

[PARTY 1]

and

[PARTY 2]

## CONCESSION CONTRACT

Public EV Charging Infrastructure in [ ● ]

[Boilerplate Drafting – Schedules (including most substantive/commercial provisions) undrafted. **Yellow highlight** and drafting notes/comments indicates where particular elements will need to be completed on a project-specific basis recognising that various elements of the template may required further development to reflect a given project.]

### Version Control – Initial Draft, Clean -20.07.23

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## CONCESSION CONTRACT

between

- (1) [PARTY 1] (the “Authority”); and
- (2) [PARTY 2] (the “Concessionaire”)

(together, the “Parties”)

### WHEREAS:

(A) This Concession Contract is a public concession services contract [in accordance with the Concession Contracts (Scotland) Regulations 2016] and, accordingly, the Authority[, together with [●]] (together with the Authority, the “Authorities”), have [has] procured the Concessionaire to carry out the Services (as defined below), the consideration for which consists in the right to exploit the Services;

(B) [The Authorities are entering into, on or around the date of signing of this Concession Contract, an Inter-Authority Agreement under which the Authority has been appointed “Lead Authority” (as defined within the Inter-Authority Agreement) and thus is responsible for the operation and management of this Concession Contract; and]

(C) The Concessionaire has agreed to provide the Services for the [Authority/Authorities] in accordance with the terms and conditions of this Concession Contract.

IT IS AGREED as follows:

## 1 DEFINITIONS AND INTERPRETATION

1.1 In this Concession Contract:

[“Above Ground Equipment” means [●]]

“Authority Contact” means [●] or such other individual as shall be notified to the Concessionaire from time to time;

“Authority Default” means where the Authority:

- (a) fails to provide the Concessionaire with access to any Site for a continuous period of [●];
- (b) fails to pay any agreed sum owed under this Concession Contract for a period of [●]; or

**Commented [BurnPaull1]:** *Drafting Note*

Template assumes related value thresholds will apply

**Commented [BurnPaull2]:** *Drafting Note*

The remainder of this document assumes that only one authority is procuring the concession, and does not refer to a lead authority or other authorities. Where multiple authorities have procured the concession, they will need to consider how best to adapt this template to reflect that. Paying particular attention to:

- Handover / Exit Management
- Leases
- Authority warranties

One way to adapt this template to include multiple authorities would be to include a recital such as the one proposed here. If a group of Authorities are looking to collaborate on EVI procurement, SFT have a template Inter-Authority Agreement available which can be used.

Another would be to include each Authority as a separate party to the Contract.

**Commented [BurnPaull3]:** *Drafting Note*

It’s foreseen that “below ground” equipment will be covered by installation works, and will be the property of the Authority as it is an improvement to the Authority-owned Sites. This is the case because it’s foreseen that Authorities will be able to source electricity at a centrally procured electricity rate if they own the below-ground equipment.

This can be covered by the specification of Existing Equipment, New Equipment and Installation Works in parts 2, 4 and 8 of the Schedule. However, Authorities may wish to use this defined term to make explicit in the front-end of the Contract that only this is included within “Equipment”.

(c) commits a material breach of this Concession Contract which has not been remedied in accordance with Clause 35 or, in the reasonable opinion of the Concessionaire, is not capable of remedy;

**“Capital Grant”** means [ ● ];

**“Collateral Agreements”** means the agreements which are collateral and supplementary to this Concession Contract listed in Part 19 of the Schedule.

**“Commencement Date”** means [the last date of signing of this Concession Contract];

**“Compensation Event”** has the meaning given in Part 18 of the Schedule;

**“Concessionaire Contact”** means [ ● ] or such other individual as shall be notified to the Authority from time to time;

**“Concession Fee”** means the fixed fee to be paid by the Concessionaire to the Authority for use of and access to the Existing Equipment and the Sites as detailed in Part 1 of the Schedule;

**“Concession Period”** means the period from the Commencement Date to [ ● ] (inclusive) [and includes the period of any extension or continuation agreed by the parties in accordance with Clause 13];

**“Conditions of Contract”** means Clauses 1 to 44 of this Concession Contract;

**“Critical KPI Failure”** [has the meaning given in Part 12 of the Schedule];

**“Data Protection Legislation”** means all laws relating to personal data protection and privacy, which are from time to time applicable in the UK, including the Data Protection Act 2018 and any subordinate legislation made under such Acts from time to time together with any binding guidance and/or codes of practice issued by the Information Commissioner, or relevant government department in relation to such legislation;

**“Default”** means any breach of the obligations of the Concessionaire under this Concession Contract, or any default, act, omission or negligence of the Concessionaire, or any Representative in connection with, or in relation to the subject matter of the Concession Contract;

**“Dispute”** means any dispute, claim or difference between the Parties arising out of or relating to this Concession Contract;

**“Equipment”** means the Existing Equipment and the New Equipment;

**“Existing Equipment”** means the [A/a]bove [G/g]round [E/e]quipment owned by the Authority immediately before the Commencement Date detailed in Part 2 of the Schedule;

**Commented [BurnPaull4]:** *Drafting Note*

Intended to detail any associated Transport Scotland grant funding being provided (and if needs be related conditions) to the Authority for the project.

It's anticipated that this will cross-refer to the Installation Programme set out in Part 9 of the Schedule (e.g. – the grant will become payable in instalments when X, Y and Z number of chargers have been installed)

**Commented [BurnPaull5]:** *Drafting Note*

Fee intended to contribute towards/cover associated costs, expenses incurred by the Authority / Lead Authority in relation to set up and ongoing management of the concession arrangement

**Commented [BurnPaull6]:** *Drafting Note*

Authorities should consider if this should be included. This would essentially be a highest-ranking KPI which equates to a Material Default (so can result in termination)

**Commented [BurnPaull7]:** This assumes that any amendments to the carriageway, carpark, lamppost, or pavement and the provision of any local connection assets (DNO works and meter installation) will form part of the Installation Works but when complete will either be adopted by the Authority or the DNO as appropriate.

The Authority should be clear in Schedule Part 11 - Specification of the Services who is responsible for maintaining any infrastructure that does not form part of the Existing or New Equipment (e.g. signage, lighting, CCTV, bay markings, grounds maintenance, etc.)

**“Exit Management Plan”** means the plan to be carried out by the Concessionaire as specified in Part 21 of the Schedule.

**“Force Majeure Event”** means war, natural flood, exceptionally adverse weather conditions, strike or lockout (other than a strike or lock-out which is limited to the Concessionaire), civil disorder, Act of God, pandemic, epidemic, power cuts or delays or other wholly exceptional events outside the control of the parties which could not have reasonably been foreseen or avoided;

**“Freedom of Information Legislation”** means all laws relating to personal data protection and privacy, which are from time to time applicable in Scotland, including the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 and any subordinate legislation made under such Acts from time to time together with any binding guidance and/or codes of practice issued by the Scottish Information Commissioner, or relevant government department in relation to such legislation;

**“Good Industry Practice”** means all standards, practices, methods and procedures conforming to all Enactments and the 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 and conditions;

**“Gross Turnover”** means the total amount of all sums of money and the value of any other consideration received or receivable for all:

- (a) goods sold, hired, leased or otherwise disposed of;
- (b) services sold or performed; and
- (c) business of whatever nature carried out;

in whole or in part at, in, from or relating to the Sites, the Installation Works or the Services by the Concessionaire or any other person;

**“Handover Date”** means the date set for the conclusion of the Handover Process, as detailed in Part 3 of the Schedule;

**“Handover Process”** means the process relating to the transfer of the Existing Equipment to the Concessionaire at the beginning of the Concession Period as detailed in Part 3 of the Schedule;

**“Improvement Plan”** means a written programme for remedying a Default arising as a consequence of a KPI Failure in accordance with Clause 12.2, specifying in detail the manner in, and the latest date by which, the Concessionaire proposes to remedy the Default;

“**Installation Works**” means the works to be carried out by the Concessionaire as specified in Part 8 of the Schedule;

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

“**Key Personnel**” means [ ● ] or any individual notified to the Concessionaire to be such by the Authority;

“**KPI Failure**” means an instance where the Concessionaire fails to carry out the Services to the standard required by the KPI Framework;

“**KPI Framework**” means the standard to which the Services are to be carried out, and the means by which this will be evaluated, as set out in Part 12 of the Schedule;

“**KPI Points**” means the points attributable to the Concessionaire in the event of any given KPI Failure, as set out in the KPI Framework.

