

AGREEMENT BETWEEN:

- (1) [●] (the **Authority**); and
- (2) [●], (registered under number [●]) whose registered office is [●] (the **Contractor**).

WHEREAS

- (A) On [date] 20[●], the Scottish Government placed contract notice [ref] in the Official Journal of the European Union seeking expressions of interest in respect of the establishment of a framework for the contracting of energy efficiency projects at non-domestic public premises in Scotland;
- (B) The Authority invited potential providers (including the Contractor), by [letter] dated [date], to participate in a mini-competition process for the [project description] [at premises description] **(the Project)**;
- (C) The Contractor submitted a tender on [date]. On the basis of this tender, the Authority selected the Contractor [by letter] to [deliver the Project]/[participate in the final stage of the mini-competition process **(the Refinement Stage)**];
- (D) As part of the [delivery of the Project]/[Refinement Stage], it is necessary for the Contractor to carry out and complete the Development Work (as hereinafter described). The Authority wishes the Contractor to undertake the Development Work on the terms and conditions set out in this Agreement.

NOW IT IS HEREBY AGREED as follows:

**1. DEFINITIONS AND INTERPRETATION**

- 1.1 In this Agreement, unless the context otherwise requires, the following words and expressions shall have the following meanings:

**“Authority Policies”** means [insert relevant references on a project specific basis];

**“Authority Facilities”** means any land, buildings or other structures, facilities and amenities and all supporting infrastructure occupied, owned or used by the Authority which is relevant to the delivery of the Project;

**“Commencement Date”** means [insert date of commencement of the Refinement Stage of the mini-competition];

**“Delivery Agreement”** means the [refer to the EnPC agreement, the template form of which is included as Schedule 5 to the Framework Agreement, as issued by the Authority for the purposes of the mini-competition process];

**“Development Work”** means an energy audit and (to the extent appropriate) a facilities survey of the Authority Facilities, including the documenting of the same, the scope of which shall be agreed between the parties but shall at a minimum cover the following: [to be completed on project specific basis including reference to the definitions of Investment Grade Audit and Investment Grade Proposal and the measurement and verification proposals, in line with the terms of the mini-competition process];

**“Development Work Fee”** means [note – fees and costs must relate to the amounts committed to within the Framework Agreement and within any ITMC Proposal prepared by the Contractor as part of the mini-competition process. These costs must be fixed amounts for defined periods, to give cost certainty to an Authority];

**“Investment Grade Audit”** means an audit exercise undertaken by the Contractor comprising the following *[to be completed on a project specific basis]* and in accordance with the investment grade audit specification forming Schedule Part 1 to this Agreement;

**“Investment Grade Proposal”** means a proposal from the Contractor comprising the following: *[to be completed on a project specific basis, but always to (i) include/reflect the Measurement and Verification Plan Specification, the Investment Grade Audit Specification and the commercial proposal of the Contractor, (ii) be prepared in a form capable of incorporation into the Contractor’s Proposals which will form part of Schedule 6 to the Delivery Contract and (iii) be legally enforceable and not subject to qualifications and/or caveats];*

**“ITMC Proposal”** means *[the Contractor’s tender]. [It will provide sufficient data, analysis and ranges of potential solutions in a format specified in the ITMC to enable the Authority to select the Most Economically Advantageous Tender. This could include the Bidders’ high level commercial offers of Guaranteed Energy Cost Performance; Contract Sum; Net Present Value; Project Plan; an outline Measurement and Verification Plan; and the cost of carrying out the Investment Grade Proposal (subject to the maximum fixed fee values agreed under the Framework Agreement) and, in the case of DBFM contracts, the Annual Payment and Contract Term];*

**“Long Stop Date”** means [●];

**“Measurement and Verification Plan Specification”** means the measurement and verification specification forming Schedule Part 2 to this Agreement;

