

**AGREEMENT**

among


**DUMFRIES & GALLOWAY COUNCIL**

and

**E4 D&G PROJECT CO LIMITED**

and

**EC HARRIS LLP**

**Burness** 

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## AGREEMENT

between

**DUMFRIES AND GALLOWAY COUNCIL**, a local authority constituted and incorporated under the Local Government etc Scotland Act 1994 acting in its capacity as both education authority under the Education (Scotland) Act 1980 and as authority responsible for recreational and social activities in terms of the Local Government & Planning (Scotland) Act 1982 and having its principal offices at English Street, Dumfries DG1 2DD ("**the Authority**"); and

**E4 D&G PROJECT CO LIMITED**, (company registered number 330921) whose registered office is at The Sherard Building, Edmund Halley Road, Oxford, Science Park, Littlemore, Oxford, Oxfordshire OX4 4DQ ("**the Contractor**"); and

**EC HARRIS LLP**, a limited liability company (registered number OC304988) and having its registered office at ECHQ, Regent Quarter, 34 York Way, London, N1 9AB ("**the Independent Certifier**")

### WHEREAS:-

- (A) The Authority and the Contractor have entered into the Project Agreement for among other matters the provision of the Schools.
- (B) The Contractor has subcontracted certain obligations under the Project Agreement to the Building Contractor.
- (C) The Project Agreement requires the Authority and the Contractor to jointly appoint the Independent Certifier.
- (D) The Contractor wishes the administration of the Building Contract to be consistent with decisions to be taken under the Project Agreement.
- (E) This Agreement sets out the terms upon which the Independent Certifier is appointed.

IT IS THEREFORE AGREED as follows:-

## 1 DEFINITIONS AND INTERPRETATION

### 1.1 In this Agreement:-

- |                                 |  |
|---------------------------------|--|
| <b>"Acceptance Certificate"</b> | has the meaning given to it in the Project Agreement;  |
| <b>"Agent"</b>                  | has the meaning given to it in the Project Agreement;  |
| <b>"Building Contract"</b>      | means the building contract of even date to this Agreement between the Contractor and the Building Contractor for the design and |

	construction of the Schools;
<b>"Building Contractor"</b>	means an unincorporated joint venture consisting of Farrans Construction Limited (Co. no. NI001654) whose registered office is at 99 Kingsway, Dunmurry, Belfast, BT17 9NU, H.&J. Martin Limited (Co. no. R000273) whose registered office is at 163 Ormeau Road, Belfast, BT7 1SP and David Patton & Sons (NI) Limited (Co. no. NI050897) whose registered office is at Greenmount House, Woodside Industrial Estate, Woodside Road, Ballymena, co. Antrim, BT42 4PT;
<b>"Certificate"</b>	means each Acceptance Certificate;
<b>"Collateral Warranty"</b>	means a collateral warranty agreement substantially in the form set out in Schedule Part 4;
<b>"Contractor Additional Fee"</b>	means the amounts payable to the Independent Certifier in consideration of the performance of any Contractor Additional Services;
<b>"Contractor Additional Services"</b>	means any services other than the Joint Services and the Contractor Services which the Independent Certifier performs on behalf of the Contractor pursuant to Clause 6 of this Agreement;
<b>"Contractor Services"</b>	means the services set out in Schedule Part 3 Appendix 1 to this Agreement;
<b>"Counterparty"</b>	means:- (a) the Authority; and (b) the Contractor;
<b>"Director"</b>	means the person named in Schedule 1 or such replacement person appointed in accordance with Clause 4.2;
<b>"Documents"</b>	means all technical information (whether or not stored in computer systems), drawings, models, bills of quantities, specifications, schedules, details, plans, programmes, budgets, reports, calculations or other documents whatsoever provided or to be provided by the Independent Certifier in connection with the Project;
<b>"External Works Availability Requirements"</b>	has the meaning given to it in the Project Agreement;

<b>“Fee”</b>	means the amounts stated in Schedule Part 2 payable to the Independent Certifier in consideration of the performance of the IC Services set out in Schedule Part 3;
<b>“FM Contractor”</b>	means Amey Business Services (Co. no. 0254794) registered office The Sherard Building, Edmund Halley Road, Oxford, OX4 4DQ;
<b>“Funding Agreements”</b>	means the funding agreements between, amongst others, the Lenders and the Contractor;
<b>“Grass Playing Fields Availability Requirements”</b>	has the meaning given to it in the Project Agreement;
<b>“IC Services”</b>	means all the services to be performed by the Independent Certifier in connection with the Project as set out in Schedule Part 3 and the body of this Agreement including any Contractor Additional Services;
<b>“Interim Acceptance Certificate”</b>	has the meaning given to it in the Project Agreement;
<b>“Interim Service Availability Requirements”</b>	has the meaning given to it in the Project Agreement;
<b>“Interim Works Area”</b>	has the meaning given to it in the Project Agreement;
<b>“Interim Works Area Snagging List”</b>	has the meaning given to it in the Project Agreement;
<b>“Joint Services”</b>	means the services set out in Schedule 3 to this Agreement to be carried out in relation to the Project Agreement;
<b>“Lenders”</b>	has the meaning given to it in the Project Agreement;
<b>“Party”</b>	means a party to this Agreement;
<b>“Project Agreement”</b>	means the agreement so designated dated on or around today’s date (including any variation or replacement of such agreement from time to time) entered into between the Authority and the Contractor;
<b>“Required Time”</b>	has the meaning given to it in the Project Agreement;

<b>“Schedule”</b>	means the schedule forming part of this Agreement in six parts; and
<b>“Services Availability Requirements”</b>	has the meaning given to it in the Project Agreement.

1.2 Save where the context otherwise requires:-

- 1.2.1 the clause headings in this Agreement are for the convenience of the Parties only and do not affect its interpretation;
- 1.2.2 words importing the singular meaning include the plural and *vice versa*;
- 1.2.3 words denoting the masculine gender include the feminine and neuter genders and words denoting natural persons include corporations and firms and all such words shall be construed interchangeably in that manner;
- 1.2.4 references in this Agreement to a **“person”** include any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency or unincorporated body of persons or association and a reference to a person includes a reference to that person’s successors, permitted transferees and assigns and any person with whom they may at any time amalgamate;
- 1.2.5 reference in this Agreement to a Clause or Schedule or Appendix are to a Clause or Schedule or Appendix of this Agreement unless otherwise specified;
- 1.2.6 reference in this Agreement to any statute or statutory instrument includes and refers to any statutory amendment or re-enactment thereof from time to time and for the time being in force;
- 1.2.7 reference in this Agreement to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.8 terms used in this Agreement that are defined in the Project Agreement shall have the meanings given to them in the Project Agreement save where otherwise expressly defined herein;
- 1.2.9 reference in this Agreement to the words **“includes”** or **“including”** are to be construed without limitation.