“**Material Default**” means where the Concessionaire:

- (a) commits a Default which has not been remedied in accordance with Clause 34 or, in the reasonable opinion of the Authority, is not capable of remedy;
- (b) commits a **Critical KPI Failure**;
- (c) fails to disclose an instance of Default by not providing the relevant data as required under Clause 11;
- (d) fails to complete the Installation Works by [ ● ];
- (e) commits a Prohibited Act;
- (f) passes a resolution for its winding up or dissolution, 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 the Concessionaire or any person gives or files notice of intention to appoint an administrator or such an administrator is appointed, or the court makes a winding-up order, or the Concessionaire makes a composition or arrangement with its creditors, or an administrator, 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;

**Commented [BurnPaull8]:** *Drafting Note*

This is the individuals that the Authority considers materially important to the Concessionaire’s performance of the contract. The Concessionaire has to notify the Authority of changes to these personnel, which gives vision of the operations to the Authority.

**Commented [BurnPaull9]:** *Drafting Note*

This term (currently undefined) is intended to be a higher threshold than that set out at Clause 12 (for KPI’s escalating to Defaults). Authorities may or may not want for it to be possible for KPIs to escalate directly to Material Default.

**Commented [BurnPaull10]:** *Drafting Note*

This is intended to be a long-stop date (later than an ordinary failure to meet the Installation Works Programme), after which the local authority can terminate.

- (g) is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;
- (h) commits an act which would justify exclusion under Regulation 40 of the Concession Contracts (Scotland) Regulations 2016;
- (i) has provided any information to the Authority at any time prior to the Authority entering into the Concession Contract which proves to be materially untrue or incorrect;

**“Necessary Consents”** means all approvals, certificates, authorisations, permissions, licences, permits, regulations and consents necessary from time to time for the performance of the Installation Works and the Services including, without limitation, all planning permissions;

**“New Equipment”** means the [A/a]bove [G/g]round [E/e]quipment to be provided by the Concessionaire for the purpose of the Services as specified in Part 4 of the Schedule;

**“Parent Company”** means [ ● ];

**“Party Representative”** means, in the case of the Authority, [ ● ] and, in the case of the Concessionaire, [ ● ];

**“Procurement Documents”** means the [Contract Notice dated [ ● ] with reference [ ● ] and the associated Invitation to Tender and the Concessionaire’s submission dated [ ● ]];

**“Prohibited Act”** means the following acts:

- (a) offering (directly or indirectly), promising or giving any person working for or engaged by the Authority a financial or other advantage to: (i) induce that person to perform improperly a relevant function or activity; or (ii) reward that person for improper performance of a relevant function or activity;
- (b) requesting (directly or indirectly), agreeing to receive or accepting any financial or other advantage as an inducement or a reward for improper performance of a relevant function or activity;
- (c) committing any offence: (i) under the Bribery Act 2010; (ii) under any law creating offences concerning fraudulent acts; or (iii) at common law concerning fraudulent acts relating to this Concession Contract or any other contract with the Authority;  
or
- (d) defrauding, attempting to defraud or conspiring to defraud the Authority;

**“Regulation”** means any relevant directives, statutes, regulations, orders, judgments of relevant courts of law, instruments, national and governmental codes of practice or other



similar instruments as the same may be amended, replaced or re-enacted by any subsequent directive, statute, regulation, order, judgment, instrument, code and references to any statute shall also include any secondary legislation made under it and references in this Concession Contract to a specific Regulation shall be construed on this basis;

**“Relief Event”** has the meaning given in Part 17 of the Schedule;

**“Representative”** means any employee, officer, worker, agent or service provider engaged by a Party in connection with this Concession Contract including any Sub-Contractor;

**“Revenue Share”** means the percentage of the Concessionaire’s Gross Turnover to be paid by the Concessionaire to the Authority for the right to exploit the Services as detailed in Part 1 of the Schedule;

**“Service Credits”** means the service credits associated with any KPI Failure as set out in Part 12 of the Schedule, which represent a genuine pre-estimate of the loss (financial or in-kind) sustained by the Authority where the Services are not performed in accordance with the KPI Framework;

**“Services”** means the services to be provided by the Concessionaire as specified in Part 11 of the Schedule;

**“Sites”** means the sites on which the Installation Works and the Services will be carried out detailed in Part 5 of the Schedule with associated plans in Part 6 of the Schedule;

**“Sub-Contract”** means any agreement between the Concessionaire and a Sub-Contractor for the purposes of the Installation Works or the Services;

**“Sub-Contractor”** means the contractors or service providers engaged by the Concessionaire to provide goods, services or works to, for or on behalf of the Concessionaire for the purposes of the Installation Works or the Services;

**“Tariff”** means the rates to be paid by customers for use of the Equipment and the Services, as detailed in Clause 9 and Part 14 of the Schedule;

**“Termination”** has the meaning given at Clause 2.1;

- 1.2 Unless a contrary intention is indicated, words, expressions and interpretational references as set out in the Procurement Documents shall have the same meanings in this Concession Contract.
- 1.3 References to Clauses and the Schedule are to clauses of, and the schedule to, this Concession Contract.
- 1.4 Headings in this Concession Contract are inserted for convenience only and shall be ignored in construing this Concession Contract.

1.5 Any reference in this Concession Contract to a document of any kind whatsoever (including this Concession Contract) is to that document as amended or varied or supplemented or novated or substituted from time to time.

## 2 CONCESSION PERIOD

2.1 This Concession Contract shall come into effect on the Commencement Date and shall continue in force in respect of the Parties until the earliest of the following to occur (such event being the “**Termination**”):

- 2.1.1 the expiry of the Concession Period;
- 2.1.2 the Concession Contract being terminated by a decision of an Adjudicator appointed in accordance with Clause 35;
- 2.1.3 the Concession Contract being terminated as a result of a Force Majeure Event in accordance with Clause 36;
- 2.1.4 the Concession Contract being terminated following an Authority Default or a Material Default in accordance with Clause 37.

2.2 [any provisions around the extension of the Concession Period if required on a project-specific basis]

## 3 FUNDING

3.1 Subject to Clause 3.2, as a concession contract, the Concessionaire will fund all elements of the Installation Works and the Services.

3.2 The Authority will pay the Capital Grant to the Concessionaire in accordance with the terms and conditions set out in Part 1 of the Schedule.

## 4 EQUIPMENT

4.1 The Authority warrants that, as at the date of signing of this Concession Contract, it has title to the Existing Equipment, but provides no warranty as to the condition of the Existing Equipment.

4.2 On the Handover Date, title in the Existing Equipment shall transfer from the Authority to the Concessionaire.

4.3 The Concessionaire and the Authority shall implement the Handover Process in accordance with Part 3 of the Schedule.

4.4 The Concessionaire shall be responsible for providing the New Equipment as specified in Part 4 of the Schedule as necessary to carry out the Installation Works and the Services.

### Commented [BurnPaull11]: Drafting Note

In developing any related procurement process/tender, an Authority should check any existing contractual commitments (such as insurance of the assets, Transport Scotland grant conditions, warranties, servicing plans, etc.), as required, to ensure that they are able to transfer ownership to the Concessionaire.

5 **LEASES**

- 5.1 The Authority warrants that it has title to the Sites as detailed in Part 5 of the Schedule.
- 5.2 The Concessionaire and the Authority shall enter into a lease in substantially the same terms and format as that set out in Part 7 of the Schedule for each of the Sites.
- 5.3 All rights under any lease entered into in accordance with this Clause 5 shall expire on the Termination of this Concession Contract.

6 **INSTALLATION WORKS**

- 6.1 The Concessionaire will carry out the Installation Works:
- 6.1.1 In accordance with all Necessary Consents
- 6.1.2 as specified in Part 8 of the Schedule;
- 6.1.3 in accordance with the Programme set out in Part 9 of the Schedule; and
- 6.2 The Concessionaire's proposal as to how they intend to carry out the Installation Works is set out in Part 10 of the Schedule. The Concessionaire will carry out the Installation Works in accordance with this proposal but, where there is any conflict between Part 8, Part 9 or Part 12 of the Schedule and Part 10 of the Schedule, Part 8, Part 9 and or Part 12 of the Schedule will take precedence.

