

If, as a result of any monitoring, auditing, examination, survey or inspection carried out by the Authority pursuant to this Contract, material breaches of the Service Provider's obligations under this Contract are identified the Authority may, in its absolute discretion and at the cost of the Service Provider, appoint a third party monitor. Such third party monitor may:

43.2.1.1 monitor and/or audit the Services and the Service Provider's and/or any Service Provider Party's monitoring (including any joint monitoring) and quality management procedures including examining or inspecting works or activities on or off site;

43.2.1.2 continue to carry out the activities in clause 43.2.1.1 above until either:

- (a) the Service Provider shall have demonstrated to the reasonable satisfaction of the Authority that any material breaches of any of the Service Provider's obligations under this Contract have been remedied or if not remediable the Service Provider has used reasonable endeavours to mitigate the consequences of such material breaches and that the Services, the Service Provider's and/or any Service Provider Party's monitoring (including any joint monitoring) and quality management procedures are delivered in such a way as to ensure that the minimum number of deductions under the Payment Mechanism are made in respect of such material breaches; or
- (b) if earlier, the Authority otherwise directs in its sole discretion.

43.3 Default

In default of agreement of any matter referred to in clause 43.2 (*Appointment of a third party monitor*), either Party may refer the matter for determination in accordance with clause 70 (*Dispute Resolution*).

43.4 Records and possession of information

- 43.4.1 In order to discharge the reporting and monitoring obligations of this clause 43 (*Monitoring and Reporting*) and notwithstanding the obligations of the Service Provider set out in clause 92 (*Service Provider Records*) the Service Provider shall comply with the terms of this clause 43.4 (*Records and possession of information*).
- 43.4.2 The Service Provider shall provide to the Authority up to date organisation charts showing its management structure and that of each Service Provider Party (if any) and indicate all substantial suppliers for the provision of the Services. The Authority shall be notified as soon as reasonably practicable of any amendment to any organisation chart.
- 43.4.3 The Service Provider shall keep evidence of all relevant training and instruction of all Employees together with relevant certificates and qualifications, and copies of the same shall be provided to the Authority on reasonable request.
- 43.4.4 Any incidents or occurrences which in the Service Provider's reasonable opinion may have a material impact upon the provision of any part of the Services and/or the compliance by the Service Provider with its obligations in clause 20 (*Obligation to provide the Services and Performance Standards*) shall be notified to the Authority in writing by the Service Provider at the earliest opportunity.
- 43.4.5 The Service Provider shall, and shall procure that each Service Provider Party (if any) shall, retain records relating to health and safety at work where there is a strict liability to so maintain such records pursuant to Legislation and shall, if reasonably requested by the Authority, make available or provide copies to the Authority of all certificates, approvals, records and/or other documents.
- 43.4.6 If reasonably requested by the Authority, the Service Provider shall provide copies of the records of any unspent convictions (as defined in the Rehabilitation of Offenders Act 1974 - Disclosure of Convictions) of any Employees.

43.5 Anticipated methods of monitoring

43.5.1 The Service Provider and the Authority shall, as at the date of this Contract, undertake monitoring pursuant to this clause 43 (*Monitoring and Reporting*) as follows:

43.5.1.1 such monitoring as is necessary to comply with the requirements of:

- (a) clause 6 (*Surveys and Inspections*);**
- (b) schedule 2 (*Output Specification*);**
- (c) schedule 11 (*Monitoring*); and**
- (d) Method Statement 2 (*Network and Infrastructure Condition*); and**

43.5.1.2 as required to respond to issues that the Service Provider is notified of by the Authority, Third Parties and members of the public.

43.5.2 The Authority may additionally undertake monitoring pursuant to this clause 43 (*Monitoring and Reporting*) as follows:

43.5.2.1 random visual inspections whereby aspects of the Services shall be marked against the requirements set out in the Output Specification;

43.5.2.2 pursuant to clause 6.21 (*Authority Surveys*);

43.5.2.3 pursuant to clause 0 (

43.5.2.4

43.5.2.5 *Authority monitoring of maintenance obligations*);

43.5.2.6 monitoring of the Management Information System;

43.5.2.7 monitoring the performance of the UTMC; and

43.5.2.8 if the Authority decides it is necessary, the appointment of a third party monitor pursuant to clause 43.2 (*Appointment of a third party monitor*).

43.5.3 The Authority shall notify the Service Provider where monitoring undertaken pursuant to clause 43.5.2 indicates that aspects of the Services are not being delivered.

43.5.4 The Service Provider shall ensure that any matter arising from any such monitoring conducted in accordance with this clause 43.5 (*Anticipated methods of monitoring*) that relates to the performance of the Services is recorded within the Management Information System.

44. THE NETWORK BOARD, PARTNERING FACILITATOR AND PROJECT MEETINGS

44.1 Objectives of the Network Board

44.1.1 The overall objectives of the Parties in establishing the Network Board ("Network Board's Objectives") are as follows:

- 44.1.1.1 to secure a working relationship between those involved in meeting or contributing to the Authority's objectives;**
- 44.1.1.2 to assist in effective communications between the Parties, those involved in meeting or contributing to the Authority's objectives and Interested Parties;**
- 44.1.1.3 to provide leadership, commitment and motivation;**
- 44.1.1.4 to create and maintain a partnering process and team culture;**
- 44.1.1.5 to achieve mutually beneficial outcomes for the Parties;**
- 44.1.1.6 to assist in giving strategic direction to the management of the Project Facilities and ensure that longer term issues are properly considered; and**
- 44.1.1.7 to ensure that all decisions support the Authority's compliance with its Best Value Duty.**

44.1.2 Accordingly it shall be the role of the Network Board:

- 44.1.2.1 to facilitate the achievement of the Network Board's Objectives;**
- 44.1.2.2 to promote best whole life cost and optimise network investment decisions;**
- 44.1.2.3 to reduce bureaucracy and duplication of effort and enhance efficiency and economy;**
- 44.1.2.4 to set optimum targets for year-on-year improvements; and**

44.1.2.5 to have regard to such Liaison Procedures that the Parties may establish from time to time pursuant to clause 86 (*Liaison*).

44.2 Terms of reference of the Network Board

44.2.1 General

The Network Board may discuss any matter of relevance to the Project Facilities, the Project Network, this Contract or the Services, including:

44.2.1.1 considering and producing recommendations to resolve any ambiguities or discrepancies in this Contract;

44.2.1.2 making proposals to remove requirements on the Parties or others which are illegal, impossible or both;

44.2.1.3 considering and subsequently recommending changes to this Contract and considering any implications (financial or otherwise) which flow from such changes;

44.2.1.4 considering all issues related to innovation and agreeing recommendations regarding the implementation and monitoring of any innovation;

44.2.1.5 convening and organising workshops and seminars for attendance by the Parties and Interested Parties on issues relevant to the performance of the Services;

44.2.1.6 considering the appropriateness of Service Point awards and levels.

44.2.2 Specific issues

The Network Board may in addition to those matters listed in clause 44.2.1 (*General*) review the following issues (without limitation):

44.2.2.1 a Change of Law which has occurred or is likely to occur and its impact upon the performance of the Services;

44.2.2.2 changes in the Authorised Functions;

- 44.2.2.3 proposed Service Provider Programmes;
- 44.2.2.4 the operation of the Service Provider's quality management systems under clause 24 (*Quality Management*);
- 44.2.2.5 the Service Provider's progress in achieving the Milestones;
- 44.2.2.6 health and safety;
- 44.2.2.7 the interface of the Project with the Authority's capital works contracts for new schemes affecting the Project Network; and
- 44.2.2.8 the interface of the Project with the new roads constructed by private developers.

44.2.3 Disputes

Notwithstanding the referral of a Dispute to Dispute Resolution under clause 70 (*Dispute Resolution*), the Parties may by agreement refer a Dispute to the Network Board for discussion and, if possible, resolution. Any decision relating to, or resolution of, such Dispute by the Network Board shall be without prejudice to the procedures in clause 70 (*Dispute Resolution*).

44.3 Network Board governance

- 44.3.1 The Network Board shall comprise two (2) representatives ("Board Members") of each of the Parties and shall operate by consensus. If a Board Member shall be unable to attend a meeting he/she shall be able to co-opt a representative to attend the meeting to act in his/her place.
- 44.3.2 At each meeting of the Network Board one (1) of the Authority's representatives shall act as chair.
- 44.3.3 Locations and timings of meetings shall be decided by the Network Board (such meetings shall not be less frequent than quarterly but may be more frequent if the Network Board so agrees).
- 44.3.4 The agenda at each meeting of the Network Board shall be agreed by Board Members who will be present at the Network Board meeting with such input and support from the Partnering Facilitator as is required.

44.3.5 The Network Board may set up working groups, sub-groups or special interest groups as it agrees.

44.3.6 All Board Members shall act in a spirit of mutual trust and co-operation when dealing with matters within the remit of the Network Board.

44.3.7 The Network Board is not empowered to give instructions or directions to either of the Parties nor to amend the terms of this Contract.

44.4 Role of the Partnering Facilitator

The Authority may appoint a Partnering Facilitator who shall attend meetings of the Network Board under an obligation to act in an independent manner without bias or favour to either Party represented on the Network Board or any Third Party who may have been invited to attend in order to establish and maintain an effective partnering process between the Board Members and assist the Board Members.

44.5 Monthly Project Meetings

44.5.1 A meeting ("Monthly Project Meeting") shall occur monthly (or at more frequent intervals as may be required by the Authority acting reasonably) throughout the Contract Term attended by the Service Provider's Representative and the Authority's Representative. The purpose of the Monthly Project Meeting shall be to (without limitation):

- 44.5.1.1 review the Monthly Service Report produced and submitted in accordance with clause 44.6 (*Monthly Service Report*);
- 44.5.1.2 record and review any delays, claims, incidents or issues arising in relation to Relief Events, Compensation Events, Force Majeure Events and Excusing Causes;
- 44.5.1.3 consider and respond to requests for extension of time;
- 44.5.1.4 consider and report on the effect of any Change or Change of Law or discuss the effect of any proposed Change or anticipated Change of Law;

- 44.5.1.5 identify and/or provide any outstanding information required from the Authority and/or the Service Provider in accordance with the provisions of this Contract;
 - 44.5.1.6 review the progress of any matters which are (at the time) subject to the Review Procedure;
 - 44.5.1.7 review conflicts (if any) between and/or in any Project Documents;
 - 44.5.1.8 review any matters arising from the Monthly Monitoring Report submitted in accordance with the requirements of this Contract;
 - 44.5.1.9 review any notification made by the Authority pursuant to clause 20.3 (*Major MS Breaches*) and/or clause 20.4 (*Minor MS Breaches*) and/or the Service Provider pursuant to clause 20.5 (*Necessity to breach Method Statements*) in respect of breaches of Method Statements and discuss the reasons for, the action taken to rectify and the measures taken, or proposed to be taken, to prevent any future occurrences of a breach of the relevant Method Statements;
 - 44.5.1.10 discuss any Major MS Breach Common Cause notified to the Service Provider by the Authority; and
 - 44.5.1.11 any other relevant matter.
- 44.5.2 The Authority's Representative and the Service Provider's Representative may invite attendees who are appropriate in relation to the agenda of the meeting, but having due regard to facilitating good and efficient management of the Monthly Project Meeting and preserving confidentiality in accordance with clause 76 (*Freedom of Information and Confidentiality*). The Service Provider's Representative will minute the meetings and use reasonable endeavours to distribute the minutes within five (5) Business Days of the relevant Monthly Project Meeting to the Authority's Representative, and any other person agreed between the Parties in writing (but in any event distribute the minutes no later than ten (10) Business Days of the relevant Monthly Project Meeting).

44.6 Monthly Service Report

A report ("Monthly Service Report") will be issued to the Authority by the Service Provider at least two (2) Business Days prior to each Monthly Project Meeting. Each Monthly Service Report will state, inter alia, the following:

- 44.6.1 details of the progress made in relation to the Core Investment Period Programme, Annual Programme and the Two Year Programme, together with details of actual progress to date and remaining duration for each activity;**
- 44.6.2 a statement of the status of all consents and approvals;**
- 44.6.3 a résumé of the reasons for any delay in the provision of the Services;**
- 44.6.4 details of the actions and timetable to be taken to mitigate delays in the provision of the Services;**
- 44.6.5 summary statement of any Changes requested by the Authority or by the Service Provider;**
- 44.6.6 details of any outstanding information required from the Authority and/or the Service Provider;**
- 44.6.7 details of any health and safety issues;**
- 44.6.8 a summary statement of quality issues (including issues regarding workmanship);**
- 44.6.9 status of any actions arising from the last Monthly Service Report;**
- 44.6.10 any details required, whether monthly or annually, in accordance with schedule 2 (*Output Specification*);**
- 44.6.11 details of any organisational changes;**
- 44.6.12 any details relevant to the exercise of Authorised Functions as may be required;**
- 44.6.13 details of any Accruals/De-Accruals that have occurred in the past Contract Month;**

- 44.6.14 details of all Claims in the past Contract Month on any of the insurance policies referred to in clause 56 (*Insurance*), including full details of any incident giving rise to any claim (save to the extent already notified under clause 56.8 (*Insurance*));
- 44.6.15 details of health and safety issues shown in a simple table of numbers and/or described in succinct prose as appropriate. This shall include as a minimum the accident incident rate for Personnel and separately for the public insofar as the accidents relate to the Services and important events such as any notices served on the Service Provider by the Health and Safety Executive;
- 44.6.16 any issues in respect of shortages and product lead in times (including any shortages or lead times in relation to equipment required by the Service Provider in order to perform its obligations as set out in clause 6 (*Surveys and Inspections*));
- 44.6.17 a summary of those issues set out in the registers referred to in part 8 of schedule 2 (*Output Specification*);
- 44.6.18 details of the Service Provider's progress made in relation to meeting its obligations set out in clause 6 (*Surveys and Inspections*) together with actual progress to date, any issues or concern which have arisen and the proposed actions to mitigate such issues or concerns;
- 44.6.19 details of any breaches of the Method Statements notified by:
- 44.6.19.1 the Authority pursuant to clause 20.3 (*Major MS Breaches*) and/or clause 20.4 (*Minor MS Breaches*); and/or
 - 44.6.19.2 the Service Provider pursuant to 20.5 (*Necessity to breach Method Statements*); and
- 44.6.20 whether such breaches are capable of remedy and, if so, whether they have been remedied;
- 44.6.21 if such breaches are not capable of remedy what measures have been put in place to mitigate the consequences of the breach; and

44.6.22 where applicable, having regard to the nature of the relevant breaches, what procedures have been put in place to ensure that such breaches do not recur; and

44.6.23 any other information reasonably requested by the Authority.

45. PAYMENT AND FINANCIAL MATTERS

45.1 Monthly Invoices and Monitoring Reports

45.1.1 Subject to clause 45.2 (*Expiry of Contract Term*), on:

45.1.1.1 the fifth (5th) Business Day after the Service Commencement Date (in respect of the Month in which Service Commencement occurs); or

45.1.1.2 the fifth (5th) Business Day of each subsequent Month during the Contract Term,

the Service Provider shall deliver to the Authority an invoice in respect of that Month ("Invoice") and a Draft Monthly Monitoring Report relating to the previous Month.

45.1.2 The Service Provider shall ensure that each Invoice is:

45.1.2.1 in a form acceptable to Her Majesty's Revenue & Customs as a valid VAT invoice; and

45.1.2.2 addressed to the Authority's Representative.

45.1.3 The Service Provider shall ensure that each Invoice contains the following information:

45.1.3.1 the Monthly Payment calculated in accordance with paragraph 2.1 of schedule 4 (*Payment Mechanism*), together with details of how such amount was calculated;

45.1.3.2 any VAT payable in respect of the amounts referred to in this clause 45.3 (*Disputed Amounts*); and

45.1.3.3 the net amount due from the Authority to the Service Provider or the Service Provider to the Authority (as appropriate).

45.1.4 The Service Provider shall complete and provide each Draft Monthly Monitoring Report in the format set out in Part 2 (*Monthly Payment*) of schedule 4 (*Payment Mechanism*).

45.1.5 For the purposes of calculating the Monthly Payment the Service Provider shall take into account only such Milestones (or part thereof) where the applicable Actual Milestone Completion Date or Actual District Milestone Completion Date (as the case may be) has actually occurred at the first day of the Month to which the relevant Invoice relates. Where such Actual Milestone Completion Date or Actual District Milestone Completion Date (as the case may be) occurs part way through a Month, the Service Provider shall be entitled to issue a supplementary Invoice in an amount equal to "X" pounds where "X" is the difference between:

45.1.5.1 such sum as would have been the Monthly Payment for that Month had the Actual Milestone Completion Date or Actual District Milestone Completion Date (as the case may be) occurred prior to the commencement of the relevant Month; and

45.1.5.2 that Monthly Payment actually included in the Invoice issued pursuant to clause 45.1.1 in respect of that Month;

provided that "X" shall be adjusted pro rata based on the number of days in the Month before and after the day on which the Actual Milestone Completion Date or Actual District Milestone Completion Date (as the case may be) occurred.

45.1.6 No earlier than five (5) Business Days and no later than ten (10) Business Days after receipt by the Authority of each Draft Monthly Monitoring Report the Parties shall meet to review and agree the content of the same, and:

45.1.6.1 the Service Provider shall, by the twentieth (20th) Business Day of each Month, provide to the Authority the Actual Monthly Monitoring Report relating to the preceding Month; and

45.1.6.2 any disputes relating to a Draft Monthly Monitoring Report may be referred by either Party for resolution pursuant to clause 70 (*Dispute Resolution*).

45.1.7 Subject to clause 45.3 (*Disputed Amounts*) and clause 68 (*Handback Procedure*), the Authority shall pay to the Service Provider the amount stated on any Invoice issued in accordance with clause 45.1.1 within ten (10) Business Days of receipt of such Invoice.

45.2 Expiry of Contract Term

45.2.1 On the fifth (5th) Business Day of the Final Month the Service Provider shall deliver to the Authority a Draft Monthly Monitoring Report relating to the Month preceding the Final Month, but shall only be entitled to deliver an Invoice relating to the Month preceding the Final Month in accordance with clause 45.2.3.1.

45.2.2 On the fifth (5th) Business Day after the Expiry Date the Service Provider shall deliver to the Authority a Draft Monthly Monitoring Report relating to the Final Month, but shall only be entitled to deliver an Invoice relating to the Final Month in accordance with clause 45.2.3.1.

45.2.3 No earlier than five (5) Business Days and no later than ten (10) Business Days after receipt by the Authority of the Draft Monthly Monitoring Report for the Final Month the Parties shall meet to review and agree the content of both the Draft Monthly Monitoring Report for the Month preceding the Final Month and the Draft Monthly Monitoring Report for the Final Month, and:

45.2.3.1 to the extent the content of the Draft Monthly Monitoring Reports are agreed by the Parties, the Service Provider shall, no later than ten (10) Business Days after such meeting provide to the Authority the Actual Monthly Monitoring Report and the Invoice relating to both the Month preceding the Final Month and the Final Month itself; and

45.2.3.2 any disputes relating to the Draft Monthly Monitoring Report may be referred by either Party for resolution pursuant to clause 70 (*Dispute Resolution*).

45.2.4 The Authority shall pay to the Service Provider the amounts stated on the Invoices issued in accordance with clause 45.1.1 or clause 45.2.3.1 within ten (10) Business Days of receipt of such Invoices.

45.3 Disputed Amounts

45.3.1 If either Party in good faith disputes any amounts which are the subject of a Draft Monthly Monitoring Report and/or an Invoice, that Party shall, as soon as reasonably practicable notify the other Party of the amounts which are in dispute (a "Disputed Sum"), providing reasonable details of the nature of each such Disputed Sum.

45.3.2 Any Disputed Sums shall not be payable until the relevant dispute has been resolved and become payable in accordance with the provisions of clause 45.3.3, but any undisputed amounts shall be payable on the due date.

45.3.3 Without prejudice to either Party's rights under clause 70 (*Dispute Resolution*), the Parties shall use all reasonable endeavours to reach agreement in respect of any Disputed Sum. Unless agreed otherwise by both Parties, if agreement has not been reached in relation to the Disputed Sum two (2) Business Days prior to the date upon which the Invoice becomes payable (or in respect of a disputed Draft Monthly Monitoring Report, at any time after the meeting pursuant to clause 45.1.6 or clause 45.2.3 (as relevant)), either Party may refer the dispute for resolution pursuant to clause 70 (*Dispute Resolution*).

45.3.4 Any amount which is agreed or determined to be payable in respect of any Disputed Sum shall be paid by means of an adjustment to the next Monthly Payment following such agreement or determination (or earlier as the paying Party may in its discretion decide).

45.4 Amounts overpaid, underpaid or wrongfully paid by a Party

In respect of any amounts overpaid, underpaid or wrongfully paid or deducted by a Party:

45.4.1 either Party may at any time recover from the other Party or deduct from or add to a future Monthly Payment any amount agreed or determined to have

been overpaid, underpaid, wrongfully paid or deducted for any reason including mistake of law or of fact;

45.4.2 each Party shall notify, in writing, the other Party of any payment which it considers to have been overpaid, underpaid, wrongfully paid, or deducted, providing reasonable details of all relevant amounts and an explanation of why that Party considers that such amounts have been overpaid, underpaid, wrongfully paid or deducted. If the other Party does not dispute all or any of such amount within thirty (30) Business Days of being notified in accordance with this clause 45.4.2, such amount shall be included in the calculation of the next Monthly Payment (and be paid in accordance with this clause 45.4) or paid earlier at the paying Party's discretion;

45.4.3 where all or any amounts referred to in clause 45.4.1 and 45.4.2 are disputed and the Parties (acting in good faith) are unable to agree, such dispute shall be resolved pursuant to the provisions of clause 70 (*Dispute Resolution*) and following determination, the relevant sum shall be included in the calculation of the following Monthly Payment (and be paid in accordance with this clause 45.4) or paid earlier at the paying Party's discretion;

45.4.4 interest shall be payable (by the paying Party) at the Standard Rate on any amount agreed or resolved to be payable pursuant to this clause 45.4 from the date on which the paying Party first had the benefit of such amount up to and including the due date for payment of the agreed or determined sum or the date paid if earlier than the due date. If the paying Party does not pay any amount agreed or determined to be payable pursuant to this clause 45.4 by the relevant date referred to in clause 45.4.2, interest shall be payable in accordance with clause 87 (*Interest on late payments*).

45.5 Set off

45.5.1 The Service Provider shall not be entitled to retain or set off any amount due to the Authority by it (other than as expressly set out in this Contract), but the Authority may retain or set off any amount owed to it by the Service Provider under this Contract which has fallen due and payable against any amount due to the Service Provider under this Contract.

45.5.2 If the payment or deduction of any amount referred to in clause 45.5.1 is disputed then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with clause 45.3 (*Disputed Amounts*).

46. ELECTRICITY PROCUREMENT

46.1 Authority's obligation to procure Unmetered Electricity

- 46.1.1 The Authority shall for the duration of the Contract Term enter into a contract with an Electricity Supplier in order to procure a supply of Unmetered Electricity to those items of Powered Apparatus capable of assessment pursuant to BSCP520 ("**Electricity Contract**") and such Electricity Contract shall allow for invoices to be paid monthly in arrears. The Authority shall provide a copy of such Electricity Contract to the Service Provider and any amendments thereto.
- 46.1.2 The Service Provider shall provide any information and/or assistance that the Authority may reasonably require relating to the supply of Unmetered Electricity pursuant to the Electricity Contract ("**Electricity Supply**") within five (5) Business Days of the date of receipt of such Authority request.
- 46.1.3 The Authority shall forward to the Service Provider any invoice received in respect of the cost of the previous Month's Electricity Supply together with details of any applicable VAT ("**Monthly Electricity Invoice**") within three (3) Business Days of the receipt of such Monthly Electricity Invoice from the Electricity Supplier.
- 46.1.4 The Authority shall pay the amount set out in each Monthly Electricity Invoice ("**Monthly Invoiced Electricity Amount**") within the time period so specified on each such Monthly Electricity Invoice and paragraph 1.8 of schedule 4 (*Payment Mechanisms*) shall apply in respect of determining the Unmetered Electricity Payment.
- 46.1.5 Subject to the provisions of clause 46.1.6, the Service Provider shall be entitled to dispute the information contained in the Monthly Electricity Invoice with the Electricity Supplier.

46.1.6 The Service Provider shall not, by any act or omission, cause the Authority to be in breach of the terms of the Electricity Contract. In the event that the Service Provider's acts or omissions cause the Authority to be in breach of the Electricity Contract or cause the Electricity Supplier to terminate the Electricity Contract, the provisions of clause 55 (*Indemnity*) shall apply and the Service Provider shall at its own cost provide such assistance as the Authority may require in entering into a replacement electricity contract.

46.1.7 The provisions of this clause 46.1 shall continue to apply in respect of the Final Month +1.

46.1.8 No later than five (5) Business Days following the end of the first Month of the Contract the Service Provider shall provide the Authority with a copy of the Powered Apparatus Inventory.

46.1.9 Within five (5) Business Days of the end of each Month following the second Month of the Contract, the Service Provider shall provide the Authority with an updated copy of the Powered Apparatus Inventory.

46.2 Authority's obligation to procure Metered Electricity

46.2.1 Subject to clause 46.2.6, the Authority shall for the duration of the Contract Term enter into a contract with an Electricity Supplier in order to procure a supply of Metered Electricity to the Metered Apparatus ("Metered Electricity Contract") and such Metered Electricity Contract shall allow for invoices to be paid monthly in arrears. The Authority shall provide a copy of such Metered Electricity Contract to the Service Provider and any amendments thereto.

46.2.2 The Service Provider shall provide any information and/or assistance that the Authority may reasonably require relating to the supply of Metered Electricity pursuant to the Metered Electricity Contract ("Metered Electricity Supply") within five (5) Business Days of the date of receipt of such Authority request.

46.2.3 The Authority shall forward to the Service Provider any details received in respect of any previous Month's Metered Electricity Supply within three (3) Business Days of the receipt of such details from the Metered Electricity

Supplier ("**Metered Electricity Information**"), including details of the consumption of **Metered Electricity** for each of the **Metered Apparatus**, for the purposes of the calculation of **EPm** pursuant to paragraph 1.9 of schedule 4 (*Payment Mechanism*).

46.2.4 Subject to the provisions of clause 46.2.5, the Service Provider shall be entitled to dispute the information contained in the **Metered Electricity Information** with the **Electricity Supplier**.

