damage was not caused or contributed to by its negligence or default, or the negligence or default of its Staff or sub-contractors, or by any circumstances within its or their control.

50.3 Subject always to clause 50.1, in no event shall the Authority be liable to the Contractor whether in contract tort or otherwise for:

(a) loss damage or injury however caused or arising out of or in connection with the provision by the Contractor of the Services or the use or occupation by the Contractor of the Premises

(b) loss of profits, business, revenue or goodwill;

(c) loss of savings (whether anticipated or otherwise);

(d) the performance by the Contractor of the Services;

(e) the use of the Premises by the Contractor and Staff

(f) indirect or consequential loss or damage whatever and howsoever caused.

50.4 The Contractor shall effect and maintain with a reputable insurance company a policy or policies of insurance for public liability and employer liability providing the level of cover in the sum of ten million pounds (£10,000,000) per policy in respect of all risks which may be incurred by the Contractor, arising out of the Contractor's performance of the Agreement, including death or personal injury, loss of or damage to property or any other loss. Such policies shall include cover in respect of any financial loss arising from any advice given or omitted to be given by the Contractor.

50.5 The Contractor shall hold employer's liability insurance in respect of Staff in accordance with any legal requirement for the time being in force.

- 50.6 The Contractor shall produce to the Contract Manager, on request, copies of all insurance policies referred to in this clause or a broker's verification of insurance to demonstrate that the appropriate cover is in place, together with receipts or other evidence of payment of the latest premiums due under those policies.
- 50.7 If, for whatever reason, the Contractor fails to give effect to and maintain the insurances required by the Agreement the Authority may make alternative arrangements to protect its interests and may recover the costs of such arrangements from the Contractor.
- 50.8 The terms of any insurance or the amount of cover shall not relieve the Contractor of any liabilities under the Agreement. It shall be the responsibility of the Contractor to determine the amount of insurance cover that will be adequate to enable the Contractor to satisfy any liability referred to in clause 50.2.
- 50.9 Save as expressly provided for or set out in this Agreement the Authority does not warrant the accuracy of any representation or statement of fact or law given to the Contractor by the Authority its servants or agents at any time before the execution of this Agreement and the Authority shall not be liable to the Contractor for any loss or damage which the Contractor may sustain as a result of relying on such representation statement information or advice whether in contract tort under the Misrepresentation Act 1967 or otherwise save insofar as the relevant representation statement information or advice was made or given fraudulently by the Authority its servants or agents acting in the course of their employment **PROVIDED THAT** the Contractor may rely as a representation but without warranty on the written answers given by the Authority to the questions raised by tenderers.
- 50.10 The liability of the Contractor and the indemnity to the Authority arising under clause 50.2 shall be without prejudice to any other right or remedy available to the Authority.
- 50.11 The insurance of the Premises and the Authority Property shall be provided for in the Lease.

## **51 Professional Indemnity**

51.1 The Contractor shall hold and maintain professional indemnity insurance cover and shall ensure that all professional consultants or sub-contractors involved in the provision of the Services hold and maintain appropriate cover. To comply with its obligations under this clause 51.1, and as a minimum, the Contractor shall ensure professional indemnity insurance held by the Contractor and by any agent, sub-contractor or consultant involved in the performance of Services has a limit of indemnity of not less than ten million pounds (£10,000,000) for any occurrences arising out of each and every event. Such insurance shall be maintained for a minimum of 6 (six) years following the expiration or earlier termination of the Agreement.

## **52 Warranties and Representations**

52.1 The Contractor warrants and represents that:

- (a) the Contractor has the full capacity and authority and all necessary consents (including, but not limited to, where its procedures so require, the consent of its parent company) to enter into and perform the Agreement and that the Agreement is executed by a duly authorised representative of the Contractor;
- (b) the Contractor shall discharge its obligations hereunder with all due skill, care and diligence including but not limited to Good Industry Practice and in accordance with the Contract Standard.
- (c) all obligations of the Contractor pursuant to the Agreement shall be performed and rendered by appropriately experienced, qualified and trained Staff with all due skill, care and diligence;
- (d) the Contractor is not in default in the payment of any due and payable taxes or in the filing, registration or recording of any document or under any legal or statutory obligation or requirement which default might have a material adverse effect on its business, assets or financial condition or its ability to observe or perform its obligations under the Agreement.