## 2 APPOINTMENT OF INDEPENDENT CERTIFIER

- 2.1 The Authority and the Contractor hereby jointly appoint the Independent Certifier and the Independent Certifier hereby agrees to perform the IC Services in accordance with the terms of this Agreement.

- 2.2 The Authority and the Contractor shall act in good faith towards the Independent Certifier at all times.

### **3 INDEPENDENT CERTIFIER'S DUTIES**

- 3.1 The Independent Certifier acknowledges that each of the Counterparties is relying and will continue to rely on the professional skill and care of the Independent Certifier required pursuant to Clause 3.6 in the performance of the IC Services and that he owes a duty of care to each of the Counterparties in relation to all aspects of the IC Services. For the avoidance of doubt, the Counterparties agree that nothing in this clause shall affect their respective rights, remedies and obligations under the Project Agreement and that for the purposes of the Project Agreement (but without prejudice to the Independent Certifier's duty of care to each of the Counterparties in respect of the IC Services as a whole) when performing the Contractor Services, the Independent Certifier is acting for and on behalf of the Contractor and not the Authority.
- 3.2 Where, in the performance of the IC Services, the Independent Certifier is required or entitled to exercise a discretion as between the Parties or the Counterparties and any third party, the Independent Certifier shall at all times act objectively and impartially and shall in no circumstances place the interests of any one party above those of any other party including any third party.
- 3.3 Where, in the performance of the IC Services, the Independent Certifier seeks or is obliged to seek the approval or agreement of the Counterparties to any matter or issue, the giving or confirming of the same shall not in any way derogate from the Independent Certifier's obligations under this Agreement nor diminish any liability on his part for breach of such obligations and no enquiry, inspection, comment, consent, decision or instruction at any time made or given by or on behalf of the Counterparties or either of them (whether in writing or otherwise) shall operate to exclude or limit the obligations of the Independent Certifier to exercise all the reasonable skill, care and diligence required by Clause 3.6 or to comply with the obligations contained in this Agreement.
- 3.4 All instructions to the Independent Certifier shall be agreed jointly by the Counterparties.
- 3.5 The Independent Certifier shall comply with all reasonable instructions given to it by the Counterparties except and to the extent that the Independent Certifier reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Agreement or prejudices or might prejudice the exercise by the Independent Certifier of its professional judgement in accordance with Clauses 3.1, 3.6 and 3.7. The Independent Certifier shall promptly confirm in writing to the Counterparties whether or not it intends to comply with such instruction and in the event that the Independent Certifier objects, the grounds for such objection.
- 3.6 The Independent Certifier warrants to each of the Counterparties jointly and severally that he has exercised and will continue to exercise, in the

performance of the IC Services all the reasonable skill, care and diligence as may reasonably be expected of a suitably qualified and competent professional experienced in providing services similar to the IC Services.

- 3.7 The Independent Certifier further warrants to each of the Counterparties severally that in the provision of the IC Services he will comply with all legislation and, without limiting the generality of the foregoing, have due and proper regard to:-

3.7.1 the CDM Regulations; and

3.7.2 the Approved Code of Practice "Managing Health & Safety in Construction" produced by the Health & Safety Executive as amended from time to time; and

3.7.3 shall comply with all lawful and reasonable directions, instructions or requests relating to or in pursuance of the same given or made by and/or on behalf of the Contractor, the Building Contractor and/or the Authority whilst the Independent Certifier is present on any of the Sites and/or the Adjoining Property.

- 3.8 The Counterparties shall procure that the Independent Certifier has all such access to the Sites as he may reasonably require for the purposes of carrying out the IC Services and all purposes ancillary or related to this Agreement.

- 3.9 In the performance of the IC Services the Independent Certifier shall have full regard to any relevant requirements and/or obligations of the Project Agreement, the Building Contract, the Funding Agreements and the FM Agreement and shall perform the IC Services in such manner and at such times that no act, omission or default of the Independent Certifier in relation thereto shall constitute or cause any breach by the Authority and/or the Contractor of any such requirements and/or obligations contained in the Project Agreement and/or the Building Contract and/or the FM Agreement and/or the Funding Agreements provided always that this shall not extend the obligations of the Independent Certifier under this Agreement beyond the standard of skill, care and diligence set out in Clause 3.6 hereof.

- 3.10 Without prejudice to Clause 3.9:-

3.10.1 the Independent Certifier shall (as a Joint Service) liaise and co-operate with the Counterparties and the Building Contractor and provide each of them with all such information in relation to the Project and as part of the IC Services as they together may from time to time reasonably require promptly and in good time so as not to delay or disrupt the progress of the Project or cause the Counterparties to be in breach of any of their respective obligations under the Project Agreement and the Building Contract;

3.10.2 The Independent Certifier shall (as a Joint Service) in respect of each Project Facility following receipt of the certified copy of the Certificate of Service Availability, Certificate of External Works Availability or Certificate of Grass Playing Field Availability, (as the case may be) pursuant to Clause 21.4 of the Project Agreement



and provided that the Independent Certifier acting reasonably is satisfied that:-

3.10.2.1 in relation to the relevant Project Facility (excluding the External Works and the Grass Playing Fields) the Service Availability Requirements have been met; (b) in relation to the relevant item of External Works, the External Works Availability Requirements have been met; and (c) in relation to the relevant Grass Playing Fields, the Grass Playing Fields Availability Requirements have been met as the case may be; and

3.10.2.2 all outstanding Works detailed in the Snagging List (excluding seeded areas, in respect of which Clause 21.8.7 of the Project Agreement shall apply) are capable of being carried out within the Required Time,

then the Independent Certifier shall, within 5 Business Days, issue an Acceptance Certificate in respect of the relevant Project Facility (excluding the External Works and Grass Playing Fields), the relevant item of External Works or the relevant Grass Playing Field as the case may be. If the Independent Certifier declines to issue an Acceptance Certificate, and the Counterparties decide to repeat the procedure set out in this clause 3.10.2 the Counterparties shall notify the Independent Certifier as such within 5 Business Days and the provisions of this Clause 3.10.2 shall apply to that repeated procedure.

3.10.2A The Independent Certifier shall, as soon as practicable following the issue by the Independent Certifier of the Acceptance Certificate in respect of the final Project Facility, (provided that the Contractor has complied with its obligations to remedy any works listed in the Snagging List) issue a final Acceptance Certificate to the Contractor.