7 **CONSENTS/PLANNING APPROVAL**

- 7.1 The Concessionaire shall ensure that all Necessary Consents are in place to perform the Installation Works and the Services and the Authority shall not (unless otherwise agreed) incur any additional costs associated with obtaining, maintaining or complying with the same.
- 7.2 Where there is any conflict or inconsistency between the provisions of this Concession Contract and the requirements of a Necessary Consent, then the latter shall prevail.
- 7.3 The Authority warrants that it has Necessary Consents relating to the Existing Equipment and the Sites to the extent detailed in Part 2 and Part 5 of the Schedule.

8 **SERVICES**

- 8.1 The Concessionaire will carry out the Services:
- 8.1.1 in accordance with all Necessary Consents
- 8.1.2 as specified in Part 11 of the Schedule; and

**Commented [BurnPaull12]:** *Drafting Note*

Authorities should be aware in the event of termination that the template Lease requires notice of termination at Clause 9.1

8.1.3 from [●] to the standard set by the KPI Framework in Part 12 of the Schedule.

8.2 The Concessionaire's proposal as to how they intend to carry out the Services is set out in Part 13 of the Schedule. The Concessionaire will carry out the Services in accordance with this proposal but, where there is any conflict between Part 11 or Part 12 of the Schedule and Part 13 of the Schedule, Part 11 and Part 12 of the Schedule will take precedence.

## 9 **TARIFFS**

9.1 For the first year of the Concession Period, the Tariff will be [●].

9.2 The Tariff for each subsequent year of the Concession Period will be set in accordance with the process set out in Part 14 of the Schedule.

## 10 **CONCESSION FEES**

10.1 In consideration of the provision of the Services by the Concessionaire in accordance with the terms and conditions of this Agreement, the Authority hereby grants the Concessionaire the right to exploit the Services.

10.2 The Concessionaire will pay the Concession Fee and the Revenue Share to the Authority in accordance with the terms and conditions set out in Part 1 of the Schedule.

## 11 **RECORDS, MONITORING AND REVIEW**

11.1 The Concessionaire shall provide monthly reports to the Authority, in the form and containing the information set out in Part 15 of the Schedule.

11.2 The Concessionaire shall maintain comprehensive and accurate records in the form and containing the information set out in Part 16 of the Schedule for a minimum of [six years] from the date of Termination.

11.3 The records kept in accordance with Clause 11.2, and such information as the Authority may reasonably request as to the performance of the Concessionaire's obligations under this Concession Contract, shall be supplied to the Authority at no cost or made available to the Authority to access on request.

11.4 The Concessionaire shall permit the Authority, or its nominated auditor, to access the Concessionaire's premises and records:

11.4.1 on no less than 5 working days' notice in order to audit the Concessionaire's performance of this Concession Contract (including but not limited to ensuring the Concessionaire's obligations under Clause 10 have been met), provided that such audit right shall be limited to once in any 12 month period unless an audit within the prior 12 months revealed any discrepancy or gave rise to a Default being registered under the terms of this Concession Contract; or

**Commented [BurnPaull13]:** *Drafting Note*

Authorities should consider the date on which the KPI Framework starts to apply. This could perhaps be the Handover Date or on completion of the Installation Works.

**Commented [BurnPaull14]:** *Drafting Note*

This Clause has deliberately been left minimal as this is a commercial point for each Project. Part 14 of the Schedule should state the tariff regime for AC and DC charging. It may also include details of:

- connection fees
- flexible tariffs
- overstay fees (and their enforcement)

11.4.2 without notice where:

- (a) the Authority has reasonable cause to believe the Concessionaire is in breach of the Health and Safety at Work etc. Act 1974 and of all other regulations pertaining to health and safety which may apply in the performance of the Concession Contract;
- (b) the Authority has reasonable cause to believe that the Concessionaire is committing a Material Defaults; or
- (c) the Authority is under investigation by the Scottish Government, or any other public agency over the deployment of any public funding granted to the Authority.

11.5 The Concessionaire will provide the Authority with all reasonable assistance in connection with its monitoring and review in relation to this Concession Contract, including without limitation liaising with the Authority Contact on all day-to-day matters relating to this Concession Contract.

## 12 KPI FRAMEWORK AND RELIEF AND COMPENSATION EVENTS

12.1 In the event of a KPI Failure, any associated Service Credit will be applied by the Authority and will be payable by the Concessionaire in accordance with the terms and conditions set out in Part 1 of the Schedule.

**Commented [BurnPaull15]:** This is only expected to apply in a limited number of circumstances where the Authority may incur costs as a result of the KPI Failure.

12.2 Where in any rolling twelve month period [●] KPI Points are attributed to the Concessionaire, the Authority shall have the right to treat this as a Default for the purposes of Clause 34.

12.3 Where and to the extent that a KPI Failure is attributable to a Relief Event:

12.3.1 no Service Credit or KPI Points will be applied by the Authority in respect of that KPI Failure; and

12.3.2 the Concessionaire will continue to bear all financial consequences such as loss of revenue attributable to that Relief Event.

12.4 Where and to the extent that a KPI Failure is attributable to a Compensation Event:

12.4.1 no Service Credit will be applied by the Authority in respect of that KPI Failure; and

12.4.2 the Concessionaire will be entitled to compensation from the Authority for any losses demonstrated to arise directly from that Compensation Event such that the Concessionaire is in no better or worse a position than they would have been had

the Compensation Event not occurred, payable in accordance with the terms and conditions set out in Part 1 of the Schedule; and

12.4.3 the KPI Failure will not count towards an event of Default under Clause 12.2 above.

12.5 The Concessionaire shall use all best endeavours to mitigate so far as possible:

12.5.1 any KPI Failure;

12.5.2 any losses; and

12.5.3 any consequences upon the performance of its obligation under this Concession Contract;

arising from any Relief Event or Compensation Event and shall not be entitled to rely upon any relief afforded to it by this Clause 12 to the extent that it is not able to perform, or has not in fact performed, its obligations under this Concession Contract due to any failure to comply with its obligations in this Clause 12.5.

12.6 To rely on any relief afforded by this Clause 12, the Concessionaire must claim a Relief Event or Compensation Event by serving written notice to that effect on the Authority within **ten** business days of it becoming aware of the relevant event. Such written notice shall give sufficient details to:

12.6.1 identify the relevant event;

12.6.2 state whether the event is claimed to be a Relief Event or a Compensation Event;

12.6.3 explain the effect of the event on the Concessionaire's ability to perform their obligations under this Concession Contract;

12.6.4 provide all relevant information relating to any KPI Failure or other failure to perform (or delay in performing) the Concessionaire's obligations under this Concession Contract which are attributable to the event; and

12.6.5 explain what action the Concessionaire has taken or intends to take in accordance with Clause 12.5.

12.7 Following the issue of any notice in accordance with Clause 12.6, the Concessionaire shall, as soon as reasonably possible:

12.7.1 submit such further relevant information relating to the Relief Event or Concession Event as it becomes aware of; and

12.7.2 notify the Authority as soon as the consequences of the Relief Event or Compensation Event have ceased and of when performance of its obligations under the Concession Contract will be resumed.

12.8 Within **five** business days of receipt of a notice in accordance with Clause 12.6, the Authority will serve written notice on the Concessionaire confirming:

12.8.1 whether the event is agreed to be a Relief Event or Compensation Event;

12.8.2 whether any effect, KPI Failure or other failure to perform the Concessionaire's obligations under this Concession Contract are agreed as being attributable to the event; and

12.8.3 whether the actions taken or intended to be taken in accordance with Clause 12.5 are agreed to be sufficient.

12.9 Where a notice issued in accordance with Clause 12.8 details any matter which is not agreed, such matter shall be addressed as a Dispute in accordance with Clause 35.

### 13 CHANGE CONTROL

13.1 Either Party may propose a change to this Concession Contract in accordance with this Clause 13, including without limitation:

13.1.1 the scope of the Installation Works as specified in Part 8 of the Schedule, or the content of the related programme and installation works proposal set out in Part 9 and Part 10 of the Schedule;

13.1.2 the Services as specified in Part 11 of the Schedule or the content of the related services proposal set out in Part 13 of the Schedule;

13.1.3 the KPI Framework; and

13.1.4 the addition/removal of Sites listed at Part 5 of the Schedule.