## **Part 8 – Default, Disruption and Termination**

### **53 Termination on change of control and insolvency**

53.1 The Authority may terminate the Agreement by notice in writing with immediate effect where:

- (a) the Contractor undergoes a change of control, within the meaning of section 416 of the Income and Corporation Taxes Act 1988, which in the opinion of the Authority impacts adversely and materially on the performance of the Agreement; or
- (b) the Contractor is an individual or a firm and a petition is presented for the Contractor's bankruptcy, or a criminal bankruptcy order is made against the Contractor or any partner in the firm, or the Contractor or any partner in the firm makes any composition or arrangement with or for the benefit of creditors, or makes any conveyance or assignment for the benefit of creditors, or if an administrator is appointed to manage the Contractor's or firm's affairs; or
- (c) the Contractor is a company, if the company passes a resolution for winding up or dissolution (otherwise than for the purposes of and followed by an amalgamation or reconstruction) or an application is made for, or any meeting of its directors or members resolves to make an application for an administration order in relation to it or any party gives or files notice of intention to appoint an administrator of it or such an administrator is appointed, or the court makes a winding-up order, or the company makes a composition or arrangement with its creditors, or an administrative receiver, receiver, manager or supervisor is appointed by a creditor or by the court, or possession is taken of any of its property under the terms of a fixed or floating charge; or
- (d) where the Contractor is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986; or
- (e) any similar event occurs under the law of any other jurisdiction.

53.2 The Contractor shall notify the Contract Manager immediately when any change of control occurs. The Authority may only exercise its right under clause 53.1(a) within six months of:

(a) being notified that a change of control has occurred; or

(b) where no notification has been made the date that the Authority becomes aware of the change of control;

but shall not be permitted to do so where an Approval was granted prior to the change of control of the Contractor.

53.3 If the Contractor, being an individual, shall die or be adjudged incapable of managing his or her affairs within the meaning of Part VII of the Mental Health Act 2005, the Authority shall be entitled to terminate the Agreement by notice to the Contractor or the Contractor's Representative with immediate effect.

#### **54 Termination on Default**

54.1 The Authority may terminate the Agreement, or terminate the provision of any part of the Agreement by written notice to the Contractor or the Contractor's Representative with immediate effect if the Contractor commits a Default and if:

(a) the Contractor has not remedied the Default to the satisfaction of the Authority within 25 Working Days, or such other period as may be specified by the Authority, after issue of a written notice specifying the Default and requesting it to be remedied; or

(b) the Default is not, in the opinion of the Authority, capable of remedy; or

(c) the Default is a material breach of the Agreement.

54.2 In the event that through any Default of the Contractor, data transmitted or processed in connection with the Agreement is either lost or sufficiently degraded as to be unusable, the Contractor shall be liable for the cost of

reconstitution of that data and shall provide a full credit in respect of any charge levied for its transmission and shall reimburse the Authority for any costs charged in connection with such Default of the Contractor.

54.3 The Contractor may terminate the Agreement if the Authority is in material breach of its obligations to pay undisputed charges by giving the Authority 60 Working Days notice specifying the breach and requiring its remedy. The Contractor's right of termination under this clause 54.3 shall not apply to non payment of the charges or Price where such non payment is due to the Authority exercising its rights under clauses 23.1 and 45.3.

## **55 Break**

55.1 Either Party shall have the right to terminate the Agreement, or to terminate the provision of any part of the Agreement by giving six months' written notice in accordance with clause 7.

## **56 Consequences of Termination**

56.1 Where the Authority terminates the Agreement under clause 45, or terminates the provision of any part of the Agreement under that clause 45, and then makes other arrangements for the provision of Services, the Authority shall be entitled to recover from the Contractor the cost reasonably incurred of making those other arrangements and any additional expenditure properly incurred by the Authority throughout the remainder of the Term or any Extension. The Authority shall take all reasonable steps to mitigate such additional expenditure. Where the Agreement is terminated under clause 45, no further payments shall be payable by the Authority to the Contractor until the Authority has established the final cost of making those other arrangements.

56.2 Where the Authority terminates the Agreement under clause 55, the Authority shall indemnify the Contractor against any commitments, liabilities or expenditure which would otherwise represent an unavoidable loss by the Contractor by reason of the termination of the Agreement, provided that the Contractor takes all reasonable steps to mitigate such loss. Where the Contractor holds insurance, the Contractor shall reduce its unavoidable costs by any insurance sums available. The Contractor shall submit a fully itemised and costed list of such loss,

with supporting evidence, of losses reasonably and actually incurred by the Contractor as a result of termination under 55.

- 56.3 The Authority shall not be liable under clause 56.2 to pay any sum which:
- (a) was claimable under insurance held by the Contractor, and the Contractor has failed to make a claim on its insurance, or has failed to make a claim in accordance with the procedural requirements of the insurance policy; or
  - (b) when added to any sums paid or due to the Contractor under the Agreement, exceeds the total sum that would have been payable to the Contractor if the Agreement had not been terminated prior to the expiry of the Term.