**“Term”** means the term of this Agreement as determined in accordance with Clause 2;

- 1.2 This Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:
- 1.2.1 headings and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement;
  - 1.2.2 except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule to this Agreement and references to Sections, Appendices and attachments (if any) are references to Sections, Appendices and attachments to or contained in this Agreement;
  - 1.2.3 the Schedules and Attachments (if any) to this Agreement are integral parts of this Agreement and a reference to this Agreement includes a reference to the Schedule and the Attachments (if any);
  - 1.2.4 words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisation having legal capacity;
  - 1.2.5 where the context so requires words importing the singular only also include the plural and vice-versa and words importing the masculine shall be construed as including the feminine or neuter or vice-versa;
  - 1.2.6 save where stated to the contrary, references to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement

concerning amendments to agreements or documents) a reference to the agreement or document as amended, supplemented, substituted, novated or assigned;

- 1.2.7 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;
- 1.2.8 references to a public organisation (other than the Authority) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both of the relevant functions and relevant responsibilities of such public organisation;
- 1.2.9 references to other persons, other than the Authority and the Contractor, shall include their successors and assignees;
- 1.2.10 the words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed *contra proferentum*;
- 1.2.11 reference to “parties” means parties to this Agreement and references to a “party” means one of the parties to this Agreement;
- 1.2.12 in construing this Agreement, the rule known as *ejusden generis* shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word “other” or “including” or “in particular” shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.

## **2. TERM**

- 2.1 This Agreement shall enter into force on the Commencement Date and shall continue (unless terminated earlier in accordance with its terms) until either:
  - 2.1.1 the date on which the Authority and the Contractor enter into the Delivery Agreement, in circumstances where, following the completion of the Development Work, the Authority determines to enter into the Delivery Agreement; or
  - 2.1.2 it is determined, pursuant to Clause 6.4, that the Authority and the Contractor shall not enter into the Delivery Agreement, either following the completion of or during the course of the Development Work.

## **3. DEVELOPMENT WORK**

- 3.1 The Contractor shall undertake the Development Work in accordance with [*reference the programme submitted by the Contractor as part of the mini-competition process, or developed by the Contractor within an agreed timescale under the terms of this agreement, which must include specific dates for the carrying out of the IGA and the submission of the IGP*].
- 3.2 As part of the Development Work the Contractor shall undertake the Investment Grade Audit, shall produce the Investment Grade Proposal and shall, subject to Clause 6.4, develop the Investment Grade Proposal pursuant to such further discussions with the Authority as may be appropriate.

- 3.3 The Contractor shall carry out the Development Work;
  - 3.3.1 with all reasonable skill, care and diligence;
  - 3.3.2 in accordance with all applicable laws, consents, regulations and Good Industry Practice;
  - 3.3.3 in a manner that is not likely to be injurious to health or to cause damage to property; and
  - 3.3.4 in accordance with the Authority Policies.
- 3.4 The Contractor shall ensure that all staff, and all staff of any subcontractors of any tier, shall have a level of qualification, training and experience which is commensurate with their role in the undertaking of the Development Work.
- 3.5 The Contractor shall not, and shall procure that any subcontractors of any tier shall not, carry out as part of the Development Work any modifications, improvements or installations to the Authority Facilities nor make any intrusions of a material nature to any building fabric, control systems or utilities conduits without, in any case, the express written consent of the Authority.
- 3.6 The Contractor shall not, and shall procure that any subcontractors of any tier shall not, cause during the course of the Development Work any damage to the Authority Facilities or to any equipment or structures contained on or within such premises. In the event that any such damage is caused, the Contractor shall, at the Authority's option, either make good such damage or replace any damaged items at its sole expense or shall reimburse the Authority for any costs and/or expenses reasonably incurred by the Authority in repairing such damage or replacing any damaged items.

#### **4. ACCESS TO AUTHORITY FACILITIES**

- 4.1 Subject to the provisions of this Clause 4, the Contractor shall be entitled to enter the Authority Facilities solely for the purposes of carrying out its obligations under this Agreement.
- 4.2 The Contractor's entitlements under Clause 4.1 shall be exercised in accordance with [*refer to access schedule setting out proposed timings and locations*]. Without prejudice to the foregoing, the Contractor shall be obliged to mitigate the impact of its exercise of such entitlements upon the provision of Authority's functions and services at the Authority Facilities.
- 4.3 The Contractor shall ensure that any employees or agents engaged at the Authority Facilities, and any employees or agents of any subcontractors of any tier who are so engaged, shall conduct themselves in a responsible manner and shall follow such reasonable instructions as may be given to them by Authority members of staff. The Contractor shall immediately remove, or procure the removal of, any such agent or employee from the Authority Facilities at the request of the Authority (which request may, for the avoidance of doubt, be made at the Authority's sole discretion).