46.2.5 The Service Provider shall not, by any act or omission, cause the Authority to be in breach of the terms of any **Metered Electricity Contract**. In the event that the Service Provider's acts or omissions cause the Authority to be in breach of a **Metered Electricity Contract** or cause the **Metered Electricity Supplier** to terminate a **Metered Electricity Contract**, the provisions of clause 55 (*Indemnity*) shall apply and the Service Provider shall at its own cost provide such assistance as the Authority may require in entering into a replacement metered electricity contract.

46.2.6 Notwithstanding the provisions of clause 46.2.1, the Service Provider shall be solely responsible for all costs associated with (including installation and the cost of **Metered Electricity** at its actual rate) any **Metered Apparatus** which requires the installation of additional electricity meters ("**Meters**") by the Service Provider or a Service Provider Party after the Service Commencement Date ("**New Meters**") save that when such requirement is solely a requirement of the Authority it shall be dealt with as an Authority Change pursuant to schedule 18 (*Change Protocol*).

46.2.7 Any fixed and standing charges ("**Existing Meter Standing Charge**") associated with any Meter other than a **New Meter** ("**Existing Meters**") shall be paid by the Authority, save that any increase in any **Existing Meter Standing Charge** which is reasonably attributable to the provision of the Services by the Service Provider shall be payable by the Service Provider to the Authority (and deducted from the **Monthly Payment** in accordance with paragraph 1.9 of schedule 4 (*Payment Mechanism*));

46.2.8 Any fixed and standing charges associated with **New Meters** shall be solely for the account of the Service Provider.

47. REVENUE SHARING

47.1 Information to be given to Authority

Within one (1) Month following the end of each Contract Year the Service Provider shall, in writing, inform the Authority of what the Revenue Sharing Equity IRR figure was for the period starting on the Service Commencement Date and ending on the final day of the previous Contract Year. If the Revenue Sharing Equity IRR, subject to clause 47.2 (*Authority's Revenue Share*) at any time during the Service Period exceeds [REDACTED] the Service Provider shall account to the Authority as follows:

47.1.1 for every percentage point (or part thereof) that the Revenue Sharing Equity IRR exceeds [REDACTED] but not [REDACTED], the Authority shall be entitled to [REDACTED] of the excess;

47.1.2 for every percentage point (or part thereof) that the Revenue Sharing Equity IRR exceeds [REDACTED] but not [REDACTED], the Authority shall be entitled to [REDACTED] of the excess; and

47.1.3 for every percentage point (or part thereof) that the Revenue Sharing Equity IRR exceeds [REDACTED], the Authority shall be entitled to [REDACTED] of the excess.

Authority's Revenue Share

47.2 The Service Provider shall pay to the Authority the Authority's Revenue Share at the same time as it makes the next Distribution following the date on which the Revenue Sharing Equity IRR exceeds [REDACTED]:

47.3 If the Service Provider fails to pay the Authority's Revenue Share at the same time as it makes the Distribution (referred to in clause 47.2), interest shall be payable in accordance with clause 87 (*Interest on late payments*).

47.4 There shall be no double counting in calculating the amount due to the Authority. In particular the calculation of Revenue Sharing Equity IRR in clause 47.1 (*Information to be given to Authority*) will exclude the Service Provider's share of any saving generated under clauses 32.4.12 (*Comprehensive Area Assessments*) and 48.5 (*Connections Review*).

48. CONNECTIONS REVIEW

48.1 Within ten (10) Business Days of each anniversary of the Service Commencement Date which falls within the Core Investment Period, the Service Provider shall complete a review of the terms upon which it receives the Original Non-Contestable Works (a "Connections Review").

48.2 Written report on Connections Review

The Service Provider shall submit a written report to the Authority no later than five (5) Business Days after the completion of each Connections Review undertaken in accordance with clause 48.1. The report shall contain details and comment on the outcome of the Connections Review, having due regard to issues of quality, health and safety, operational resources and capabilities and including the most economically advantageous terms to the Authority upon which the Service Provider would be able to procure or provide the Original Non-Contestable Works to the next succeeding Connections Review or (if earlier) for the remainder of the Core Investment Period.

48.3 Alteration of terms upon which Service Provider receives any Original Non-Contestable Works

The Service Provider shall not be obliged to alter the terms upon which it receives any Original Non-Contestable Works but if the Service Provider does choose to alter the terms upon which it receives such Original Non-Contestable Works during the provision of the Core Investment Period, the provisions of clauses 48.4 to 48.7 shall apply.

48.4 If, in accordance with clause 48.3 (*Alteration of terms upon which Service Provider receives any Original Non-Contestable Works*) or otherwise, the Service Provider changes the terms upon which it receives the Original Non-Contestable Works such that the price of the Original Non-Contestable Works is less than the relevant amount in schedule 17 (*Original Non-Contestable Works Prices*) the Service Provider shall (unless the Authority agrees otherwise in writing that such changes are de minimus), adjust the Financial Model in accordance with clause 53 (*Financial Adjustments*) to reflect such changes. Such adjustment shall take effect on the date the revised terms come into effect.

- 48.5 To the extent that the adjustment to the Financial Model referred to in clause 48.4 identifies a reduction to the costs as shown in the Financial Model resulting from the changes to the terms upon which the Original Non-Contestable Works are received, the Authority shall be entitled to receive a saving of fifty per cent (50%) of the amount of such reduction ("**Non-Contestable Works Saving**") and the Annual Unitary Charge shall be adjusted accordingly to take into account such Non-Contestable Works Saving.
- 48.6 The Service Provider shall provide such information as the Authority reasonably requires to substantiate any calculations made in accordance with clauses 48.4 to 48.5 inclusive.
- 48.7 Notwithstanding any of the matters set out in this clause 48 (*Connections Review*), in no circumstances shall the Annual Unitary Charge be increased because of any Connections Review.

49. TAXATION

Adjustment of payments after taking a Relevant Tax Liability into account

Where either:

- 49.1 a payment (a "**Termination Payment**") is to be made to the Service Provider pursuant to clause 69.1 (*Compensation Following an Authority Default or a Voluntary Termination*), clause 69.3 (*Compensation following a Prohibited Act*) or clause 69.4 (*Compensation following a Force Majeure Event or Uninsurability*) (but not otherwise); or
- 49.2 a payment (an "**Indemnity Payment**") is to be made to the Authority under any other provision of this Contract,

then the amount of a Termination Payment or, where applicable, an Indemnity Payment shall be adjusted so as to ensure that the Party receiving the Termination Payment or Indemnity Payment is in the same position after account is taken of any Relevant Tax Liability which that Party incurs as a result of such Termination Payment, Indemnity Payment or additional payment under this clause 49 as it would have been in had it not been for such Relevant Tax Liability. Without prejudice to the generality of this clause 49.2, if and to the extent that any sum (an "**Authority Indemnity Sum**") constituting (directly or indirectly) an indemnity or reimbursement to the Authority but paid by the Service Provider to any person other than the

Authority, shall be treated as taxable in the hands of the Authority, the Service Provider shall promptly pay to the Authority such sum ("Compensating Sum") as (after taking into account any Tax suffered by the Authority on the Compensating Sum) shall reimburse the Authority for any Tax suffered by it in respect of the Authority Indemnity Sum after taking into account any deduction for Tax purposes obtained by the Authority in respect of the payment of, or the matter giving rise to, the Authority Indemnity Sum and the time at which the benefit of such deduction is obtained.

49.3 Determining whether Service Provider has a Relevant Tax Liability

In determining whether the Service Provider has a Relevant Tax Liability by reason of the Termination Payment, it should be assumed that any Relevant Reliefs which are available to the Service Provider (or would have been so available but for a surrender by the Service Provider of such Reliefs by way of group or consortium relief or their utilisation to reduce or eliminate any liability for tax other than a liability for tax arising in respect of the receipt or accrual of the Annual Unitary Charge) for offset against a Termination Payment, or against Tax in relation to the same, have been so offset to the maximum extent possible.

49.4 Negotiations with HMRC in relation to any Relevant Tax Liability

The Service Provider shall keep the Authority fully informed of all negotiations with Her Majesty's Revenue & Customs in relation to any Relevant Tax Liability in respect of a Termination Payment. The Service Provider shall not agree, accept or compromise any claim, issue or dispute relating to such Relevant Tax Liability without the prior written consent of the Authority, which shall not be unreasonably withheld or delayed. The Authority may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct the Service Provider to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of a Termination Payment, provided that the cost of any such dispute (including any interest or penalties incurred as a direct result of such action) shall be at the Authority's expense. However, if the Service Provider obtains professional advice from an independent person with relevant expertise that any resistance, appeal, defence or other mode of dispute is not likely to result in any more beneficial position in relation to the Relevant Tax Liability, the Service Provider shall be entitled not to continue with such resistance, appeal, defence or other mode of dispute. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial

position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under this clause 49 (*Taxation*) to reflect such outcome.

49.5 Repayment to the Authority

If:

49.5.1 the Authority makes or is obliged to make a Termination Payment which gives rise to a Relevant Tax Liability; and

49.5.2 the Service Provider subsequently obtains and uses (or would have obtained and used, had it taken all reasonable steps to do so) a Relevant Relief,

then the Service Provider shall repay to the Authority such amount as will leave the Service Provider (after that payment and, where required by clause 49.4 (*Negotiations with HMRC in relation to any Relevant Tax Liability*), on the basis that the Service Provider obtained and used that Relief) in no better and no worse position than it would have been in if no Relevant Tax Liability had arisen.

49.6 For the purposes of clause 49.5 (*Repayment to the Authority*) any Relevant Relief obtained and used (or which would have been obtained and used had all reasonable steps been taken to do so) by any person associated or connected with the Service Provider for any Tax purpose shall be treated as if it had been obtained and used by the Service Provider; and the Service Provider shall procure at the request and expense of the Authority that the Service Provider's auditors at the time of the request certify to the Authority whether any such Relief has been obtained and used by the Service Provider or any such person (or, in their reasonable opinion, acting as experts and not as arbitrators, whether any such Relief would have been obtained and used by the Service Provider or any such person had all reasonable steps been taken to do so) and, if so, its amount.

49.7 Payment of increase in amount of Termination Payment

Any increase in the amount of a Termination Payment which is payable under this clause 49 (*Taxation*) shall be paid on the later of five (5) Business Days after a demand therefor (together with evidence in sufficient detail for the Authority to satisfy itself of the Relevant Tax Liability and its calculation) is made by the Service Provider and:

49.7.1 in the case of an Actual Liability, five (5) Business Days before the date on which the relevant Tax must be paid to the tax authority in order to avoid incurring interest and penalties; and

49.7.2 in the case of a Deemed Liability, five (5) Business Days before the date on which Tax which would not have been payable but for the utilisation of the relevant Relief must be paid in order to avoid incurring interest or penalties (whether by the Service Provider or otherwise) and, for the purposes of determining when the Relief would otherwise have been utilised, Reliefs shall be regarded as utilised in the order in which they arise.

49.8 The Authority shall have the right to pay the amount payable under this clause 49 (*Taxation*) directly to the appropriate authority entitled to receive such amount in satisfaction of the relevant tax due by the Service Provider.

50. NO DEDUCTIONS OR WITHHOLDINGS

50.1 All payments due to either Party under this Contract and any other Project Document shall be calculated and made free and clear of and without deduction for, or on account of, any Taxes, unless such deduction or withholding is required by law. The Service Provider shall account on a timely basis to the appropriate authority in respect of any such deduction or withholding which is so required.

50.2 Deductions or withholdings required by law

If such deduction or withholding is required by law, the Service Provider or the Authority (as the case may be) shall, subject to clause 50.3 (*Economic benefit from deduction or withholding*) increase the payments to the Authority or the Service Provider (as the case may be) so that the net amount received and retained by the Authority or the Service Provider (as the case may be) after such deduction or withholding (and after taking account of any further deduction or withholding which is required to be made which arises as a consequence of the increase) shall be equal to the full amount which the Authority or the Service Provider (as the case may be) would have received and retained if no such deduction or withholding had applied.

50.3 Economic benefit from deduction or withholding

To the extent that the Authority or the Service Provider (as the case may be) actually derives an economic benefit from a deduction or withholding of an increased payment

under clause 50.2 (*Deductions or withholdings required by law*), the Authority or the Service Provider (as the case may be) shall make such payment as the Authority or the Service Provider (as the case may be) in its absolute discretion certifies will transfer that economic benefit to the Service Provider or the Authority (as the case may be) and will leave the Authority or the Service Provider (as the case may be) in no better and no worse position than it would have been in had no such benefit been derived. Any payments so made by the Authority or the Service Provider (as the case may be) shall be refundable to the Authority or the Service Provider (as the case may be) to the extent that the relevant benefit is ultimately not actually derived.

51. VALUE ADDED TAX

- 51.1 All amounts due under this Contract are exclusive of VAT.
- 51.2 If any supply made or referred to in this Contract is or becomes chargeable to VAT then the person receiving the supply ("Recipient") shall in addition pay the person making the supply ("Supplier") the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.
- 51.3 Where under this Contract any amount is calculated by reference to any sum which has or may be incurred by any person, the amount shall include any VAT in respect of that amount only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set-off or repayment.
- 51.4 The Service Provider shall provide the Authority with any information reasonably requested by the Authority in relation to the amount of VAT chargeable in accordance with this Contract and payable by the Authority to the Service Provider.
- 51.5 The Authority shall pay to the Service Provider from time to time as the same is incurred by the Service Provider sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within twenty (20) Business Days of the delivery by the Service Provider to the Authority of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this clause 51.4 "Irrecoverable VAT" means input VAT incurred by the Service Provider on any supply which is made to it which is used or to be used exclusively in performing the Services or any of the obligations or provisions under this Contract (together with input VAT incurred as part of its overheads in relation to such

activities) to the extent that the Service Provider is not entitled to repayment or credit from Her Majesty's Revenue & Customs (or any successor body) in respect of such input VAT.

52. SUB-CONTRACTORS IN THE CONSTRUCTION INDUSTRY SCHEME

- 52.1 This clause 52 (*Sub-contractors in the Construction Industry Scheme*) relates to the Construction Industry Scheme ("**CIS Scheme**") the framework of which is contained in Chapter 3 of Part 3 of the Finance Act 2004 with the operational details contained in the Income Tax (Construction Industry Scheme) Regulations 2005 SI 2005/2045 ("**2005 Regulations**") and which commenced on 6 April 2007.
- 52.2 Notwithstanding clause 50 (*No Deductions or Withholdings*), all payments made under this Contract that are a Contract Payment will be paid in accordance with this clause.
- 52.3 The Parties believe that all payments made pursuant to this Contract will not be within the CIS Scheme by virtue of Regulation 23 of the 2005 Regulations (Arrangements involving public bodies).
- 52.4 If and to the extent that payments made pursuant to this Contract are not excluded from the CIS Scheme by virtue of Regulation 23 of the 2005 Regulations, the Parties agree to operate the CIS Scheme in accordance with the 2005 Regulations, the Finance Act 2004 or any other statute or subordinate legislation relating to the CIS Scheme as from time to time modified or replaced whether before or after the date of this Contract ("**Relevant Legislation**") and the Parties shall use their reasonable endeavours to ensure that the Service Provider is paid without deductions under the CIS Scheme but the Authority shall be entitled to make the statutory deduction from any payment due to the Service Provider as instructed by Her Majesty's Revenue & Customs pursuant to a verification under Regulation 6(1) of the 2005 Regulations, or any subsequent notice from Her Majesty's Revenue & Customs served under Regulation 6(6) of the 2005 Regulations and in any event in accordance with the Relevant Legislation.
- 52.5 If compliance with this clause involves the Authority or the Service Provider in not complying with any other of the terms of this Contract (save for the Parties' obligations to comply with all laws), then the provisions of this clause shall prevail.

53. FINANCIAL ADJUSTMENTS

53.1 Custody Arrangements for the Base Case Financial Model

53.1.1 The Service Provider shall, no later than ten (10) Business Days after the date of this Contract, deliver two (2) electronic copies on CD-Rom in Microsoft Excel 2003 (or any media/software that replaces this) of the Base Case Financial Model to the Authority (for the Authority to hold on its own behalf).

53.1.2 The Service Provider shall lodge with the Authority one (1) electronic copy on CD-Rom in Microsoft Excel 2003 (or any media/software that replaces this) of each Base Case Financial Model (in each case becoming the Base Case Financial Model for the purposes of this Contract) as may be revised from time to time pursuant to this clause 53 (*Financial Adjustments*) no later than ten (10) Business Days after any revisions have been effected and agreed with the Authority.

53.1.3 Any amendments to the Base Case Financial Model shall reflect, be consistent with and be made only in accordance with the provisions of this Contract.

53.1.4 Either Party shall have the right to inspect and audit the Base Case Financial Model at its own cost at all reasonable times.

53.2 Revisions to the Base Case Financial Model

53.2.1 Where the Parties agree that the financial consequences of any Relevant Event are best dealt with without a revision to the Base Case Financial Model, they shall agree to make such revision to the Monthly Unitary Charge as necessary on a one-off or recurrent basis. Such change shall, on the next occasion that there is a revision to the Base Case Financial Model in accordance with this clause 53 (*Financial Adjustments*) be consolidated as an update to the Annual Unitary Charge and Base Case Financial Model.

53.2.2 Prior to making any changes to the Base Case Financial Model (subject to any express provision of this Contract to the contrary), the Parties shall agree the Effective Date for the change and the basis of the revision to the Base Case Financial Model.

53.2.3 Except for revisions due to:

- 53.2.3.1 a Qualifying Refinancing (in which case the provisions of clause 93 (*Refinancing*) shall apply);**
- 53.2.3.2 a Connections Review in accordance with schedule 17 (*Original Non-Contestable Works Prices*) (in respect of the Service Provider's share of savings); or**
- 53.2.3.3 a Service Provider Change which results in costs savings (and such costs savings are shared in accordance with paragraph 4 of part 5 of schedule 18 (*Change Protocol*)),**

the Annual Unitary Charge shall be revised so as to ensure that the Service Provider is left in no better and no worse position (as defined by clause 53.3.3) than it was prior to the Effective Date and the event which gave rise to the need for the revision. In no circumstances shall any revision provide compensation to the Service Provider for any deviation in performance from that predicted in the latest Base Case Financial Model as agreed between the Parties or determined in accordance with Dispute Resolution.

- 53.2.3.4 The Service Provider shall take all reasonable and appropriate steps to mitigate the financial effects of any revision including, in particular, any adverse financial impact upon the Authority.**
- 53.2.3.5 If the Base Case Financial Model is to be revised, then the Service Provider shall make appropriate electronic amendments to it to effect such revisions made in accordance with this clause 53 (*Financial Adjustments*).**
- 53.2.3.6 Where a revision to the Annual Unitary Charge is required, the Service Provider, shall at its own cost, save as otherwise expressly provided, revise the Base Case Financial Model and submit to the Authority a revised Base Case Financial Model reflecting such adjustments.**

53.3 Principles of Adjustment

53.3.1 The following guidelines shall be followed in revising the Base Case Financial Model:

- 53.3.1.1** wherever possible the revision shall be carried out without altering the logic, formulae, inputs and assumptions incorporated in the Base Case Financial Model in any way whatsoever and only data such as costs incurred by the Service Provider and the timing and amounts of drawdowns of funding shall be changed;
- 53.3.1.2** where it is necessary to amend the logic, formulae, inputs and assumptions incorporated in the Base Case Financial Model to permit revisions to be made, this shall be carried out to the minimum extent necessary and in accordance with generally accepted accounting principles;
- 53.3.1.3** where any amendment is made to the logic, formulae, inputs and assumptions incorporated in the Base Case Financial Model, the Base Case Financial Model, as amended, shall first be run with the data included in the Base Case Financial Model immediately prior to amendment to ensure that the Key Ratios in the Base Case Financial Model are maintained at no lower or no higher levels from the Key Ratios immediately after the amendment and the real pre-tax Project IRR after and immediately prior to amendment does not differ by more than five (5) basis points (being zero point zero five);
- 53.3.1.4** the Parties may only agree changes or additions to the guidelines set out in this clause 53.3.1 where they are required in relation to circumstances not dealt with by the assumptions in the Base Case Financial Model; and
- 53.3.1.5** unless otherwise agreed by the Parties, the Service Provider shall not be permitted to backdate any increase in the Unitary Change as a result of an Authority Change.

53.3.2 Any amendment to the logic, formulae, inputs and assumptions incorporated in the Base Case Financial Model shall be fully recorded so that the manner in which the revised Annual Unitary Charge is calculated can be readily verified.

53.3.3 Any reference in this Contract to "no better and no worse" and to leaving the Service Provider being in a "no better and no worse position", shall be construed by reference to the Service Provider's:

53.3.3.1 rights, duties and liabilities under or arising pursuant to performance of this Contract, the Senior Financing Agreements and the Key Sub-Contracts; and

53.3.3.2 ability to perform its obligations and exercise its rights under this Contract, the Senior Financing Agreements and the Key Sub-Contracts,

so as to ensure that on comparing the output of the Base Case Financial Model (as at the Effective Date) before and after entering into the required Base Case Financial Model revisions, such comparison of the output from such Base Case Financial Model shows that:

53.3.3.3 the Base Case Equity IRR shall be unchanged;

53.3.3.4 the Service Provider shall be in a position which is unchanged in relation to the minimum and average Annual Debt Service Cover Ratio, and the minimum and average Loan Life Cover Ratio;

53.3.3.5 the Service Provider is left in a position which is unchanged in relation to inflation hedging of the Annual Unitary Charge within the Base Case Financial Model; and

53.3.3.6 the ability of the Service Provider to comply with the Contract is not adversely affected or improved as a consequence of the Relevant Event.

53.3.4 The Parties shall review annually and use reasonable endeavours to agree all Accruals and De-Accruals during the relevant Contract Year in order to determine whether a downwards adjustment to the Annual Unitary Charge to

reflect any benefit to the Authority and/or financial savings to the Service Provider and Service Provider Parties which have not been reflected (pursuant to schedule 19 (*Accrual and De-accrual of Project Network Parts*)) by the application of "y" values. When determining such adjustment, the Parties shall take into account the following principles:

53.3.4.1 the aggregate impact of each Accrual and each De-Accrual in the relevant Contract Year on the Service Provider's Cost Base;

53.3.4.2 any information provided by the Service Provider to the Authority pursuant to clause 31.2 (*Maintainability Assessment Service*);

53.3.4.3 any financial savings made by the Service Provider and/or Service Provider Parties for the remainder of the Contract Term arising from works carried out by (or procured by) the Authority which, pursuant to this Contract, are required in order for the Service Provider to comply with the Output Specification;

53.3.4.4 the timing of the realisation of lifecycle benefit to the Service Provider and/or the Service Provider Parties during the Contract Term; and

53.3.4.5 the "no better and no worse" principle.

53.3.5 The Parties shall review annually all Small HWA Works undertaken pursuant to clause 34.1 (*Major HWA Works, Standard HWA Works, Small HWA Works and Immediate HWA Works*) during the preceding Contract Year in order to determine whether an upwards or downwards adjustment is required to the Annual Unitary Charge to reflect any changes to the Project Network as a result of such Small HWA Works undertaken. When determining such adjustment, the Parties shall take into account the following principles:

53.3.5.1 any applicable Y values listed in part 2 or part 3 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) or as otherwise agreed pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*) in respect of the relevant Project Network Part or Project Network Parts in existence

immediately prior to the commencement of the Small HWA Works;

53.3.5.2 any applicable Y values in part 2 or part 3 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) or as otherwise agreed pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*) in respect of the relevant Project Network Part or Project Network Parts in existence immediately following the completion of the Small HWA Works;

53.3.5.3 the extent to which the Small HWA Works replace or improve existing Project Network Parts; and

53.3.5.4 any comments made by the Service Provider pursuant to clause 31 (*Maintainability Assessment Service*).

53.4 Procedure

53.4.1 The Base Case Financial Model shall be revised by the Service Provider in accordance with the provisions of this clause 53 (*Financial Adjustments*) within fifteen (15) Business Days of the Effective Date.

53.4.2 If the Base Case Financial Model is to be revised the Service Provider shall at its own cost, save as otherwise expressly provided, revise the Base Case Financial Model and submit to the Authority the revised Base Case Financial Model for approval (such approval not to be unreasonably withheld or delayed).

53.4.3 The revised Base Case Financial Model produced pursuant to clause 53.4.2 shall, when it is approved by the Authority (such approval not to be unreasonably withheld), become the Base Case Financial Model for the purposes of this Contract until its further amendment in accordance with this Contract.

53.4.4 The Service Provider shall ensure that each iteration of the Base Case Financial Model is provided with a unique reference number and date.

- 53.4.5** The costs of undertaking a revision of the Base Case Financial Model shall be treated as a project cost in respect of all Relevant Events and (for the avoidance of doubt) shall be incorporated within the revised inputs associated with the revisions to the Base Case Financial Model as a result of such Relevant Event.
- 53.4.6** Where practicable, the Service Provider shall use all reasonable endeavours to carry out revisions to the Annual Unitary Charge at the end of a Contract Year in order that the revised Annual Unitary Charge may take effect at the beginning of the next Contract Year.
- 53.4.7** Following agreement of the revised Base Case Financial Model, the Service Provider shall:
- 53.4.7.1** promptly deliver a copy of the revised Base Case Financial Model to the Authority in accordance with the provisions of clause 53.1.2;
 - 53.4.7.2** return a copy of the revised Base Case Financial Model to the Authority, having observed the necessary version control in accordance with clause 53.4.4 and the necessary revisions to the Annual Unitary Charge to be made in accordance with this clause 53 (*Financial Adjustments*); and
 - 53.4.7.3** the necessary adjustments to the Annual Unitary Charge shall be made from the Effective Date.
- 53.4.8** Unless otherwise agreed in writing by the Parties, the Service Provider shall not be permitted to backdate any increase in the Annual Unitary Charge as a result of a Change.
- 53.4.9** If the Service Provider does not perform the revisions required by, and in accordance with this clause 53 (*Financial Adjustments*), the Authority may, if the Service Provider fails to rectify such failure within ten (10) Business Days of notice of such failure from the Authority, perform the revisions and determine the revised Annual Unitary Charge accordingly. All costs incurred by the Authority in doing so shall be paid by the Service Provider.

53.5 Disputes

53.5.1 Where the Service Provider and the Authority are unable to agree the revisions to the Base Case Financial Model (including the actual version of the Base Case Financial Model to be used prior to the required changes being made) within twenty (20) Business Days of submission of the revised Base Case Financial Model by the Service Provider to the Authority (or such other time period as is agreed between the Parties), then the matter shall be determined in accordance with clause 70 (*Dispute Resolution*). Where the Adjudicator so requires, he shall have the assistance of an independent auditor appointed by agreement between the Service Provider and the Authority or failing such agreement by the appropriate institution to be named.