## **57 Disruption**

- 57.1 The Contractor shall take reasonable care to ensure that in the execution of the Agreement it does not disrupt the operations of the Authority, its employees or any other contractor employed by the Authority.
- 57.2 The Contractor shall immediately inform the Authority of any actual or potential industrial action, whether such action be by their own employees or others, which affects or might affect its ability at any time to perform its obligations under the Agreement.
- 57.3 In the event of industrial action by the Staff or the Contractor's suppliers the Contractor shall seek the Authority's Approval to its proposals for the continuance of the performance of the Services in accordance with its obligations under the Agreement.
- 57.4 If the Contractor's proposals referred to in clause 57.3 are considered insufficient or unacceptable by the Authority acting reasonably, then the Agreement may be terminated by the Authority by notice in writing with immediate effect.

## **58 Recovery upon Termination**

58.1 Save as otherwise expressly provided in this Agreement and notwithstanding the provisions of;

(a) termination of this Agreement shall be without prejudice to any rights, remedies or obligations accrued under this Agreement prior to termination or expiration and nothing in the Agreement shall prejudice the right of either Party to recover any amount outstanding at such termination or expiry; and

(b) termination of this Agreement shall not affect the continuing rights and obligations of the Contractor and the Authority under clause 13 (Standard of Work), 23 (Recovery of Sums Due), 27 (Prevention of Corruption), 33 (Data Protection Act), 34 (Confidentiality), 37 (Publicity and Media), 38 (Security), 39 (Intellectual Property Rights), 40 (Audit), 46 (Remedies Cumulative), 50 (Indemnity and Insurance), 51 (Professional Indemnity), 52 (Warranties and Representations), 54 (Termination on Default), 56 (Consequences of Termination), 58 (Recovery on Termination) and 64 (Governing Law).

58.2 At the end of the Term (and howsoever arising) the Contractor shall forthwith vacate the Premises leaving it in a clean and good order of repair and condition in accordance with the Lease and forthwith deliver to the Authority all the Authority's Property (including but not limited to materials, documents, information, access keys) relating to the Agreement in its possession or under its control or in the possession or under the control of any permitted suppliers or sub-contractors and in default of compliance with this clause the Authority may recover possession thereof and the Contractor grants licence to the Authority or its appointed agents to enter (for the purposes of such recovery) any premises of the Contractor or its permitted suppliers or sub-contractors where any such items may be held.

58.3 The Authority shall further be entitled to recover possession of any of the Authority's Property and exercise a lien over any Equipment remaining upon the Premises at the date of termination for any amount due under the Agreement or otherwise from the Contractor to the Authority.

58.4 The Authority's exercise of its rights under this clause 58 is without prejudice to:



58.4.1 any of its other remedies under the Agreement

58.4.2 any rights of action which shall accrue to it or have already accrued to it.

58.5 At the end of the Term (howsoever arising) and/ or after the Term the Contractor shall provide assistance to the Authority and any new contractor appointed by the Authority to continue or take over the performance of the Agreement in order to ensure an effective handover of all work then in progress. Where the end of Term arises due to the Contractor's default, the Contractor shall provide such assistance free of charge. Otherwise the Authority shall pay the Contractor's reasonable costs of providing the assistance, and the Contractor shall take all reasonable steps to mitigate such costs.

## **59 Force Majeure**

59.1 Neither Party shall be liable to the other Party for any delay in or failure to perform its obligations under the Agreement (other than a payment of money) if such delay or failure results from a Force Majeure event. Notwithstanding the foregoing, each Party shall use all reasonable endeavours to continue to perform its obligations hereunder for the duration of such Force Majeure event. However, if any such event prevents either Party from performing all of its obligations under the Agreement for a period in excess of 6 Months, either Party may terminate the Agreement by notice in writing with immediate effect.

59.2 Any failure or delay by the Contractor in performing its obligations under the Agreement which results from any failure or delay by an agent, sub-contractor or supplier shall be regarded as due to Force Majeure only if that agent, sub-contractor or supplier is itself impeded by Force Majeure from complying with an obligation to the Contractor.

59.3 Clause 59 does not affect the Authority's rights under clause 58.

59.4 If either of the Parties becomes aware of circumstances of Force Majeure which give rise to or which are likely to give rise to any such failure or delay on its part as described in clause 59.2 it shall forthwith notify the other by the most expeditious

method then available and shall inform the other of the period which it is estimated that such failure or delay shall continue.

- 59.5 For the avoidance of doubt it is hereby expressly declared that the only events which shall afford relief from liability for failure or delay of performance of the Agreement shall be any event qualifying for Force Majeure hereunder.