#### **5. INFORMATION**

- 5.1 [*consider on a project specific basis whether the Authority should be obliged to provide any information to the Contractor in support of its carrying out of the Development Work and, if so, on what basis that information is to be provided. It should be assumed as a baseline that no warranty of accuracy is given and that any obligation upon the Authority is subject to any relevant provisions of the Framework Agreement, including with respect to confidentiality. If*

*the provision of information is separately covered as part of the terms of the mini-competition process, then this clause may not be required]*

## **6. SUBMISSION OF INVESTMENT GRADE PROPOSAL**

- 6.1 The Contractor shall submit to the Authority the Investment Grade Proposal by the date specified in *[insert reference to relevant part of programme referred to in clause 3.1]*. Any failure of the Contractor to submit the Investment Grade Proposal in accordance with the timescale specified in this Clause 6.1 shall be deemed, for the purposes of Clause 8.1 of this Agreement, to be a material breach of this Agreement.
- 6.2 If it is determined by the Authority, acting reasonably, that the Investment Grade Proposal as submitted pursuant to Clause 6.1 is not complete, including as to content and scope, or is otherwise not in accordance with the requirements of this Agreement, the Authority shall within [14] days after the date of such submission notify the Contractor, such notification to include a reasonable level of detail as to the reasons for the Authority's determination. Within [14] days of receipt of the Authority's notification, the Contractor shall resubmit an updated Investment Grade Proposal in which the Contractor, acting in good faith, shall have sought to address to a reasonable degree of detail the reasons given by the Authority in making its said determination.
- 6.3 The Contractor shall procure that the Investment Grade Proposal which is submitted to the Authority pursuant to Clause 6.1, including as resubmitted pursuant to Clause 6.2 if relevant, is of a standard as would be reasonably expected of a consultant providing similar services as the Contractor.
- 6.4 The Authority shall, following consideration of the Investment Grade Proposal as submitted pursuant to this Clause 6, be entitled, at its sole discretion, to:
- 6.4.1 determine that the Authority and the Contractor shall not enter into the Delivery Agreement.
  - 6.4.2 seek to engage in further discussions with the Contractor with respect to the terms of the Investment Grade Proposal so submitted, with a view to entering into the Delivery Contract.

## **7. PAYMENT**

- 7.1 In the event that:
- 7.1.1 either following the completion of or during the course of the Development Work, it is determined by the Authority, pursuant to Clause 6.4, that the Authority and the Contractor shall not enter into the Delivery Agreement; or
  - 7.1.2 the Authority and the Contractor have not entered into the Delivery Contract by the Long Stop Date and there is no reasonable prospect of them entering into the Delivery Contract within a reasonable period of time following the Long Stop Date,
- the Authority shall, unless the parties agree otherwise and subject to Clause 7.2, be liable to pay to the Contractor the Development Work Fee.
- 7.2 The Authority shall not be liable to pay the Development Work Fee in the following circumstances:
- 7.2.1 The Contractor has submitted an Investment Grade Proposal pursuant to Clause 6 which does not equal or improve upon the position set out in the ITMC Proposal;

7.2.2 *[to be considered on a project specific basis. It should be assumed as a baseline that the fee would not be paid where clauses 6.3, 8.1 or 8.2 apply].*

7.3 Where Clause 7.1 applies, the Contractor shall provide the Authority with an invoice for the Development Work Fee and the Authority shall pay such invoice within 30 days of receipt.

7.4 In the event of late payment of the Development Work Fee the Contractor shall be entitled to charge interest on the amount outstanding at an annual rate of [ %] above *[base rate]*, such interest accruing daily from the date on which the payment became due until the actual date of payment.