13.2 If the Authority wishes to propose a change, it shall serve a notice on the Concessionaire setting out the details of and reasons for the change (the "Authority Change Notice").

13.3 The Concessionaire shall only be entitled to refuse a change to this Concession Contract if the change is to cause the Concessionaire to provide the Services in a way that infringes any Regulation, is commercially unsustainable, or is inconsistent with Good Industry Practice.

13.4 The Concessionaire shall, as soon as practicable and in any event within **ten** working days of receipt of an Authority Change Notice, deliver to the Authority its response (the "Response"). The Response shall either reject the Authority proposed change for the reasons set out at Clause 13.3, or include the opinion of the Concessionaire on:

**Commented [BurnPaull16]:** Drafting Note

Authorities should have regard to what is listed at this clause, particularly in terms of the procurement regulations requirement for a "clear, precise and unequivocal review clause". The separate tariff review mechanism means that doesn't have to be included here.

- 13.4.1 the method of implementation of the change;
  - 13.4.2 the cost of implementation of the change (which shall be paid to the Concessionaire by the Authority in accordance with the terms and conditions set out in Part 1 of the Schedule);
  - 13.4.3 a timetable for implementation of the change;
  - 13.4.4 any other variations to this Concession Contract and/or any associated lease required as a result of the change;
  - 13.4.5 any other details the Concessionaire deems necessary; and
  - 13.4.6 any other details requested by the Authority.
- 13.5 As soon as practicable after the Authority receives the Response, the Parties shall engage to discuss and agree the issues set out in the Response. If the Parties cannot agree, the matter shall be dealt with in accordance with Clause 35 of this Concession Contract.
- 13.6 As soon as practicable after the contents of the Response have been agreed or otherwise determined, the Authority shall:
- 13.6.1 confirm in writing to the Concessionaire that the Response (as modified) is agreed;  
or
  - 13.6.2 withdraw the Authority Change Notice.
- 13.7 In the event that the Authority confirms that the Response is agreed in accordance with Clause 13.6.1, the Parties shall within **five** working days enter into a written agreement to vary this Concession Contract in accordance with the Authority Change Notice and the Response.
- 13.8 If the Concessionaire wishes to propose a change it shall, at its own cost, serve a notice on the Authority (the “**Concessionaire Change Notice**”) setting out:
- 13.8.1 the details of the change;
  - 13.8.2 the cost which will be borne by the Concessionaire in implementing such change;
  - 13.8.3 the reasons for the change;
  - 13.8.4 the method of implementation of the change;
  - 13.8.5 a timetable for implementation of the change; and
  - 13.8.6 any other variations to this Concession Contract and/or any associated lease required as a result of the change.



- 13.9 Where the Concessionaire Change Notice arises due to a change in law, or Regulation, or Necessary Consent which has a material effect on the Services, the Authority shall not be entitled to refuse the proposed change to the extent that it is necessary to comply with such law, Regulation or Necessary Consent, but shall otherwise have discretion not to agree to the proposed Change.
- 13.10 As soon as practicable after receipt of a Concessionaire Change Notice, the Authority shall confirm in writing to the Concessionaire whether the Concessionaire Change Notice (as modified, if applicable) is agreed or not.
- 13.11 In the event that the Authority confirms that the Concessionaire Change Notice is agreed in accordance with Clause 13.10, the Parties shall within 5 working days enter into a written agreement to vary this Concession Contract in accordance with the Concessionaire Change Notice.
- 13.12 The Concessionaire shall pay the Authority's reasonable costs incurred in dealing with any Concessionaire Change Notice, including but not limited to costs associated with dealing with any amendment to this Concession Contract and/or any associated lease.

#### 14 TITLE AND RISK

- 14.1 The Equipment shall at all times during the period commencing on the Handover Date and concluding on Termination remain the property of the Concessionaire and the Authority shall have no right, title or interest in the Equipment, save for the right to possession and use of the Equipment subject to the terms and conditions of this Concession Contract.
- 14.2 The subject or product of any Installation Works that do not form part of the Equipment shall remain the property of the Authority and the Concessionaire shall have no right, title or interest in such property save for the right to possession and use of the same subject to the terms and conditions of this Concession Contract.
- 14.3 During the Concession Period:
- 14.3.1 the risk of loss or theft of, or damage or destruction to the Equipment shall remain at the sole risk of the Concessionaire during the Concession Period; and
- 14.3.2 the Authority shall not be under any liability whatsoever, and the Concessionaire shall indemnify, and keep the Authority indemnified, for any loss of, or damage to any person, customer, motor vehicle or other property arising, or for damages or compensation for any delay or loss if any unauthorised person uses or endeavours to use the Equipment, except where such damage arises as the result of an act or omission of the Authority, or its employees.
- 14.4 Immediately upon Termination, ownership of the Equipment shall vest in the Authority in its entirety and thereafter the Concessionaire shall have no right, title or interest in it.

**Commented [BurnPaull17]:** *Drafting Note*

Subject to SFT/Authority discussions with SG Procurement on National Electricity Framework, TS in relation to grant conditions and any related technical advisor input

14.5 The Concessionaire undertakes to take all necessary steps to ensure that the transfer of ownership of assets set out in Clause 14.4 takes place immediately upon Termination in accordance with Clause 21.

14.6 Subject to Clause 37.2.2, the Concessionaire shall not be entitled to any payment for the Equipment on Termination. ..

## 15 **INTELLECTUAL PROPERTY**

15.1 Save as granted under this Concession Contract, neither the Authority nor the Concessionaire shall acquire any right, title or interest in the other's Intellectual Property Rights.

15.2 The Concessionaire warrants that the performance of the Concessionaire's responsibilities and obligations shall not infringe any Intellectual Property Rights of any third party and that the Concessionaire owns, has obtained, or shall obtain valid licences for all Intellectual Property Rights that are necessary to provide the Services and perform all of its obligations under this Concession Contract.

15.3 All Intellectual Property Rights in any branding, or logos prepared by or for the Concessionaire for use, or intended for use, exclusively in relation to the Services, or the Sites, or any part of them shall belong to the Concessionaire.

15.4 The Concessionaire grants to the Authority (and its employees, agents, contractors, or any other person the Authority appoints to operate the Equipment) a non-exclusive, perpetual, irrevocable licence to use the Concessionaire's Intellectual Property Rights in the Equipment developed for or used in the delivery of the Services, to the extent necessary to install and operate the Equipment.

## 16 **PUBLICITY**

16.1 The Concessionaire shall conform to any required branding standards notified to them by the Authority. Approval of signage and publicity announcements or publications in connection with the Services should be obtained from the Authority by the Service Provider prior to use, issue or publication, such approval not to be unreasonably withheld by the Authority.

## 17 **PERSONNEL**

17.1 The Concessionaire shall ensure that all individuals employed or engaged in connection with the provision of the Installation Works and the Services are of suitable character and are appropriately qualified, trained and experienced in the area of work which they are to perform.

17.2 The Concessionaire shall provide the Authority with details of all Key Personnel.

17.3 The Concessionaire shall ensure that its Representatives:

- 17.3.1 are adequately supervised and informed of the aspects of this Concession Contract applicable to them so that they can comply with this Concession Contract;
- 17.3.2 are appropriately attired for the duties they are undertaking including, (where necessary) wearing protective clothing and footwear;
- 17.3.3 carry identification with them at all times and on request, disclose their identity to the Authority or any third party;
- 17.3.4 other than as permitted by this Concession Contract, do not solicit or act in such a manner as to induce payment for performance of the Services; and
- 17.3.5 act in a courteous and considerate manner and do not use foul or offensive language, bring offensive materials onto or consume intoxicating liquor or illegal drugs whilst carrying out the Installation Works or the Services.

17.4 The Concessionaire shall immediately notify the Authority of any information that the Authority reasonably requests to enable it to be satisfied that the obligations of this Clause 17 have been met.

18 **INSURANCE**

18.1 The Concessionaire shall at all times maintain insurance cover with a reputable insurance company, as follows:

- 18.1.1 public liability insurance (minimum of [ ● ] for each and every claim);
- 18.1.2 product liability insurance (minimum of [ ● ] for each and every claim);
- 18.1.3 employers liability insurance (minimum of [ ● ] for each and every claim);
- 18.1.4 professional indemnity insurance (minimum of [ ● ] for each and every claim),

which shall be maintained for no less than [ ● ] years after the end of the Concession Period.