## **Part 9 – Best Value Duty**

### **60 Authority’s Best Value Duty**

60.1 The Contractor acknowledges that:

- a) the Authority is subject to the Best Value Duty; and
- b) the provisions of this clause 60 are intended to assist the Authority in discharging its Best Value Duty in relation to the Services.

60.2 The Contractor shall, throughout the Term, but only to the extent of its obligations in the Agreement and on the written request of the Contract Manager make arrangements to seek continuous improvement in the way in which the Services are provided, having regard to a combination of economy, efficiency and effectiveness.

### **61 Customer Satisfaction Survey**

61.1 The Contractor shall, on each Customer Satisfaction Survey Date, undertake (or procure the undertaking of) a customer satisfaction survey (“Customer Satisfaction Survey”) the purpose of which shall include:

- (a) assessing the level of satisfaction among users of Services (including the way in which the Services are provided, performed and delivered) and, in particular, with the quality, efficiency and effectiveness of the Services;
- (b) assisting in the preparation of the Contractor’s Annual Service Report and Annual Service Plan (as defined in clause 62).

61.2 The Customer Satisfaction Survey shall be undertaken by means of distributing to users of the Services within 10 Working Days of each Customer Satisfaction

Survey Date a questionnaire [or other survey method as agreed between the Parties] in a form to be agreed with the Authority (acting reasonably).

- 61.3 The content of the questionnaire [or other material to be used for any other survey method] referred to in clause 61.2 and the method of undertaking the Customer Satisfaction Survey shall comply with all Law.
- 61.4 The Authority shall provide reasonable assistance and information to the Contractor to enable the Contractor to undertake the Customer Satisfaction Survey.
- 61.5 Within 3 (months) of each Customer Satisfaction Survey Date, the Contractor shall prepare a summary of the results of the Customer Satisfaction Survey in such form as the Authority shall reasonably require and promptly upon a written request from the Authority provide such further details (including copies of all returned questionnaires and/or any other survey material used by the Contractor) as the Authority shall reasonably require.

## **62 Annual Service Report and Annual Service Plan**

- 62.1 Without prejudice to any other provision in the Agreement the Contractor shall at its own cost, provide to the Authority a written report (the "Annual Service Report") to the reasonable satisfaction of the Authority.
- 62.2 The Contractor shall upon a written request from the Authority promptly provide such written evidence or other supporting information as the Authority may reasonably require to verify and audit the information and other material contained in the Annual Service Report.
- 62.3 If, in the Authority's reasonable opinion, the provision, performance or delivery of the Services (or any part) may be more effective, efficient and economic having regard to the Annual Service Report and the Best Value Duty, then the Authority may serve a written notice upon the Contractor (a "Services Improvement Notice") stating the nature and timing of the changes to the provision, performance or delivery of the Services (or the relevant part) which the Authority desires.
- 62.4 The Contractor shall, within 20 (twenty) Working Days of the date of receipt of the Services Improvement Notice, provide the Authority at its own cost with a written statement (the "Annual Service Plan") containing the Contractor's proposals to achieve the change to the Services (or the relevant part) in accordance with the Services Improvement Notice.

- 62.5 As soon as practicable after the Authority receives the Annual Service Plan, the Parties shall discuss and agree the issues set out in the Annual Service Plan. In such discussions the Authority may modify the Services Improvement Notice, in which case the Contractor shall, as soon as practicable, and in any event not more than 10 Working Days after the receipt of such modification, notify the Authority of any consequential changes to the Annual Service Plan.
- 62.6 If the Parties cannot agree on the contents of the Annual Service Plan then the dispute will be determined in accordance with the clause 64.
- 62.7 As soon as practicable after the content of the Annual Service Plan has been agreed or otherwise determined pursuant to the clause 64 the Authority shall:
- a) confirm in writing the Annual Service Plan; or
  - b) withdraw the Services Improvement Notice.
- 62.8 If the Authority does not confirm the Annual Service Plan within 10 Working Days of the Annual Service Plan having been agreed or otherwise determined pursuant to the clause 64 then the Annual Service Plan shall be deemed to have been withdrawn.
- 62.9 If the Authority confirms the Annual Service Plan the Authority shall propose a change in the Services in accordance with clause 43.
- 62.10 The Contractor shall take all reasonable steps to mitigate any costs arising as a consequence of a Services Improvement Notice and an Authority Notice of Change served pursuant to clause 62.9.

## **Part 10 – Dispute and Law**

### **63 Governing Law**

- 63.1 The Agreement shall be governed by and interpreted in accordance with English law and the Parties submit to the exclusive jurisdiction of the courts of England.