7.5 If the Authority and the Contractor enter into the Delivery Contract on or before the Long Stop Date, the Authority will not be liable to pay the Contractor the Development Work Fee, rather consideration for the Contractor carrying out the Development Work shall be incorporated into the *[reference to contract payments]* to be payable by the Authority to the Contractor under the Delivery Contract. For the avoidance of doubt, any such consideration as is incorporated into the *[reference to contract payments]* under the Delivery Contract shall be of a financial value which is fully consistent with the commitments made by the Contractor pursuant to the *[reference the Framework Agreement or high level audit commitments to mirror the definition of "Development Work Fee"]* and shall, where appropriate, be assessed on an open book basis.

## **8. TERMINATION**

8.1 Either party may terminate this Agreement, by serving notice on the other party with immediate effect, if that other party materially breaches any provision of this Agreement and, if such breach is capable of remedy, that other party has not remedied the breach within [14] days (or such longer period as may be agreed).

8.2 The Authority may terminate this Agreement by serving written notice on the Contractor with immediate effect if *[reference any relevant circumstances included within Framework Agreement such as insolvency]*.

8.3 The Authority may terminate this Agreement at any time by giving [●] days' written notice to the Contractor.

8.4 *[Consider on a project specific basis, and in light of the terms of the relevant mini-competition, whether any compensation would be due by one or other party in the event of a termination of this Agreement pursuant to this Clause 8. It should be assumed as a baseline that no compensation is due by either party for a termination of this Agreement other than where the Authority terminates this Agreement on the basis of Clause 8.3, in which case payment shall be due to the Contractor on the basis of Clause 7 as if the Authority had notified the Contractor that it does not wish to enter into the Delivery Agreement with the Contractor. Such payment would require to be capped to relevant framework commitments and, so far as appropriate, to actual, verified time and cost reasonably incurred]*

## **9. FRAMEWORK AGREEMENT**

9.1 *[Consider on project specific basis which provisions of the Framework Agreement should apply to this agreement mutatis mutandis, for example in respect of indemnity, PI/EL insurance and disputes]*

## **10. NO WAIVER**

- 10.1 Any relaxation, forbearance, indulgence or delay (together indulgence) of any party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right (whether against that party or any other person).
- 10.2 Notwithstanding any breach of this Agreement by either party, and without prejudice to any other rights which the other party may have in relation to it, the other party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

## **11. NO AGENCY**

- 11.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and the Contractor.
- 11.2 Save as expressly provided otherwise in this Agreement, the Contractor shall not be, or be deemed to be, an agent of the Authority and the Contractor shall not hold itself out as having authority or power to bind the Authority in any way.

## **12. ENTIRE AGREEMENT**

- 12.1 Except where expressly provided otherwise in this Agreement, this Agreement, and the [*reference to Framework Agreement*], constitute the entire agreement between the parties in connection with its subject matter and supersede all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.
- 12.2 Each of the parties acknowledges that:
- 12.2.1 it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and
- 12.2.2 this Clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

## **13. THIRD PARTY RIGHTS**

- 13.1 Save to the extent expressly provided in this Agreement and, to avoid doubt, without prejudice to the rights of any permitted successor to the rights of Contractor or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement upon any person other than the Authority and the Contractor and without prejudice to the generality of the foregoing, there shall not be created by this Agreement a *jus quaesitum tertio* in favour of any person whatsoever.

#### **14. SEVERABILITY**

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

#### **15. AMENDMENTS**

- 15.1 This Agreement may not be varied or amended except by an agreement in writing signed by duly authorised representatives of both parties.

#### **16. FURTHER ASSURANCE**

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

#### **17. GOVERNING LAW AND JURISDICTION**

- 17.1 This Agreement shall be considered as a contract made in Scotland and shall be subject to the laws of Scotland.
- 17.2 The parties agree that the courts of Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

IN WITNESS WHEREOF these presents typewritten on this and the preceding [●] pages together with the Schedule in [●] Parts are executed by the parties hereto as follows:

*[signing blocks]*

*[Schedule parts, if needed]*

Schedule Part 1 - Investment Grade Audit Specification

Schedule Part 2 - Measurement & Verification Plan Specification