3.10.2B The Independent Certifier shall (as a Joint Service) in respect of each Project Facility following receipt of notice from the Contractor to inspect the Interim Works Area pursuant to Clause 21A.1 of the Project Agreement and provided that the Independent Certifier acting reasonably is satisfied that:-

3.10.2B.1 that the Interim Works Availability Requirements have been met; and

3.10.2B.2 all outstanding Works detailed in the Interim Works Area Snagging Works are capable of being carried out within the Required Time;

then the Independent Certifier shall, within five (5) Business Days, issue an Interim Works Acceptance Certificate in respect of the Interim Works Area. If the Independent Certifier declines to issue an Interim Works Acceptance Certificate, and the Counterparties decide to repeat the procedure set out in this clause 3.10.2B the Counterparties shall notify the Independent Certifier as such

within five (5) Business Days and the provisions of this Clause 3.10.2B shall apply to that repeated procedure.

- 3.10.3 the Independent Certifier shall (as a Joint Service) have due regard to any written representations made to it by either the Authority and/or the Contractor and/or the Building Contractor and/or the FM Contractor, (the party making the representation having previously sent the other parties a copy), in respect of any matter connected with the IC Services and, in particular, the achievement of completion of any part of the Works;
- 3.10.4 nothing in Clause 3.10.1 or Clause 3.10.3 shall in any way fetter the decision of the Independent Certifier as to its obligations under Clause 3.10.2;
- 3.10.5 the Independent Certifier shall (as a Joint Service) provide copies of all Certificates issued by Independent Certifier under the Project Agreement to each of the Counterparties forthwith upon their issue;
- 3.10.6 (as a Contractor Additional Service) having regard to any written representations made pursuant to Clause 3.10.3 the Independent Certifier shall provide a professional view to both the Contractor and the Authority on any matters within the Independent Certifier's professional expertise regarding the cause of and mitigation of Works Compensation Events in an effort to facilitate an agreement between the Counterparties as to the effect of the Work Compensation Events. For the avoidance of doubt, any such view expressed shall have no effect under the Project Agreement;
- 3.10.7 (as a Contractor Additional Service) having regard to any written representations made pursuant to Clause 3.10.3 the Independent Certifier shall provide a professional view to both the Contractor and the Authority on any matters within the Independent Certifier's professional expertise regarding the cause of and mitigation of Relief Events or Force Majeure Events in an effort to facilitate an agreement between the Counterparties as to the effect of Relief Events or Force Majeure Events. For the avoidance of doubt, any such view expressed shall have no effect under the Project Agreement;
- 3.10.8 for the avoidance of doubt, the Independent Certifier shall only be required to establish whether the Service Availability Requirements and/or External Works Availability Requirements and/or Grass Playing Field Requirements (as the case may be) have been met in accordance with the Project Agreement to the extent possible for a consultant carrying out the IC Services and exercising the standard of skill, care and diligence set out in Clause 3.6;
- 3.10.9 the Independent Certifier shall have no liability in delict to any of the Counterparties. This Agreement sets out the full extent of the rights, duties and liabilities of the Independent Certifier to the

Counterparties except where such liability arises in relation to the exceptions contained in Clause 22.1 of the Project Agreement;

- 3.10.10 the Independent Certifier shall only be liable under this Agreement in respect of claims which are notified to the Independent Certifier before the expiration of the period of twelve (12) years from the date of completion of all of the IC Services under the terms of this Agreement;
- 3.10.11 the Independent Certifier shall not have any authority to and shall not make or purport to make any alteration or addition to or omission from the design of the Project (including, without limitation, the setting of performance standards) or (save to the extent expressly provided in this Agreement) issue any instruction or direction to the Contractor, the Building Contractor, any member of the Professional Team or any other contractor, subcontractor or professional consultant employed or engaged in connection with the Project and shall not have any authority to and shall not consent or agree to any waiver or release of any obligation, right, remedy, recourse or responsibility of any party under the Project Agreement, the Building Contract, the FM Agreement or of any contract pursuant to which any contractor, subcontractor or professional consultant is employed or engaged by any party to the Project Agreement, in connection with the Project;
- 3.10.12 the Counterparties may, by joint notice in writing to the Independent Certifier suspend all or part of the activities of the Independent Certifier for a period previously agreed or determined by the Counterparties;
- 3.10.13 not used;
- 3.10.14 the Contractor may, by notice in writing to the Independent Certifier copied to the Authority, suspend all or part of the Contractor Services and the Contractor Additional Services for a period previously agreed or determined by the Contractor;
- 3.10.15 the Independent Certifier shall on the date of this Agreement enter into Collateral Warranty agreements in favour of:
  - 3.10.15.1 the Agent;
  - 3.10.15.2 the Building Contractor; and
  - 3.10.15.3 the FM Contractor.

#### **4 INDEPENDENT CERTIFIER'S PERSONNEL**

- 4.1 The Independent Certifier shall forthwith appoint the Director to direct and control the overall performance by the Independent Certifier of the IC Services and act as the primary contact and liaison with the Counterparties. Such person or any replacement approved by the Counterparties pursuant to Clause 4.2 from time to time shall have full authority to act on behalf of the Independent Certifier for all purposes in connection with this Agreement.

- 4.2 The Independent Certifier shall not replace the Director nor any person approved by the Counterparties pursuant to this Clause 4.2 without the prior approval of the Counterparties (which approval shall not be unreasonably withheld or delayed) as to the fact and identity of such replacement and if such approval is given the identity of the replacement must be previously approved in writing by the Counterparties.

## 5 REMUNERATION

- 5.1 In full consideration of the performance of the IC Services in accordance with this Agreement, the Independent Certifier shall be entitled to be paid:-

5.1.1 the Fee; and

5.1.2 the Contractor Additional Fee (if any),

in accordance with this Clause 5. For the avoidance of doubt, the Fee and any Contractor Additional Fee are inclusive of all disbursements including travel, photocopying, printing and accommodation, save as expressly provided in Schedule Part 2 but exclusive of any applicable Value Added Tax and payment thereof shall (for the avoidance of doubt subject to Clause 6) constitute full reimbursement to the Independent Certifier of all costs, losses, expenses, overheads or profits suffered, incurred or earned, as the case may be, by the Independent Certifier in respect of the performance of its obligations under this Agreement whenever they may be performed.

- 5.2 The Independent Certifier may submit invoices to the Contractor no more frequently than once a month and at the address set out in and marked for the attention of the person identified in Schedule Part 1 Part 2:-

5.2.1 for the Fee in the instalments and the times provided for in Schedule Part 2 on or after the occurrence of the event allocated to that instalment (with a copy to the Authority);

5.2.2 for the amount of any Contractor Additional Fee valued in the manner agreed between the Contractor and the Independent Certifier at the time that the Contractor Additional Service is instructed and agreed between them and provided that the Independent Certifier shall specify in the invoice the Additional Contractor Services to which the Contractor Additional Fee relates.

- 5.3 Not used.

- 5.4 Any sum properly included in an invoice submitted under and in accordance with this Clause 5, shall become due on the date twenty eight (28) days before the end of the month following the month in which the invoice is received by the Contractor ("**the Due Date for Payment**").