### **64 Dispute Resolution**

- 64.1 The Parties shall attempt in good faith to negotiate a settlement to any dispute between them arising out of or in connection with the Agreement within 20 Working Days of either Party notifying the other of the dispute such efforts shall

involve the escalation of the dispute to the managing director (or equivalent) of each Party.

64.2 Nothing in this dispute resolution procedure shall prevent the Parties from seeking from any court of the competent jurisdiction an interim order restraining the other Party from doing any act or compelling the other Party to do any act.

64.3 If the dispute cannot be resolved by the Parties pursuant to clause 64.1 the dispute shall be referred to mediation pursuant to the procedure set out in clause 64.5 unless (a) the Authority reasonably considers that the dispute is not suitable for resolution by mediation; or (b) the Contractor does not agree to mediation.

64.4 The performance of the Agreement shall not be suspended, cease or be delayed by the reference of a dispute to mediation and the Contractor (or employee, agent, supplier or sub-contractor) shall comply fully with the requirements of the Agreement at all times.

64.5 The procedure for mediation and consequential provisions relating to mediation are as follows:

(a) a neutral adviser or mediator (“the Mediator”) shall be chosen by agreement between the Parties or, if they are unable to agree upon a Mediator within 10 Working Days after a request by one Party to the other or if the Mediator agreed upon is unable or unwilling to act, either Party shall within 10 Working Days from the date of the proposal to appoint a Mediator or within 10 Working Days of notice to either Party that he is unable or unwilling to act, apply to the President for the time being of the Chartered Institute of Arbitrators or a person appointed by him to appoint a Mediator.

(b) The Parties shall within 10 Working Days of the appointment of the Mediator meet with him in order to agree a programme for the exchange of all relevant information and the structure to be adopted for negotiations to be held. If considered appropriate, the Parties may at any stage seek assistance from [specify relevant mediation provider] to provide guidance on a suitable procedure.

- (c) Unless otherwise agreed, all negotiations connected with the dispute and any settlement agreement relating to it shall be conducted in confidence and without prejudice to the rights of the Parties in any future proceedings.
- (d) If the Parties reach agreement on the resolution of the dispute, the agreement shall be reduced to writing and shall be binding on the Parties once it is signed by their duly authorised representatives.
- (e) Failing agreement, either of the Parties may invite the Mediator to provide a non-binding but informative opinion in writing. Such an opinion shall be provided on a without prejudice basis and shall not be used in evidence in any proceedings relating to the Agreement without the prior written consent of both Parties.
- (f) If the Parties fail to reach agreement in the structured negotiations within 60 Working Days of the Mediator being appointed, or such longer period as may be agreed by the Parties, then any dispute or difference between them may be referred to the Courts.

**IN WITNESS** whereof the Agreement has been signed and delivered as a deed on the date and year stated at the beginning of this deed.

**THE COMMON SEAL of** )  
**THE DARTFORD BOROUGH** )  
**COUNCIL** was hereunto affixed ) Marie Kelly-Stone  
in the presence of ) Head of Legal Services

**SIGNED AS A DEED BY** )  
**ORCHARD THEATRE** ) Managing Director  
**DARTFORD LIMITED** acting by )  
in the presence of:

Witness signature

Witness name

Address

Occupation

## FIRST SCHEDULE - SPECIFICATION SCHEDULE

### Preamble

This Specification Schedule describes the services to be provided by the Contractor, as provided for in clause 11.2 of the Agreement.

### 1. General

- 1.1 The Contractor will present an annual programme of shows at The Orchard Theatre.

### 2. Level of Service

- 2.1 The Authority wishes to secure the maximum use of The Orchard Theatre, so that it offers the greatest possible benefit to the residents of Dartford and contributes as fully as possible to the vitality and economic well-being of Dartford, especially but not exclusively, the Dartford town centre.
- 2.2 The Contractor will therefore be required to present as many shows as is practicable each year, and to limit the number of occasions when The Orchard Theatre is unavailable for public use to the minimum necessary for the proper functioning, maintenance and improvement of the building.
- 2.3 The Contractor will also be expected to maximise theatre attendances. This is in any event a commercial requirement, but over and above this, the Authority regards full use of the theatre to be consistent with maximising its community benefit and its contribution to the viability and vitality of the Dartford town centre.
- 2.4 The target number of annual performances is 292, and the target annual average house as a percentage of capacity, is 57. These figures are derived from Financial Appendix 1 of the Contractor's Tender document. They will not be rigidly applied, but will be used by the Authority to monitor whether the Contractor is generally achieving the expected level of usage of the theatre during the course of each year.