53.5.2 Without prejudice to clause 53.5.1, where the Parties are unable to agree any matter arising under clause 53 (*Financial Adjustments*) either Party may refer matters for determination pursuant to clause 70 (*Dispute Resolution*)

PART L - CORPORATE GENERAL

54. WARRANTIES AND UNDERTAKINGS

54.1 Service Provider's Warranties

54.1.1 The Service Provider warrants to the Authority on the terms set out in this clause 54.1 (*Service Provider's Warranties*).

54.1.2 Due incorporation of the Service Provider and its capacity

54.1.2.1 The Service Provider and Holdco is duly:

- (a) incorporated under the law of England and Wales; and
- (b) has the corporate power to own its assets and to carry on its business as it is now being conducted.

54.1.2.2 The Service Provider:

- (a) has the power to enter into and to exercise its rights and perform its obligations under this Contract and the other Project Documents to which it is a party; and
- (b) has taken all necessary action to authorise the execution of and the performance of its obligations under this Contract and the other Project Documents to which it is a party (or, in the case of this Contract and any other any Project Documents executed after the date of this Contract, such action will be taken before such execution).

54.1.2.3 The Service Provider is not subject to any other obligation, compliance with which will or is likely to have a material adverse effect on the ability of the Service Provider to perform its obligations under this Contract or any other Project Document to which it is a party.

54.1.2.4 The obligations expressed to be assumed by the Service Provider under this Contract and each other Project Document to which it is a party constitute, or will when executed constitute, legal, valid, binding and enforceable obligations on the Service Provider and each Project Document will be in the proper form for enforcement in England and Wales.

54.1.2.5 The execution, delivery and performance by the Service Provider of this Contract and the other Project Documents does not contravene any provision of:

- (a) any existing Legislation either in force, or enacted but not yet in force, binding on the Service Provider;
- (b) its Memorandum and Articles of Association;
- (c) any order or decree of any court or arbitrator which is binding on the Service Provider; or
- (d) any obligation which is binding upon the Service Provider or upon any of its assets or revenues.

- 54.1.2.6 The copies of each Project Document which the Service Provider delivers to the Authority are or, as the case may be, will be true and complete copies of such documents and there are not in existence any other agreements or documents replacing or relating to any such Project Documents which would materially affect their interpretation or application.
- 54.1.2.7 The Service Provider and Holdco have not, other than in connection with the Project, traded at any time since their incorporation as companies pursuant to the Companies Act.
- 54.1.2.8 There are no material facts or circumstances in relation to the financial position or constitution of the Service Provider which have not been fully and fairly disclosed to the Authority and which if disclosed might reasonably have been expected to affect the decision of the Authority to enter into this Contract.
- 54.1.2.9 Subject to any express provision of this Contract to the contrary and clause 57.3.1 (*Authority's Warranties*), the Service Provider has conducted its own analysis and review of the Disclosed Information in accordance with this Contract.

54.1.3 No litigation

No claim is presently being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of the knowledge of the Service Provider, pending or threatened in writing against the Service Provider or any of its assets which will or may have a material adverse effect on the ability of the Service Provider to perform its obligations under this Contract and/or any other Project Document.

54.1.4 Solvency of the Service Provider

No proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Service Provider threatened) for the winding-up or dissolution of the Service Provider or for the appointment of a receiver, administrative receiver, administrator, liquidator or similar officer in relation to any of its assets or revenues.

54.1.5 Service Provider Default Event

No Service Provider Default Event has occurred and no event or circumstance has occurred or arisen which, with the giving of notice, lapse of time, determination of materiality or satisfaction of any other condition may become a Service Provider Default Event.

54.1.6 Taxation

No transfer, stamp or registration or similar taxes or charges are payable by the Service Provider pursuant to the laws of the United Kingdom or any part thereof in connection with the execution, delivery, performance or enforcement of this Contract or any of the Project Documents or any transaction contemplated thereby.

54.1.7 Information provided to the Authority

Without prejudice to clause 85 (*Entire Agreement*), all information, representations and other matters of fact committed in writing to the Authority by or on behalf of the Service Provider or its agents or employees in connection with or arising out of its tender including in the course of the subsequent negotiations is or are true, complete and accurate in all material respects in the context of the Project, and the Service Provider is not aware of any material facts or circumstances which have not been disclosed to the Authority and which might, if disclosed, adversely affect the decision of anyone considering whether or not to contract with the Service Provider.

54.1.8 Employees

54.1.8.1 Neither the Service Provider nor any of its agents, Sub-Contractors or the employees or any of them, or so far as the Service Provider is aware, anyone acting on their behalf has committed any Prohibited Act.

54.1.8.2 The Service Provider is not aware that a Prohibited Act has been committed by a Sub-subcontractor.

54.1.8.3 In connection with this Contract and any other Project Document, no commission (excluding fees payable to the Service

Provider's professional or financial advisers) has been paid or agreed to be paid by the Service Provider or on its behalf or to its knowledge or by or on behalf of or to the knowledge of any of its agents, Sub-Contractors or Sub-subcontractors or the employees of any of them.

54.1.9 Prohibited Act

The Service Provider shall not commit, and shall ensure that in entering this Contract neither it nor any of its agents, contractors, Sub-Contractors or Sub-subcontractors or the employees of any of them or anyone acting on the Service Provider's behalf has committed any Prohibited Act.

54.1.10 Each of the Service Provider's Warranties shall be separate and independent and, save as expressly provided to the contrary, shall not be limited by reference to any of them or by any other provisions of this Contract.

54.1.11 The Service Provider hereby acknowledges and agrees that compliance by it with the Service Provider's Warranties (or any of them) referred to in this clause 54 (*Warranties and Undertakings*) shall not itself constitute performance of any of its other obligations under this Contract.

54.1.12 Each of the Service Provider's Warranties is given by the Service Provider on the date of this Contract and in respect of the Service Provider's Warranties contained in clauses 54.1.2.1(b), 54.1.2.2, 54.1.2.3, 54.1.2.4, 54.1.2.5, 54.1.2.6 and 54.1.2.7 are deemed repeated on each day of the Contract Term by reference to the facts and circumstances existing as at each such date.

54.2 Service Provider's Undertakings

The Service Provider hereby undertakes with the Authority that for so long as this Contract remains in force:

54.2.1 the Service Provider shall give the Authority notice of all litigation or arbitration or administrative or adjudication or mediation or similar proceedings before or of any court, arbitrator or governmental authority which would or may materially adversely affect the Service Provider's ability to perform its obligations under this Contract and shall, for so long as such proceedings subsist, keep the Authority reasonably informed of the same

upon becoming aware that the same is or may be threatened in writing or pending, and again immediately after the commencement thereof;

- 54.2.2 save as permitted pursuant to clause 72 (*Assignment and Sub-Contracting*), it will not without the prior written consent of the Authority (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend or otherwise dispose of (other than by way of giving security) the whole or any part of its business or assets which would or may materially affect the ability of the Service Provider to perform its obligations under this Contract;
- 54.2.3 it will not without the prior written consent of the Authority operate or use the whole or any part of its business or assets in a manner which would or may materially affect the ability of the Service Provider to perform its obligations under this Contract;
- 54.2.4 it will not cease to be resident in the United Kingdom or transfer in whole or in part its undertaking, business or trade outside the United Kingdom;
- 54.2.5 it will not undertake the performance of its obligations under this Contract for the provision of the Services otherwise than through itself or a Subcontractor or Sub-subcontractor;
- 54.2.6 it shall not without the written consent of the Authority (not to be unreasonably withheld or delayed) incorporate any company or purchase or acquire or subscribe for any shares in any company save where such company is involved in the provision of the Services;
- 54.2.7 it shall not without the consent of the Authority (not to be unreasonably withheld or delayed) make any loans or grant any credit or give guarantee or indemnity to or for the benefit of any person or otherwise voluntarily or for consideration assume any liability (whether actual or contingent) in respect of any obligation of any other person except in the ordinary course of its business or as otherwise pursuant to the Financing Agreements or the Project Documents; and
- 54.2.8 it shall not change or cease its business or start any other business which is materially different from that to be carried on by it under this Contract.

54.3 Disclosed Information

The Authority agrees that the Disclosed Information has been provided in good faith but:

54.3.1 the Authority does not give any warranty or undertaking as to the relevant completeness, accuracy or fitness for any purpose of any of the Disclosed Information; and

54.3.2 neither the Authority nor any of its agents or servants shall be liable to the Service Provider in contract, tort (including negligence or breach of statutory duty), statute or otherwise as a result of:

54.3.2.1 any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Disclosed Information; or

54.3.2.2 any failure to make available to the Service Provider any materials, documents, drawings, plans or other information relating to the Project,

save that nothing in this Contract shall affect the liability of the Authority for any fraudulent misrepresentation in relation to the Disclosed Information.

54.4 Service Provider's Due Dilligence

54.4.1 The Service Provider shall be deemed to have:

54.4.1.1 satisfied itself as to the assets to which it will acquire rights and the nature and extent of the risks assumed by it under this Contract; and

54.4.1.2 gathered all information necessary to perform its obligations under this Contract and other obligations assumed, including:

(a) information as to the nature, location and condition of the Project Network (including hydrological, geological, geo-technical and sub-surface conditions);

- (b) information relating to archaeological finds, areas of archaeological scientific or natural interest, local conditions and facilities and the quality of existing structures; and
- (c) information concerning any Consents or planning permissions which are or may be required and any third party rights, interests or property (including property interests) affected,

save in respect of:

- 54.4.1.3 any Latent Defect (to which clause 7 (*Latent Defects*) shall apply);
- 54.4.1.4 any Project Network Discovery to which clause 17.8 (*Project Network Discoveries*) shall apply;
- 54.4.1.5 any Unascertained Land Rights (to which clause 15.6 (*Observance by Service Provider of Land Rights*) shall apply.

54.4.2 Save as expressly set out in clauses 54.4.1.3 to 54.4.1.5, the Service Provider shall not in any way be relieved from any obligation under this Contract nor shall it be entitled to claim against the Authority on grounds that any information, whether obtained from the Authority or otherwise (including information made available by the Authority) is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

55. INDEMNITY

55.1 Matters indemnified by the Service Provider

The Service Provider shall, subject to clause 55.2 (*Exclusions*), be responsible for and shall release and indemnify the Authority, its employees, agents and contractors on demand from and against, all liability for:

- 55.1.1 death or personal injury;

55.1.2 loss of or damage to property (including property belonging to the Authority or for which it is responsible "Authority Property");

55.1.3 breach of statutory duty; and

55.1.4 third party actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis);

which may arise out of, or in consequence of:

55.1.5 the design (subject to clause 7 (*Latent Defects*)), installation, operation or maintenance of the Project Network excluding Privately Maintainable Public Rights of Way; or

55.1.6 the operation or maintenance of the Project Assets and/or the Project Facilities; or

55.1.7 the performance or non-performance by the Service Provider of its obligations under this Contract; or

55.1.8 the presence on the Authority's Property or on any part of the Project Facilities not the property of the Authority, of a Service Provider a Sub-Contractor, their employees or agents in each case in relation to the provision of the Services or the discharge of obligations under this Contract,

and (without limitation to the generality of clauses 55.1.5 to 55.1.8 inclusive) which may specifically include:

55.1.9 the failure by the Service Provider to keep the Management Information System and/or the Project Network Model up to date at all times;

55.1.10 the failure of the Service Provider to bear the costs and charges referred to in clause 15.5.6 (*Additional Access*);

55.1.11 any damage or loss suffered by an Owner to its building as a result of the actions of the Service Provider pursuant to clause 16 (*Affixing and Removal of Project Network Parts*);

- 55.1.12 any action brought in the name of the Authority by the Service Provider in respect of an unauthorised encampment pursuant to clause 18.4.5 (*Gypsies and Travellers*);
- 55.1.13 a breach of the CDM Regulations by the Service Provider, the CDM Co-ordinator and/or any Service Provider Party or any member of its professional team;
- 55.1.14 the circumstances envisaged by the indemnity in clause 30.1 (*Authority subcontracts Third Party Undertakings to Service Provider*) and 30.2 (*Assignment of benefit of Delegated Rights to the Service Provider*);
- 55.1.15 the failure by the Service Provider to make the payment due to the Authority and/or the Statutory Undertaker pursuant to clause 35.17.5.2 (*Financial Provisions*);
- 55.1.16 the circumstances envisaged by clause 46.1.6 (*Authority's obligation to procure Unmetered Electricity*) apply;
- 55.1.17 the circumstances envisaged by the indemnity in clause 59.6 (*Indemnity in favour of the Authority*) apply;
- 55.1.18 the Service Provider (or any Sub-Contractor) by virtue of any act or omission breaches the provisions of clause 81 (*Data Protection Act*); and/or
- 55.1.19 the Service Provider causing or contributing to any finding of maladministration in respect of the Authority by the Commission for Local Administration pursuant to clause 82 (*Commission for Local Administration*).

55.2 Exclusions

The Service Provider shall not be responsible or be obliged to release and indemnify the Authority from and against liability for:

- 55.2.1 any of the matters referred to in clauses 55.1.1 to 55.1.4 (inclusive) which arises as a direct result of the Service Provider acting on the instruction of the Authority (except where such instruction is issued by a person who is manifestly not authorised to do so); or

- 55.2.2 any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Authority, its employees, agents or contractors to the extent they are working on the Project Network in a highway maintenance related capacity or by the breach by the Authority of its obligations under this Contract; or
- 55.2.3 Third Party Claims arising as a consequence of the geometry of the Project Roads, save to the extent that the Service Provider has not complied with other obligations of this Contract and that those other obligations of this Contract had contributed to the Third Party Claim; or
- 55.2.4 Third Party Claims where the incident giving rise to the Third Party Claim occurred prior to the Service Commencement Date (as referred to in schedule 27 (*Administration of Third Party Claims*)); or
- 55.2.5 any costs related to managing and/or rectifying the occurrence of a Latent Defect in a Structure, Bridge or Tunnel in excess of the relevant LD Direct Costs Cap; or
- 55.2.6 any of the matters referred to in clauses 55.1.1 to 55.1.4 (inclusive) which arises as a result of works and/or management undertaken by or on behalf of the Authority pursuant to clause 34 (*Highway Works Authority*); or
- 55.2.7 any of the matters referred to in clause 55.1.1 arising as a result of any act or omission of the Authority or any Authority Party; or
- 55.2.8 any liability incurred in respect of a claim made pursuant to clauses 55.1.1 to 55.1.4 (inclusive) to the extent that, when taken together with any other claims made under those clauses over the Contract Term, the amount of the Service Provider's Uninsured Losses exceeds [REDACTED] or [REDACTED]; or
- 55.2.9 any liability incurred in respect of a claim made pursuant to clauses 55.1.2 to 55.1.4 (inclusive) to the extent that, when taken together with any other claims made under those clauses, the amount of the Service Provider's Uninsured Losses exceeds [REDACTED] in any one (1) Contract Year.

55.3 An indemnity by either Party under any provision of this Contract shall be without limitation to any indemnity by that Party under any other provision of this Contract.

55.4 Conduct of Proceedings for matters covered by Service Provider's and Authority's Indemnities

55.4.1 This clause shall apply to the conduct, by a party from whom an indemnity is sought under this Contract, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is referred to as the "Beneficiary" and the party giving the indemnity is referred to as the "Indemnifier".

55.4.2 If the Beneficiary receives any notice, demand, letter or other document concerning any claim from which it appears that the Beneficiary is, or may become, entitled to indemnification under this Contract or any of the Project Documents, the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of such document, and shall supply a copy of the relevant document to the Indemnifier.

55.4.3 Subject to the provisions of this clause 55.4 (and in particular clause 55.4.6), following the service of a notice by a Beneficiary pursuant to clause 55.4.2, where it appears that the Beneficiary is or may become entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to indemnifying the Beneficiary to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to:

55.4.3.1 dispute the claim in the name of the Beneficiary at the Indemnifier's own expense; and

55.4.3.2 take conduct of any defence, dispute, compromise or appeal of the claim and of any incidental negotiations;

and the Beneficiary shall give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim.

55.4.4 With respect to any claim conducted by the Indemnifier pursuant to clause 55.4.3:

55.4.4.1 the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;

55.4.4.2 the Indemnifier shall not bring the name of the Beneficiary into disrepute; and

55.4.4.3 the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed.

55.4.5 The Beneficiary shall (without prejudice to its duty to mitigate) be free to pay or settle any claim on such terms as it may in its absolute discretion think fit and without prejudice to its rights and remedies under this Contract if:

55.4.5.1 the Indemnifier is not entitled to take conduct of the claim in accordance with clause 55.4.3;

55.4.5.2 the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under clause 55.4.2 or notifies the Beneficiary that it does not intend to take conduct of the claim; or

55.4.5.3 the Indemnifier fails to comply in any material respect with the provisions of clause 55.4.3 within twenty (20) Business Days of notice from the Beneficiary of such failure.

55.4.6 The Beneficiary shall be entitled at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which clause 55.4.3 applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice

pursuant to this clause 55.4.6, then the Indemnifier shall be released from any liability under its indemnity under clause 55.1 and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to clause 55.4.3 in respect of such claim;

55.4.7 If the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:

55.4.7.1 an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses reasonably and properly incurred by the Beneficiary in recovering the same; and

55.4.7.2 the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity;

provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose any indirect or consequential losses or claims for loss of profits which are excluded by this Contract from being recovered from the Indemnifier).

55.4.8 Any person taking any of the steps contemplated by this clause 55.4 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Contract.

56. INSURANCE

56.1 Required Insurances

56.1.1 The Service Provider shall, during the Mobilisation Period, take out and maintain or procure the maintenance of the insurances set out in paragraphs 9.1 and 9.2 of part 2 of schedule 1 (*Definitions, Interpretation and*

Construction). These insurances must be effective in each case not later than the date on which the relevant risk commences.

56.1.2 The Service Provider shall, during the Service Period, take out and maintain or procure the maintenance of the insurances described in part 1 of schedule 6 (*Insurance*) and any other insurances as may be required by law. These insurances must be effective in each case not later than the date on which the relevant risk commences.

56.2 No Party to this Contract shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured or additional insured person.

56.3 The insurances referred to in clause 56.1 (*Required Insurances*) shall:

56.3.1 subject to clause 56.4 below, name the Service Provider as co-insured with any other party maintaining the insurance;

56.3.2 provide for non-vitiation protection in respect of any claim made by the Authority as co-insured in accordance with Endorsement 2 in part 2 of schedule 6 (*Insurance*);

56.3.3 contain a clause waiving the insurers' subrogation rights against the Authority, its employees and agents in accordance with Endorsement 2 in part 2 of schedule 6 (*Insurance*);

56.3.4 provide for 30 days' prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 in part 2 of schedule 6 (*Insurance*); and

56.3.5 in respect of the Physical Damage Policies, provide for payment of any proceeds received by the Service Provider in accordance with clause 56.12A (*Reinstatement under Contractors' All Risks*).

56.4 Wherever possible, the insurances referred to in clause 56.1 (*Required Insurances*) shall name the Authority as a co-insured for its separate interest.

56.5 Information to be provided to the Authority by the Service Provider

The Service Provider shall provide to the Authority:

56.5.1 copies on request of all insurance policies referred to in clause 56.1 (*Required Insurances*) (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority shall be entitled to inspect them during ordinary business hours; and

56.5.2 evidence that the premiums payable under all insurance policies have been paid and that the insurances are in full force and effect in accordance with the requirements of clauses 56.1 (*Required Insurances*) to 56.11 and schedule 6 (*Insurance*).

56.6 Renewal certificates in relation to the insurances referred to in clause 56.1 (*Required Insurances*) shall be obtained by the Service Provider as and when necessary and copies (certified in a manner acceptable to the Authority) shall be forwarded to the Authority as soon as possible but in any event on or before the renewal date.

56.7 Service Provider breach

If the Service Provider is in breach of clause 56.1 (*Required Insurances*), the Authority may pay any premiums required to keep such insurance in force or itself procure such insurance and may in either case recover such amounts from the Service Provider on written demand.

56.8 Notification of claims exceeding £50,000 and claims and incidents relating to a Notifiable Injury

56.8.1 In addition to its obligations under clause 44.6.14 (*Monthly Service Report*) the Service Provider shall give the Authority notification within twenty (20) Business Days:

56.8.1.1 after any claim in excess of fifty thousand pounds (£50,000) (Indexed) on any of the insurance policies referred to in this clause; and

56.8.1.2 after any claim (irrespective of its value) relating to a Notifiable Injury;

accompanied by full details of the incident giving rise to the claim.

56.8.2 Within forty eight (48) hours of the Service Provider becoming aware of any incident that has resulted in a Notifiable Injury which may result in a claim on any of the insurance policies referred to in this clause, the Service Provider shall notify the Authority of the incident and provide the Authority with all the details of the incident available to the Service Provider.

56.9 Neither failure to comply nor full compliance with the insurance provisions of this Contract shall limit or relieve the Service Provider of its liabilities and obligations under this Contract.

56.10 The insurance premiums in respect of the insurances referred to in clause 56.1 (*Required Insurances*) shall be the responsibility of the Service Provider.

56.11 The insurances referred to in this clause 56 (*Insurance*) shall be effected with insurers approved by the Authority, such approval not to be unreasonably withheld or delayed.

56.11.A.1 All insurance proceeds received under any policy referred to in paragraph 1 of Part 1 of schedule 6 (*Insurance*) ("**Physical Damage Policies**") shall be applied to repair, reinstate and replace each part or parts of the Project Network Part(s) in respect of which the proceeds were received.

56.11.A.2 All insurance proceeds paid under any Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of fifty thousand pounds (£50,000) (Indexed) shall be paid into the Joint Insurance Account.

56.12 Reinstatement

56.12.1 Subject to clause 56.12.3, where damage to Project Network Parts occurs as a result of a single event (or a series of related events) (the "**Relevant Incident**") and such damage is likely to require works or replacement costing in excess of twenty thousand pounds (£20,000) (Indexed) (provided that any damage covered by Contractors' All Risks shall not count towards the twenty thousand pounds (£20,000) (Indexed) and to which clause 56.12A (*Reinstatement under Contractors' All Risks*) shall apply) or, in any case, where the Relevant Incident affects a Structure, Bridge or Tunnel (save where

the total cost of damage is covered by Contractors' All Risks, in which case clause 56.12A (*Reinstatement under Contractors' All Risks*) shall apply):

56.12.1.1 the Service Provider shall deliver as soon as practicable and in any event within twenty (20) Business Days after the Relevant Incident a plan (the "Reinstatement Plan**") prepared by the Service Provider for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace the Project Network Parts which are the subject of the Relevant Claim or Relevant Incident (including all associated traffic management) in accordance with clause 56.12.2 below. The Reinstatement Plan shall set out:**

- (a) if not the Service Provider or a Sub-Contractor, the identity of the person proposed to effect each element of the Reinstatement Works, which shall be subject to the prior written approval of the Authority;**
- (b) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority, which approval shall not be unreasonably delayed;**
- (c) an estimate of the likely cost for such rectification;**
- (d) traffic management measures, including road closures, diversions, restricted access to roads and any closure or restrictions on pedestrian thoroughfares that the Service Provider has taken, or intends to take, as part of the rectification, together with an estimate of the cost of such measures;**
- (e) any further measures that the Service Provider has taken, or intends to take in order to manage any immediate or potential health and safety risk to the public;**

- (f) the extent to which the Authority (in the opinion of the Service Provider and based on the information available to the Service Provider at the relevant time) or Service Provider will be entitled to recover the costs of rectification (including those costs listed in paragraphs (c) and (d) above) from any third party; and
- (g) where relevant, and to the extent not addressed in the Reinstatement Plan, the terms of any CAR Reinstatement Plan required as a result of the Relevant Incident, pursuant to clause 56.12A (*Reinstatement under Contractors' All Risks*).

56.12.1.2 provided that the Authority is satisfied that the Reinstatement Plan will enable the Service Provider to comply with clause 56.12.2 within a reasonable timescale then where the cost of Reinstatement Works is below the relevant Material Damage Limits or the Authority agrees to fund the cost of any Reinstatement Works in excess of the Material Damage Limits then:

- (a) the Reinstatement Plan will be adopted;
- (b) the Service Provider shall, as necessary, enter into contractual arrangements to effect the Reinstatement Works with any person (or persons) identified in the Reinstatement Plan approved by the Authority;
- (c) where the Reinstatement Plan incorporates the terms of any CAR Reinstatement Plan then clause 56.12A.1.2 shall apply in respect of the Reinstatement Plan to the extent it applies to CAR Reinstatement Works;
- (d) the Authority agrees and undertakes that, subject to compliance by the Service Provider with its obligations under this clause, and provided that the Service Provider procures that the Reinstatement Works are carried out and completed in accordance with the contractual

arrangements referred to in clause 56.12.1.2(b), it shall not exercise any right which it might otherwise have to terminate this Contract by virtue of the Relevant Incident;

- (e) the Authority undertakes to use reasonable endeavours to assist the Service Provider in the carrying out of the Reinstatement Plan;
- (f) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with clause 56.12.2 the Authority shall issue a statement to that effect; and
- (g) subject to the provisions of clause 55.2 (*Exclusions*) the Service Provider shall be solely responsible for the payment of any deficiency of the Relevant Proceeds to fund the Reinstatement Works, provided that subject to compliance with clause 56.12.3 the Service Provider shall not be responsible for any Relevant Incident for the cost of any Reinstatement Works in excess of:
 - (i) twenty thousand pounds (£20,000) (Indexed) (provided that any damage covered by Contractors' All Risks shall not count towards the twenty thousand pounds (£20,000) (Indexed) and to which clause 56.12A (*Reinstatement under Contractors' All Risks*) shall apply) to the extent that such Reinstatement Works relate to Project Network Parts other than Structures, Bridges and Tunnels; and
 - (ii) one hundred thousand pounds (£100,000) (Indexed) (provided that any damage covered by Contractors' All Risks shall not count towards the one hundred thousand pounds (£100,000) (Indexed) and to which clause

56.12A (Reinstatement under Contractors' All Risks) shall apply) to the extent that such Reinstatement Works relate to Structures, Bridges or Tunnels,

(together the "Material Damage Limit")

and in each case, such costs to exclude any costs (including traffic management costs) which the Service Provider is unable having used reasonable endeavours, but without incurring material additional expenditure (and for these purposes "material additional expenditure" means costs or expenses in excess of ten thousand pounds (£10,000) (Indexed) but excluding costs or expenses in respect of which the Authority has agreed to indemnify the Service Provider) to recover from a third party (including, but not limited to those costs listed in the Reinstatement Plan pursuant to clause 56.12.1.1(f) and clause 56.12B (*Conduct of Third Party Claims*) shall apply in respect of recovery of such costs.