- 5.5 The final date for the making of any payment of any sum due pursuant to this Agreement shall be twenty eight (28) days after the sum becomes due under the terms of this Agreement ("**the Final Date For Payment**"). Subject to Clause 5.6, the Contractor may (without prejudice to any other right or remedy which the Contractor may have under or arising from or pursuant to this Agreement, any other agreement or statute, at common law or otherwise)

deduct or withhold from any money otherwise due to the Independent Certifier under or pursuant to this Agreement any sum or sums for which the Independent Certifier is liable to the Contractor under, arising from or pursuant to this Agreement, or statute, at common law or otherwise.

- 5.6 Not later than five (5) days after the Due Date for Payment or the date on which any sum becomes due or would have become due to the Independent Certifier pursuant to this Agreement if:-

5.6.1 the Independent Certifier had carried out his obligations under this Agreement; and

5.6.2 no set-off or abatement was permitted by reference to any sum claimed;

the Contractor shall give notice to the Independent Certifier specifying the amount (if any) of the payment made or proposed to be made and the basis on which that amount is calculated.

- 5.7 If the Contractor intends to withhold payment of any sum due to the Independent Certifier under this Agreement pursuant to Clause 5.5, the Contractor shall give the Independent Certifier a notice not later than four (4) days prior to the Final Date For Payment of that sum specifying:-

5.7.1 the amount proposed to be withheld and the ground for withholding payment; or

5.7.2 if there is more than one ground, each ground and the amount attributable to it.

- 5.8 The Contractor shall be liable to pay to the Independent Certifier any applicable VAT properly chargeable by the Independent Certifier in respect of the Fee and the Contractor Additional Fee (if appropriate).

- 5.9 Amounts agreed by the Contractor to be paid to the Independent Certifier on a time basis shall subject to any other agreement be paid at the rates shown in Schedule Part 2. For the avoidance of doubt any endorsement by a Counterparty of the time and personnel of the Independent Certifier occupied in the provision of any service shall not constitute an agreement to make a payment upon a time basis.

- 5.10 For the avoidance of doubt, the Authority shall not be obliged to make any payment to the Independent Certifier pursuant to this Agreement.

## **6 ADDITIONAL SERVICES**

- 6.1 The Independent Certifier shall perform such Contractor Additional Services as the Contractor may from time to time instruct in writing (with copies to the other Counterparty) and which the Independent Certifier (acting reasonably) may agree to perform provided always that such Contractor Additional Services do not conflict with and/or prejudice the Services, the Contractor Services, the Joint Services and/or any previously agreed Contractor Additional Services.

- 6.2 Not used.

- 6.3 For the avoidance of doubt the Contractor acknowledges that performance of the following obligations shall constitute the Contractor Additional Services:-
- 6.3.1 the service referred to in Clause 3.10.6; or
  - 6.3.2 the service referred to in Clause 3.10.7.
- 6.4 The Fee or (as the case may be) the Contractor Additional Fee shall be increased by a fair and reasonable amount in the event that the amount of work to be done by the Independent Certifier in performing any part of the IC Services is increased due to:-
- 6.4.1 changes to the Project Agreement or Building Contract after the date of this Agreement;
  - 6.4.2 delays or extensions to the programme for the Project; or
  - 6.4.3 instructions by the Counterparties (including but not limited to instructions to suspend and/or recommence work).
- 6.5 Subject to the provisions of Clause 5.7, if the Contractor fails to pay the Fee and if any, the Contractor Additional Fee or any part thereof, due to the Consultant by the Final Date For Payment the Contractor shall pay, in addition to the amount not properly paid, simple interest thereon for the period until such payment is made. The rate of interest payable shall be 2.5% over the base rate of The Bank of England which is current at the date the payment by the Contractor became overdue.

## **7 PROFESSIONAL INDEMNITY INSURANCE**

- 7.1 Without prejudice to its other obligations under this Agreement or otherwise at law, the Independent Certifier confirms that it has and shall maintain at all times with reputable insurers or underwriters carrying on business within the European Union from the commencement of IC Services and for a period expiring no earlier than twelve (12) years after the completion of all of the IC Services and notwithstanding the termination for any reason of the Independent Certifier's engagement under this Agreement, professional indemnity insurance on market standard terms with a limit of indemnity of not less than £10,000,000 in respect of each and every claim or series of claims consequent upon or attributable to the same cause or original source (but such limit may apply in aggregate in any year of insurance in relation to claims arising out of pollution and/or contamination and/or date recognition and with a limit of indemnity of not less than £250,000 in aggregate in any year of insurance in respect of asbestos related claims) for liabilities which may arise under this Agreement, provided always that such insurance continues to be available to it in the European Union insurance market upon reasonable terms and at commercially reasonable premium rates and (for the avoidance of doubt) provided further that for the purposes of this Clause 7.1 and clause 7.3 payment of any increased or additional premiums and any terms required by insurers by reason of the Independent Certifier's own claims record or other acts omissions matters or things peculiar to the Independent Certifier will be deemed to be reasonable terms and/or commercially reasonable premium rates as applicable.

- 7.2 As and when he is reasonably required to do so, the Independent Certifier shall produce for inspection by any Counterparty documentary evidence that the insurance required by Clause 7.1 is being properly maintained subject to the same not constituting a breach of the terms of such insurance.
- 7.3 The Independent Certifier shall forthwith notify the Counterparties if the insurance required by Clause 7.1 ceases to be available upon reasonable terms and at commercially reasonable premium rates and (in this event) shall continue to maintain insurance upon such terms and with such a limit of indemnity as may then be so available upon reasonable terms and at commercially reasonable rates.
- 7.4 The Independent Certifier shall not compromise, settle or waive any claim which it may have under such insurance in respect of any professional liability which it may incur under this Agreement without the prior written consent of the Counterparties.

## **8 CONFIDENTIALITY**

- 8.1 The Independent Certifier shall not, at any time during the period of his engagement hereunder (save in the proper course of his duties or as may be required by law or any regulatory authority) and at any time after its expiry or termination for any reason, disclose to any person nor otherwise make use of any confidential information (including, but without limitation, the provisions of the Project Agreement and/or any Project Document and/or the Funding Agreements, information relating to methods and techniques of construction for the Project and financial information relating to the Project) of which he has or may in the course of his engagement hereunder become aware relating to the Project, any of the Counterparties or otherwise, nor shall he disclose to any person whatsoever (save as aforesaid or to his insurance or professional advisers) anything contained in this Agreement, without the prior written consent of the Counterparties.
- 8.2 The Independent Certifier shall comply with its obligations under the DPA and other applicable law in respect of such data.
- 8.3 This Clause 8 does not restrict the Independent Certifier's use of information which is in the public domain (otherwise than due to a breach of this Clause 8 by the Independent Certifier) or which came to the Independent Certifier otherwise than in relation to its appointment as Independent Certifier for the Project.