### 3. Balance of Programme

- 3.1 The Authority wishes to secure a balance of high quality entertainment at The Orchard Theatre which will appeal to Dartford residents. At the same time, the Authority acknowledges the Contractor's need to present a programme which is commercially viable, and does not therefore seek to be prescriptive in the matter of programming.
- 3.2 The Authority will nevertheless monitor the balance and quality of programming to satisfy itself that overall the objectives outlined in paragraph 3.1 above are being met by the Services.
- 3.3 The balance of programming will be monitored using the breakdown set out in Financial Appendix 1 of the Contractor's Tender Document; "Production Breakdown and Financial Model". This breakdown will not be rigidly applied, but will be used by the Authority to monitor whether the Contractor is generally



achieving the expected mix and variety of shows. For clarity, the Production Breakdown is set out below as follows:

<b>Production Type</b>	<b>Days</b>
Music	40
Comedy	30
Variety	40
Children's Entertainment	18
Musicals	48
Ballet	8
Opera	8
Spoken Word	8
Drama	24
Dance	6
Orchestral Concerts	4
New and World Music	4
Pantomime	54

#### **4. Community Access**

- 4.1 The Contractor will deliver a programme of Community Access and Education which shall be agreed each year with the Authority. The programme will form part of the Contractor's annual Business Plan and will be deliverable within the financial terms of this Contract. The programme will be generally in accordance with the principles described in Method Statement 8 of the Contractor's Tender Document.

#### **5. Catering Service**

- 5.1 The Contractor will maintain a catering service for the customers of The Orchard Theatre and for more general public use, so long as this is commercially viable.

## SECOND SCHEDULE - PRICING SCHEDULE

1. The Authority shall pay to the Contractor the following sums which shall be annually adjusted in accordance with the CPI on 1 November each year, initially based on November 2008 (i.e. 109.9):

Year 1	£374,115
Year 2	£357,635
Year 3	£346,060
Year 4	£348,664
Years 5 - 10	£352,389p.a.
Years 11 – 20	£387,389 p.a.

2. Payment, for each year of this Agreement, shall be made by the Authority in twelve equal instalments, following receipt of invoices.
3. In the event that the Improvement Works detailed in the Twelfth Schedule cost less than £350,000, the annual sums referred to in paragraph 1 above shall be adjusted upwards by one tenth of the difference between £350,000 and the cost of the Improvement Works for each of the first ten years of this Agreement.

*(Example: if the Improvement Works cost £320,000 then the Year 1 amount payable would be £374,115 plus (£30,000/10) = £377,115). For Years 11-20 the amount payable would remain at £387,389.*

4. The Contractor shall pay to the Authority 10% of its net profit before tax achieved in any year of this Agreement, where this is a positive figure, payable in a single payment within six months of the Contractor's financial year end. The Contractor will supply a copy of audited accounts to the Council within 6 months of its financial year end.

## THIRD SCHEDULE - MONITORING SCHEDULE

### Preamble

This Monitoring Schedule sets out how the Authority will monitor the provision of the Services specified in the Specification Schedule.

### 1. General Arrangements

1.1 Compliance with the Agreement will be monitored as follows:

- i) Monthly, by way of a meeting between the Authority's Contract Manager and the Contractor's Representative;
- ii) Quarterly, by way of a written report by the Contractor's Representative in a set format;
- iii) Six-monthly, by way of a meeting between the Contractor's senior management representatives and the Authority's contract management team;
- iv) Annually, by way of an Annual Report to the Authority and review of the Business Plan which may be subject to the Authority's scrutiny process.

### 2. Monitoring Information

2.1 The items to be monitored, the information to be provided and the performance indicators to be used, are as set out below. The targets are not to be rigidly applied, but will be used as reference points against which to measure whether overall the Services are being provided as envisaged:

Item	Measure	Target
Level of use	no. of shows per annum	292
Balance of programme	shows per annum by type	see below
Audience	annual average % capacity	57%
Audience profile	% by area	40% D'ford
Customer Satisfaction	Survey Review of complaints	
Community Access	Community Access Programme	
Profitability	P&L Interim Management Accounts	
General	Annual Report	

## **Programme Balance**

<b>Production Type</b>	<b>Days</b>
Music	40
Comedy	30
Variety	40
Children's Entertainment	18
Musicals	48
Ballet	8
Opera	8
Spoken Word	8
Drama	24
Dance	6
Orchestral Concerts	4
New and World Music	4
Pantomime	54

- 2.2 The above items will be included in written pro forma reports at the monthly, quarterly, six monthly and annual monitoring stages as relevant, and in a format which will be agreed with the Contractor. In addition, any general items will be reported and discussed at the monthly meetings or as and when they arise.