56.12.2 The Service Provider shall carry out the Reinstatement Works to a standard agreed between the Parties acting reasonably and in accordance with the Reinstatement Plan and Good Industry Practice and to the extent relevant in accordance with the provisions of the Output Specification so that on completion of the work, the provisions of this Contract are complied with.

56.12.3 Without prejudice to the Authority's right to invoke a Change, where the amount required to fund the Reinstatement Works (less any damage covered by Contractors' All Risks) exceeds the relevant Material Damage Limits:

56.12.3.1 the Authority shall, within twenty (20) Business Days of receipt of the Reinstatement Plan, or, within sixty (60) Business Days of receipt of a Reinstatement Plan which includes Structures (excluding Minor Structures), Bridges or Tunnels, at the Authority's sole discretion and option, require an Authority Change either:

- (a) such that the relevant affected Project Network Part or Project Network Parts or part or parts thereof are removed from the ambit of the Service Provider's responsibilities under this Contract to the extent necessary to enable the Authority to repair, reinstate and replace each part or parts of the affected Project Network Parts; or
- (b) such that the Authority will fund the cost of the Reinstatement Works in excess of the relevant Material Damage Limits either in accordance with the Reinstatement Plan or as otherwise determined in accordance with schedule 18 (*Change Protocol*)

56.12.4 To the extent that the Relevant Incident, repair, reinstatement or replacement of each part or parts of the affected Project Network Parts requires a Reinstatement Plan and affects the Service Provider's ability to deliver the Services and, subject always to:

56.12.4.1 the Service Provider's compliance with its other obligations under this clause 56.12 (*Reinstatement*) including compliance with all material requirements of the Reinstatement Plan; or

56.12.4.2 the effects of any Authority Change implemented pursuant to clause 56.12.3.1,

an Excusing Cause shall occur but only for the period from the date of the Relevant Incident until the earlier of:

(a) the actual date of completion of the implementation of the relevant Change and/or completion of the repair, reinstatement or replacement. and

(b) the date for completion of the repair, reinstatement or replacement as set out in the relevant Reinstatement Plan.

56.12.5 If, following a Relevant Incident, the Authority exercises its right to invoke a Change in accordance with clause 56.12.3, or otherwise, such Change shall

take into account the Service Provider bearing the cost of any Reinstatement Works equivalent to:

- 56.12.5.1 where the cost of Reinstatement Works is less than the Material Damage Limit, the full cost of the Reinstatement Works; and
- 56.12.5.2 where the Reinstatement Works is equal to or exceeds the Material Damage Limit, an amount equivalent to the Material Damage Limit.

56.12A Reinstatement under Contractors' All Risks

56.12A.1 Subject to clause 56.12A.3, where damage to Project Network Parts occurs as a result of a single event (or a series of related events) and such damage is covered by the Contractors' All Risks (the "Relevant CAR Incident") and likely to require works or replacement costing in excess of twenty thousand pounds (£20,000) (Indexed) or, in any case, where the Relevant CAR Incident affects a Structure, Bridge or Tunnel:

56.12A.1.1 the Service Provider shall deliver as soon as practicable and in any event within twenty (20) Business Days after the Relevant Incident a plan (the "CAR Reinstatement Plan") prepared by the Service Provider for the carrying out of the works necessary (the "CAR Reinstatement Works") to repair, reinstate or replace the Project Network Parts which are the subject of the Relevant Claim or Relevant CAR Incident (including all associated traffic management) in accordance with clause 56.12A.2 below, save that where the Relevant CAR Incident is also a Relevant Incident pursuant to clause 56.12.1 the Service Provider shall incorporate the terms of the CAR Reinstatement Plan into the terms of the Reinstatement Plan produced pursuant to clause 56.12.1.1, and the terms of clause 56.12 (Reinstatement) shall apply to the approval of the

CAR Reinstatement Plan as part of the overall Reinstatement Plan. The CAR Reinstatement Plan shall set out, to the extent not addressed in the Reinstatement Plan in respect of the Relevant Incident:

- (a) if not the Service Provider or a Sub-Contractor, the identity of the person proposed to effect each element of the CAR Reinstatement Works, which shall be subject to the prior written approval of the Authority; and**
- (b) the proposed terms and timetable upon which the CAR Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority, which approval shall not be unreasonably delayed;**

56.12A.1.2 provided that the Authority is satisfied that the CAR Reinstatement Plan will enable the Service Provider to comply with clause 56.12A.2 within a reasonable timescale then:

- (a) the CAR Reinstatement Plan will be adopted;**
- (b) the Service Provider shall, as necessary, enter into contractual arrangements to effect the CAR Reinstatement Works with any person (or persons) identified in the CAR Reinstatement Plan approved by the Authority;**

- (c) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Joint Insurance Account ("the Relevant Proceeds") (together with any interest accrued) may be withdrawn by the Service Provider from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in clause 56.12A.1.2(b) and to meet any other reasonable costs and expenses of the Service Provider for the sole purposes of funding the CAR Reinstatement Works and the Parties shall operate the signatory requirements of the Joint Insurance Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and Expiry Date, the Authority may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any CAR Reinstatement Works;
- (d) the Authority agrees and undertakes that, subject to compliance by the Service Provider with its obligations under this clause, and provided that the Service Provider procures that the CAR Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in clause 56.12A.1.2(b), it shall not exercise any right which it might otherwise have to terminate this Contract by virtue of the Relevant Incident;

- (e) the Authority undertakes to use reasonable endeavours to assist the Service Provider in the carrying out of the CAR Reinstatement Plan;
- (f) after the CAR Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with clause 56.12A.2 the Authority shall permit withdrawal by the Service Provider of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under clause 56.12A.1.2(c) in respect of the Relevant Incident, together with any interest accrued; and
- (g) subject to the provisions of clause 55.2 (*Exclusions*) the Service Provider shall be solely responsible for the payment of any deficiency of the Relevant Proceeds to fund the CAR Reinstatement Works.

56.12A.2 Where insurance proceeds are to be used, in accordance with this Contract, to repair, reinstate or replace any Project Network Part, the Service Provider shall carry out the work to a standard agreed between the Parties acting reasonably and in accordance with negotiation and Good Industry Practice and to the extent relevant in accordance with the provisions of the Output Specification so that on completion of the work, the provisions of this Contract are complied with.

56.12A.3 If following a Relevant CAR Incident, the Authority exercises its right to invoke a Change, such that the relevant affected Project Network Part or part or parts thereof are removed from the Service Provider's responsibility under this Contract to the extent necessary to enable the Authority to undertake CAR Reinstatement Works the Service Provider shall, and to the extent not satisfied out of Relevant

Proceeds or required for any CAR Reinstatement Works already undertaken, pay to the Authority a sum equivalent to the full cost of the CAR Reinstatement Works.

56.12A.4 If following a Relevant CAR Incident, the Authority exercises its right to invoke a Change, such that the relevant affected Project Network Part or part or parts thereof are removed from the Service Provider's responsibility under this Contract, other than to enable the Authority to undertake CAR Reinstatement Works, the Service Provider shall, and to the extent not required for any CAR Reinstatement Works already undertaken, pay to the Authority the balance of any Relevant Proceeds and the Service Provider shall be entitled to withdraw such amount from the Joint Insurance Account for the purposes thereof.

56.12B Conduct of Third Party Claims

56.12B.1 To the extent that the Authority is obliged, or elects pursuant to clause 56.12.3.1, to fund the cost of Reinstatement Works in excess of the limits set out in clause 56.12.1.2(g) this clause shall apply to the conduct, by the Service Provider, of claims made against a third party for the recovery of such costs ("Insurance Recovery Claim"). The Service Provider shall use reasonable endeavours to pursue any such Insurance Recovery Claim where such Insurance Recovery Claim was detailed in the Reinstatement Plan in accordance with clause 56.12.1.1(f) or where it would otherwise be reasonable for the Service Provider to pursue such Insurance Recovery Claim provided that, subject to clause 56.12B.8, the Service Provider shall not be obliged to incur material additional expenditure (as defined in clause 56.12.1.2(g)) in pursuing such Insurance Recovery Claims.

56.12B.2 If either the Authority or the Service Provider serves or receives any notice, demand, letter or other document concerning any Insurance Recovery Claim such Party shall give notice in writing to the other party as soon as reasonably practicable and in any event within twenty (20) Business Days of service or receipt of such document, and shall supply a copy of the relevant document to the other Party.

56.12B.3 Subject to the provisions of this clause 56.12B, following the service of a notice by the Authority pursuant to clause 56.12B.2, where it appears that the Authority is or may become entitled to recover any amount arising out of the Insurance Recovery Claim, the Service Provider shall (subject to clause 56.12B.5.1 and clause 56.12B.5) take conduct of any claim, dispute, compromise or appeal of the claim and of any incidental negotiations and the Authority shall give the Service Provider all reasonable co-operation, access and assistance for the purposes of considering and pursuing such claim.

56.12B.4 With respect to any claim conducted by the Service Provider pursuant to clause 56.12B.3:

56.12B.4.1 the Service Provider shall keep the Authority fully informed and consult with it about material elements of the conduct of the claim;

56.12B.4.2 the Service Provider shall not bring the name of the Authority into disrepute; and

56.12B.4.3 the Service Provider shall not settle such claims without the prior consent of the Authority, such consent not to be unreasonably withheld or delayed.

56.12B.5 The Authority shall be free to settle or discontinue any claim on such terms as it may in its absolute discretion think fit and without prejudice to its rights and remedies under this Contract if:

56.12B.5.1 the Service Provider is not entitled to take conduct of the claim in accordance with clause 56.12B.3;

56.12B.5.2 the Authority notifies the Service Provider of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice under clause 56.12B.2 or

56.12B.5.3 the Service Provider notifies the Authority that it does not intend to take conduct of the claim; or

56.12B.5.4 the circumstances set out in clause 56.12B.8(a) or (b) apply; or

56.12B.5.5 the Service Provider fails to comply in any material respect with the provisions of clause 56.12B.3 within twenty (20) Business Days of notice from the Authority of such failure.

56.12B.6 The Service Provider shall pay to the Authority all amounts recovered pursuant to any Insurance Recovery Claims up to the amount that the Authority has funded the Service Provider in respect of the relevant Reinstatement Works pursuant to clause 56.12.1.2(f) and any additional costs incurred by the Authority in respect of such Insurance Recovery Claim, including all sums paid pursuant to the indemnity in clause 56.12B.8. Any remaining amounts shall be for the account of the Service Provider.

56.12B.7 Where the Service Provider pays to the Authority amounts recovered pursuant to an Insurance Recovery Claim and the Authority subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the same fact, matter, event or circumstances giving rise to the payment of such amount, the Authority shall forthwith repay to the Service Provider whichever is the lesser of:

56.12B.7.1 an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses reasonably and properly incurred by the Authority in recovering the same; and

56.12B.7.2 the amount paid to the Authority by the Service Provider in respect of the Insurance Recovery Claim;

provided that there shall be no obligation on the Authority to pursue such recovery other than pursuant to clause 56.12.1.2(f) and that the Service Provider is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Service

Provider exceeds any costs sustained by the Authority (including for this purpose indirect or consequential losses or claims for loss of profits which are otherwise excluded by this Contract from being recovered from the Service Provider, and any sums paid pursuant to the indemnity in clause 56.12B.8).

56.12B.8 The Service Provider shall notify the Authority in circumstances where the Service Provider reasonably believes that continuing to pursue an Insurance Recovery Claim (beyond the notice period set out in this clause 56.12B.8) pursuant to this clause 56.12B (*Conduct of Third Party Claims*) would lead to the Service Provider incurring material additional expenditure (as defined in clause 56.12.1.2(g)) in pursuing such Insurance Recovery Claim, and upon such notification the Authority shall notify the Service Provider within fifteen (15) Business Days (provided that the Service Provider shall remain responsible for continuing to pursue such Insurance Recovery Claim for the duration of the fifteen (15) Business Days) that:

- a) **the Authority will take over the conduct of such Insurance Recovery Claim, in which case the Service Provider shall provide the Authority with all reasonable co-operation, access and assistance for the purposes of considering and pursuing such claim, without incurring material additional expenditure (as defined in clause 56.12.1.2(g)) in respect of such Insurance Recovery Claim, and the Service Provider shall have no further obligation to pursue such Insurance Recovery Claim pursuant to this clause 56.12B (*Conduct of Third Party Claims*); or**
- b) **the Service Provider shall continue to pursue such Insurance Recovery Claim pursuant to this clause 56.12B (*Conduct of Third Party Claims*) subject to the Authority indemnifying the Service Provider in a form acceptable to the Service Provider, acting reasonably, against all costs or expenses incurred by the Service Provider in pursuing such Insurance Recovery Claim in excess of ten thousand pounds (£10,000) (Indexed), save that the Authority may cap such indemnity at**

a level determined by the Authority, provided that any costs or expenses incurred by the Service Provider in excess of such cap shall be deemed to be material expenditure for the purposes of this clause 56.12B (*Conduct of Third Party Claims*) and the Service Provider shall have no further obligation to pursue such Insurance Recovery Claim pursuant to this clause 56.12B (*Conduct of Third Party Claims*).

and, subject to clause 56.12B.8(a) and clause 56.12B.8(b), the Service Provider will have no further obligation to pursue such Insurance Recovery Claim.

56.13 Uninsurable Risks

If a risk usually covered by contractors' 'all risks' insurance, property damage insurance, third party liability insurance, delay in start up and business interruption insurance (but not loss of profits), environmental impairment liability insurance or statutory insurances in each case required under this Contract becomes Uninsurable then:

56.13.1 the Service Provider shall notify the Authority within five (5) Business Days of the risk becoming Uninsurable; and

56.13.2 if both Parties agree, or it is determined in accordance with clause 70 (*Dispute Resolution*) that the risk is Uninsurable and that:

56.13.2.1 the risk being Uninsurable is not caused by the actions of the Service Provider or any sub-contractor of the Service Provider; and

56.13.2.2 the Service Provider has demonstrated to the Authority that the Service Provider and a prudent board of directors of a company operating the same or substantially similar PFI businesses in the United Kingdom to that operated by the Service Provider would in similar circumstances (in the absence of the type of relief envisaged by this clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking

into account *inter alia* (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

the Parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either Party).

56.14 If the requirements of clause 56.13 (*Uninsurable Risks*) are satisfied, but the Parties cannot agree as to how to manage or share the risk, then:

56.14.1 in respect of such third party liability insurance only the Authority shall (at the Authority's option) either pay to the Service Provider an amount equal to the amount calculated in accordance with clause 69.4 (*Compensation following a Force Majeure Event or Uninsurability*) and this Contract will terminate, or elect to allow this Contract to continue and clause 56.14.2 shall thereafter apply in respect of such risk; and

56.14.2 in respect of such contractors 'all risks' insurance, property damage insurance, third party liability insurance (if the Authority elects to allow this Contract to continue in accordance with clause 56.14.1) delay in start up and business interruption insurance (but not loss of profits), environmental impairment liability insurance or statutory insurances this Contract shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to the Service Provider an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Contract will continue, or an amount equal to the amount calculated in accordance with clause 69.4 (*Compensation following a Force Majeure Event or Uninsurability*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon this Contract will terminate; and

56.14.3 where pursuant to clauses 56.14.1 and/or 56.14.2 this Contract continues then the Annual Unitary Charge shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by the Service Provider in respect of the

relevant risk in the year prior to it becoming Uninsurable (Indexed from the date that the risk becomes Uninsurable). Where the risk is Uninsurable for part of a year only the reduction in the Annual Unitary Charge shall be pro-rated to the number of months for which the risk is Uninsurable; and

56.14.4 where pursuant to clauses 56.14.1 and/or 56.14.2 this Contract continues the Service Provider shall approach the insurance market at least every four months to establish whether the risk remains Uninsurable. As soon as the Service Provider is aware that the risk is no longer Uninsurable, the Service Provider shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Contract.

56.15 If, pursuant to clause 56.14.2, the Authority elects to make payment to the Service Provider (such that this Contract will terminate) (the "Relevant Payment"), the Service Provider shall have the option (exercisable in writing within twenty (20) Business Days of the date of such election by the Authority (the "Option Period")) to pay to the Authority on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the relevant risk not become Uninsurable, in which case this Contract will continue (and the Relevant Payment will not be made by the Authority), and the Service Provider's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

56.16 Nothing in this clause 56 (*Insurance*) shall oblige the Service Provider to take out insurances in respect of a risk which is Uninsurable save where the predominant cause of the risk being Uninsurable is any act(s) or omission(s) of the Service Provider or a Service Provider Party.

56.17 Unavailability of terms and conditions

56.17.1 If, upon the renewal of any insurance which the Service Provider is required to maintain or to procure the maintenance of pursuant to this Contract:

56.17.1.1 any Insurance Term is not available to the Service Provider in the worldwide insurance market with reputable insurers of good standing; and /or

56.17.1.2 the insurance premium payable for insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,

(other than, in each case, by reason of one or more actions of the Service Provider and/or any sub-contractors of the Service Provider) then clause 56.17.2 shall apply.

56.17.2 If it is agreed or determined that clause 56.17.1 applies then the Authority shall waive the Service Provider's obligations in clauses 56.1 (*Required Insurances*) to 56.10 and/or schedule 6 (*Insurance*) in respect of that particular Insurance Term and the Service Provider shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Contract as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in clause 56.17.1 continue to apply to such Insurance Term.

56.17.3 To the extent that the Parties agree (acting reasonably), or it is determined pursuant to Dispute Resolution, that an alternative or replacement term and/or condition of insurance is available to the Service Provider in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address the Service Provider's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, the Service Provider shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Contract, the costs of such insurance shall be subject to the premium costs sharing mechanism set out at clause 56.18 (*Insurance Review Procedure*).

56.17.4 The Service Provider shall notify the Authority as soon as reasonably practicable and in any event within five (5) days of becoming aware that clause 56.17.1.1 and/or clause 56.17.1.2 are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term

(irrespective of the reason for the same). The Service Provider shall provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the Parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.

56.17.5 In the event that clause 56.17.1.1 and/or clause 56.17.1.2 apply in respect of an Insurance Term (irrespective of the reasons for the same), the Service Provider shall approach the insurance market at least every four months to establish whether clause 56.17.1.1 and/or clause 56.17.1.2 remain applicable to the Insurance Term. As soon as the Service Provider is aware that clause 56.17.1.1 and/or clause 56.17.1.2 has ceased to apply to the Insurance Term, the Service Provider shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Contract.

56.18 Insurance Review Procedure

56.18.1 This procedure shall be used to determine whether the Authority shall bear any increase or benefit from any decrease in Relevant Insurance costs.

56.18.2 The Service Provider's insurance broker shall prepare a report on behalf of both the Service Provider and the Authority ("**Joint Insurance Cost Report**"). The Report is to be prepared at the Service Provider's expense and should, as a minimum, contain the following information for the relevant Insurance Review Period:

56.18.2.1 a full breakdown of the Actual Relevant Insurance Cost;

56.18.2.2 a full breakdown of the Base Relevant Insurance Cost;

56.18.2.3 a spreadsheet (the "**Insurance Summary Sheet**") detailing separately:

(a) the sum(s) insured/limit of indemnity (i.e. rateable factor for each of the Relevant Insurances);

(b) the premium rate for each of the Relevant Insurances;

- (c) the net premium paid (or to be paid) for each of the Relevant Insurances (i.e. excluding both insurance premium tax and broker's fees and commissions);
 - (d) the deductible(s) for each Relevant Insurance; and
 - (e) details of any claims (paid or reserved) (including incident date, type and quantum) in excess of fifty thousand pounds (£50,000) (Indexed), being the amount stated in clause 56.8 (*Notification of claims exceeding £50,000 and claims and incidents relating to a Notifiable Injury*).
- 56.18.2.4 an assessment and quantification of each Project Insurance Change together with the reasons therefore;
- 56.18.2.5 full details of any Portfolio Cost Saving;
- 56.18.2.6 any other reasons that the Service Provider believes may have caused a change (by way of increase or decrease relative to the Base Relevant Insurance Costs) in the Actual Relevant Insurance Cost;
- 56.18.2.7 the opinion of the Service Provider's insurance broker as to the reasons why the Actual Relevant Insurance Cost has varied from the Base Relevant Insurance Cost, specifying the impact of each of the factors and quantifying the amount attributable to each factor specified above;
- 56.18.2.8 the calculation of the Insurance Cost Differential and any Exceptional Cost or Exceptional Saving arising from this calculation;
- 56.18.2.9 evidence satisfactory to the Authority (acting reasonably) of any changes to circumstances generally prevailing in the Relevant Insurance Market that are claimed to account for the Insurance Cost Differential; and

56.18.2.10 details of movements in the CBS private capital non marine index plus, if available from other appropriate sources, details of changes in insurance cost across the PFI market as a whole.

56.18.3 The Service Provider shall procure that the Service Provider's insurance broker, no later than the date which is ten (10) Business Days after the Insurance Review Date, delivers to the Authority, at the same time as it delivers to the Service Provider, at least two (2) copies of the Joint Insurance Cost Report. At the same time the Service Provider should send a copy of the Insurance Summary Sheet to HM Treasury private finance unit or its nominee. Following receipt of the Joint Insurance Cost Report, the Authority shall notify the Service Provider in writing within fifteen (15) Business Days whether or not it accepts the Joint Insurance Cost Report including full details of any disagreement. If the Authority does not provide such notification and/or details of any disagreement to the Service Provider within fifteen (15) Business Days, the Authority shall be deemed to have accepted the Joint Insurance Cost Report. If the Authority disagrees with any item in the Joint Insurance Cost Report, the Parties shall use their respective reasonable endeavours acting in good faith to agree the contents of the Joint Insurance Cost Report. If the Parties fail to agree the contents of the Joint Insurance Cost Report within thirty five (35) Business Days from the date it was delivered to the Authority, the matter shall be resolved pursuant to clause 70 (*Dispute Resolution*) provided always that references in clause 70.2 (*Adjudication*) to an expert shall be construed as references to an independent insurance expert agreed by the Parties or, in the absence of agreement appointed by the President for the time being of the Chartered Institute of Arbitrators.

56.18.4 The Authority may make the Joint Insurance Cost Report available to any of its or HM Treasury's agents or advisers or other body or bodies nominated by HM Treasury for insurance cost verification, benchmarking or similar purpose.

56.18.5 Sharing of Exceptional Cost and Exceptional Saving

56.18.5.1 If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Cost, the

Authority shall within twenty (20) Business Days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Service Provider equal to eighty-five per cent (85%) of the Exceptional Cost.

56.18.5.2 If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Saving, the Service Provider shall within twenty (20) Business Days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Authority equal to eighty-five per cent (85%) of the Exceptional Saving.

56.18.5.3 Following the completion of the Insurance Review Procedure, if it is agreed or determined that there is neither an Exceptional Cost nor an Exceptional Saving, any Insurance Cost Differential shall be borne by or benefit the Service Provider.

56.18.6 Insurance Cost Index

If at any time an Insurance Cost Index is published and intended for use in PFI contracts of a similar nature to this Contract, the Parties shall meet with a view to agreeing (a) its application to the Project, taking into account any relevant guidance issued by HM Treasury and (b) how a Portfolio Cost Saving may be accounted for when the Insurance Cost Index is in use.

56.19 Indexation of Insurance Figures

The levels of cover, deductibles and excesses referred to in this clause 56 (*Insurance*) and schedule 6 (*Insurance*) shall be Indexed and the definition of Required Insurances shall be deemed to include reference to such indexation from time to time provided that this shall not apply in respect of the following insurances for the duration of the CIP; Contractors' All Risks, delay in start up, third party liability (insofar as it relates to Core Investment Works) and environmental liability. However, if the Service Provider can demonstrate that the insurance market will only provide cover or accept deductibles or excesses relating to the Required Insurances at figures other than the Indexed figure then at the Service Provider election:

56.19.1 in relation to levels of cover, the cover shall be obtained at a level as close as possible and less than the Indexed level of cover;

56.19.2 in relation to excesses and deductibles, the cover shall be obtained for excesses and deductibles as close as possible and greater than the Indexed level,

but the expression Required Insurances shall, for the purposes of clause 56.13 (*Uninsurable Risks*) be deemed nevertheless, to refer to fully Indexed levels of cover, excess and deductibles.

56.20 Insurance Broker's Letter of Undertaking

On or before the Service Commencement Date and during the Contract Term the Service Provider shall procure that any broker appointed by the Service Provider to arrange the insurances referred to in this clause 56 (*Insurance*) (such appointment to be approved by the Authority such approval not to be unreasonably withheld) shall provide to the Authority a letter of undertaking substantially in the form set out in part 3 of schedule 6 (*Insurance*) and signed by such broker.

57. EMPLOYMENT MATTERS - TUPE

57.1 Interpretation

57.1.1 Contracts (Rights of Third Parties) Act 1999

Subject to clause 57.1.1.1, the Contracts (Rights of Third Parties) Act 1999 shall not apply to this clause 57 (*Employment Matters - TUPE*). Therefore a person who is not a Party to this Contract shall not be able to enforce any of the obligations of either of the Authority or the Service Provider (or the relevant Service Provider Party) under this clause 57 (*Employment Matters - TUPE*) except that:

57.1.1.1 New Joiners shall be able to enforce the obligations of the Service Provider under clauses 57.8 (*ADR*) and 57.10 (*Treatment of New Joiners*) subject to clause 57.1.1.2 and Transferring Employees shall be able to enforce the obligations of the Service Provider under clause 57.8 (*ADR*) subject to clause 57.1.1.2; and

57.1.1.2 the Authority and the Service Provider shall be entitled to amend the content of this clause 57 (*Employment Matters - TUPE*) without the consent of any of the New Joiners and without the consent of the Transferring Employees.

57.1.2 Consent of Transferring Employees

The Service Provider acknowledges and agrees that the Authority has not given any warranties or representations that all or any of the prospective Transferring Employees will consent to a Relevant Transfer to the Service Provider (or the relevant Service Provider Party).

57.1.3 Secondary TUPE

Subject to clause 57.3.5, this clause 57 (*Employment Matters - TUPE*) shall not apply to employees employed by a contractor (or any tier of sub-contractor to such contractor) of the Authority prior to the Service Commencement Date who may transfer to the Service Provider (or the relevant Service Provider Party) on the Service Commencement Date.