## **9 ASSIGNATION AND SUBCONTRACTING**

- 9.1 The Independent Certifier shall not assign or transfer any interest in or obligations under in this Agreement to any person without the prior consent of the Counterparties and only then on terms expressly approved by the Counterparties and subject to the Independent Certifier's obligations under this Agreement remaining in full force and effect.
- 9.2 The Independent Certifier shall not, without the prior consent (which shall not be unreasonably withheld) of the Counterparties to the identity and terms of appointment of any sub-consultant, sub-contract to any person the

performance of any of the IC Services and where the Counterparties give consent to the Independent Certifier subcontracting any of its duties pursuant to this Clause 9.2:-

- 9.2.1 the Independent Certifier shall be responsible for the breaches acts omissions negligence or other default of any sub-consultant its agents or employees appointed by the Independent Certifier as fully as if they were the breaches, acts, omissions, negligence or other defaults of the Independent Certifier its agents or employees and such sub-contracting shall not affect the liabilities and/or obligations of the Independent Certifier under this Agreement and/or at law or otherwise; and
  - 9.2.2 no sub-contracting by the Independent Certifier shall affect the Fee or any Contractor Additional Fee; and
  - 9.2.3 each of the Counterparties may at any time assign, charge or transfer its respective interests, benefits and obligations in this Agreement (as a whole and not in parts) and all its rights arising hereunder (whether or not accrued) to any person upon notice to the Independent Certifier provided that not more than two such assignments shall be permitted by any one Counterparty provided further that any assignment of this Agreement (including any assignment by way of security and/or subsequent reassignment) to the Agent and any subsequent assignment to any successor or replacement of the Agent shall not be counted as an assignment for the purposes of the limit on the number of permitted assignments under this Clause 9.2.3.
- 9.3 The Independent Certifier shall not at any time assert that any permitted assignee, in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement on the part of the Independent Certifier by reason that such assignee, is not an original party to this Agreement or that no loss has been suffered by the assignor, or a different loss has been suffered by such assignee, than that suffered by the assignor.

## **10 TERMINATION OF INDEPENDENT CERTIFIER'S ENGAGEMENT BY COUNTERPARTY**

- 10.1 In the event of the insolvency of the Independent Certifier or a material breach by the Independent Certifier of its obligations under this Agreement which it shall fail to remedy after receiving a twenty eight (28) day notice in writing from the Contractor or the Authority (on behalf of the other Counterparty and having first obtained the consent of the other Counterparty such consent not to be unreasonably withheld or delayed) specifying the breach and requiring its remedy, the Contractor or the Authority (on behalf of the other Counterparty and having first obtained the consent of the other Counterparty to do so such consent not to be unreasonably withheld or delayed), may then by a further twenty one (21) days notice in writing to the Independent Certifier terminate the Independent Certifier's engagement under this Agreement.



- 10.2 Either the Contractor or the Authority, on behalf of the other Counterparty and having first obtained the consent of the other Counterparty (such consent not to be unreasonably withheld or delayed), may by notice in writing bring to an end the performance of any divisible part of the IC Services.

**11 TERMINATION OF INDEPENDENT CERTIFIER'S ENGAGEMENT BY INDEPENDENT CERTIFIER**

- 11.1 In the event that any one or more of the Counterparties fails to make a payment of any undisputed sum due pursuant to this Agreement by the Final Date for Payment which breach it or they, as appropriate, shall fail to remedy after receiving a twenty eight (28) day notice in writing from the Independent Certifier (such notice to be copied simultaneously to both Counterparties) specifying the breach and requiring its remedy, the Independent Certifier may then by a further notice in writing to the Counterparties (subject to Clause 13) terminate its engagement under this Agreement twenty eight (28) days from the date of receipt by the Counterparties of such notice unless the breach referred to in the first notice has been remedied by any one or more of the Counterparties before the expiry of the twenty eight (28) days notice period.

**12 CONSEQUENCES OF TERMINATION OF INDEPENDENT CERTIFIER'S ENGAGEMENT**

- 12.1 Upon any notice of termination of the Independent Certifier's engagement served under Clause 10 or Clause 11, the Independent Certifier shall take such steps as are necessary or reasonably desirable such that by the end of the 21 days notice period the IC Services have been brought to an end in an orderly manner but with all reasonable speed and economy and that there has been delivered to the Counterparties or any person nominated by them copies of all Documents, reports, minutes of meetings and other documents prepared or in the course of preparation by the Independent Certifier in connection with the Project and (in the event that a replacement firm has been appointed to complete the performance of the IC Services) shall co operate fully with such replacement to the extent that it is reasonable to do so.
- 12.2 If the Independent Certifier's engagement under this Agreement is terminated (save other than for any act omission, negligence or other default of the Independent Certifier), the Contractor shall (subject to any withholdings, deductions or set-offs which they are entitled to make and to Clauses 12.3, 12.4 and 12.5) pay to the Independent Certifier such parts of the Fee and Contractor Additional Fee which shall have accrued due prior to the date of such termination less the amount of any payments in respect of the same previously paid to the Independent Certifier.
- 12.3 Upon any termination of the Independent Certifier's engagement howsoever arising, the Counterparties shall not be liable, save as is exclusively set out in Clause 12.2, to the Independent Certifier for any further sums whether in respect of loss of profit, loss of contracts or other costs, losses and/or expenses arising out of or in connection with such termination.
- 12.4 Termination of the Independent Certifier's engagement howsoever arising shall, subject to Clause 12.3, be without prejudice to the rights and remedies

of any Party in relation to any omission, negligence, act or other default of any other Party prior to such termination.

- 12.5 The provisions of this Agreement shall continue to bind each Party insofar as and for as long as may be necessary to give effect to their respective rights and obligations under this Agreement.

### **13 STEP IN PROVISIONS**

- 13.1 The Independent Certifier shall not exercise nor seek to exercise any right to terminate its engagement under this Agreement or serve a notice terminating its engagement under Clause 11 or to discontinue the performance of the IC Services for any reason whatsoever, including breach on the part of any one or more of Counterparty, without giving to each Counterparty not less than twenty eight (28) days notice in writing of its intention to do so and specifying the grounds for the proposed termination or discontinuance together with details of any sums due under this Agreement which have not yet been paid.

- 13.2 Any period stipulated in this Agreement for the exercise by the Independent Certifier of a right of termination shall be extended as necessary to take account of the period of notice required under Clause 13.1.

- 13.3 The Independent Certifier's right to terminate its engagement under this Agreement or to discontinue the performance of the IC Services shall cease if, within the period of twenty eight (28) days referred to in Clause 13.1, any Counterparty not in breach of this Agreement shall give notice to the Independent Certifier:-

13.3.1 requiring it to continue the performance of the IC Services;

13.3.2 acknowledging that it is assuming all the obligations of the other Counterparty which is in breach under this Agreement; and

13.3.3 undertaking to the Independent Certifier to discharge all payments which may subsequently become due to the Independent Certifier under this Agreement and paying to the Independent Certifier any sums which have already become due but which remain unpaid.