18.2 The Concessionaire shall supply to the Authority a copy of all insurance policies certificates, cover notes, premium receipts or such other documents as may satisfy the Authority that such insurance is in place:

- 18.2.1 prior to the Commencement Date;
- 18.2.2 immediately on any material variation to any such documents; and
- 18.2.3 at any other time within fourteen days of written request by the Authority.

**Commented [BurnPaull18]:** *Drafting Note*  
 Authority should take advice on suitable insurance policies, including whether or not they will be a named party on such policies.

18.3 The Concessionaire shall give immediate notice to the Authority in the event of any incident in connection with the Installation Works or the Services which causes any personal injury or damage to property and which may be the subject of a claim under the Concessionaire's or the Authority's insurance and shall give all information and assistance that the Authority or the Authority's insurers may require and shall not make any admission without the written consent of the Authority's insurers. The Concessionaire shall permit the Authority's insurers to take proceedings in the name of the Concessionaire to recover compensation in respect of any matter covered by the Authority's insurers.

18.4 The Concessionaire shall immediately notify the Authority if any claim or demand is made or action brought against the Concessionaire for infringement or alleged infringement of any Intellectual Property Rights in connection with the performance of this Concession Contract.

## 19 **COLLATERAL AGREEMENTS**

19.1 The Concessionaire will supply to the Authority copies of each of the Collateral Agreements.

19.2 The Concessionaire shall not enter into, amend, novate, assign, or agree to the novation or assignment of, any Collateral Agreement without the prior consent of the Authority, such consent not to be unreasonably withheld by the Authority.

19.3 The Concessionaire shall ensure that the terms of any Sub-Contract appropriately ensure that the Concessionaire complies with their obligations under this Concession Contract. The Concessionaire shall not enter into, amend, novate, assign, or agree to the novation or assignment of, any Sub-Contract without the prior consent of the Authority, such consent not to be unreasonably withheld by the Authority.

19.4 Any sub-contracting shall not relieve the Concessionaire from any liability or obligation under this Concession Contract and the Concessionaire shall be responsible for the acts, omissions, defaults or neglect of any Sub-Contractor and its agents or employees in all respects as if they were the acts, omissions, defaults or neglect of the Concessionaire.

## 20 **PARENT COMPANY GUARANTEE**

20.1 The Concessionaire shall ensure that, prior to the Commencement Date, the Parent Company provides to the Authority a parent company guarantee in the same terms and format as that set out at Part 20 of the Schedule.

## 21 **EXIT MANAGEMENT**

21.1 Prior to and following Termination, the Concessionaire will carry out the Exit Management Plan as specified in Part 21 of the Schedule.

21.2 The Concessionaire's proposal as to how they intend to carry out the Exit Management Plan is set out in Part 22 of the Schedule. The Concessionaire will carry out the Exit Management

Plan in accordance with this proposal but, where there is any conflict Part 21 of the Schedule and Part 22 of the Schedule, Part 21 of the Schedule will take precedence.

## 22 **LIABILITY**

- 22.1 Subject to Clause 22.3, neither Party shall be liable to the other Party (as far as permitted by law) for indirect special or consequential loss or damage in connection with this Concession Contract which shall include, without limitation, any loss of or damage to profit, revenue, contracts, anticipated savings, use, goodwill or business opportunities whether direct or indirect.
- 22.2 Each Party shall at all times take all reasonable steps to minimise and mitigate any loss or damages for which the relevant Party is entitled to bring a claim against the other Party pursuant to this Concession Contract.
- 22.3 The Concessionaire's total aggregate liability is unlimited in respect of:
- 22.3.1 the indemnities in Clauses [ ● ];
  - 22.3.2 any breach of Clauses [ ● ]; and
  - 22.3.3 the Concessionaire's wilful default.
- 22.4 Notwithstanding any other provision of this Concession Contract no Party limits or excludes its liability for:
- 22.4.1 fraud or fraudulent misrepresentation;
  - 22.4.2 death or personal injury caused by its negligence, or that of its employees, agents or Sub-Contractors;
  - 22.4.3 breach of any obligation as to title implied by statute; or
  - 22.4.4 any other act or omission, liability for which may not be limited under any applicable law.
- 22.5 Nothing in this Concession Contract shall impose any liability on the Authority in respect of any liability incurred by the Concessionaire to any other person, but this shall not be taken to exclude or limit any liability of the Authority to the Concessionaire that may arise by virtue of either a breach of this Concession Contract or by negligence on the part of the Authority or their employees, servants or agents.

23 **INDEMNITIES**

23.1 The Concessionaire shall fully indemnify the Authority from and against all claims, direct losses, costs, expenses, demands and liabilities which may be brought against or incurred by the Authority in respect of:

23.1.1 customers' use or any person's unauthorised use of the Equipment;

23.1.2 the death of or injury to any person;

23.1.3 any breach by the Concessionaire, its staff, agents, assigns or Sub-Contractors (of any level of remoteness) of the Data Protection Legislation; or

23.1.4 any infringement of a third party's intellectual property rights in respect of the Equipment.

23.2 The Concessionaire shall indemnify and keep indemnified the Authority from and against any and all claims, demands, proceedings, actions, damages, direct costs, expenses, direct loss and liability arising from: (i) the carrying out of the Installation Works by the Concessionaire; (ii) the provision of the Services by the Concessionaire; and (iii) a Default, save to the extent that the Default arises from any default or negligence of the Authority or its employees provided always, for the avoidance of doubt, that this does not extend to any loss of profits suffered by the Authority.

23.3 The Concessionaire shall at all times maintain required insurances in support of its indemnities as provided in this Clause 23.

24 **CONFIDENTIALITY**

24.1 The Parties shall not, and shall ensure that their Representatives shall not, use or disclose any confidential material provided by the other Party pursuant to this Concession Contract or by a customer, otherwise than for the performance of this Concession Contract, save as may be agreed by the disclosing party, or required by law, including as a result of a request made under Freedom of Information Legislation.

24.2 For the avoidance of doubt, confidential information shall not include: (i) any information obtained from a third party who is free to divulge such information; (ii) any information which is already in the public domain otherwise than as a breach of this Concession Contract; or (iii) any information which was rightfully in the possession of a Party prior to the disclosure by the other Party and lawfully acquired from sources other than the other Party.

24.3 The Concessionaire shall take all necessary precautions to ensure that confidential information is only made available to its Representatives on a "need to know" basis and shall ensure that such Representatives are aware of and comply with the confidentiality obligations under this Concession Contract.

24.4 The Authority will take all reasonable steps to protect the commercial confidentiality of the Concessionaire, subject always, to its duties under the Freedom of Information Legislation and to any governmental agency.

## 25 DATA PROTECTION

25.1 Each Party shall in connection with the provision of the Services and the performance of its obligations under this Concession Contract comply with the Data Protection Legislation.

**Commented [BurnPaull19]:** *Drafting Note*

Data Protection provisions to be considered on a project specific basis.

## 26 CYBER SECURITY

26.1 [Scottish Government required drafting to be included].

## 27 FAIR WORK

27.1 [Scottish Government required drafting to be included].

**Commented [BurnPaull20]:** *Drafting Note*

For information on Scottish Government Fair Work First policies - see the link below

<https://www.gov.scot/publications/fair-work-first-guidance-2/pages/1/>

## 28 FREEDOM OF INFORMATION

28.1 The Concessionaire acknowledges that the Authority is subject to the provisions of the Freedom of Information Legislation and the Concessionaire shall where reasonable, at their own expense, assist and co-operate with the Authority to enable the Authority to comply with these information disclosure obligations.

28.2 Where the Concessionaire receives a request for information under the Freedom of Information Legislation in relation to information which it is holding on behalf of the Authority in relation to this Concession Contract, it shall (and shall procure that its Representatives shall):

28.2.1 transfer the request for information to the Authority as soon as practicable after receipt and in any event within two business days of receiving a request for information;

28.2.2 provide the Authority with a copy of all information in its possession or power in the form that the Authority requires within ten business days (or such longer period as the Authority may specify) of the Authority requesting that information; and

28.2.3 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 the Freedom of Information Legislation.