**FOURTH SCHEDULE - COMMERCIALY SENSITIVE INFORMATION  
SCHEDULE**

*Not applicable*

## FIFTH SCHEDULE - CONTRACTS TO BE ADMINISTERED SCHEDULE

## SIXTH SCHEDULE - AUTHORITY PROPERTY SCHEDULE

## SEVENTH SCHEDULE - TRANSFERRING EMPLOYEES SCHEDULE

*NB: Schedule of Transferring Employees - indicative only*

*Structure Chart*



## EIGHTH SCHEDULE - LEASE

**NINTH**

**SCHEDULE**

**–**

**PREMISES**

**LICENCE**

## TENTH SCHEDULE - WARRANTIES

The Authority hereby warrants and undertakes to the Contractor that

1. It has disclosed to the Contractor all material facts and matters relating to and concerning the conditions of employment of any Transferring Employees in so far as such relate to their respective service with the Authority including ages length of service notice periods benefits including retirement benefits policies or other agreements in respect of each of them and any variation thereto agreed with or imposed upon any Transferring Employee within a period of six months preceding the Commence Date.
2. There are no subsisting collective agreements with any trade union association or other body representing any of the Transferring Employees.
- 3 It has disclosed to the Contractor full details of any material representations or statements made by the Authority to any of the Transferring Employees or any employees (or their trade unions or other representatives) in any way connected with or concerning employment with the Contractor within the period of six months preceding the Commencement date.
- 4 The Transferring Employees are the only employees (as defined by regulation 2(1) of TUPE) of the Authority engaged or working in the Undertaking as at the Commencement Date.
- 5 Save in respect of the Transferring Employees the Authority has not in relation to the Undertaking offered a contract of employment to any other person or other legal entity.
6. There are no persons working in the Undertaking who are on maternity leave [absent on grounds of disability] or on other leave of absence who have a statutory or contractual right to return to work in the Undertaking.
7. There are no enquiries or investigations into the Undertaking by The Equality and Human Rights Commission or other similar authority.
8. All notices required to be issued by TUPE in respect of the Transferring Employees have been duly and properly issued.

9. It has consulted under TUPE.
  
10. It has not dismissed any person for a reason connected with this Agreement other than a reason which is 'an economic technical or organisational reason entailing changes in the workforce' such expression having the meaning prescribed under regulation 7(2) of TUPE.
  
11. It has fully complied with all its obligations under regulation 13 of TUPE.
  
12. It is not aware of any litigation (including any industrial action) relating to or concerning all or any of the Transferring Employees which could give rise to any legal claim or right of action or create liability in respect of the employment of any of the Transferring employees.
  
13. It is not aware of any litigation relating to or concerning any Trade Union or staff association or other body representing Transferring Employees.

## ELEVENTH SCHEDULE – PROGRAMME OF REPLACEMENT AND RENEWAL WORKS

### CAPITAL WORKS REPORT - Sept 09

#### Introduction

Mark Shadrake and Chris Wright (Aster Maintenance) were invited to site in April 2009 to carry out a visual survey of existing mechanical & electrical services systems with a brief to rationalize the works identified as condition C or D from the Frankham report and provide budget costs against our recommendations. They have also highlighted the ductwork cleaning element of the report.

- **Condition C is Poor** – Showing Major defects and/or not operating as intended
- **Condition D is Bad** – Life expired and/or serious risk of imminent failure

#### Mechanical Condition D Items:-

##### 1. Replace all boiler plant & pumps **£125,000.00**

- Comment - The boilers appear to have been well maintained over the years and although some parts will be obsolete or difficult to obtain they will remain serviceable for the near future. We would recommend a phased replacement program starting in year 2 or 3.
- Action – We would recommend looking further into this issue as it is an area of such great expense and what other options are available.

Price excludes pipe-work and thermal insulation.

##### 2. Supply & Extract AHU (box office & cash area) – life expired **£0**

- Comment - The AHU plant in general has been well maintained and the comments and recommendations are more a reflection of the age of the plant. Our price is not to replace plant but to allow for improvement and upgrading elements of the system.
- Action - This equipment has been decommissioned in the Foyer upgrades works.