- 13.4 On compliance by any Counterparty with Clause 13.3, this Agreement shall continue in full force and effect as if the right of termination or discontinuance on the part of the Independent Certifier had not arisen and on the basis that all references in this Agreement to either and/or both Counterparties shall thereafter be read and construed as references to the Counterparty complying with Clause 13.3.

- 13.5 Where a Counterparty has given notice in compliance with Clause 13 and has given an undertaking pursuant to Clause 13.3.3 and has assumed responsibility under this Agreement in accordance with Clause 13.4 the Counterparty in breach shall reimburse and indemnify the other Counterparty against each and every liability which that other Counterparty may have to the Independent Certifier by virtue of such undertaking and assumption of responsibility and against any claims, demands, proceedings, damages, costs and expenses sustained, incurred or payable by that other Counterparty as a

consequence thereof insofar as and to the extent that the same has arisen by reason of any breach by such Counterparty of its obligations under this Agreement.

#### **14 VARIATION, WAIVER AND ENTIRE AGREEMENT**

- 14.1 All additions, amendments and variations to this Agreement shall be binding only if in writing and signed by the duly authorised representative of each Party.
- 14.2 No waiver by any Party of any default or defaults by any other Party in the performance of any of the provisions of this Agreement shall operate or be construed as a waiver of any other or further default or defaults whether of a like or different character.
- 14.3 This Agreement supersedes any previous agreement or arrangement made with the Independent Certifier by either or both of the Counterparties in respect of the IC Services (whether oral or written) and (but without prejudice to or derogation from the respective rights, responsibilities, remedies, recourse and obligations of the Counterparties to each other pursuant to the Project Agreement) represents the entire understanding between the Counterparties and the Independent Certifier in relation thereto. For the avoidance of doubt as between the Counterparties, in the event of any ambiguity or discrepancy between the provisions of this Agreement and the provisions of the Project Agreement, the provisions of the Project Agreement shall prevail.
- 14.4 Notwithstanding the date of this Agreement, it shall have effect as if it had been executed upon the actual commencement of the IC Services by the Independent Certifier.
- 14.5 This Agreement is for the sole benefit of the Parties. Without prejudice to the rights of the Agent, the Building Contractor and the FM Contractor under Cause 3.10.15 this Agreement, and save where expressly provided for in this Agreement no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party against any Party to this Agreement.

#### **15 DOCUMENTS**

- 15.1 To the extent that copyright in the Documents is vested in the Independent Certifier it shall remain vested in the Independent Certifier and subject thereto the Independent Certifier hereby grants to each Counterparty an irrevocable non exclusive royalty free licence with full title guarantee (for the avoidance of doubt such licence to remain in full force and effect notwithstanding determination of the Independent Certifier's appointment for whatever reason or any dispute under this Agreement) to copy and use the Documents and to reproduce the works designs and inventions contained in the Documents for all purposes related to the Project including but without limitation the construction completion reconstruction alteration extension maintenance letting promotion advertisement reinstatement use and repair of the Project or the Counterparties' interests in it (but so that such licence shall not extend to or include a licence to reproduce the designs contained in them

for any extension of the Schools) and each Counterparty shall be entitled to grant sub-licences on terms equivalent to the provision of this Clause 15.1 and the Counterparty's licence and such sub-licence shall be transferable to other persons without charge provided always that the Independent Certifier shall not be liable for the consequences of any use of the Documents by the Counterparties or such other persons for any purpose other than that for which they were prepared and provided by the Independent Certifier.

- 15.2 The Independent Certifier shall provide to the Counterparties at their request in such manner and form as is reasonably requested such additional copies of all or any of the Documents as are reasonably required by the Counterparties beyond those required for the construction and completion of the Project and shall provide such additional information and co-operation as is reasonably required in connection with the same.
- 15.3 Where any rights are vested in the Independent Certifier by virtue of Chapter IV (Moral Rights) of Part 1 of the Copyright Designs and Patents Act 1988 the Independent Certifier hereby irrevocably waives any such rights in relation to the Project or any part thereof and to any Documents and shall obtain a written waiver from its employees from time to time of any rights that they may have in respect of the same.

## **16 CUMULATIVE RIGHTS AND ENFORCEMENT**

- 16.1 Any rights and remedies provided for in this Agreement whether in favour of the Counterparties or the Independent Certifier are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.
- 16.2 The duties and obligations of the Independent Certifier arising under or in connection with this Agreement arise to the Counterparties jointly and severally (save where expressly provided otherwise) and the Counterparties may accordingly enforce the provisions of this Agreement and pursue the prospective rights under this Agreement in their own name, whether separately or with each other.
- 16.3 The Counterparties covenant with each other that they will not waive any rights, remedies or entitlements or take any other action under this Agreement that would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other Counterparty without the other Counterparty's prior written consent, such consent not to be unreasonably withheld or delayed.

## **17 SEVERABILITY**

- 17.1 If any provision of this Agreement shall be declared invalid, unenforceable or illegal, such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability or legality of the remaining provisions of this Agreement.

## **18 NOTICES**

### **18.1 Form and Service of Notices**

All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class post, facsimile, by hand, by e-mail or any other electronic communication, or leaving the same at:-

<b>Contractor</b>	<b>Authority</b>	<b>Independent Certifier</b>
E4D&G Project Co Limited The Sherard Building, Edmund Halley Road, Oxford Science Park, Littlemore, Oxford OX4 4DQ	Dumfries and Galloway Council Smarter Schools PPP Project Office 24 Nith Place Dumfries DG1 2PN	Partner EC Harris LLP Baskerville House Centenary Square Birmingham B1 2ND
Fax:	Fax:	Fax:

### **18.2 Change of Details**

Any Party may change its nominated address, email address or facsimile number by prior notice to the other Party.

### **18.3 Effectiveness of Notices**

18.3.1 Except as provided below, any communication in connection with a Finance Document will be deemed to be given as follows:-

18.3.1.1 if delivered in person, at the time of delivery;

18.3.1.2 if posted, five (5) days after being deposited in the post, postage prepaid, in a correctly addressed envelope; and

18.3.1.3 if by fax, when received in legible form; and

18.3.1.4 if by e-mail or any other electronic communication, when received in legible form.

18.3.2 A communication given under paragraph 18.3.1 above but received on a day which is not a Business Day or after business hours in the place of receipt will only be deemed to be given on the next Business Day.

## **19 GOVERNING LAW**

19.1 Subject to Clause 20, the Scottish courts shall have jurisdiction to settle any dispute which may arise out of or in connection with this Agreement.