28.3 Where an Authority receives a request for information under the Freedom of Information Legislation which relates to this Concession Contract, it shall inform the Concessionaire of the request for information as soon as practicable after receipt and in any event at least two business days before disclosure and shall use all reasonable endeavours to consult with the

Concessionaire prior to disclosure and shall consider all representations made by the Concessionaire in relation to the decision whether or not to disclose the information requested.

28.4 The Authority shall be responsible for determining in their absolute discretion whether any information requested from them under the Freedom of Information Legislation:

28.4.1 is exempt from disclosure under the Freedom of Information Legislation; or

28.4.2 is to be disclosed in response to a request for information.

28.5 The Concessionaire acknowledges that the Authority may be obliged under the Freedom of Information Legislation to disclose information:

28.5.1 without consulting the Concessionaire where it has not been practicable to achieve such consultation; or

28.5.2 following consultation with the Concessionaire and having taken its view into account.

## 29 **COMPLIANCE**

29.1 The Concessionaire shall comply with all laws relating to the Installation Works and the Services.

## 30 **ASSIGNATION AND SUBCONTRACTING**

30.1 The Concessionaire shall not assign, transfer or purport to assign or transfer to any other persons any of its rights or sub-contract any of its obligations under this Concession Contract without the express consent of the Authority in writing.

30.2 The Authority may at its discretion assign, novate or otherwise dispose of any or all of its rights, obligations and liabilities under this Concession Contract to a body other than the Authority, which performs any of the functions that previously had been performed by the Authority.

30.3

## 31 **NO AGENCY / PARTNERSHIP**

31.1 Save as expressly provided otherwise in this Concession Contract or where a statutory provision otherwise requires, the Parties shall not in any way whatsoever:

31.1.1 be, act or hold themselves out as an agent of the others;

31.1.2 make any representations or give any warranties to third parties on behalf or in respect of the others; or



31.1.3 bind or hold themselves out as having authority or power to bind the others.

31.2 Nothing in this Agreement shall create, or be deemed to create, a partnership between the Parties.

## 32 NON-EXCLUSIVITY

32.1 The Concessionaire acknowledges that in entering into this Concession Contract no form of exclusivity is granted by the Authority, and the Authority is at all times entitled to enter into similar contracts with other operators in relation to the same or similar Services.

32.2 The Authority makes no representation and gives no warranty or undertaking in relation to nature, volume or value of custom (including, without limitation, bookings by the Authority) for the Services during the Concession Period.

## 33 NOTICES

33.1 Any notice required to be given by either Party pursuant to or in connection with this Concession Contract shall not be effective unless given in writing and sent by first class post or by email to the following addresses:

33.1.1 [ ● ]

33.1.2 [ ● ]

33.2 A notice served in accordance with Clause 33.1 shall be deemed to have been duly served when received except that if it is received between 5pm on a business day and 9am on the immediately following business day it shall be deemed to have been served at 9am on the second of such business days.

33.3 Each Party shall notify the other in writing within five business days of any change in its addresses for service.

## 34 DEFAULT / REMEDIATION

34.1 On the occurrence of a Default or within a reasonable time after the Authority becomes aware of the same, and while the same is subsisting, the Authority may serve notice of default, including any loss and/or damages sustained by the Authority as a consequence of such Default on the Concessionaire requiring the Concessionaire to, within twenty business days, either (at the Authority's option):

34.1.1 remedy the Default referred to in such notice of default (if the same is continuing);  
or

34.1.2 if the Default arises as a consequence of a KPI Failure in accordance with Clause 12.2 provide an Improvement Plan in relation to the Default.

**Commented [BurnPaull21]:** Drafting Note  
To be considered on a project specific basis

- 34.2 Where the Concessionaire provides an Improvement Plan in accordance with Clause 34.1.2, the Authority shall have twenty business days from receipt of the same within which to notify the Concessionaire whether it accepts the terms of the Improvement Plan. Where the Authority notifies the Concessionaire that it does not accept the Improvement Plan, the parties shall endeavour within the following five business days to agree any necessary amendments to the Improvement Plan put forward. In the absence of agreement within five business days, the question of whether the Improvement Plan (as the same may have been amended by agreement) will remedy the Default in a reasonable manner and within a reasonable time period such matter shall be addressed as a Dispute in accordance with Clause 35.
- 34.3 Any of the following events shall constitute a Material Default:
- 34.3.1 the Default notified in a notice of default served under Clause 34.1 is not remedied and no Improvement Plan is provided before the expiry of the period referred to in Clause 34.1;
  - 34.3.2 where the Concessionaire puts forward an Improvement Plan which has been accepted by the Authority or has been determined to be reasonable and the Concessionaire fails to achieve any element detailed in the Improvement Plan (such failure not being attributable to a Force Majeure Event, a Relief Event or a Compensation Event);
  - 34.3.3 any Improvement Plan put forward by the Concessionaire is rejected by the Authority as not being reasonable, and the dispute resolution procedure does not find against that rejection,
- 34.4 Where the Concessionaire puts forward an Improvement Plan which has been accepted by the Authority or has been determined to be reasonable and the Concessionaire fails to achieve any element detailed in the Improvement Plan and such failure is attributable to a Force Majeure Event, a Relief Event or a Compensation Event then, subject to the Concessionaire complying with the mitigation and other requirements in this Concession Contract concerning Force Majeure Events, Relief Events or Compensation Events (as applicable), the time for performance of the Improvement Plan or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by the Force Majeure Event, Relief Event or Compensation Event (as the case may be). Such period shall be agreed by the parties or determined in accordance with Clause 35.
- 34.5 The Concessionaire shall reimburse the Authority for all reasonable costs incurred by the Authority in exercising any of its rights pursuant to this Clause 34 following a Default. The Authority shall take reasonable steps to mitigate such costs.

## 35 **DISPUTE RESOLUTION**

- 35.1 The procedure set out in this Clause 35 shall apply to any Dispute, but shall not impose any pre-condition on either Party or otherwise prevent or delay either Party from commencing

proceedings in any court of competent jurisdiction in relation to any Dispute in which that party requires either:

35.1.1 an order (whether interim or final) restraining or interdicting the other party from doing any act or compelling the other party to do any act; or

35.1.2 a decree for a liquidated sum to which there is no stateable defence.

35.2 Unless this Agreement has already been repudiated or terminated, the parties shall, (notwithstanding that any Dispute is subject to a procedure set out in this Clause 35), continue to carry out their obligations in accordance with this Concession Contract.

#### **Party Representative Meeting**

35.3 Where a Dispute arises then each Party Representative and such other persons as either Party considers appropriate shall attend a meeting in relation to the Dispute within ten business days of notification of that Dispute and attempt in good faith to resolve the Dispute.

#### **Party Management Meeting**

35.4 If the Parties fail to resolve a Dispute within ten business days of a meeting pursuant to Clause 35.3, then the Dispute will be escalated to the Party Management. Party Management on behalf of each Party and such other persons as either Party considers appropriate shall attend a further meeting in relation to the Dispute within ten business days of such escalation and attempt in good faith to resolve the Dispute.

#### **Mediation**

35.5 If the Parties fail to resolve a Dispute within twenty business days of a meeting pursuant to Clause 35.4, they may (if both Parties so agree) refer the Dispute to mediation on such conditions as may be agreed between the Parties. Any mediation shall be completed within thirty business days of such referral and any agreement arising therefrom shall be recorded in writing and signed by the parties and shall be binding and final to the extent set out in such agreement unless otherwise agreed.

35.6 For the avoidance of doubt, mediation shall not be a precondition to the commencement of Adjudication or court proceedings.

#### **Adjudication**

35.7 Either Party may at any time (notwithstanding that other dispute resolution procedures are running concurrently) give the other Party notice of its intention to refer a Dispute to adjudication (the "**Notice of Adjudication**"). The party giving the Notice of Adjudication (the "**Referring Party**") shall by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with Clause 35.8 below (the "**Adjudicator**").