### **Mechanical Condition C Items:-**

#### **3. Steel Panel Emitters & Fan coils – Disrepair and missing TRV £1000.00**

- Action/Comments - This item relates to general repair and maintenance and could be completed over any period of time within allotted maintenance attendances from contractor

#### **4. Install thermostatic mixing valves to all areas where children may be present or have access to. £2000.00**

- Comment – This is a health & safety issue that should be addressed promptly
- Action -Awaiting confirmation of exact quote so work can be undertaken forthwith

#### **5. Supply & Extract serving areas inc. Foyer, Bar, Kitchen supply & extract – life expired £15,000.00**

- Comment - The AHU plant in general has been well maintained and the comments and recommendations are more a reflection of the age of the plant. This price is not to replace plant but to allow for improvement and upgrading elements of the system
- Action – As per the Boiler whilst plant remains serviceable and within economic environmental efficiencies straight replacement is only one option.

#### **6. Toilet Extract systems – life expired £1000.00**

- Comment - The AHU plant in general has been well maintained and the comments and recommendations are more a reflection of the age of the plant. Our price is not to replace plant but to allow for improvement and upgrading elements of the system
- Action – As point 5

#### **7. Install sump pump to the cable pit £600.00**

- Action/Comments –See Below

#### **8. MCB's used to turn off lights – install light switching £0**

- Action- This has been installed in the Foyer upgrades works.

9. Overhaul External Luminaires **£3000.00**

10. Internal Luminaires – Walkways, Galleries, store rooms and Control room – install and upgrade lighting **£5000.00**

- Action/Comments – In response to Points 7 9 and 10 – Works to be completed

11. Power Circuits/Outlets – Installation of additional circuits to minimize the use of extension leads **£5000.00**

- Action/Comments – Figure for upgrade of wiring to admin areas. Use of Extension leads in pit is due to flexible nature of pit and is always used within manufactures and Health and Safety guidelines.

**Electrical Condition C Items:-**

12. Distribution Boards fair-poor condition – Inspect and test all distribution boards and re-label **£4000.00**

13. Re-wire of Sub-Mains Cabling – recommend carrying out load calculation and testing procedures **£3000.00**

- Comment – This recommendation from the Frankham report appears to be based on the age of the installation and they do comment that condition is satisfactory. From the visual inspection it can be seen the original installation was completed to a good standard and we are only recommending verification of the soundness of the installation by carrying out specific testing and not a full re-wire as the Frankham report suggests.
- Action – DBC to advise on further scope if preferred. Substantial saving gained by not completing full rewire

14. Re-wire Circuit Wiring throughout – Some areas may require partial re-wire and bringing up to standard **£25,000.00**

- Action/Comment – The Frankham report highlights the adaptations and extensions that have taken place over the years along with the age of the installation. There will be areas that will need upgrading however a full re-wire is not deemed to be necessary at this stage.

15. Internal Luminaires – some replacement and additional fittings will be required to boiler and plant rooms **£2000.00**
- Action Comments – see below
16. Internal Luminaires – Rope & Stair lighting not working – Replacement possibly with Fibre system **£0**
- Comments – Work completed prior to beginning of tenancy
17. Internal Luminaires – Spotlights in Foyer rewire and replacement – may be fibre system/feature lighting (possibly part of a separate scheme already) **£0**
- Comment – Works complete as part of foyers upgrade
18. Emergency Lighting – Upgrade fittings and circuits throughout **£12,000.00**
- Action/Comments – see below
19. Emergency Lighting – Upgrade central back-up system to facilitate increased load as required **£10,000.00**
- Action/Comments – see below
20. Fire Alarm Audible Test – Test and advise **£800.00**
- Action/Comments – In relation to points 15, 17 18, 19 20 – All work to be completed

### **Miscellaneous**

21. Ductwork Cleaning (excluding access) **£30,000.00**
- Comments - This item has been highlighted along with grille cleaning throughout without further elaboration and may be based on visual check of accessible areas only. Access to clean all parts would be very difficult and we would recommend a full quotation is obtained by a specialist firm along with indoor air quality checks on a routine basis.



- Action – DBC/HQ to discuss once further investigation is concluded. Provisional sum therefore should be apportioned until true cost/full extent is further surveyed.

Further areas of Renewal /Improvement outside of The Frankham Report

- 22. Automatic Front Door Openers **£12,000.00**
- 23. Orchestra Pit Lift **£30,000.00**
- 24. Dressing Room Mirror Lighting **£5,000.00**
- 25. Vinyl Floor Replacement to Auditorium Floor **£4000.00**
- 26. Roof Man Safe System **£25,000.00**

## **TWELFTH SCHEDULE –IMPROVEMENT WORKS**

Improvement works to the Foyer (and works ancillary thereto) at the Orchard Theatre Dartford, as detailed in the Lease.

1. The Authority shall be liable for the costs of implementing the Improvement Works limited to the outturn cost of the Improvement Works, up to £350,000 (three hundred and fifty thousand pounds) (the Capital).
2. The Capital shall be released on a stage payment basis, to be agreed between the parties.