57.1.4 If all or any of the Transferring Employees transfer under TUPE from the Authority or the Service Provider to a Service Provider Party then the Service Provider shall ensure that the obligations imposed on the Service Provider under clause 57 (*Employment Matters - TUPE*) are complied with by the Service Provider Party.

57.2 TUPE

57.2.1 Application of TUPE

The Parties confirm their understanding that TUPE shall apply to this Contract so that the Transferring Employees shall at 00:01 hours on the Service Commencement Date transfer to the Service Provider (or the relevant Service Provider Party).

57.2.2 Relevant Transfers

57.2.2.1 The Authority and the Service Provider acknowledge and agree that any change in the identity of the provider of some or all of

the Services pursuant to the changes contemplated by this Contract will give rise to a Relevant Transfer.

57.2.2.2 Even if as a matter of law TUPE does not apply to such a change, or is held by a competent court or tribunal not to apply to such a change, the Authority and the Service Provider will conduct themselves as if TUPE applies and the Service Provider shall procure that the relevant incumbent Service Provider Party and any proposed replacement Service Provider Party shall comply with their obligations under TUPE including to the duty to inform and consult with Employee Representatives.

57.2.3 Compliance with TUPE

The Service Provider shall offer to employ the Transferring Employees in order that they will become employees of the Service Provider (or the relevant Service Provider Party) with effect from 0001 hours on the Service Commencement Date and that the Service Provider (or the relevant Service Provider Party) will comply with all of their obligations under this clause 57 (*Employment Matters - TUPE*). The Service Provider's obligations under clause 57.2.3 will apply irrespective of whether the Law provides that TUPE applies or not. The Service Provider will (or will procure that the relevant Service Provider Party will) therefore employ each of the Transferring Employees on the Transferred Terms and Conditions.

57.2.4 Transition

The Authority and the Service Provider shall use reasonable endeavours to ensure that there is a smooth transition in respect of the Relevant Transfer.

57.3 Authority's obligations as Transferor

57.3.1 Authority's Warranties

The Authority warrants to the Service Provider that:

57.3.1.1 in respect of the Transfer Information:

- (a) it has disclosed the Transfer Information to the Service Provider to the extent permitted by law (and without prejudice to the generality of the foregoing the DPA);
- (b) the Transfer Information is accurate and complete and up to date at the date of its supply;
- (c) it shall update such Transfer Information every Month from the date of this Contract and provide to the Service Provider as soon as reasonably practicable copies of such updated Transfer Information;
- (d) it shall provide each of the prospective Transferring Employees with an opportunity to look at their own Personnel File prior to the Service Commencement Date;
- (e) it shall on the Service Commencement Date provide the Service Provider with the name (surname, forename, title and initials), date of birth, home address, job title, job description and place of work of the Objecting Employees; and
- (f) it shall as soon as reasonably practicable inform the Service Provider if any Transferring Employee becomes an Objecting Employee and if any Transferring Employee after becoming an Objecting Employee ceases to be an Objecting Employee,

57.3.1.2 the Transferring Employees identified to the Service Provider immediately prior to the Service Commencement Date are the only persons employed by the Authority who will be entitled at any time (whether by operation of TUPE or otherwise) to transfer to the Service Provider (or the relevant Service Provider Party) as a result of the Service Provider's obligation to provide the Services pursuant to this Contract;

57.3.1.3 it will give a true, complete and accurate statement to the Service Provider no later than ten (10) Business Days from the date of

this Contract whether any prospective Transferring Employee at the date of the Contract and to the best of the Authority's knowledge:

- (a) has given or received notice of dismissal (including notice of objection to transfer under TUPE);
- (b) is the subject of or pursuing a grievance, a harassment claim, a performance claim, a sickness claim or a personal injury claim;
- (c) is the subject of disciplinary proceedings or is under disciplinary investigation; or
- (d) has made an application to the Employment Tribunal or the County Court relating to their employment by the Authority which is still proceeding and has not been determined provided that this shall not require the Authority to disclose any decision or judgment which is more than two (2) years old at the date of this Contract;

57.3.1.4 at the Service Commencement Date the only Transferring Employees engaged in any trade dispute on the Service Commencement Date are those whose names have been notified by the Authority to the Service Provider prior to or on the Service Commencement Date;

57.3.1.5 immediately prior to the Service Commencement Date every Transferring Employee will be in possession of a valid work permit if required by Section 8 of the Asylum and Immigration Act 1996; and

57.3.1.6 at the Service Commencement Date the only trade unions recognised by the Authority in respect of Transferring Employees are those who have been notified by the Authority to the Service Provider ten (10) Business Days prior to the Service Commencement Date and the Service Provider shall and shall procure that the relevant Service Provider Party shall recognise

all such trade unions in respect of Transferring Employees pursuant to Regulation 6 of TUPE,

and the Authority shall indemnify and keep indemnified the Service Provider (for itself and on behalf of each Service Provider Party) from all Loss arising out of the failure by the Authority to comply with any of its obligations and warranties in clause 57.3.1 and the Service Provider acknowledges and shall procure that the relevant Service Provider Party shall acknowledge the Recognition Agreement.

57.3.2 Employment Costs

57.3.2.1 The Authority has supplied to the Service Provider the Workforce Information in the Authority's data room, as at the date of the submission of the Service Provider's best and final offer refresh submission in March 2009 which is contained in annexure 13 (the "First Employee List").

57.3.2.2 The Authority shall supply to the Service Provider an update of the First Employee List at monthly intervals from the date of this Contract and an updated list ten (10) Business Days before the Planned Service Commencement Date. The Authority shall also supply to the Service Provider within five (5) Business Days after the Service Commencement Date, information which was correct as at the Service Commencement Date (the "Final Employee List"), in respect of the Transferring Employees on all the same matters as should be provided in the First Employee List.

57.3.2.3 Without prejudice to clause 57.3.2.1 and 57.3.2.2, the Authority shall:

- (a) provide the Employee Liability Information to the Service Provider at such time or times as are required by TUPE; and**
- (b) update the Employee Liability Information to take account of any changes as required by TUPE.**

57.3.2.4 The Service Provider has provided to the Authority, and the Authority has agreed, the details set out in schedule 32 (*Employee Information*) which show the following information:

- (a) the workforce which the Service Provider proposes to establish to provide the Services (the "**Proposed Workforce**") classified by reference to grade, job description, hours worked, shift patterns, pay scales, rates of pay, terms and conditions and pension arrangements;
- (b) the monthly costs of employing the Transferring Employees who are expected to be engaged in the provision of the Services. These costs (the "**Remuneration Costs**") have been calculated on the basis of (amongst other things) the information contained in the First Employee List.

57.3.2.5 If at any time (including, for the avoidance of doubt, after the submission of the Final Employee List) the Remuneration Costs require to be adjusted on account of any differences between the information contained in the First Employee List and that contained in the Final Employee List, or on account of any inaccuracies in or omissions from the information contained in the First Employee List or the Final Employee List then (subject to clauses 57.3.2.6, 57.3.2.7 and 57.3.2.9) there shall be a corresponding adjustment to the Annual Unitary Charge to compensate for any such difference.

57.3.2.6 If the circumstances described in clause 57.3.2.5 arise:

- (a) in circumstances where there are more Transferring Employees than shown on the Final Employee List then the Parties shall discuss the implications for the provision of Services; and
- (b) the Service Provider and the relevant Service Provider Party shall take all reasonable steps to mitigate any

additional costs and any adjustment to the Annual Unitary Charge shall be calculated as if they had done so.

57.3.2.7 In calculating any adjustment to be made to the Annual Unitary Charge pursuant to clause 57.3.2.5:

- (a) no account shall be taken of a decrease in the Remuneration Costs to the extent that it arises from a reduction in the number of Transferring Employees or their whole time equivalent such that there are, immediately after the Service Commencement Date, fewer suitably qualified persons available than are required in order to establish the Proposed Workforce;
- (b) to avoid double counting, no account shall be taken of any change to the Remuneration Costs to the extent that the Service Provider has been or will be compensated as a result of any Indexation of the Annual Unitary Charge under this Contract;
- (c) to avoid doubt any changes in costs which fall to be dealt with under clause 57.3.2.5 and which arise from a Change in Law shall be dealt with in accordance with the provisions of clause 57.3.2.5 and shall not be taken into account for the purposes of clause 0 (
- (d)
- (e) *Change of Law*);
- (f) no adjustments under clause 57.3.2.5 shall be made in respect of overpayments made by the Service Provider or a Service Provider Party to Transferring Employees which arise from reliance on the Final Employee List to the extent that the Service Provider or Service Provider Party is able to correct overpayments in respect of continuing employment having taken reasonable steps to do so;

- (g) if there are underpayments by the Service Provider or a Service Provider Party to Transferring Employees, whether claimed or established as unlawful deductions from wages or as a breach of contract, which arise from reliance on the Final Employee List, there shall be an immediate increase to the Monthly Payment in respect of all such liabilities of the Service Provider or the Service Provider Party for all such underpayments which are retrospective (save that any such liabilities which relate to the period prior to the Service Commencement Date shall be dealt with in accordance with clauses 57.3.4 and 57.6 (*Remuneration*));
- (h) in order to prevent duplication, no adjustment shall be made under clause 57.3.2.7 if any indemnity given by the Authority under any other provision of this Contract would apply; and
- (i) no adjustment shall be made under clause 57.3.2.7 where clause 57.3.6 applies and the Authority recoups a saving or the Service Provider is compensated under clause 57.3.6.

57.3.2.8 Either Party may propose an adjustment to Annual Unitary Charge pursuant to clause 57.3.2.5 by giving not less than ten (10) Business Days notice to the other. Each Party will provide or procure the provision to the other, on an open book basis, access to any information or data which the other Party reasonably requires for the purpose of calculating or confirming the calculation of any adjustment pursuant to clause 57.3.2.5.

57.3.2.9 In relation to all matters described in clauses 57.3.2.6 and 57.3.2.7 the Service Provider and the Authority shall, and the Service Provider shall procure that the relevant Service Provider Party shall, co-operate with the other or others and take all reasonable steps to mitigate any costs and expenses and any adverse effect on industrial or employee relations.

57.3.3 Replacement of Employees

The Authority shall not following the date of this Contract replace any of the Transferring Employees without first obtaining the consent of the Service Provider (not to be unreasonably withheld or delayed) other than in circumstances where the prospective Transferring Employee secures another position in the Authority's employment or where such individual's employment is terminated. In either case the Authority shall immediately inform the Service Provider and the Authority may replace the prospective Transferring Employee without the Service Provider's consent provided that the replacement employee is engaged on substantially equivalent terms and conditions of employment and subject to the Authority using all reasonable endeavours to replace such prospective Transferring Employee with another person of similar skills, qualifications and experience.

57.3.4 Indemnity - pre Service Commencement Date acts/omissions

The Authority shall indemnify and keep indemnified the Service Provider for itself and on behalf of the relevant Service Provider Party against any Loss which is attributable to any act or omission by the Authority prior to 0001 hours on the Service Commencement Date in respect of any of the Authority's obligations or duties (in either case, whether arising under common law, statute, custom or otherwise) to or in relation to any of its employees (including Transferring Employees and Objecting Employees) or former employees or their trade union, elected employee representatives or staff associations (including any liability arising out of the termination or dismissal of any employee or former employee) and which the Service Provider (or the relevant Service Provider Party) may incur or suffer.

57.3.5 Secondary Employees

The Authority shall use reasonable endeavours to provide the Service Provider with Workforce Information in respect of employees employed by a contractor (or any tier of sub-contractor of such contractor) of the Authority who may transfer to the Service Provider (or the relevant Service Provider Party) on the Service Commencement Date but the Authority gives no warranty or representation as to the accuracy of any such information provided.

57.3.6 Pay and Grading Review (including Single Status) - Pre Service Commencement Date

If through the implementation by the Authority of a new pay and grading structure (including Single Status) in respect of its employees results in increases or decreases in pay rates or benefits (including any consequential amendments to terms and conditions of employment including payment protection arrangements) of Transferring Employees and such increase or decrease is due to come into force prior to the Service Commencement Date then:

57.3.6.1 if so instructed by the Authority, the Service Provider shall and shall ensure that the Service Provider Party shall prepare an estimate of the cost of the proposed increase or decrease within twenty (20) Business Days of the instruction with details of how such increase or decrease has been calculated which shall be on the following assumptions:

- (a) where there is an increase the Service Provider or Service Provider Party shall be compensated for such increase and therefore the change shall be cost neutral for the Service Provider or Service Provider Party, subject to clause 57.3.6.1(c);
- (b) where there is a decrease the Authority shall recoup the saving by making an appropriate deduction from the Annual Unitary Charge, subject to clause 57.3.6.1(c); and
- (c) proper account shall be taken of any change to the method of working of the Transferring Employees as a result of any material changes to the conditions of employment; and

57.3.6.2 the Authority shall within twenty (20) Business Days of the receipt of the estimate under clause 57.3.6.1 indicate in writing to the Service Provider or the Service Provider Party as to whether

such estimate is agreed. In default of such agreement Dispute Resolution shall apply; and

57.3.6.3 there shall be a corresponding adjustment to the Annual Unitary Charge in accordance with the agreed estimate or the estimate as determined in accordance with Dispute Resolution.

57.3.7 Paying and Grading Review (including Single Status - Consequential Provisions

57.3.7.1 Where as a result of the operation of clause 57.3.6 there is an increase or decrease in the pay rate or benefits (including any consequential amendments to terms and conditions of employment including payment protection arrangements) of a Transferring Employee and either:

(a) such Transferring Employee appeals to the Authority or an Employment Tribunal against the decision of the Authority; or

(b) such Transferring Employee makes a claim for compensation including back pay for a period of six (6) years in respect of an earlier period of employment with the Authority,

then clause 57.3.7.2 shall have effect, whether or not such appeal or claim is made before, on or after the Service Commencement Date.

57.3.7.2 The Authority shall be responsible for hearing and defending as appropriate any claim under clause 57.3.7.1(a) and for making any payment of compensation under clause 57.3.7.1(b).

57.3.7.3 If the outcome of such appeal is to change the pay rates or benefits (including any consequential amendments to terms and conditions of employment and payment protection arrangements) of the Transferring Employee who appealed then:

- (a) if the outcome is before the Service Commencement Date then clause 57.3.2 (*Employment Costs*) shall apply; and
- (b) if the outcome is on or after the Service Commencement Date then clause 57.3.2 (*Employment Costs*) shall apply.

57.3.8 Payment of Pay and Grading Payment Protection Sum

57.3.8.1 The Annual Unitary Charge payable by the Authority to the Service Provider pursuant to clause 45 (*Payment and Financial Matters*) shall not include any payment in respect of the Pay and Grading Payment Protection Sum.

57.3.8.2 The Authority shall identify in both:

- (a) the update of the First Employee List issued to the Service Provider under clause 57.3.2.1; and
- (b) the Final Employee List issued to the Service Provider under clause 57.3.2.2;

the names of the Qualifying Transferring Employees and the Pay and Grading Payment Protection Sum that is payable for each of them.

57.3.8.3 Following the Service Commencement Date the Service Provider shall give written notice to the Authority within five (5) Business Days of a Qualifying Transferring Employee ceasing to be entitled to a Pay and Grading Payment Protection Sum whether on account of the Qualifying Transferring Employee having left the employment of the Service Provider or a Service Provider Party or the Qualifying Transferring Employee having accepted an offer of employment with the Service Provider or Service Provider Party on different terms and conditions of employment which make no provision for payment of a Pay and Grading Payment Protection Sum or for any other reason and such notice shall specify the date of cessation.

57.3.8.4 In respect of each Month of the Payment Protection Period the following process shall be applied for the payment of the Pay and Grading Payment Protection Sum:

- (a) on the fifth (5th) Business Day of each Month the Service Provider shall deliver an invoice to the Authority addressed to the Authority's Representative (such invoice to be in a form acceptable to Her Majesty's Revenue & Customs as a valid VAT invoice) for the Pay and Grading Payment Protection Sum which is payable to the Qualifying Transferring Employees in respect of such Month; and
- (b) ten (10) Business Days following receipt by the Authority of the invoice issued by the Service Provider in accordance with clause 57.3.8.4(a) the Authority shall pay to the Service Provider the payment Pay and Grading Payment Protection Sum which is payable to the Qualifying Transferring Employees in respect of such Month.

57.4 Service Provider's Indemnity as Transferee ✓

57.4.1 Indemnity Post Service Commencement Date - acts/omissions

The Service Provider agrees to indemnify the Authority and to hold it harmless at all times from any Loss which arises from claims by the Transferring Employees or by any trade unions, elected employee representatives or staff associations in respect of all or any Transferring Employees as a result of or in connection with any act or omission of the Service Provider or the relevant Service Provider Party, save to the extent that such Loss arises in connection with any act and/or omission on or after 0001 hours on the Service Commencement Date and up to the Termination Date or Expiry Date and whether such liability arises or claims arise as a result of any relevant event in clause 57.4.2 (*Relevant Event*) or otherwise.

57.4.2 Relevant Event

The relevant events for the purposes of clause 57.4.1 (*Indemnity Post Service Commencement Date - acts/omissions*) include but are not limited to:

- 57.4.2.1 breach of obligations (whether contractual, statutory, at common law or otherwise) by the Service Provider or relevant Service Provider Party;
- 57.4.2.2 any employment related claim including unfair dismissal, redundancy, statutory redundancy, equal pay, sex, race, disability discrimination, religious discrimination, sexual orientation discrimination or age discrimination, or for a protective award for failure to inform and consult with appropriate representatives in relation to a TUPE transfer or collective redundancies, or any other Consultation Requirements;
- 57.4.2.3 any disciplinary action taken against or dismissal of the Transferring Employees, after the Service Commencement Date; and
- 57.4.2.4 the payment of Injury Allowance.

57.4.3 Prospective Changes

The Service Provider will indemnify the Authority and hold it harmless at all times from any Loss which arises from claims by any Transferring Employees or Objecting Employees and which arises from or in relation to:

- 57.4.3.1 any anticipated, prospective or actual change to or breach of the relevant employee's terms and conditions of employment by the Service Provider or the relevant Service Provider Party, whether such claim is brought before or after the relevant Service Commencement Date; and
- 57.4.3.2 any claim by any Transferring Employee or Objecting Employee (including claims of unfair dismissal and wrongful dismissal and whether brought in the Employment Tribunal or the courts or any other jurisdiction) on grounds arising from the anticipated, prospective or actual change in the identity of the employee's employer.

57.4.4 Excluded Employees

57.4.4.1 This clause 57.4.4 (*Excluded Employees*) has effect where a Transferring Employee becomes an Excluded Employee.

57.4.4.2 The Authority shall give written notice of a Transferring Employee becoming an Excluded Employee to the Service Provider within five (5) Business Days of the dismissal.

57.4.4.3 If the Excluded Employee appeals against his/her dismissal to the Authority's appeals committee then if:

(a) such appeal is made prior to the Service Commencement Date, the Authority shall use reasonable endeavours to convene an appeal hearing by the Authority's appeals committee prior to the Service Commencement Date; or

(b) such appeal is made after the Service Commencement Date, the Authority shall arrange for an appeal hearing by the Authority's appeals committee as soon as practicable following the Service Commencement Date.

57.4.4.4 The Authority shall inform the Service Provider in writing of:

(a) the date of the Authority's appeals committee within five (5) Business Days of the Authority giving written notice to the Excluded Employee of the date of the hearing; and

(b) the decision of the Authority's appeals committee within two (2) Business Days of the appeals committee issuing its decision in writing to the Excluded Employee.

57.4.4.5 If the outcome of the Authority's appeals committee is that the Excluded Employee is to be reinstated, then the Service Provider shall or shall procure that the relevant Service Provider Party shall reinstate the Excluded Employee and treat the Excluded Employee as a Transferring Employee whose employment transferred to the Service Provider or the relevant Service Provider Party on the Service Commencement Date.

57.5 Duty to inform and consult representatives

57.5.1 Provision of Assistance and Information

The Service Provider shall provide all assistance and information which the Authority may reasonably require in order to inform and consult the trade unions or employee representatives of any of the Transferring Employees and Objecting Employees in accordance with Regulation 13 of TUPE within a reasonable period before the Service Commencement Date (including any participation in the consultation process which the Authority or representatives of the Transferring Employees may reasonably require). Such information shall include without limitation details of the Service Provider or the Service Provider Party's organisational structure as appropriate.

57.5.2 Authority's Indemnity

The Authority shall indemnify and keep indemnified the Service Provider for itself and on behalf of any relevant Service Provider Party in respect of any award of compensation made by an Employment Tribunal under Regulation 15 of TUPE in respect of any failure by the Authority to comply with the obligation to consult with appropriate representatives or representatives of an employee or former employee of the Authority arising under Regulation 13 of TUPE save where such failure arises from a failure by the Service Provider to supply sufficient information to the Authority which is reasonably required by the Authority in order to enable the Authority to comply with its obligation to consult.

57.5.3 Service Providers Indemnity

The Service Provider shall indemnify and keep indemnified the Authority in respect of any award of compensation made by an Employment Tribunal under Regulation 15 and 16 of TUPE in respect of any failure by the Service Provider or the relevant Service Provider Party to consult with appropriate representatives of an employee or former employee of the Authority or the Service Provider or the relevant Service Provider Party pursuant to Regulation 13 of TUPE save when such failure arises from a failure of the Authority or any Successor Service Provider to supply sufficient information to the Service Provider or any relevant Service Provider Party which is

reasonably required by the Service Provider or any relevant Service Provider Party in order to enable it or them to comply with its or their obligations to inform and consult pursuant to TUPE, or which arises as a result of any failure by the Service Provider to supply information or sufficient information to enable the Authority to comply with its obligation to consult.

57.6 Remuneration

57.6.1 Non-Holiday Pay

All salaries and other emoluments (other than holiday pay), tax and national insurance payments, contributions to retirement benefit schemes flexi-time and any other benefit payable in respect of:

57.6.1.1 the period before the Service Commencement Date relating to the Transferring Employees shall be borne by the Authority (and not by the Service Provider or the relevant Service Provider Party). The Authority shall indemnify and keep indemnified the Service Provider for itself and on behalf of the relevant Service Provider Party against any Loss arising from the Authority's failure to discharge its or their obligations under clauses 57.6.1 (*Non-Holiday Pay*) or 57.6.2 (*Holiday Pay*);

57.6.1.2 the period from the Service Commencement Date until the Friday immediately following the Service Commencement Date relating to the Transferring Employees shall be paid by the Authority, and the Authority may deduct such payment from any payment due to the Service Provider;

57.6.1.3 subject to clause 57.6.1.2 above the period from the Service Commencement Date relating to the Transferring Employees shall be borne by the Service Provider or the relevant Service Provider Party and the Service Provider will indemnify the Authority against any Loss arising from the Service Provider's or the relevant Service Provider Party's failure to discharge its or their obligations under this clause 57.6.1.3.

57.6.2 Holiday Pay

In relation to entitlement to holiday pay for the Transferring Employees the following shall apply:

57.6.2.1 the Transferring Employees entitlement to holiday pay shall be apportioned proportionately between the periods of the current holiday year prior to and after the Service Commencement Date;

57.6.2.2 where a Transferring Employee has taken more than his/her proportionate holiday as at the Service Commencement Date the Service Provider shall pay the Authority a sum equal to the cost to the Authority of the number of days holiday taken by the Transferring Employee in excess of his proportionate holiday entitlement;

57.6.2.3 where a Transferring Employee has taken less than his/her proportionate holiday as at the Service Commencement Date the Authority shall pay to the Service Provider a sum equal to the cost of the Service Provider paying for the number of days holiday by which the actual number of days holiday taken is less than the Transferring Employee's proportionate holiday entitlement at the Service Commencement Date.

57.6.3 Holiday Records

The Authority shall provide the Service Provider with complete, up to date and accurate details of holiday taken and holiday not yet taken but approved by the Authority for each Transferring Employee in the then current holiday year prior to the Service Commencement Date, within three (3) Business Days of the Service Commencement Date.

57.7 TUPE Plus

57.7.1 Health Care

The Service Provider undertakes that the Transferring Employees and any New Joiners shall be entitled to have a health check every two (2) years from the Service Commencement Date at the Service Provider's cost, such health check to be undertaken by a suitably qualified health professional and to have

a written record of the outcome of such health check with the Month of its completion.

57.7.2 Training

The Service Provider shall and shall procure that any relevant Service Provider Party shall either:

57.7.2.1 secure IIP accreditation within one (1) year of the Service Commencement Date for the benefit of the Transferring Employees and New Joiners, maintain such IIP accreditation, provide the Authority's Representative with details of the outcome of any inspection by the organisation monitoring or inspecting such accreditation within seven (7) days of the publication of any such inspection, and give the Authority's Representative written notice of any cancellation or withdrawal of such accreditation or any warning of such cancellation or withdrawal within seven (7) days of the receipt of such notice by the Service Provider or relevant Service Provider Party; or

57.7.2.2 use best endeavours to agree a training plan annually with each of the Transferring Employees and New Joiners which complies with Good Industry Practice which shall provide for a minimum of two and a half (2½) days' training for each Transferring Employee and New Joiner, is geared towards the existing skills of such Transferring Employees and New Joiners and provides for the broadening and further development of such skills and where reasonably appropriate the development of new skills, and shall monitor progress by and provide feedback to the Transferring Employees and New Joiners during the course of each year on the implementation of the training plan.

57.7.3 Place of work

The Service Provider shall not require nor shall it procure that the Service Provider Party shall require any Transferring Employee to work outside the Project Area except with the prior written consent of such Transferring Employee provided that:

57.7.3.1 where a Transferring Employee is undertaking winter maintenance work the Transferring Employee may be required to work up to 0.5 miles outside the Project Area without such consent being requested; and

57.7.3.2 where a Civil Emergency Declaration is issued under schedule 10 (*Civil Emergency Planning*) the Transferring Employee may be required to work in one or more of the districts within the West Midlands County or adjacent to the Authority.

57.7.4 Base

The Service Provider shall not and shall procure that the Service Provider Party shall not require any of the Transferring Employees to be based at any depots or other premises outside the Project Area except with the prior written consent of the Transferring Employees.

57.7.5 Performance of Services

The Service Provider shall not and shall procure that the Service Provider Party shall not require any of the Transferring Employees to be employed on undertaking any other work other than the performance of the Services except with the prior written consent of the Transferring Employees.

57.8 ADR

57.8.1 ADR Code of Practice

The Parties will seek to resolve disputes in connection with the compliance by the Service Provider or the relevant Service Provider Party with this clause 57 (*Employment Matters - TUPE*) that relate to New Joiners by mediation using the ADR Code of Practice provided that the Authority shall have first endeavoured where appropriate to have exhausted the normal local procedures set out in clauses 57.11.5 (*Complaint*) and 57.11.6 (*Response*).