- 35.8 The Adjudicator nominated to consider any Dispute shall be selected by agreement between the Parties, each acting reasonably and having regard to the nature of the Dispute. If the Parties are unable to agree on the identity of the adjudicator to be selected within five business days of the Notice of Adjudication, the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch shall be entitled to appoint such adjudicator on application for such appointment by either Party.
- 35.9 The Referring Party shall, within five business days of the Notice of Adjudication, serve its statement of case (the “**Referral Notice**”) on the Adjudicator and the other party to the Dispute (the “**Responding Party**”). The Referral Notice shall set out each element of the Referring Party’s claim and the relief or remedy sought in sufficient detail so as to enable the Responding Party to understand and, where appropriate, respond to the claim and the Referral Notice shall be accompanied by copies of, or relevant extracts from, this Concession Contract and such other documents as the Referring Party intends to rely upon.
- 35.10 Within five business days of appointment in relation to a particular Dispute, the Adjudicator shall establish the procedure and timetable for the adjudication. The Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. The parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.
- 35.11 The Adjudicator shall reach a decision on the Dispute within twenty business days of the Referral Notice (or such other period as the Parties may agree). Unless the Parties otherwise agree, the Adjudicator shall give reasons for their decision in writing. Unless and until the Dispute is finally determined by court proceedings or by an agreement in writing between the Parties, the Adjudicator’s decision shall be binding on both Parties who shall forthwith give effect to the decision.
- 35.12 The Adjudicator’s costs of any reference shall be borne as the Adjudicator shall specify or, failing such specification, equally by the Parties. Each Party shall bear its own costs arising out of the adjudication, including legal costs and the costs and expenses of any witnesses.
- 35.13 The Adjudicator shall be deemed not to be an arbitrator but shall render their decision as an adjudicator and the law relating to arbitration shall not apply to the Adjudicator or their determination or the procedure by which they reached their determination.
- 35.14 The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.
- 35.15 All information, data or documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 24, disclose to any person or company any such information, data or documentation and all such information, data or

documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.

35.16 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of their functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.

35.17 The Adjudicator may on their own initiative or on the request of either Party correct his decision so as to remove a clerical or typographical error arising by accident or omission. Any such correction of a decision shall be made or requested within five business days of the date upon which the Adjudicator's decision was delivered to the Parties. Any such correction of a decision shall form part of the decision.

## 36 **FORCE MAJEURE**

36.1 Subject to Clause 36.2, where the Concessionaire is, for any reason, unable to perform any of its obligations under this Concession Contract:

36.1.1 the Concessionaire shall notify the Authority of this inability to perform as soon as possible;

36.1.2 the Authority may employ another service provider to provide that part of the Works or Services which the Concessionaire is unable to perform and recover any additional costs reasonably and properly incurred in doing so from the Concessionaire.

36.2 Neither Party shall be liable by reason of any delay in or failure to perform its obligations under this Concession Contract due to any Force Majeure Event.

36.3 If either Party is affected by a Force Majeure Event:

36.3.1 it shall immediately notify the other Party in writing of the matters constituting the Force Majeure Event and shall keep that Party fully informed of any relevant change of circumstances whilst such Force Majeure Event continues; and

36.3.2 it shall take all reasonable steps available to it to minimise the effects of the Force Majeure Event on the performance of its obligations under this Concession Contract.

36.4 If the Party affected by a Force Majeure Event fails to comply with any of its obligations under clauses 36.3 above then no relief for the Force Majeure Event, including the provisions of clause 36.2 above, shall be available to it and the obligations of each Party shall continue in full force and effect.

36.5 Where both Parties agree that a Force Majeure Event renders the performance of the Installation Works or Services impossible, such that the best solution is Termination, Termination shall take effect from such date as agreed between the Parties.

37 **TERMINATION**

37.1 In the event of a Material Default, the Authority may, without prejudice to any other rights or remedies of the Authority:

37.1.1 terminate this Concession Contract by notice in writing, such notice to have effect from the date specified therein; and

37.1.2 recover from the Concessionaire the amount of any loss resulting from such Termination including, but not limited to, the reasonable and properly incurred cost of arranging alternative provision of the Installation Works and the Services and any additional expenditure reasonably incurred by the Authority throughout the remainder of the Concession Period (such additional expenditure calculated on the basis that there had been no early Termination).

37.2 In the event of an Authority Default, the Concessionaire may, without prejudice to any other rights or remedies of the Concessionaire:

37.2.1 terminate this Concession Contract by at least [three months'] notice in writing; and

37.2.2 recover from the Authority [formula for calculating damages recoverable on termination TBC].

38 **CONTINUING OBLIGATIONS / SEVERABILITY**

38.1 The following provisions of this Concession Contract (excluding any obligation fully performed) shall continue in full force and effect notwithstanding Termination:

38.1.1 Clause 11 (Records, Monitoring and Review)

38.1.2 Clause 15 (Intellectual Property)

38.1.3 Clause 21 (Exit Management)

38.1.4 Clause 22 (Liability)

38.1.5 Clause 23 (Indemnities)

38.1.6 Clause 24 (Confidentiality)

38.1.7 Clause 25 (Data Protection)

38.1.8 Clause 28 (Freedom of Information)

38.1.9 Clause 35 (Dispute Resolution)

**Commented [BurnPaul22]:** *Drafting Note*

This clause deliberately gives the Authorities the right to determine the date of termination. Authorities will likely still want to build in a sufficient period pre-termination for implementation of the Exit Management Plan.

38.1.10 Clause 39 (Waiver)

38.2 In the event of any provision of this Agreement being or becoming legally ineffective or unenforceable the remaining provisions of this Agreement shall not be invalidated.

39 **WAIVER**

39.1 The failure to exercise or delay in exercising a right or remedy provided by this Concession Contract or by law does not constitute and shall not be construed as a waiver of the right or remedy or a waiver of other rights or remedies nor effect the validity of this Concession Contract.

39.2 A waiver of a breach of any of the terms of this Concession Contract or of a default under this Concession Contract does not constitute a waiver of any other breach or default and shall not affect the other terms of this Concession Contract.

39.3 A waiver of a breach of any of the terms of this Concession Contract or of a default under this Concession Contract will not prevent an Authority from subsequently requiring compliance with the waived obligation.

40 **RIGHTS OF THIRD PARTIES**

40.1 Except as otherwise expressly provided in this Concession Contract and to avoid any doubt, without prejudice to the rights of any permitted successor to the rights of the Concessionaire or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement (whether under the Contract (Third Party Rights) (Scotland) Act 2017 or otherwise) upon any person other than the Authority and the Concessionaire.

41 **CAPACITY**

41.1 Each Party warrants and represents that:

41.1.1 it has the full capacity and has taken all steps and obtained all approvals to enable it to lawfully enter into and perform its obligations under this Concession Contract;

41.1.2 this Concession Contract is executed by a duly authorised representative;

41.1.3 it will continue to maintain in full force and effect such authorisations, approvals, orders, certificates, permits and licences of and from any and all governmental, regulatory and administrative bodies as are necessary to lawfully perform its obligations under this Concession Contract;

42 **CONTRACT DOCUMENTS**

42.1 Where there is any conflict or inconsistency between the provisions of this Concession Contract, such conflict or inconsistency shall be resolved according to the following order of priority:

42.1.1 the Conditions of Contract;

42.1.2 all Parts of the Schedule, except the Parts listed at Clause 42.1.4 below;

42.1.3 all other schedules attached to these Conditions of Contract, except the schedules listed at clauses 4.1.4 below; and

42.1.4 Part 10 (Installation Works Proposal), Part 13 (Services Proposal) and Part 22 (Exit Management Proposal) of the Schedule.

43 **COUNTERPARTS AND DELIVERY**

43.1 This Concession Contract may be executed in any number of counterparts each of which so executed will be an original but together will constitute one and the same instrument.

43.2 Where executed in counterparts:

43.2.1 this Concession Contract will not take effect until each of the counterparts has been delivered;

43.2.2 each counterpart will be held as undelivered until the parties agree a date on which the counterparts are to be treated as delivered; and

43.2.3 the date of delivery may be inserted in the testing clause.



44 **GOVERNING LAW AND JURISDICTION**

44.1 This Agreement shall be governed by and construed in accordance with the Laws of Scotland and the Parties irrevocably submit to the exclusive jurisdiction of the Scottish courts.