19.2 This Agreement shall be governed by and construed in all respects in accordance with the laws of Scotland.

## 20 ADJUDICATION

20.1 Any dispute or difference arising under this Agreement or in connection therewith may be referred by either the Independent Certifier or any of the Counterparties to adjudication in accordance with the adjudication procedure contained in the Project Agreement *mutatis mutandis*.

20.2 Any notice of adjudication to be served on the Independent Certifier shall be served on \_\_\_\_\_, Group Solicitor, EC Harris LLP, ECHQ, Regent Quarter, 34 York Way, London N1 9AB with copies to Fishburns, 61 St Mary Axe, London EC3A 8AA, the solicitors to the Independent Certifier's insurers and the Director.

20.3 In the event of a dispute or difference arising under or in connection with this Agreement which in the opinion of either Counterparty relates to a dispute or potential dispute arising under or in connection with any other agreement between the Contractor, and/or the Authority, and a third party, ("**Related Dispute**") and where the Related Dispute has been referred to an adjudicator for determination under an adjudication procedure which in all material respects is equivalent to the adjudication procedure referred to in Clause 20.1 hereof either Counterparty may at its absolute discretion request the adjudicator appointed for the Related Dispute to consolidate or determine concurrently with the Related Dispute the dispute or difference arising under or in connection with this Agreement.

20.4 In the event that a dispute or difference under this Agreement has already been referred to an adjudicator pursuant to the procedure referred to in Clause 20.1 hereof either Counterparty may at its absolute discretion request of the said adjudicator that a Related Dispute be consolidated with or heard concurrently with the said dispute or difference under this Agreement.

## 21 LIABILITY

- 21.1 Save in relation to death or personal injury, wilful default or fraud, the Independent Certifier's non-compliance with the relevant law or third party claims arising against the Authority and the Contractor (as the case may be) arising in delict and/or in respect of a breach of statutory duty by the Independent Certifier, the liability of the Independent Certifier under this Agreement shall be limited to the sum of £10,000,000 in respect of each and every claim.
- 21.2 Save in respect of reasonably foreseeable losses arising under the Project Agreement, the Building Contract and the FM Agreement the Independent Certifier shall have no liability in respect of loss of profit, loss of business opportunity, loss of goodwill or consequential or economic losses.
- 21.3 Any claim of any kind arising out of or in connection with this Agreement, shall be brought only against the Independent Certifier, EC Harris LLP. No claims in respect of this Agreement will be brought against any of the partners or employees of the Independent Certifier.

IN WITNESS WHEREOF these presents consisting of this and the preceding 20 pages together with the Schedule in five parts annexed hereto are executed as follows:-

SUBSCRIBED for and on behalf of  
the said DUMFRIES AND GALLOWAY COUNCIL

at Edinburgh  
on 7 JANUARY 2008

by \_\_\_\_\_  
Print Full Name

\_\_\_\_\_  
Authorised Signatory

before

\_\_\_\_\_  
Print Full Name

\_\_\_\_\_  
Witness

Address c/o PRINCES EXCHANGE  
1 EARL GREY ST.  
EDINBURGH

SUBSCRIBED for and on behalf of  
the said E4 D&G PROJECT CO LIMITED  
under a Power of Attorney dated

at Edinburgh  
on 7 JANUARY 2008

by \_\_\_\_\_  
Print Full Name

\_\_\_\_\_  
Attorney

\_\_\_\_\_  
Print Full Name

\_\_\_\_\_  
Witness

Address  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
BURNES LLP  
50 LOTHIAN ROAD  
FESTIVAL SQUARE  
EDINBURGH EH3 9WJ  
Tel. No 0131 473 6000  
\_\_\_\_\_

SUBSCRIBED for and on behalf of  
the said EC HARRIS LLP

at BIRMINGHAM OFFICE  
on 20TH DECEMBER 2007

by \_\_\_\_\_  
Print Full Name

\_\_\_\_\_  
Member

\_\_\_\_\_  
Print Full Name

\_\_\_\_\_  
Member/~~Witness~~

Address  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



This is the Schedule referred to in the foregoing Agreement among Dumfries and Galloway Council, E4 D&G Project Co Limited, and EC Harris LLP

## **SCHEDULE PART 1 - CONTACT DETAILS FOR PAYMENT**

### **Part 1 – Independent Certifier**

Associate:

Telephone:

Direct line :

Mobile:

Switchboard: +44 (0) 121 503 7200

Fax:

Fax: +44 (0) 121 503 7201

E-mail:

@echarris.com

### **Part 2 – Contractor**

General Manager:

Telephone:

Fax:

E-mail:

@amey.co.uk

### **Part 3 – Authority**

Director:

Telephone:

Fax:

E-mail:

@dumgal.gov.uk

## SCHEDULE PART 2 – INVOICING

### 1 Details for Submission of Invoices

Invoices shall be submitted no more frequently than monthly and shall include a breakdown of the instalments by reference to the events set out in this Schedule Part 2. The invoices must also be valid for the recovery of VAT.

### 2 Instalments in Respect of the Fee

The Independent Certifier may apply for instalments in respect of the Fee no earlier than and in no greater amounts than as detailed below (Fees below are exclusive of VAT):-			

### 3 Independent Certifier Fee Proposals

Assumed (30) months overall programme.

		Familiarisation meetings/document review & Days/ Months		Day Rate	No. of Months	Man Days	Fee
Month	1	Familiarisation					
	2						
	3						
	4						
	5						
	6						
	7						
	8						
	9						
	10						
	11						
	12						
	13						
	14						

		Familiarisation meetings/document review & Days/ Months		Day Rate	No. of Months	Man Days	Fee
	15						
	16						
	17						
	18						
	19						
	20						
	21						
	22						
	23						
	24						
	25						
	26						
	27						
	28						
	29						
	30						

## **SCHEDULE PART 3 – SERVICES**

### **Scope of Services - Independent Certifier Contract**

The Independent Certifier shall perform the role of “Technical Adviser” as referred to in Clause 21 (including complying with any time limits specified in such Clauses) of the Project Agreement, by providing the following scope of Services:

#### **1 QUARTELY REPORT AND COMPLETION CERTIFICATION**

The Independent Certifier shall:

- 1.1 During the Works, provide the Authority and the Contractor with a quarterly report on the activities carried out by the Independent Certifier.
- 1.2 Undertake regular inspections during the Works , as necessary, in accordance with any periods set out in the Project Agreement and report on the completion status of the Project, identifying any work that is not compliant with the Authority’s Requirements, the Contractor’s Proposals, the Reviewable Design Data, the Service Availability Requirements and/or the External Works Availability Requirements and/or the Grass Playing Fields Availability Requirements and/or Interim Works Availability Requirements (as the case may be).
- 1.3 Determine whether any relevant phase is finished or complete in accordance with the Service Availability Requirements and/or External Works Availability Requirements and/or the Grass Playing Fields Availability Requirements and/or Interim Works Availability Requirements (as the case may be) and advise the Contractor and the Authority of the need for any re-testing which may be necessary to demonstrate whether a relevant phase of the Project is finished or complete.
- 1.4 Certify the relevant completion date and issue an Acceptance Certificate in accordance with the Project Agreement.
- 1.5 Comply with its obligations in relation to Snagging List in Clause 21 and Interim Works Area Snagging List in Clause 21.A4 of the Project Agreement.
- 1.6 Review the Snagging List and the Interim Works Snagging List and advise the Contractor and the Authority as appropriate.