57.8.2 Compliance

The Service Provider shall and shall procure that the relevant Service Provider Party shall comply with the procedures set out in the ADR Code of

Practice and shall implement any decision made by the Independent Person including any revised package of terms and conditions imposed under a final reference under Stage 3.

57.9 Frustration

The Service Provider shall and shall procure that any relevant Service Provider Party shall take no steps calculated to frustrate any process connected with staff transfers under TUPE.

57.10 Treatment of New Joiners

57.10.1 Consultation

The Service Provider shall and shall procure that any relevant Service Provider Party shall consult in accordance with the Consultation Mechanism concerning the terms and conditions to be offered to New Joiners and any changes to such terms and conditions having regard to this clause 57.10 (*Treatment of New Joiners*).

57.10.2 Terms and Conditions

57.10.2.1 The Service Provider shall and shall procure that any relevant Service Provider Party shall offer employment to New Joiners on fair and reasonable terms and conditions which are overall no less favourable than the Transferred Terms and Conditions (save in respect of pensions which are dealt with at clause 57.10.3 (*Disclosure*) below) of the Transferring Employees employed in comparable positions to the New Joiners. Such terms and conditions shall be evaluated in the round as a package.

57.10.2.2 The Service Provider shall not and shall procure that any relevant Service Provider Party shall not offer or change terms and conditions which could have the effect of undermining the integrated nature or the quality of the Combined Workforce.

57.10.3 Disclosure

The Service Provider shall and shall procure that any relevant Service Provider Party shall ensure that the terms and conditions on which the New Joiners are employed permit disclosure of information relating to the New Joiner's terms and conditions to the Authority, the Authority's Representative, and the Government Authority's Representative.

57.10.4 The Service Provider shall and shall ensure that any relevant Service Provider Party shall procure that the New Joiners are offered a stakeholder pension scheme, under which the employer matches contributions up to at least six per cent (6%).

57.11 Monitoring and Enforcement

57.11.1 Duty

The Service Provider shall provide the Authority's Representative with such information at such time and in such format as the Authority's Representative may reasonably require in order for the Authority's Representative to be satisfied that the Service Provider or the relevant Service Provider Party is complying with clause 57.10 (*Treatment of New Joiners*).

57.11.2 Authority's Representative

The Service Provider shall provide the Authority's Representative with such information at such time and in such format as the Authority's Representative may reasonably require in order for the Authority's Representative to be satisfied that the Service Provider or the relevant Service Provider Party is complying with the Code.

57.11.3 Independent Auditor

57.11.3.1 The Authority and the Service Provider shall jointly appoint and the Service Provider shall pay an independent auditor (the "**Independent Auditor**") to undertake an audit of the compliance by the Service Provider, or the relevant Service Provider Party as appropriate, with the relevant provisions of clause 57 (*Employment Matters - TUPE*) which affect New Joiners and Transferring Employees as set out in clause 57.11.3.2 ("**Relevant Criteria**"). In default of agreement the Independent

Auditor shall be appointed by the Authority and if the Service Provider fails to pay the Independent Auditor the Authority may pay the Independent Auditor in default and recover such payment from any payment of the Monthly Payment.

57.11.3.2 The Relevant Criteria comprise:

- (a) clause 57.7 (*TUPE Plus*); and**
- (b) clause 57.10 (*Treatment of New Joiners*).**

57.11.3.3 The Independent Auditor shall audit the compliance with the Relevant Criteria:

- (a) at the end of each Contract Year;**
- (b) following such processes as shall be agreed by the Authority and the Service Provider as set out in clause 57.11.3.4; and**
- (c) shall produce a report in accordance with clause 57.11.3.5.**

57.11.3.4 The processes to be undertaken by the Independent Auditor may include one or more of the following:

- (a) interviews with Transferring Employees, New Joiners and other employees of the Service Provider or Service Provider Party;**
- (b) surveys of Transferring Employees and New Joiners; and**
- (c) inspection of the records of the Service Provider Party as appropriate.**

57.11.3.5 The Independent Auditor's report shall be in writing and shall be issued to the Authority, the Service Provider and the Service Provider Party (as appropriate) and the Employee Representatives and shall state:

- (a) whether the Service Provider or the Service Provider Party has complied with the Relevant Criteria and if not the material respects in which the Service Provider or the Service Provider Party is deficient, together with full particulars of the deficiency, and a timescale within which to remedy such deficiency;
- (b) whether the Service Provider or the Service Provider Party has been allowed effective access to Transferring Employees and New Joiners and to records in accordance with clause 57.11.3.6 or in which respects such access was deficient;
- (c) whether the Service Provider or the Service Provider Party is required to change its practice in order to comply with the Relevant Criteria;
- (d) whether the Service Provider or the Service Provider Party has remedied any deficiency/changed its practice following any Independent Auditor's report in respect of a previous Contract Year.

57.11.3.6 The Service Provider shall, and shall ensure that the Service Provider Party, shall afford the Independent Auditor access to such Transferring Employees and New Joiners as may reasonably be required in order for the Relevant Criteria to be audited, subject to clause 57.11.3.7.

57.11.3.7 The terms of the appointment of the Independent Auditor shall limit the Independent Auditor from:

- (a) carrying out the audit over more than three (3) complete Business Days;
- (b) requiring more than ten per cent (10%) of the Transferring Employees or New Joiners to be interviewed whether individually or in a group.

57.11.3.8 The terms of the appointment of the Independent Auditor shall preclude the Independent Auditor from publishing the report to persons other than the Authority, the Service Provider (or the Service Provider Party as appropriate) and the Employee Representatives.

57.11.3.9 The terms of the appointment of the Independent Auditor shall require that the report is issued to the Authority, the Service Provider (or the Service Provider Party as appropriate) and the Employee Representatives within three (3) Months of the Independent Auditor's appointment for the purpose of providing a report for a particular Contract Year.

57.11.4 Audit Outcomes

57.11.4.1 If the Independent Auditor shall identify either:

- (a) material respects in which the Service Provider or Service Provider Party is deficient under clause 57.11.3.5(a); or
- (b) changes in practice to achieve compliance with the Relevant Criteria under clause 57.11.3.5(c):

then the Service Provider shall within twenty (20) Business Days of the receipt of the Independent Auditor's report state in writing to the Authority the action that the Service Provider, or the Service provider Party intends to take and the timescale, in order to remedy the deficiency and/or change its practice as appropriate.

57.11.4.2 The Service Provider shall within two (2) Months of the issue of its statement under clause 57.11.4.1 confirm in writing to the Authority as to whether the action promised under clause 57.11.4.1 has been implemented.

57.11.5 Complaint

Where either:

57.11.5.1 the Authority or the Authority's Representative considers that the Service Provider or the relevant Service Provider Party is not complying with its obligations under clauses 57.11.1 (*Duty*) to 57.11.2 (*Authority's Representative*) inclusive; or

57.11.5.2 a Transferred Employee, New Joiner, or Employee Representative gives notice to the Authority's Representative that it has been unable to resolve a complaint in relation to clause 57.10 (*Monitoring and Enforcement*) and/or 57.11 (*Treatment of New Joiners*) directly with the Service Provider or the relevant Service Provider Party and provides full particulars of such complaint (provided that if the Transferred Employee, New Joiner, or Employee Representative so requests, the Authority's Representative shall afford the Transferred Employee, New Joiner, or Employee Representative a reasonable opportunity to present its case at a meeting with the Authority's Representative),

then the Authority shall give written notice to the Service Provider of the particulars of such non-compliance or complaint and shall invite a response within such reasonable time as may be determined by the Authority not being less than ten (10) Business Days.

57.11.6 Response

Upon receipt of any written response from the Service Provider to the Authority's notice under clause 57.11.5 (*Complaint*) then:

57.11.6.1 if the Authority is satisfied with such response it shall give written notice to the Service Provider (and where the response is in respect of a complaint) to the Transferred Employee, New Joiner or Employee Representative that made the complaint;

57.11.6.2 if the Authority is not reasonably satisfied with such response (or if the Service Provider fails to provide a response), it may issue written notice to the Service Provider to take immediate action to remedy the matter within such time as may be determined by the Authority not being less than five (5) Business Days; and

57.11.6.3 If the Authority considers that the Service Provider or relevant Service Provider Party remains in default following this process then the provisions of clause 57.8 (ADR) shall apply.

57.11.7 Breach

If the Service Provider or the relevant Service Provider Party fails to comply with the Authority's notice under clause 57.11.6.2 then the Authority may ascertain its costs in investigating and enforcing compliance and deduct such cost from any payment to the Service Provider under this Contract or recover the same as a debt.

57.12 Obligations on expiry or termination

57.12.1 Relevant Transfer

The Authority and the Service Provider acknowledge and agree that the return or transfer of all or part of the Services to the Authority and/or to a Successor Service Provider following the termination of this Contract (including termination by effluxion of time on the Expiry Date) will give rise to a transfer under TUPE.

57.12.2 Information

Subject to any restrictions imposed by legislation (including the DPA), during the period of eighteen (18) Months preceding the Expiry Date or at any other time after the Authority has given notice to terminate this Contract, the Service Provider shall and shall procure that any relevant Service Provider Party shall:

57.12.2.1 fully and accurately disclose to the Authority the Workforce Information and the Combined Workforce Terms and Conditions relating to the Combined Workforce as the Authority reasonably requests together with full details of the employers liability insurance arrangements and certificates of insurance which have been maintained by the Service Provider or Service Provider Party as appropriate for each Contract Year of the Service Period and shall permit the Authority to use the information for informing any tenderer for the Services provided pursuant to this

Contract, and the Service Provider shall warrant that the information provided under clause 57.12.2.1 shall be true, complete and accurate in all material respects;

57.12.2.2 enable and assist the Authority and such other persons as the Authority may determine to communicate with and meet those employees and their Employee Representatives as, when and where the Authority may reasonably require;

57.12.2.3 co-operate in the orderly transfer of employment of the Combined Workforce if and to the extent reasonably requested by the Authority, including complying with all reasonable instructions from the Authority with regard to arrangements connected with the termination or partial termination of this Contract and taking all reasonable steps to mitigate any costs which the Authority and/or any Successor Service Provider may incur as a result of termination or partial termination of this Contract; and

57.12.2.4 provide all such information to any prospective Successor Service Provider as required by any provision of TUPE.

57.12.3 Change to Terms

During the eighteen (18) Months preceding the Expiry Date or at any time after notice terminating this Contract for whatever reason has been given, the Service Provider shall not and shall procure that any relevant Service Provider Party shall not:

57.12.3.1 materially amend or promise so to amend the rates of remuneration of or hours to be worked by or otherwise materially vary the Combined Workforce Terms and Conditions (including such terms and conditions which apply to entitlement of, membership of, contributions to, or pension accrual under, any statutory, occupational or personal pension scheme) of any of the Combined Workforce who are or will be engaged wholly or partially in providing the Services or materially increase or decrease the number of employees performing the Services;

57.12.3.2 terminate the employment of any of the Combined Workforce (save in the event of gross misconduct) or assign any member of the Combined Workforce away from the provision of the Services;

57.12.3.3 change the number of the Combined Workforce or replace any member of the Combined Workforce or redeploy or reassign any member of the Combined Workforce; or

57.12.3.4 recruit any member of the Combined Workforce for employment in connection with, or assign any additional employee to, the provision of the Services under this Contract,

without the prior written agreement of the Authority, not to be unreasonably withheld or delayed, provided that the Service Provider and/or such relevant Service Provider Party will be so entitled without requirement of consent to give effect to any pre-existing contractual obligations to any such member of the Combined Workforce and to award an annual pay increase.

57.12.4 Communication

During the period of six (6) Months preceding the Expiry Date, or after the Authority has given notice to terminate this Contract, the Service Provider shall and shall procure that the relevant Service Provider Party shall enable and assist the Authority and such other persons as the Authority may determine to communicate with and meet the Combined Workforce and their Employee Representatives when and where the Authority may determine.

57.12.5 Disclosure

57.12.5.1 Subject to any restrictions imposed by legislation, including the DPA, during the six (6) Months preceding the Expiry Date, or after the Authority has given notice to terminate this Contract, the Service Provider shall (and shall procure any relevant Service Provider Party shall) fully and accurately disclose to the Authority the Workforce Information and the Combined Workforce Terms and Conditions and together with full details of the employer's liability insurance arrangements and certificates

of insurance which have been maintained by the Service Provider or Service Provider Party as appropriate for each Contract Year of the Service Period and shall permit the Authority to use the information to inform the nominated new Successor Service Provider.

57.12.5.2 The Service Provider shall (and shall ensure that every relevant Service Provider Party shall) permit the Authority to use the information provided in clauses 57.12.2.1 and 57.12.5.1 for such purposes as the Authority shall deem appropriate and shall enable and assist the Authority and such other persons as the Authority may determine to communicate with and meet those members of the Combined Workforce and their Employee Representatives when and where the Authority may determine. The Service Provider agrees to indemnify and keep the Authority and at the Authority's request any Successor Service Provider fully indemnified in respect of any Loss arising from the provision of inaccurate, incomplete or misleading information under clauses 57.12.2.1 and 57.12.5.1.

57.12.6 Non Disclosure

In the event that any employee, worker or any other party engaged in the provision of the Services prior to the expiry or termination of this Contract but not listed in the information given under clause 57.12.5.1 above transfers to and becomes an employee of the Authority or any Successor Service Provider by operation of law on the expiry or termination of this Contract then the Authority or any Successor Service Provider may dismiss any such individual within six (6) Months of expiry or termination as appropriate and in such instance the Service Provider shall indemnify and keep indemnified the Authority and at the Authority's request any Successor Service Provider against any Loss which may be ordered to be paid by an employment tribunal or court of competent jurisdiction or which otherwise reasonably arises from the transfer of employment or the dismissal of such individual by the Authority or Successor Service Provider and the Service Provider shall indemnify the Authority and at the Authority's request any Successor Service

Provider in connection with the employment of such person up to the date of termination provided always that:

57.12.6.1 the Service Provider is notified no later than two (2) Months prior to any such dismissal taking place and is given an adequate opportunity to avoid or mitigate the consequences of any such dismissal including the Service Provider reemploying such employee; and

57.12.6.2 the Authority or the Successor Service Provider takes all reasonable steps to mitigate the potential loss provided that the Authority or the Successor Service Provider Party is not required to permanently employ such employee.

57.12.7 Terms and Conditions

The Service Provider shall and shall procure that the relevant Service Provider Party shall, within fourteen (14) days of a written request by the Authority, provide to the Authority or to any potential Successor Service Provider nominated by the Authority full written details of the identity and full Combined Workforce Terms and Conditions of all individuals whose employment may, pursuant to TUPE, transfer to the Authority or such potential Successor Service Provider (together with all other Workforce Information) relating to such individuals. The Authority shall be entitled to rely upon and to warrant the accuracy of all such information to any potential Successor Service Provider.

57.12.8 Indemnity - Information

The Service Provider shall indemnify the Authority and, at the Authority's request, any Successor Service Provider against any Indemnified Liabilities arising directly or indirectly out of or in connection with any claim arising from the inaccuracy of the Workforce Information provided by the Service Provider under clause 57.12.7 (*Terms and Conditions*).

57.12.9 Indemnity - Other Risks

The Service Provider shall at all times indemnify and keep indemnified the Authority and at its direction the Successor Service Provider against all Loss

which is attributable to any act or omission by the Service Provider or a Service Provider Party, save to the extent that such Loss arises in connection with any act and/or omission of the Authority and/or any Successor Service Provider, prior to the expiry or termination of this Contract in respect of any of the Service Provider's or Service Provider Party's obligations or duties (in either case, whether arising under common law, statute, custom or otherwise) to or in relation to any of the Combined Workforce or their trade unions, elected employee representatives or staff associations (including any liability arising out of the termination or dismissal of any member or former member of the Combined Workforce) and which the Authority or a Successor Service Provider may incur or suffer.

57.12.10 Partial Termination

For the avoidance of doubt the obligations of the Authority and the Service Provider under clause 57.12 (*Obligations on expiry or termination*) shall apply to a partial termination of this Contract. A partial termination shall include, without limitation, the Authority arranging for the performance of a significant part of the Services by a Third Party other than exercising its right to take Required Action under clause 60 (*Step in*) and in such circumstances any references in this paragraph to the Expiry Date or Termination Date shall be deemed to refer to the date of partial termination and references to the Combined Workforce shall be deemed to refer to such of the Combined Workforce as are assigned to those of the Services which are the subject of the partial termination.

57.13 Agency Workers and Seconded Employees

57.13.1 Limitation on numbers

The Service Provider shall ensure and shall procure that any Service Provider Party shall ensure that at all times during the Service Period the number of Agency Workers and Seconded Employees managed by the Service Provider or the Service Provider Party as appropriate does not exceed the Agency Workers and Seconded Employees Percentage Cap of the Services Workforce without the Authority's prior consent such consent not to be unreasonably withheld or delayed subject to clause 57.13.3.

57.13.2 Length of assignment

The Service Provider shall not and shall procure that a Service Provider Party does not engage or have under its management an Agency Worker or Seconded Employee for more than [REDACTED] without the Authority's prior written consent (such consent not to be unreasonably withheld or delayed) subject to clause 57.13.3 in any period of five (5) years and for the purpose of clause 57.13.2 in calculating one period of engagement or management the period of engagement or management by the Service Provider and each Service Provider Party shall be aggregated.

57.13.3 Application for Consent

57.13.3.1 Any application by the Service Provider or Service Provider Party to exceed the Agency Workers and Seconded Employees Percentage Cap or the [REDACTED] Month restriction in clause 57.13.2 (*Length of assignment*) shall be made at least two (2) Months before the restriction is likely to be contravened and shall identify the relevant Agency Worker(s) or Seconded Employee(s) as appropriate. Any such consent given by the Authority may be subject to such conditions as may reasonably be specified by the Authority.

57.13.3.2 It shall be reasonable for the Authority to withhold consent if the Service Provider or Service Provider Party has failed without good reason to comply with conditions previously specified by the Authority under clause 57.13.3.1 or if it reasonably considers that the continued engagement of the Agency Worker(s) or Seconded Employees(s) as appropriate will adversely affect the performance of a part of the Services.

57.14 The Authority shall indemnify the Service Provider and any relevant Service Provider Party in respect of any award of compensation made by an Employment Tribunal or competent court and all Loss in respect of any failure of the Authority or Successor Service Provider to supply information or sufficient information to enable the Service Provider or relevant Service Provider Party to comply with its obligations to inform and consult pursuant to TUPE in respect of the termination (whether in whole or in part) of this Contract or its expiry.

58. PENSIONS

The Parties shall comply with the provisions of schedule 25 (*Pensions*).

59. INTELLECTUAL PROPERTY RIGHTS

59.1 Licence from the Service Provider to the Authority

59.1.1 The Service Provider hereby grants to the Authority, or will procure the grant to the Authority of, a perpetual, transferable, non-exclusive, royalty free, irrevocable licence in respect of the Project Intellectual Property owned by the Service Provider or its Affiliates (other than those assigned to the Authority pursuant to clause 59.2.2) arising or used under this Contract (including that subsisting in computer software or in any systems developed or used by or for the Service Provider identifying outages and/or difficulties with the Project Network and/or the delivery of the Services) for the purposes of maintaining, managing, providing, carrying out, replacing and operating the Project Network, Project Facilities and/or Services and/or services analogous to the Services in relation to the Project, provided that such licence shall only take effect:

59.1.1.1 upon termination of this Contract pursuant to clause 61 (*Termination*);

59.1.1.2 where necessary prior to the events listed in clause 59.1.1.1 to the extent required by the Authority's officers and employees in carrying out their duties, for the purposes of receiving the Services and otherwise exercising its rights in accordance with this Contract; and/or

59.1.1.3 to enable the Authority to and/or permit the Authority to authorise and permit a replacement Service Provider to carry out services equivalent to any or all of the Services immediately on the occurrence of any Step In Event. Such licence shall commence on the occurrence of a Step In Event and shall continue in force in respect of such Step In Event until the cessation of such Step In Event.

59.1.2 Any licence granted under clause 59.1.1 shall include, without limitation, a right to use, amend, copy, extend or modify any of the Project Intellectual Property. The Authority shall be permitted to grant sub-licences on the same terms as the licence granted by the Service Provider to the Authority under this clause 59.1 (*Licence from the Service Provider to the Authority*) and the licence granted under this clause shall be transferable to third parties having or acquiring an interest in the Project Network, Project Facilities, the Services and/or this Contract or any part thereof.

59.1.3 The Service Provider shall use all reasonable endeavours to procure the grant of licences to the Authority in accordance with the terms set out in clauses 59.1.1 and 59.1.2 in relation to any Project Intellectual Property not owned by it or by its Affiliates. Any additional licence fees or royalties payable for such licences shall be payable by the Authority. In the event the Service Provider is unable to procure the grant of such licences, it will notify the Authority and consult with the Authority on the effect of such inability to procure a licence. The Service Provider will provide all reasonable co-operation to mitigate the effect of such inability and/or to negotiate the terms of any alternative licence terms that may be agreeable to the third party licensor.

59.2 Ownership of Trade Marks and Data

59.2.1 The Service Provider acknowledges that the Authority is or (where such rights have not yet been created) will be the proprietor of:

59.2.1.1 the Data, all copies thereof and all Intellectual Property Rights in and to the Data; and

59.2.1.2 the Trade Marks and all Intellectual Property Rights and goodwill in and to the Trade Marks.

59.2.2 Save to the extent assigned pursuant to the Senior Financing Agreements, the Service Provider hereby assigns to the Authority with full title guarantee (free from all liens, charges, encumbrances and third party rights), as a present assignment of present and future rights, all right, title and interest in and to:

59.2.2.1 the Data and all Intellectual Property Rights in any Data in each case generated by or for the Service Provider pursuant to this Contract; and/or

59.2.2.2 any Intellectual Property Rights and goodwill generated by the Service Provider through the use of any of the Trade Marks,

with the intent that they shall vest in the Authority forthwith upon the same coming into existence.

59.3 Copies of licensed materials to be made available to the Authority

The Service Provider shall promptly deliver to the Authority at the Authority's request and in any event on termination of this Contract, a copy of any Data requested by the Authority in respect of which the Intellectual Property Rights in such Data are assigned to the Authority pursuant to clause 59.2.2 (*Ownership of Trade Marks and Data*) and in the Service Provider's possession, custody or control at the date of such request subject to the Authority paying the Service Provider's reasonable copying fees. If the Authority no longer has a licence to use any such Data, then the Authority shall forthwith return all such materials so supplied to the Service Provider immediately following the ending of such licence.

59.4 Further assurance by the Service Provider

The Service Provider shall, if and when necessary as required by the Authority at the Authority's expense, sign, execute and do and use its reasonable endeavours to procure any third party signs, executes all such documents and does all such acts and things as the Authority may reasonably require to fully and effectively enable the Authority to confirm the benefit of the licence (including the right to grant sub-licences) granted under clause 59.1.1 (*Licence from the Service Provider to the Authority*) and/or the rights assigned to it pursuant to clause 59.2.2 (*Ownership of Trade Marks and Data*).

59.5 Licence to use Trade Marks and Data

59.5.1 The Authority hereby grants to the Service Provider a non-exclusive, non-transferable, irrevocable royalty free licence for the Contract Term to use and copy:

- 59.5.1.1 the Trade Marks;
- 59.5.1.2 the Data; and
- 59.5.1.3 any other Authority Project Intellectual Property,

solely for the purpose of carrying out the Services and/or the Service Provider's obligations pursuant to this Contract in connection with the Project ("Permitted Purpose") and only to the extent necessary for the Permitted Purpose. The licence granted to the Service Provider under this clause 59.5 (*Licence to use Trade Marks and Data*) shall include the right for the Service Provider to grant a sub-licence or licence to any Service Provider Party for the Permitted Purposes and only to the extent necessary for the Permitted Purposes on terms no less onerous than those set out in this Contract. The Service Provider shall procure that each such Service Provider Party shall only use and copy such items as permitted by the licence set out in this clause 59.5 (*Licence to use Trade Marks and Data*).

59.5.2 The Service Provider will observe, and will procure that its Sub-Contractors observe, all reasonable directions given by the Authority from time to time in relation to the permitted form and manner of use and representation of the Trade Marks.

59.6 Indemnity in favour of the Authority

59.6.1 The Service Provider shall indemnify the Authority pursuant to and in accordance with clause 55 (*Indemnity*) and keep the Authority fully and effectively indemnified against any and all Losses which the Authority may sustain or incur, or which may be brought or established against the Authority or by any of its permitted sub-licensees, and which in any case arise out of or in relation to or by reason of any claim or allegation that the use or reproduction, modification, merger and adaptation by the Authority or by its permitted sub-licensees of the Intellectual Property Rights in the Data and Retained Data, in accordance with the terms of the licence granted under clause 59.1 (*Licence from the Service Provider to the Authority*), infringes any Intellectual Property Rights of any Third Party.

59.6.2 The Service Provider will use all reasonable endeavours to procure, on behalf of the Authority, all of the rights granted by the Service Provider under clause 59.1 (*Licence from the Service Provider to the Authority*) in respect of software licences to the Service Provider and/or its Sub-Contractors in connection with the provision of the Services.

59.7 Materials which come into being in the future

Where any of the Data referred to in this clause 59 (*Intellectual property rights*) has yet to come into existence, the provisions of this clause 59 (*Intellectual property rights*) shall apply to such Data immediately upon the same coming into existence.

59.8 Consequences of Termination

59.8.1 Upon termination of this Contract, howsoever caused:

59.8.1.1 the licence granted by the Authority to the Service Provider pursuant to clause 59.5 (*Licence to use Trade Marks and Data*) shall cease to have effect;

59.8.1.2 the Service Provider shall cease use of the Data, the Trade Marks, and all other Authority Project Intellectual Property and return to the Authority or, at the Authority's request, destroy all copies (whether hard copy or electronic) of or embodying any of the Data and/or the Authority Project Intellectual Property ("Authority Materials") in the power, possession or control of the Service Provider or any Service Provider Party and shall, at the request of the Authority, remove all references to the Trade Marks from any items, livery, cars, buildings, letterhead, systems or documents in the power, possession or control of the Service Provider or any Service Provider Party. For this purpose, the Parties shall (acting reasonably) agree the time and manner of any required action and (in default of such agreement within twenty (20) Business Days after the Termination Date), the Service Provider will permit the Authority to enter on to the premises at any reasonable time or times (save in an emergency) where the Authority Materials are held to identify and remove the Authority Materials.