IN WITNESS WHEREOF these presents consisting of this and the preceding [ ● ] pages together with the schedule in [ ● ] parts annexed hereto are executed in counterpart as follows and DELIVERED on [ ● ]:

SUBSCRIBED for and on behalf of the said [ ● ]

at

on

by

\_\_\_\_\_  
Print Full name

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

before this witness:

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

\_\_\_\_\_  
Witness

Address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

SUBSCRIBED for and on behalf of the said [ ● ]

at

on

by

\_\_\_\_\_  
Print Full name

before this witness:

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

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

Address:

\_\_\_\_\_  
Witness

TEMPLATE

This is the Schedule referred to in the foregoing Concession Contract between [ ● ] and [ ● ] dated [ ● ]

#### PART 1 – PAYMENT MECHANISM

[To detail conditions (how they are set, evaluated, indexed, etc. throughout the Concession Period) and mechanisms around payment of:

- Capital Grant;
- Concession Fee;
- Revenue Share (Authority should consider frequency of Revenue Share payment and when it is paid: e.g. annually in arrears, or monthly at 1/12 of the previous financial year’s share);
- Service Credits;
- payment due by Authority on Compensation event;
- cost of implementation of Authority Change Notice; and
- any other sums which fall due under the Concession Contract.]

**Commented [BurnPaull23]:** The Authority may wish to invite bidders to offer an increasing percentage revenue share over the length of the concession

#### PART 2– DETAILS OF EXISTING EQUIPMENT

[To detail Existing Equipment (above ground) which is to be transferred from the Authority to the Concessionaire on the Handover Date (and back on Termination) and details of any Necessary Consents already in place. Where possible existing contractual rights relating to the Existing Equipment (such as warranties) should be transferred.]

#### PART 3 – HANDOVER PROCESS

[To detail process for the transfer of the Existing Equipment to the Concessionaire at the beginning of the Concession Period, including a “Handover Date” on which the transfer will take place.]

#### PART 4 – SPECIFICATION OF NEW EQUIPMENT

[To detail Authority’s requirements as to the specification of New Equipment (above ground). This should align with specification in any related procurement documents.]

The Concessionaire will be required to provide Equipment that complies with all Necessary Consents. Local authorities are encouraged to only list additional requirements that are necessary to meeting their objectives in terms of service quality and accessibility.]

## **PART 5 – LIST OF SITES**

[To detail the Sites on which the Services are to be carried out. Authority warrants at Clause 5.1 that it has title to these sites. The more information that can be provided (any EVI already in place, location, accessibility, title deeds, etc. the better for the Concessionaire in terms of planning and implementing the Services.]

The Authority should identify priority locations for charge point installations but afford the Concessionaire the flexibility to offer an alternative location that can deliver the same or similar charging capacity, user experience and accessibility for that locality.]

## **PART 6 – SITE PLANS**

[Plans that detail the Sites listed at Part 5.]

## **PART 7 – TEMPLATE LEASE**

[Burness Paull have provided a Template Lease which can be adapted for use on a project-specific basis.]

## **PART 8 – SPECIFICATION OF INSTALLATION WORKS**

[Details of the Installation Works (including the installation of below ground connections, etc.) which are required to be carried out. This should align with specification in any related procurement documents. This may include things such as DNO Works, Meter Installation, Site Layout and Accessibility Requirements, CCTV, Signage, Lighting and Security as well as any landscaping works]

## **PART 9 – PROGRAMME**

[Programme against which the Concessionaire must carry out the Installation Works. This could be staggered (e.g. V number of chargers installed by W date, X number of chargers installed by Y date, all chargers installed by Z date). Definition of “Material Default” includes option to state a long-stop date by which all Installation Works must be completed (and therefore the network must be fully operational)]

It may be that dates for the installation of some chargepoints needs to change due to a Relief Event in Schedule Part 17.

Depending on the scope of the Installation Works, the Programme may comprise the requirement to install part of the overall scope within a defined period with the requirement for the Authority and the Concessionaire to jointly develop an agreed programme for the remaining phases of the Installation Works..]

## PART 10 – INSTALLATION WORKS PROPOSAL

[Relevant details the Installation Works to be provided by bidders as part of the procurement process, and then relevant aspects included in the Schedule here so that Concessionaire is contractually obliged to provide the same.]

[These are likely to be reference design templates for generic installations for each type of installation being proposed.]

## PART 11 – SPECIFICATION OF SERVICES

[Specification of the Services (operation of the EVI Network) which are to be carried out throughout the Concession Period. This should align with specification in any related procurement documents.]

The Concessionaire will already be required to operate the EVI Network in a manner that complies with all Necessary Consents per Clause 8. Local authorities are encouraged to only list additional requirements that are necessary to meeting their objectives in terms of service quality and accessibility.

Things to consider may include:

- Data Protection and Security
- Charge Point Management System
- Fault Management
- Planned Maintenance
- Customer Interface and 24/7 Helpline
- Booking Systems

The Authority should be clear in Schedule Part 11 - Specification of the Services who is responsible for maintaining any infrastructure that does not form part of the Existing or New Equipment (e.g. signage, lighting, CCTV, bay markings, grounds maintenance, etc.). ]

## PART 12 - KPI FRAMEWORK

[Framework which sets the level to which Services must be carried out.]

Each KPI should have a set number of KPI Points associated with failure (a certain number of KPI points will then amount to a default per Clause 12.2), which should be determined by materiality of the failure.

Some KPIs may also have an associated Service Credit (compensation payable to Authority on KPI Failure).

Authorities should note that, without a Service Credit or the KPI Points threshold being reached, there is no consequence or remedy for a KPI Failure.

Authorities may also want to assign to each KPI:

- a notification period (how quickly the Authority must be told of failure); and
- a rectification period (within which, if addressed, KPI Failure, KPI Points and Service Credit are not applied).

The Authority may want to set a mechanism for adjusting/calculating Service Credits throughout the Concession Period (e.g. indexation), but should remember that these must always be a compensation, set at the level of a genuine pre-estimate of loss in the event of a KPI Failure, and not penalties.

The authority may wish to offer a grace period on the application of KPI Failures to Existing Equipment.]

### **PART 13 –SERVICES PROPOSAL**

[Detail of how the Concessionaire will carry out the Services to be provided by bidders as part of the procurement process, and then relevant aspects included in the Schedule here so that Concessionaire is contractually obliged to provide the same.]

### **PART 14 – TARIFF REVIEW**

[This should set out process for varying or adjusting the tariff regime for AC and DC charging. It may also include the proposal by Concessionaire or the Authority to introduce flexible tariffs and any discounted tariffs for target user groups.]

### **PART 15– REPORTING REQUIREMENTS**

[Details of the information to be provided by the Concessionaire to the Authority in monthly and annual reports per Clause 11.1. Should include progress reporting on the Installation Works, project accounts for purpose of calculating revenue share, annual tariff benchmarking, monthly KPI performance monitoring, etc.]

### **PART 16 – RECORDS**

[Form of project records to be kept per Clause 11.2. Should include any information that Authority may need access to from an audit perspective.]

### **PART 17 – RELIEF EVENTS**

[Details of events by which Concessionaire can claim relief from KPI failures, etc. Envisioned that these will be events outwith the control of either party (e.g. delay in provision of Necessary Consents, , delay by the electricity network operator, failure or non-availability of the electrical supply to the Site all provided the Concessionaire has complied with all relevant processes and which is not due to failure of Concessionaire]

## **PART 18 – COMPENSATION EVENTS**

[Details of events by which Concessionaire can claim compensation from KPI failures, etc. (Envisioned that this will include a failure of the Authority in provision of access to a Site)]

## **PART 19 – COLLATERAL AGREEMENTS**

[Collateral agreements (such as subcontracts approved in the procurement process, or crucial supply chain contracts) which the Authority wants to be covered by Clause 19.]

## **PART 20 – TEMPLATE PARENT COMPANY GUARANTEE**

[Burness Paul have provided a Template PCG which can be adapted for use on a project-specific basis.]

## **PART 21 - EXIT MANAGEMENT SPECIFICATION**

[Details of the Exit Management Plan (including the handover of the assets to the Authority or to a subsequent contractor, etc.) which are required to be carried out. This should align with specification in any related procurement documents.]

## **PART 22 – EXIT MANAGEMENT PROPOSAL**

[Detail of how the Concessionaire will carry out the Exit Management Plan to be provided by bidders as part of the procurement process, and then included in the Schedule here so that Concessionaire is contractually obliged to provide the same.]