And in order to enable the Independent Certifier to discharge these primary functions which are to be performed independently, fairly and impartially to and as between the Contractor and the Authority and having regard to the

interests of Senior Lender, the Independent Certifier shall discharge the further duties described below.

## **2 GENERAL**

The Independent Certifier shall:

- 2.1 Familiarise itself with the Project Agreement (including the Design Data, and any Authority Change or Contractor Change issued from time to time and any other relevant documentation or information referred to in the Project Agreement, relevant Authority's Requirements, Contractor's Proposals and the Building Contract to the extent necessary to be in a position to carry out the Services in accordance with the terms of the Project Agreement and this Appointment.
- 2.2 Following notification by the Contractor, pursuant to Clause 21 or 21A.1 of the Project Agreement, inspect and comment as required on the Works as required by the Project Agreement and the Service Availability Requirements and/or the External Works Availability Requirements and/or the Grass Playing Fields Availability Requirements and/or the Interim Works Availability Requirements (as the case may be).

## **3 DESIGN REVIEW**

- 3.1 For the avoidance of doubt, nothing in this paragraph 3 or elsewhere in this Appointment shall impose any design liability on the Independent Certifier, and any design liability shall remain with the parties responsible for such design under the Project Agreement. The Services required under this paragraph 3 shall be supervisory in nature and shall not require the Independent Certifier to approve (or otherwise) the suitability of the design under the Project Agreement.
- 3.2 The Independent Certifier shall:
  - 3.2.1 Monitor and report upon the implementation of the Quality Plan as provided for in the Building Contract for the construction, structural and engineering services design for the Project
  - 3.2.2 Monitor the detailed working drawings and specifications for a sample number and type of rooms which in his professional judgment is appropriate to be selected by the Independent Certifier to verify that they comply with the Approved RDD Item as described in the Project Agreement. The Independent Certifier has indicated that in normal circumstances twenty-five percent (25%) of rooms should be sampled. If in the professional judgment of the Independent Certifier, because of the results of its sample or other circumstances a different sampling percentage is appropriate, he shall provide a detailed report in respect of that and, if so agreed (or determined as between the Contractor and the Authority by the Dispute Resolution Procedure) any change in the percentage sampling resulting in a change in fees will be borne by the Contractor.

- 3.2.3 Review the detailed design information for any approved design or specification variations for compliance with the performance and quality standards of the Project Agreement and quality standards as set out in the Quality Plan as provided for in the Building Contract.

#### **4 PROCEDURE REVIEW**

The Independent Certifier shall:

- 4.1 Monitor the operation of the quality assurance procedures of the Building Contractor at regular intervals (maximum three (3) months) during the execution of the Works.
- 4.2 The Independent Certifier shall familiarise itself with the proposed procedures and programmes for the testing and commissioning of any mechanical and electrical engineering services prior to the Authority's occupation.
- 4.3 Monitor the procedures for the identification, approval and recording of agreed Changes to the Works in accordance with the Project Agreement.
- 4.4 Review any samples or mock ups and check that they have been approved in accordance with the Project Agreement.

#### **5 CONSTRUCTION REVIEW**

The Independent Certifier shall:

- 5.1 Visit each Site (monthly) and monitor the Works for their compliance with the Authority's Requirements, the Contractor's Proposals and the Approved RDD. The Building Contractor shall agree a programme with the Independent Certifier for the inspection of key construction processes and the completed phases of the Works and shall give the Independent Certifier advance notice of these Works being carried out on Site. The compliance testing of the construction works is based on a 50% sample of rooms for each school to be agreed with the Contractor and Authority. The Independent Certifier shall identify any aspect of the Works which needs to be inspected before being covered over by subsequent activity so that he may satisfy himself that these have been constructed in accordance with the Project Agreement and the Quality Plan referred to in the Building Contract without the need for opening up.
- 5.2 Randomly check that the Works are being undertaken in accordance with the Quality Plan referred to in the Building Contract. .
- 5.3 Review the written mechanical and electrical engineering services testing and commissioning procedure. Undertake selective witnessing of the mechanical and electrical services testing and commissioning. The Independent Certifier has indicated that these sampling proportions should amount to approximately twenty five percent (25%). The Independent Certifier shall review one hundred percent (100%) of all test results. If in the professional

## **APPENDIX 1 - ADDITIONAL SERVICES RELATING TO BUILDING CONTRACT ONLY**

The terms of this appointment will apply equally in respect of any additional service(s) *mutatis mutandis*, save that:-

- 1     there shall be no duty of care to the Authority and any references to the Authority shall be deemed to be deleted; and
- 2     payment for such service(s) shall be made in accordance with the following rates recoverable on a time related basis:

Partner

Associate

Senior Consultant

Consultant

The above fees are exclusive of VAT and disbursements.

Note the rates will be subject to indexation increases in annual inflation from April 2007 in line with the RPIX Index

judgment of the Independent Certifier, because of the results of witnessing (or because of other circumstances) a different sampling percentage is appropriate he shall provide a detailed report in respect of that and any change in the percentage sampling resulting in a change of fees will be borne by the Contractor.

- 5.4 Inspect rectification works which have previously prevented the Independent Certifier from certifying the Project as complete. Concurrent with the issue of the relevant Acceptance Certificate, agree a Snagging List and Interim Works Area Snagging List with the Contractor and comply with Clause 21 and 21A.1 of the Project Agreement.
- 5.5 Check the production of the relevant operating manuals, relevant approvals, test results, inspection records and as built drawings and monitor the timely handover of this documentation.
- 5.6 Interim Certificates for Stranraer Secondary will be as in accordance with the phasing programme issued to EC Harris LLP under separate cover.

## **6 PARTICIPATION IN DISPUTE RESOLUTION**

As and when required by the Authority or the Contractor, the Independent Certifier shall participate in the Dispute Resolution Procedure of the Project Agreement (as such term is defined in the Project Agreement) to the extent that issues under the Project Agreement which have been referred to the said Dispute Resolution Procedure relate to the Independent Certifier's other obligations and tasks as set out in this Schedule Part 3 and this Appointment. If the participation of the Independent Certifier is required under this clause, the Independent Certifier shall be entitled to be paid on hourly rates (as identified in Appendix 1 )for services in connection with Dispute Resolution.