PART M - STEP IN, EXPIRY AND TERMINATION

60. STEP IN

60.1 Authority's emergency step in rights

If the Authority reasonably believes that it needs to take action in connection with the Services:

60.1.1 because a serious risk exists to the health or safety of persons or property or to the environment; and/or

60.1.2 to discharge a statutory duty; and/or

60.1.3 because a Category 1 Defect has occurred;

(in each case a "Step In Event") then the Authority shall be entitled to take action in accordance with clause 60.2 below.

60.2 If clause 60.1 (*Authority's emergency step in rights*) applies and the Authority wishes to take action, the Authority shall notify the Service Provider in writing of the following:

60.2.1 the action it wishes to take;

60.2.2 the reason for such action;

60.2.3 the date it wishes to commence such action;

60.2.4 the time period which it believes will be necessary for such action; and

60.2.5 to the extent practicable, the effect on the Service Provider and its obligations to provide the Services during the period when that action is being taken.

60.3 Following service of such notice under clause 60.2, the Authority shall take such action as notified under clause 60.2 above and any consequential action as it reasonably believes is necessary (together, the "Required Action") and the Service Provider shall give all reasonable assistance to the Authority while it is taking such Required Action.

60.4 If the Service Provider is not in breach of its obligations under this Contract, then for so long as and to the extent that the Required Action is taken, and this prevents the Service Provider from providing any part of the Service:

60.4.1 the Service Provider shall be relieved from its obligations to provide such part of the Services; and

60.4.2 in respect of the period in which the Authority is taking the Required Action and provided that the Service Provider provides the Authority with reasonable assistance (such assistance to be at the expense of the Authority to the extent incremental costs are incurred), the Annual Unitary Charge due from the Authority to the Service Provider shall equal the amount the Service Provider would receive if it were satisfying all of its obligations and providing the Service affected by the Required Action in full over that period.

60.5 If the Required Action is taken as a result of a breach of the obligations by the Service Provider under the Contract, then for so long as and to the extent that any Required Action is taken, and this prevents the Service Provider from providing any part of the Services:

60.5.1 the Service Provider shall be relieved of its obligations to provide such part of the Services; and

60.5.2 in respect of the period in which the Authority is taking Required Action and provided that the Service Provider provides the Authority with reasonable assistance (such assistance to be at the expense of the Service Provider to the extent incremental costs are incurred), the Annual Unitary Charge due from the Authority to the Service Provider shall equal the amount the Service Provider would receive if it were satisfying all of its obligations and providing the Services affected by the Required Action in full over that period, less an amount equal to all the Authority's costs in taking the Required Action.

60.6 Where the Required Action is taken otherwise than as a result of a breach by the Service Provider of its obligations under this Contract, the Authority shall undertake the Required Action in accordance with Good Industry Practice.

61. TERMINATION

61.1 Termination of this Contract

Without prejudice to clause 78 (*Continuing Obligations*) this Contract will terminate on the earlier of:

61.1.1 the Expiry Date;

61.1.2 the date of termination pursuant to clauses 56.14.1 and/or 56.14.2 (*Insurance*);

61.1.3 the date of termination by the Authority pursuant to clause 62 (*Termination by the Authority*);

61.1.4 the date of termination by the Service Provider pursuant to clause 63 (*Termination by the Service Provider*);

61.1.5 the date of termination following a Prohibited Act pursuant to clause 64 (*Termination for Corrupt Gifts and Fraud*);

61.1.6 the date of termination following a Force Majeure Event pursuant to clause 65 (*Termination following a Force Majeure Event*); and

61.1.7 the date of termination pursuant to clause 98 (*Local Government (Contracts) Act 1997*).

61.2 Antecedent Breaches and Exclusive Right to Terminate

61.2.1 This clause 61 (*Termination*) and clauses 62 (*Termination by the Authority*) to 65 (*Termination following a Force Majeure Event*) (inclusive) are without prejudice to either Party's accrued rights in respect of any breach of this Contract including any breach giving rise to termination of this Contract save that if the effect of antecedent breaches by the Service Provider of this Contract have been taken into account in the calculation of compensation payable pursuant to clause 69 (*Compensation on termination*) no further liability shall attach in respect of such antecedent breaches.

61.2.2 Each and any of the events referred to in:

61.2.2.1 the definition of "Service Provider Default Event" constitute the only breaches of this Contract or of any of the other Project Documents which shall constitute a Service Provider Default Event; and

61.2.2.2 the definition of "Authority Default Event" constitute the only breaches of this Contract or of any of the other Project Documents which shall constitute an Authority Default Event.

62. TERMINATION BY THE AUTHORITY

62.1 Service Provider Default Event

If a Service Provider Default Event has occurred and the Authority wishes to terminate this Contract, it must serve a Termination Notice on the Service Provider.

62.2 Termination Notice

The Termination Notice must specify:

62.2.1 the type and nature of the Service Provider Default Event that has occurred giving reasonable details; and

62.2.2 that in the case of any Service Provider Default falling within the limbs (a), (g), (h), (o) or (q) of the definition of Service Provider Default Event, this Contract will terminate on the day falling forty (40) Business Days after the date on which the Service Provider received the Termination Notice, unless:

62.2.2.1 in the case of a breach under limb (a) of the definition of Service Provider Default Event the Service Provider puts forward an acceptable rectification programme within twenty (20) Business Days (and implements such programme in accordance with its terms and rectifies the Service Provider Default Event in accordance with the programme); or

62.2.2.2 in the case of a breach under limb (g), (h), (o) or (q) of the definition of Service Provider Default Event, the Service

Provider rectifies the Service Provider Default Event within forty (40) Business Days; and

62.2.3 that in the case of any other Service Provider Default Event (not being limbs (a), (g), (h), (o) and (q) of the definition of Service Provider Default Event) this Contract will terminate on the date falling forty (40) Business Days after the date the Service Provider receives the Termination Notice.

62.3 If the Service Provider either:

62.3.1 rectifies the Service Provider Default Event within the time period specified in the Termination Notice; or

62.3.2 implements the rectification programme, if applicable, in accordance with its terms,

the Termination Notice will be deemed to be revoked and this Contract will continue.

62.4 Termination

If:

62.4.1 in the case of a Service Provider Default Event within limb (a) of the definition of that term no acceptable rectification programme has been put forward pursuant to clause 62.2.2.1 and the Service Provider fails to rectify the Service Provider Default Event within the time specified in the Termination Notice; or

62.4.2 in the case of a Service Provider Default Event within limbs (g), (h), (o) or (q) of the definition of Service Provider Default Event, the Service Provider fails to rectify the Service Provider Default Event within the specified time in the Termination Notice,

the Authority may give notice that the Contract will, subject to the terms of the Direct Agreement, terminate on the date falling forty (40) Business Days after the date of receipt of the Termination Notice.

62.5 If the Service Provider fails to implement any rectification programme in accordance with its terms, this Contract will, subject to the terms of the Direct Agreement, terminate on the date falling forty (40) Business Days after the date of notification by

the Authority to the Service Provider of such failure to implement the rectification programme in accordance with its terms.

62.6 Notification of actual or potential Service Provider Default Event

Where either Party believes that a Service Provider Default Event has occurred or a breach which, if not remedied, is reasonably likely to constitute a Service Provider Default Event or an event or circumstance has occurred which would, with the giving of notice, lapse of time, determination of materiality or satisfaction of any other condition, constitute or give rise to a Service Provider Default Event, in either case that Party shall as soon as is reasonably practicable after it has knowledge of the same notify the other Party of the same and the Parties shall promptly discuss the matter at managerial level.

62.7 Voluntary Termination by the Authority

62.7.1 The Authority may terminate this Contract at any time on or before its Expiry Date by complying with its obligations under clause 62.7.2 to 62.7.4.

62.7.2 If the Authority wishes to terminate this Contract under this clause, it must give notice to the Service Provider stating:

62.7.2.1 that the Authority is terminating this Contract under this clause 62.7 (*Voluntary Termination by the Authority*);

62.7.2.2 that this Contract will terminate on the date specified in the notice, which must be a minimum of twenty (20) Business Days after the date of receipt of the notice; and

62.7.2.3 whether the Authority has chosen to exercise its option under clause 67 (*Other Consequences of termination or expiry*) below.

62.7.3 On termination, the Authority shall have the option to require the Service Provider to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority.

62.7.4 This Contract will terminate on the date specified in the notice referred to in clause 62.7.2.

62.8 Persistent Breach

62.8.1 Subject to clause 20.6, if a particular breach, other than any breach for which Service Default Termination Points, Milestone Default Termination Points, Service Points or Adjustment Default Points could have been awarded and/or Adjustments could have been made, has continued for more than [REDACTED] Business Days or occurred more than [REDACTED] times in any [REDACTED] period then the Authority may serve a notice on the Service Provider:

62.8.1.1 specifying that it is a formal warning notice;

62.8.1.2 giving reasonable details of the breach; and

62.8.1.3 stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Contract.

62.8.2 If, following service of such a warning notice, the breach specified has continued beyond [REDACTED] Business Days or recurred in [REDACTED] or more Months within the [REDACTED] period after the date of service, then the Authority may serve another notice (a "Final Warning Notice") on the Service Provider:

62.8.2.1 specifying that it is a Final Warning Notice;

62.8.2.2 stating that the breach specified has been the subject of a warning notice served within the [REDACTED] period prior to the date of service of the Final Warning Notice; and

62.8.2.3 stating that if such breach continues for more than [REDACTED] [REDACTED] or recurs in [REDACTED] within the [REDACTED] period after the date of service of the Final Warning Notice this Contract may be terminated.

62.8.3 A warning notice may not be served in respect of any breach which has previously been counted in the making of a separate warning notice.

62.9 Replacement of a non-performing Sub-Contractor

62.9.1 Where the whole (and, for the avoidance of doubt, not part) of the Sub-Contract is terminated by the Service Provider, the Service Provider shall by

a notice in writing to the Authority, be entitled to require that there be disregarded for the purposes of calculating whether a Service Provider Default has occurred:

62.9.1.1 pursuant to limbs (l), (m) and (n) of the definition of Service Provider Default:

- (a) any Milestone Default Termination Point(s), Service Default Termination Point(s) and/or Adjustment Default Point(s), Service Point(s) and/or warning notices and/or Final Warning Notices incurred by the Service Provider prior to the date that the Sub-Contractor was replaced and attributable to the performance or non-performance of that replaced Sub-Contractor; and
- (b) any Milestone Default Termination Point(s), Service Default Termination Point(s), Adjustment Default Point(s), Service Point(s), warning notices and/or Final Warning Notices incurred by the Service Provider in the two (2) Months following the date upon which the Sub-Contractor was replaced and attributable to the performance or non-performance to that part of the Service in respect of which the Sub-Contractor has been replaced;

provided that the Service Provider shall not be entitled to give more than two (2) such notices in total during the Contract Term, of which only one (1) such notice may be given during the Core Investment Period.

62.9.2 The Authority shall still be entitled to make Adjustments to the Annual Unitary Charge during the period following the date upon which the Sub-Contractor was replaced, where the Service Provider serves a notice pursuant to this clause 62.9 (*Replacement of a non-performing Sub-Contractor*).

62.10 Termination by the Authority for breach of the Refinancing Provisions

62.10.1 If the Service Provider wilfully breaches clause 93.1 (*Refinancing*) then the Authority may terminate this Contract at any time on or before its Expiry

Date by complying with its obligations under clause 62.10.2 to 62.10.4 (inclusive).

62.10.2 If the Authority wishes to terminate this Contract under this clause 62.10.2, it must give notice to the Service Provider stating:

62.10.2.1 that the Authority is terminating this Contract under this clause 62.10.2 (*Termination by the Authority for breach of the Refinancing Provisions*);

62.10.2.2 that this Contract will terminate on the date falling twenty (20) Business Days after the date of receipt of the notice; and

62.10.2.3 whether the Authority has chosen to exercise its option under clause 62.10.3.

62.10.3 On termination, the Authority shall have the option to require the Service Provider to transfer to the Authority all of its rights, title and interest in and to the Assets.

62.10.4 This Contract will terminate on the date falling twenty (20) Business Days after the date of receipt of the notice referred to in clause 62.10.2.

63. TERMINATION BY THE SERVICE PROVIDER

63.1 If an Authority Default has occurred and the Service Provider wishes to terminate this Contract, it must serve a Termination Notice on the Authority within thirty (30) Business Days of becoming aware of the Authority Default.

63.2 The Termination Notice must specify the type of Authority Default which has occurred entitling the Service Provider to terminate.

63.3 This Contract will terminate on the day falling thirty (30) Business Days after the date the Authority receives the Termination Notice, unless the Authority rectifies the Authority Default within twenty (20) Business Days of receipt of the Termination Notice.

64. TERMINATION FOR CORRUPT GIFTS AND FRAUD

64.1 Prohibited Acts

If the Service Provider, or any Sub-Contractor (or anyone employed by or acting on behalf of any of them) or any of its or their agents or shareholders commits any Prohibited Act, then the Authority shall be entitled to act in accordance with clauses 64.2 to 64.7 (inclusive).

- 64.2 If a Prohibited Act is committed by the Service Provider or by an employee not acting independently of the Service Provider, then the Authority may terminate this Contract by giving notice to the Service Provider.
- 64.3 If the Prohibited Act is committed by an employee of the Service Provider acting independently of the Service Provider, then the Authority may give notice to the Service Provider of termination and this Contract will terminate, unless within ten (10) Business Days of receipt of such notice the Service Provider terminates the employee's employment and (if necessary) procures the performance of such part of the Services by another person.
- 64.4 If the Prohibited Act is committed by a Sub-Contractor or by an employee of that Sub-Contractor not acting independently of that Sub-Contractor, then the Authority may give notice to the Service Provider of termination and this Contract will terminate, unless within twenty (20) Business Days of receipt of such notice, the Service Provider terminates the relevant Project Document and procures the performance of such part of the Services by another person.
- 64.5 If the Prohibited Act is committed by an employee of a Sub-Contractor acting independently of that Sub-Contractor then the Authority may give notice to the Service Provider of termination and this Contract will terminate, unless within twenty (20) Business Days of receipt of such notice the Sub-Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Services by another person.
- 64.6 If the Prohibited Act is committed by any other person not specified in clauses 64.2 to 64.5, then the Authority may give notice to the Service Provider of termination and this Contract will terminate unless within twenty (20) Business Days of receipt of such notice, the Service Provider:

- 64.6.1 procures the termination of such person's employment and of the appointment of their employer (where not employed by the Service Provider or the Sub-Contractors) and (if necessary) procures the performance of such part of the Services by another person; and
- 64.6.2 in the case of a DNO carrying out Non-Contestable Works and where no organisation other than the DNO can carry out such Non-Contestable Works for the Service Provider:
- 64.6.2.1 (where the person is acting independently of his or her employer), uses reasonable endeavours to procure the termination of such person's employment, or the removal of that person from the provision of the Service and (if applicable) procures the performance of such part of the Service by another person; or
- 64.6.2.2 (where such person is not acting independently of his or her employer), take such actions as is required by the Authority (acting in a reasonable and proportionate manner) in relation to the DNO including, where practicable, procurement of a reasonably equivalent viable alternative provider of the Non-Contestable Works.

64.7 Notice of termination

Any notice of termination under this clause 64 (*Termination for Corrupt Gifts and Fraud*) shall specify:

- 64.7.1 the nature of the Prohibited Act;
- 64.7.2 the identity of the party whom the Authority believes has committed the Prohibited Act;
- 64.7.3 the date on which this Contract will terminate, in accordance with the applicable provision of this clause 64 (*Termination for Corrupt Gifts and Fraud*); and
- 64.7.4 the Authority's chosen option under clause 69.3 (*Compensation following a Prohibited Act*).

65. TERMINATION FOLLOWING A FORCE MAJEURE EVENT

- 65.1 No Party shall be entitled to bring a claim for a breach of obligations under this Contract by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt (but without prejudice to clauses 65.5 or 65.7), the Authority shall not be entitled to terminate this Contract for a Service Provider Default if such Service Provider Default arises from a Force Majeure Event.
- 65.2 Nothing in clause 65.1 shall affect any entitlement to make Adjustments or any Adjustments made as a result of schedule 4 (*Payment Mechanism*) in the period during which the Force Majeure Event is subsisting.
- 65.3 On the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.
- 65.4 As soon as practicable following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this Contract.
- 65.5 If no such terms are agreed on or before the date falling eighty five (85) Business Days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Contract for a period of more than one hundred and twenty eight (128) Business Days, then, subject to clause 65.6, either Party may terminate this Contract by giving twenty (20) Business Days written notice to the other Party.
- 65.6 If the Contract is terminated under clause 65.5 or clause 65.7 compensation shall be payable by the Authority in accordance with clause 69.4 (*Compensation following a Force Majeure Event or Uninsurability*) and the Authority may require the Service Provider to transfer its title, interest and rights in and to any Assets to the Authority.

65.7 If the Service Provider gives notice to the Authority under clause 65.5 that it wishes to terminate this Contract, then the Authority has the option either to accept such notice or to respond in writing on or before the date falling seven (7) Business Days after the date of its receipt stating that it requires this Contract to continue. If the Authority gives the Service Provider such notice, then:

65.7.1 the Authority shall pay to the Service Provider the Monthly Unitary Charge from the day after the date on which this Contract would have terminated under clause 65.5 as if the Services the performance of which is affected by the Force Majeure Event ("Affected Services") were being fully provided save that Adjustments in respect of Performance Standard 1B shall continue to be made at the level they were being made on the date immediately prior to the occurrence of the Force Majeure Event and provided that, to the extent that the Service Provider has been issued a Certificate of Completion in respect of a Milestone, nothing in this clause 65 (*Termination following a Force Majeure Event*) shall affect the Service Provider's entitlement to an increase in the Monthly Unitary Charge pursuant to clause 9.2 (*Unitary Charge Adjustment - Certificate of Completion*); and

65.7.2 this Contract will not terminate until expiry of written notice (of at least twenty (20) Business Days) from the Authority to the Service Provider that it wishes this Contract to terminate.

65.8 The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Service Provider shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

65.9 The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Contract. Following such notification this Contract shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

66. DE-MOBILISATION PROCEDURES

During the twelve (12) Month period immediately preceding the Expiry Date or, if applicable, during the period between the date of service of any Termination Notice and the relevant date of termination, and for any additional period as set out in schedule 13 (*Demobilisation*) the Parties shall comply with their respective obligations as set out in schedule 13 (*Demobilisation*).

67. OTHER CONSEQUENCES OF TERMINATION OR EXPIRY

67.1 Transfer of documents etc to the Authority following termination

The Service Provider shall within twenty (20) Business Days of the Expiry Date (or if earlier the Termination Date) hand over to the Authority all documents (or complete and accurate copies thereof), records, books, data and/or information in the possession, custody or power of the Service Provider relating to and/or touching upon the design, installation, refurbishment, maintenance and/or replacement of the Project Network, the Project Facilities and the carrying out of the Services other than any of such documents, records, books, data and/or information of a financial nature which will not be relevant to the provision of services equivalent to the Services after the Termination Date. Without prejudice to clause 59.8 (*Consequences of Termination*) documents, records, books, data and/or information kept or stored on computer will be surrendered, released and/or handed-over to the Authority by whatever means and in whatever format the Authority may reasonably require.

67.2 Provision of Information

The Service Provider shall (subject to any condition imposed on the Service Provider or any Sub-Contractor by Legislation):

67.2.1 following the service of a Termination Notice;

67.2.2 following termination of this Contract when a Termination Notice is not served; and/or

67.2.3 no later than six (6) Months and no earlier than twelve (12) Months before the Expiry Date,

supply to the Authority all information reasonably required by the Authority to carry out the Services (including information on the identity, terms and conditions of employment of all employees of the Service Provider or any Sub-Contractor employed in the provision of the Services) and the Service Provider warrants that, to the best of its knowledge and belief, such information is accurate in all material respects.

67.3 Assignment of Rights, etc.

Subject to the Direct Agreement, on the Expiry Date (or if earlier, on the Termination Date) the Service Provider shall assign to the Authority in accordance with the Demobilisation Plan:

67.3.1 the benefit of all and any contracts or arrangements (as are reasonably required by the Authority) it may have with any third parties and shall, if for any reason it cannot assign the same, declare a trust of all its beneficial interest in the same for the benefit of the Authority; and

67.3.2 take such action in relation to Intellectual Property Rights as is referred to in clause 59 (*Intellectual property rights*),

and the Service Provider hereby irrevocably and unconditionally appoints the Authority as the Service Provider's lawful attorney for the duration of the Contract Term (and to the complete exclusion of any rights that the Service Provider may have in such regard) for the purpose of generally executing or approving such deeds or documents and doing any such acts or things necessary to give effect to the provisions of this clause 67.3 (*Assignment of Rights, etc.*) as the attorney may think fit.

67.4 Vacation of Authority's Property, etc

On the Expiry Date (or if earlier on the Termination Date), the Service Provider shall, and shall procure that all Service Provider Parties shall:

67.4.1 vacate any of the Authority's facilities or premises where any part of the Services was or is being carried out;

67.4.2 minimise any inconvenience to the Authority and any other Authority Party caused by such vacation; and

67.4.3 make good any damage caused by the Service Provider and/or any Service Provider Party (at the Service Provider's expense) within twenty (20) Business Days of such vacation,

provided that this clause shall not apply to the Depot and the UTC Centre which shall be vacated in accordance with the Demobilisation Plan.

67.5 Transfer of Assets

Subject to the Direct Agreement and without prejudice to part 2 of schedule 13 (*Demobilisation*) and unless the Authority notifies the Service Provider in writing to the contrary, the Service Provider shall transfer its rights, title and interest in and to the Assets to the Authority (or any person nominated by the Authority), on and with effect from the Expiry Date, or if earlier, the Termination Date (as the case may be) for no additional payment.

67.6 Co-operation by the Service Provider

In addition to complying with the provisions of paragraph 7 of part 1 of schedule 13 (*Demobilisation*), on and after the Termination Date the Service Provider shall continue to act in good faith and shall co-operate with the Authority to ensure the smooth hand-over of the Project Facilities, and the transition by the Termination Date of the provision of the Services to the Authority or a Third Party nominated by the Authority.

67.7 Retendering the Services on Expiry

67.7.1 On or before a date falling no later than twelve (12) Months prior to the Expiry Date, the Authority shall notify the Service Provider in writing whether it requires the retendering of the provision of the Services.

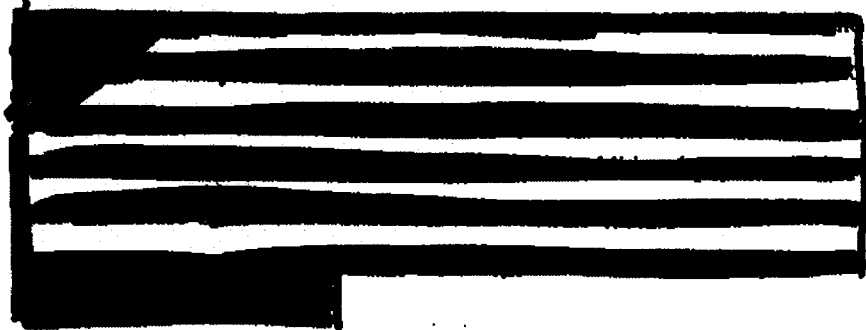
67.7.2 If the Authority requires the retendering of the provision of the Services then:

67.7.2.1 the Service Provider shall do all necessary acts (including entering into any contracts) to ensure that the Successor Service Provider obtains all of its rights, title and interest in and to the Assets with effect on and from the Expiry Date; and

67.7.2.2 the Authority will bear all costs of any retendering of this Contract on expiry.

67.7.3 If the Authority does not require a retendering of the Services then the Assets shall transfer to the Authority on the Expiry Date (unless such Assets are Service Provider's Stock and/or Service Provider's Vehicles in which case part 2 of schedule 13 (*Demobilisation*) shall apply) and the Service Provider shall do any necessary acts (including entering into any contracts) to ensure that the Authority obtains all of its rights, title and interest in the Assets with effect on and from the Expiry Date.

67.7.4



68. HANDBACK PROCEDURE

68.1 General

The Service Provider shall perform the Services in accordance with the provisions of this Contract so that at the Expiry Date (and, for the avoidance of doubt, not the Termination Date) the Project Network (and each Project Network Part) and the Project Facilities comply with the applicable Expiry Condition Requirements.

68.2 Compliance with the Expiry Condition A Requirements

68.2.1 Project Roads

68.2.1.1 The Service Provider shall ensure that all Project Roads comply with the Expiry Condition A Requirements on the Expiry Date.

68.2.1.2 The Service Provider shall use the data generated from the Condition Surveys undertaken in Year 23 pursuant to clause 6 (*Surveys and Inspections*) to:

- (a) predict the deterioration rates of the Project Roads for the remainder of the Contract Term; and
- (b) identify the works required to be carried out in the remainder of Year 23 and the twenty fourth (24th) Contract Year ("Year 24") to:
 - (i) ensure that the Project Roads shall comply with the Expiry Condition A Requirements when the Condition Surveys are undertaken in Year 24 pursuant to clause 6 (*Surveys and Inspections*); and
 - (ii) ensure that the Project Roads comply with the Expiry Condition A Requirements on the Expiry Date.

68.2.1.3 The Service Provider shall update the Service Provider Programmes in accordance with clause 11 (*Service Provider Programmes*) in respect of the works identified pursuant to clause 68.2.1.2(a) and carry out the Services in the remainder of Year 23 and Year 24 in accordance with such Service Provider Programmes.

68.2.1.4 If the data generated from the Condition Surveys carried out in Year 24 pursuant to clause 6 (*Surveys and Inspections*) identifies that the Project Roads do not comply with the Expiry Condition A Requirements, the Service Provider shall:

- (a) notify the Authority in writing that such Project Roads have failed to comply with the Expiry Condition A Requirements within five (5) Business Days of the Service Provider becoming aware of such failure; and
- (b) update the relevant Service Provider Programmes in accordance with clause 11 (*Service Provider Programmes*) in respect of the works required in order that the Project Roads shall meet the Expiry Condition A

Requirements as soon as reasonably practicable and, in any event, no later than six (6) Months prior to the Expiry Date.

68.2.1.5 The Service Provider shall carry out the Services in the remainder of Year 24 and the twenty-fifth (25) Contract Year ("Year 25") in accordance with Service Provider Programmes.

68.2.1.6 The Service Provider shall notify the Authority and the Independent Certifier (as soon as reasonably practicable and, in any event, no later than six (6) Months prior to the Expiry Date) of the following:

(a) whether the works referred to in clause 68.2.1.4(b) are completed or not and, where such works are not completed, all details in respect of such works; and

(b) whether all Project Roads meet the Expiry Condition A Requirements and, if any Project Roads fail to comply with the Expiry Condition A Requirements, detail in respect of which Performance Targets within the Expiry Condition A Requirements have not been complied with.

68.2.1.7 The Independent Certifier shall by the date that is five (5) Months, but not earlier than the date which is eighteen (18) Months prior to the Expiry Date notify the Authority and the Service Provider (in writing) whether or not (using the information generated by the Service Provider in accordance with clause 68.2.1.6 and any relevant surveys, inspections, tests and assessments carried out by the Service Provider pursuant to clause 6 (Surveys and Inspections)) all Project Roads comply with the Expiry Condition A Requirements (irrespective of whether or not the Service Provider has complied with clause 68.2.1.6).

68.2.1.8 Where the Independent Certifier notifies the Authority and the Service Provider pursuant to clause 68.2.1.7 that all the Project Roads comply with the Expiry Condition A Requirements, the

Authority shall not be entitled to retain any sums from the Monthly Unitary Charge in respect of the Service Provider failing to ensure that the Project Roads comply with the Expiry Condition A Requirements (other than pursuant to clause 68.5 (*Retention Fund Account*)).

68.2.1.9 Where the Independent Certifier notifies the Authority and the Service Provider pursuant to clause 68.2.1.7 that any of the Project Roads do not meet the Expiry Condition A Requirements, the Independent Certifier shall, (within ten (10) Business Days of receipt by the Authority of such notification pursuant to clause 68.2.1.7):

- (a) issue a schedule of works that are required in order to ensure that such Project Roads shall meet the Expiry Condition A Requirements at the Expiry Date ("Expiry Condition A Works"); and
- (b) provide (in the Independent Certifier's reasonable opinion) a written estimate of the cost of the Expiry Condition A Works ("First Estimate").

68.2.1.10 The Authority shall be entitled to retain a sum equal to the First Estimate from the Monthly Unitary Charge (where the Authority (acting reasonably) does not consider there will be sufficient funds in the Retention Account to meet all failures by the Service Provider to comply with the Expiry Condition Requirements) until such time as the Authority is required to reimburse the Service Provider with the balance of the Retention Fund Account pursuant to clause 68.6 (*Application of the Retention Fund Account*).

68.2.1.11 The Service Provider may update the relevant Service Provider Programmes in accordance with clause 11 (*Service Provider Programmes*) to take into account the Expiry Condition A Works and the Service Provider shall carry out the Services in respect of the remainder of the Contract Term in accordance with such Service Provider Programmes. The exercise of the Service

Provider's right pursuant to this clause 68.2.1.11 shall not prevent or restrict the Authority from exercising its rights pursuant to clause 68.2.1.9.

68.2.1.12 The Independent Certifier using all available information in respect of the condition of the Project Roads (including the data generated from the Condition Surveys carried out in the final Contract Year pursuant to clause 6 (Surveys and Inspections)) shall, no earlier than three (3) Months prior to the Expiry Date but no later than two (2) Months prior to the Expiry Date, notify the Authority and the Service Provider in writing of the following:

- (a) which Project Roads have complied with and have not complied with the Expiry Condition A Requirements; and**
- (b) (if pursuant to clause 68.2.1.12 above, the Independent Certifier confirms that not all Project Roads comply with the Expiry Condition A Requirements) confirmation as to which Project Roads have not complied with which Performance Targets within the Expiry Condition A Requirements;**
- (c) which Expiry Condition A Works are still outstanding (if any);**
- (d) if failure to meet the Expiry Condition A Requirements is as a result of failure to undertake works other than the Expiry Condition A Works, an estimate (in the reasonable opinion of the Independent Certifier) of the cost of such additional works; and**
- (e) any of the Expiry Condition A Works which have been undertaken to the reasonable satisfaction of the Independent Certifier.**

68.2.1.13 The Independent Certifier shall, as soon as reasonably practicable following receipt by the Authority of the notice pursuant to clause 68.2.1.9 and in any event not less than two (2) Months prior to the Expiry Date, provide the Authority and the Service Provider with two written estimates provided by two (2) independent contractors of the cost of the Expiry Condition A Works.

68.2.1.14 The Authority shall be entitled to retain from the Monthly Unitary Charge the following amounts (in addition to any other amounts expressly referred to in this clause 68 (*Handback Procedure*):

(a) (if the average of the two estimates from the independent contractors provided by the Independent Certifier pursuant to clause 68.2.1.13 is higher than the First Estimate), the difference between such average and the First Estimate; and

(b) a sum equivalent to the cost of the additional works identified pursuant to clause 68.2.1.12(d),

until such time as the Authority is required to reimburse the Service Provider with the balance from the Retention Fund Account pursuant to clause 68.5 (*Retention Fund Account*).

68.2.1.15 If the Service Provider disputes any of the contents of the notice provided by the Independent Certifier pursuant to clause 68.2.1.9 (including any of the contents of the schedule of works or the First Estimate) and/or 68.2.1.12, either Party may refer the dispute to Dispute Resolution provided that until such time as the dispute is agreed or determined pursuant to clause 70 (*Dispute Resolution*), the Authority shall be entitled to proceed on the basis of the contents of the Independent Certifier's notice given pursuant to clause 68.2.1.12 and shall be entitled to make any retention in accordance with clause 68.2.1.10 and 68.2.1.14 until such time as the Authority is required to reimburse the Service Provider with the balance from the Retention Fund Account

pursuant to clause 68.6 (*Application of the Retention Fund Account*) or as otherwise agreed or determined in accordance with Dispute Resolution.

68.2.2 Structures, Bridges and Tunnels

68.2.2.1 The Service Provider shall ensure that all Structures (excluding Minor Structures), Bridges and Tunnels comply with Expiry Condition A Requirements on the Expiry Date.

68.2.2.2 The Service Provider shall, on or before the date on which Year 23 expires, complete all works required to be carried out to Structures (excluding Minor Structures), Bridges and Tunnels, as identified by those General Inspections, Principal Inspections, Special Inspections and/or Structural Assessments carried out by the Service Provider prior to the commencement of Year 19 pursuant to clause 6 (*Surveys and Inspections*) so that such Structures (excluding Minor Structures), Bridges and Tunnels comply with the Expiry Condition A Requirements.

68.2.2.3 The Service Provider shall ensure that all works referred to in clause 68.2.2.2 are incorporated within the Service Provider Programmes for completion on or before Year 23 expires and the Service Provider shall perform the Services in accordance with the Service Provider Programmes.

68.2.2.4 The Service Provider shall, on or before the date on which Year 24 expires, complete all works required to be carried out to Structures (excluding Minor Structures), Bridges and Tunnels, as identified by those General Inspections, Principal Inspections, Special Inspections and/or Structural Assessments carried out by the Service Provider from the commencement of Year 19 to expiry of the twenty-second (22nd) Contract Year ("Year 22") pursuant to clause 6 (*Surveys and Inspections*) so that such Structures (excluding Minor Structures), Bridges and Tunnels comply with the Expiry Condition A Requirements.

68.2.2.5 The Service Provider shall undertake all works identified as being required to Structures (excluding Minor Structures), Bridges and Tunnels as a result of General Inspections, Special Inspections and/or Structural Assessments carried out in Year 23, Year 24 and until 6 Months prior to the Expiry Date so as to ensure that such Structures (excluding Minor Structures), Bridges and Tunnels comply with Expiry Condition A Requirements.

68.2.2.6 The Service Provider shall complete all works required to Structures (excluding Minor Structures), Bridges and Tunnels, as identified by any Principal Inspections carried out by the Service Provider in Year 23 pursuant to clause 6 (*Surveys and Inspections*), on or before the date on which Year 24 expires to the extent that Good Industry Practice for the maintenance of Structures (excluding Minor Structures), Bridges and Tunnels would require such works to be completed by the Expiry Date so that such Structures (excluding Minor Structures), Bridges and Tunnels meet the Expiry Condition A Requirements.

68.2.2.7 The Service Provider shall complete all works required to Structures (excluding Minor Structures), Bridges and Tunnels, as identified by any Principal Inspections carried out by the Service Provider in Year 24 pursuant to clause 6 (*Surveys and Inspections*), on or before the date that is six (6) Months prior to the Expiry Date to the extent that Good Industry Practice for the maintenance of Structures (excluding Minor Structures), Bridges and Tunnels would require such works to be completed by the Expiry Date so that such Structures (excluding Minor Structures), Bridges and Tunnels meet the Expiry Condition A Requirements.

68.2.2.8 The Service Provider shall notify the Authority and the Independent Certifier six (6) Months prior to the end of Year 23 of the following:

- (a) whether the works referred to in clause 68.2.2.2 have been completed;

- (b) whether the Service Provider has complied with the Service Provider Programmes for the first six (6) Months of Year 23 in respect of the works identified in clause 68.2.2.2; and
- (c) whether all Structures, Bridges and Tunnels comply with the Expiry Condition A Requirements and if any Structures (excluding Minor Structures), Bridges and/or Tunnels do not comply with the Expiry Condition A Requirements, provide full details as to which Structures (excluding Minor Structures), Bridges and/or Tunnels do not comply with which Performance Targets within the Expiry Condition A Requirements;

68.2.2.9 The Independent Certifier shall notify the Authority and the Service Provider (in writing) within five (5) Business Days prior to the end of Year 23 of the following:

- (a) whether the works referred to in clause 68.2.2.2 have been completed;
- (b) whether the Service Provider has complied with the Service Provider Programmes for the first six (6) Months of Year 23 in respect of the works identified in clause 68.2.2.2;
- (c) whether all Structures, Bridges and Tunnels comply with the Expiry Condition A Requirements and if any Structures, Bridges and/or Tunnels do not comply with the Expiry Condition A Requirements, provide full details as to which Structures, Bridges and/or Tunnels failed to comply with which Performance Targets within the Expiry Condition A Requirements; and
- (d) the cost of the works identified in (a) to (c) (inclusive) provided by two independent contractors and if the Independent Certifier is unable to obtain such costs, an

estimate in the Independent Certifier's opinion (acting reasonably).

68.2.2.10 The Service Provider shall notify the Authority and the Independent Certifier six (6) Months prior to the expiry of Year 24 of the following:

- (a) whether the works referred to in clause 68.2.2.4 have been completed;
- (b) whether the Service Provider has complied with the Service Provider Programmes for the first six (6) Months of Year 24 in respect of the works identified in clause 68.2.2.4;
- (c) whether all Structures (excluding Minor Structures), Bridges and Tunnels comply with the Expiry Condition A Requirements and if any Structures (excluding Minor Structures), Bridges and/or Tunnels do not comply with the Expiry Condition A Requirements, provide full details as to which Structures (excluding Minor Structures), Bridges and/or Tunnels do not comply with which Performance Targets within the Expiry Condition A Requirements.

68.2.2.11 The Independent Certifier shall notify the Authority and the Service Provider (in writing) within five (5) Business Days prior to the end of Year 24 of the following:

- (a) whether the works required to in clause 68.2.2.4 have been completed;
- (b) whether the Service Provider has complied with the Service Provider Programmes for the first 6 Months of Year 24 in respect of the works identified in clause 68.2.2.4;
- (c) whether all Structures (excluding Minor Structures), Bridges and Tunnels comply with the Expiry Condition

A Requirements and if any Structures (excluding Minor Structures), Bridges and Tunnels do not comply with the Expiry Condition A Requirements, provide full details as to which Structures (excluding Minor Structures), Bridges and/or Tunnels do not comply with which Performance Targets within the Expiry Condition A Requirements; and

- (d) the cost of the works identified in (a) to (c) (inclusive) provided by two independent contractors and if the Independent Certifier is unable to obtain such costs, an estimate in the Independent Certifier's opinion (acting reasonably).**

68.2.2.12 The Independent Certifier shall notify the Authority and the Service Provider (in writing) two (2) Months prior to the Expiry Date of:

- (a) whether the Structures (excluding Minor Structures), Tunnels and Bridges comply with the Expiry Condition A Requirements;**
- (b) if any Structures (excluding Minor Structures), Tunnels and/or Bridges do not comply with the Expiry Condition A Requirements, which Performance Targets within the Expiry Condition A Requirements have not been complied with;**
- (c) an estimate (in the reasonable opinion of the Independent Certifier) of the cost for ensuring that all Structures (excluding Minor Structures), Bridges and Tunnels comply with Expiry Condition A Requirements.**

68.2.2.13 The Authority shall be entitled to retain from the Monthly Unitary Charge (and provided that such retention shall not be made before the date which is eighteen (18) Months prior to the Expiry Date) either:

- (a) the average of the costs identified pursuant to clause 68.2.2.9(d); or
- (b) the average of the costs identified pursuant to clause 68.2.2.11(d) if such average is higher than the amount identified pursuant to 68.2.2.13(a) above,

until such time as the Authority is required to reimburse the Service Provider with the balance from the Retention Fund Account pursuant to clause 68.6 (*Application of the Retention Fund Account*).

68.2.2.14 If the Service Provider disputes any of the contents of the notice provided by the Independent Certifier pursuant to this clause 68.2.2 (*Structures, Bridges and Tunnels*) the matter shall be referred to Dispute Resolution provided that until such time as the matter in dispute is agreed or determined pursuant to clause 70 (*Dispute Resolution*) the Authority shall be entitled to proceed on the basis of the Independent Certifier's notice provided pursuant to this clause 68.2.2 (*Structures, Bridges and Tunnels*) and shall be entitled to carry out any retention in accordance with clause 68.2.2.13 until such time as the Authority is required to reimburse the Service Provider with the balance from the Retention Fund Account pursuant to clause 68.6 (*Application of the Retention Fund Account*).

68.3 Compliance with the Expiry Condition B Requirements

68.3.1 The Service Provider shall ensure that all Project Network Parts comply with the Expiry Condition B Requirements on the Expiry Date.

68.3.2 The Service Provider shall undertake and complete the Final Service Inspection (in accordance with clause 6 (*Surveys and Inspections*)) no later than nine (9) Months prior to the Expiry Date, in respect of all Project Network Parts in order to confirm whether all Project Network Parts comply with the Expiry Condition B Requirements in the final Contract Year.

68.3.3 If the Final Service Inspection identifies that any Project Network Parts do not comply with the Expiry Condition B Requirements then the Service Provider shall notify the Authority, in writing, (within five (5) Business Days of completion of the Final Service Inspection) of the following:

68.3.3.1 which Project Network Parts do not comply with the Performance Targets within the Expiry Condition B Requirements; and

68.3.3.2 which Performance Targets within the Expiry Condition A Requirements have not been complied with in respect of the Project Network Parts referred to in clause 68.3.3.1.

68.3.4 The Service Provider shall update the Service Provider Programmes in accordance with clause 11 (*Service Provider Programmes*) in order to ensure that any Project Network Parts identified pursuant to clause 68.3.3.1 shall meet the Expiry Condition B Requirements on the Expiry Date.

68.3.5 The Service Provider shall carry out the Services in accordance with such Service Provider Programmes and the Service Provider shall ensure that no later than four (4) Months prior to the Expiry Date, the Project Network Parts identified pursuant to clause 68.3.3.1 shall meet the Expiry Condition B Requirements.

68.3.6 The Service Provider shall notify the Authority and the Independent Certifier in writing (as soon as reasonably practicable during the final Contract Year and, in any event, no later than five (5) Business Days prior to the date that is four (4) Months prior to the Expiry Date) of the following:

68.3.6.1 whether the Service Provider has complied with the Service Provider Programmes (as updated pursuant to clause 68.3.4);

68.3.6.2 whether all Project Network Parts comply with the Expiry Condition B Requirements; and

68.3.6.3 what works here are included in the Service Provider Programmes in the forthcoming two (2) Months which are required in order to comply with Expiry Condition B Requirements.

68.3.7 Following the Service Provider's notification under clause 68.3.6 the Independent Certifier shall notify the Authority and the Service Provider (in writing) no later than three (3) Months prior to the Expiry Date of:

68.3.7.1 whether all Project Network Parts comply with Expiry Condition B Requirements;

68.3.7.2 the works that are required in order to ensure that such Project Network Parts comply with the Expiry Condition B Requirements at the Expiry Date; and

68.3.7.3 an estimate of the cost of the works referred to above in clause 68.3.7.1 (in the reasonable opinion of the Independent Certifier).

68.3.8 Where the Independent Certifier gives a notification under clause 68.3.7.2 and 68.3.7.3 the Authority shall be entitled to retain, in addition to the retention made in accordance clause 68.5.1, the cost provided by the Independent Certifier pursuant to clause 68.3.7 until such time as the Authority is required to reimburse the Service Provider with the balance of the Retention Fund Account pursuant to clause 68.6 (*Application of the Retention Fund Account*) and the Service Provider shall be under no obligation to carry out such works (as identified by the Independent Certifier pursuant to clause 68.3.7) prior to the Expiry Date.

68.3.9 If the Service Provider disputes the contents of the notice given by the Independent Certifier pursuant to clause 68.3.7 the matter shall be referred to Dispute Resolution provided that until such time the matter in dispute is agreed or determined pursuant to clause 70 (*Dispute Resolution*) the Authority shall be entitled to proceed on the basis of the contents of the notice given by the Independent Certifier pursuant to clause 68.3.7 and shall be entitled to make any retention in accordance with the same until such time as the Authority is required to reimburse the Service Provider with the balance from the Retention Fund Account pursuant to clause 68.6 (*Application of the Retention Fund Account*).

68.4 Compliance with the Expiry Condition C Requirements

68.4.1 Within thirty (30) Business Days prior to the Expiry Date, the Authority or its nominee shall commence any inspections, surveys, tests and assessments as it requires to establish that the UTMC, the Management Information System, the Project Network Model and the Project Facilities comply with the Expiry Condition C Requirements.

68.4.2 If any of the inspections, surveys, tests and/or assessments carried out by the Authority or its nominee pursuant to clause 68.4.1 identify that the UTMC, the Management Information System, the Project Network Model and/or the Project Facilities do not comply with the Expiry Condition C Requirements then the Authority shall notify (within five (5) Business Days of completion of such inspections, surveys, tests and/or assessments) the Service Provider of the following:

68.4.2.1 which requirements in the Depot Lease and the UTC Centre Lease and which Performance Targets within the Expiry Condition C Requirements the Service Provider has failed to comply with; and

68.4.2.2 an estimate of the cost required to ensure that the UTMC, the Management Information System, the Project Network Model and/or the Project Facilities comply with the Expiry Condition C Requirements provided by two independent contractors and if the Authority is unable to obtain such costs, an estimate in the Independent Certifier's opinion (acting reasonably).

68.4.3 The Authority shall be entitled to retain an amount equal to the estimate provided by the Independent Certifier identified pursuant to clause 68.4.2 and the Service Provider shall be under no obligation to carry out any works in order to ensure that the UTMC, the Management Information System, the Project Network Model and/or the Project Facilities comply with the Expiry Condition C Requirements prior to the Expiry Date unless otherwise instructed by the Authority.

68.4.4 If the Service Provider disputes the costs provided by the Authority or its nominee pursuant to clause 68.4.2, the Service Provider shall be entitled to

refer the matter to Dispute Resolution provided that until such time as the matter in dispute is agreed or determined pursuant to clause 70 (*Dispute Resolution*) the Authority shall be entitled to proceed on the basis of its findings and shall be entitled to make the retention in accordance with clause 68.4.3 until such time as the Authority is required to reimburse the Service Provider with the balance from the Retention Fund Account pursuant to clause 68.5 (*Retention Fund Account*).

68.5 Retention Fund Account

68.5.1 The Parties shall ensure that the Retention Fund Account is opened at least [REDACTED] prior to the Expiry Date and that all monies retained pursuant to this clause 68 (*Handback Procedure*) shall be paid into the Retention Fund Account.

68.5.2 The Authority shall withhold from the Service Provider [REDACTED] of the Monthly Unitary Charge in the last [REDACTED] prior to the Expiry Date and pay such amount into an interest bearing account in the joint names of the Authority and the Service Provider ("Retention Fund Account"). Any interest accrued on money standing to the credit of the Retention Fund Account shall be credited to the Retention Fund Account. All sums standing to the credit of the Retention Fund Account from time to time, including any accrued interest, shall be dealt with only in accordance with the following provisions of this clause 68 (*Handback Procedure*). The application of monies from the Retention Fund Account in accordance with this clause 68 (*Handback Procedure*) shall fully discharge the liability of the Authority to make payment of the Monthly Unitary Charge that otherwise would have been due to the Service Provider.

68.5.3 Notwithstanding any other provisions of this Contract, the Authority may retain additional amounts from the Monthly Unitary Charge to those permitted pursuant to clause 68.5.2 in accordance with the provisions of clauses 68.2.1.10, 68.2.1.14, 68.2.1.15, 68.2.2.13, 68.2.2.14, 68.3.8, 68.4.3 and 68.4.4 (as applicable).

68.6 Application of the Retention Fund Account

68.6.1 Without prejudice to any other right or remedy of the Authority, the Authority may recover from the Service Provider by means of a withdrawal from the Retention Fund Account those amounts identified by the Independent Certifier in the Final Report and the costs of the Independent Certifier in performing in accordance with this clause 68 (*Handback Procedure*).

68.6.2 Upon the earlier of the expiry of the [REDACTED] Month period commencing on the Expiry Date and the date upon which the following occurs:

68.6.2.1 all the works and actions identified by the Independent Certifier in the Final Report have been carried out by or on behalf of the Authority to the Authority's reasonable satisfaction; and

68.6.2.2 all such work has been paid for by withdrawal from the Retention Fund Account or by the Service Provider; and

68.6.2.3 there are no ongoing disputes pursuant to the Dispute Resolution, the Authority shall within [REDACTED] pay any credit balance on the Retention Fund Account (less any bank charges and less any deductions required by Law to be made from such account) to the Service Provider as soon as practicable following receipt of a valid VAT invoice for such amount from the Service Provider.

68.6.3 Independent Certifier's Report

68.6.3.1 The Independent Certifier shall produce a report within three (3) Months following the Expiry Date setting out the Independent Certifier's conclusion as to whether the Service Provider has met all Expiry Condition Requirements ("Final Report") taking into account all information provided by the Independent Certifier to the Authority during the operation of clause 68 (*Handback Procedure*).

68.6.3.2 Subject to clause 68.6.3.3, if the Final Report states that there has been any failure to meet the Expiry Condition Requirements, the

Authority shall be entitled to withdraw the cost (as identified in the Final Report) from the Retention Fund.

68.6.3.3 If the Service Provider disputes any of the contents of the Final Report, the Service Provider shall be entitled to refer the matter to Dispute Resolution.

69. COMPENSATION ON TERMINATION

69.1 Compensation Following an Authority Default or a Voluntary Termination

69.1.1 If either:

69.1.1.1 the Service Provider terminates this Contract following an Authority Default pursuant to clause 63 (*Termination by the Service Provider*); or

69.1.1.2 the Authority terminates this Contract pursuant to clause 62.7 (*Voluntary Termination by the Authority*); or

69.1.1.3 clause 69.6 (*Relevant Discharge Terms*) applies,

the Authority shall pay the Service Provider "the Authority Default Termination Sum" in accordance with this clause on the Termination Date.

69.1.2 Subject to clauses 69.1.4 to 69.1.6 below, the Authority Default Termination Sum shall be an amount equal to the aggregate of:

69.1.2.1 the Base Senior Debt Termination Amount;

69.1.2.2 [REDACTED]

69.1.2.3 [REDACTED]

- 69.1.3** On payment of the amount referred to in clause 69.1.2 above, the Authority shall have the option to require the Service Provider to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority.
- 69.1.4** If the aggregate of the amounts referred to in clauses 69.1.2.1 and 69.1.2.3 is less than the Revised Senior Debt Termination Amount, then the Authority Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in clause 69.1.2.2 provided always that:
- 69.1.4.1** the amount referred to in clause 69.1.2.2 shall only be paid to the extent that the Service Provider has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and
- 69.1.4.2** if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle the Service Provider to terminate such Sub-Contract.
- 69.1.5** If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Service Provider has wilfully, or through gross negligence, failed to comply with its obligations under clause 11.4.4.1 of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 69.1.6** If the Service Provider has wilfully or through gross negligence failed to comply with its obligations under clause 11.4.4.2 of the Direct Agreement and there has been an overstatement of the cash balances by the Service Provider as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this clause 69.1.6, then the

Authority Default Termination Sum, shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

69.2 Compensation following a Service Provider Default Event

69.2.1 Retendering Election

69.2.1.1 If the Authority terminates this Contract pursuant to clause 62 (*Termination by the Authority*) (but not pursuant to clause 62.7 (*Voluntary Termination by the Authority*)) following the occurrence of a Service Provider Default Event subject to clause 69.2.1.2, the Authority shall be entitled either to:

- (a) retender the provision of the Project in accordance with clause 69.2.2 (*Retendering Procedure*); or
- (b) require an expert determination in accordance with clause 69.2.3 (*No Retendering Procedure*).

69.2.1.2 The Authority shall be entitled to retender the provision of the Project in accordance with clause 69.2.2 if:

- (a) the Authority notifies the Service Provider on or before the date falling twenty (20) Business Days after the Termination Date that it intends to retender; and
- (b) there is a Liquid Market, and either:
 - (i) the Senior Lenders have not exercised their rights to step in under clause 5 of the Direct Agreement; or
 - (ii) the Service Provider or Senior Lenders have not procured the transfer of the Service Provider's rights and liabilities under this Contract to a

Suitable Substitute Service Provider and have failed to use all reasonable efforts to do so,

but otherwise the Authority shall not be entitled to re-tender the provision of the Project and clause 69.2.3 (*No Retendering Procedure*) shall apply.

69.2.2 Retendering Procedure

69.2.2.1 If the Authority elects to retender the provision of the Project pursuant to clause 69.2.1 (*Retendering Election*), then the following provisions shall apply:

- (a) The objective of the retendering procedure shall be to establish and pay to the Service Provider the Highest Compliant Tender Price, as a result of the Tender Process.**
- (b) The Authority shall (subject to any Legal Requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.**
- (c) The Authority shall notify the Service Provider of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process but shall act reasonably in setting such requirements and terms.**
- (d) The Service Provider authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under clause 76 (*Freedom of Information and Confidentiality*) that is reasonably required as part of the Tender Process.**
- (e) The Service Provider may, at its own cost, appoint a person ("Tender Process Monitor") to monitor the Tender Process for the purposes of monitoring and reporting to the Service Provider and the Senior Lenders**

on the Authority's compliance with the Tender Process and making representations to the Authority. The Tender Process Monitor will not disclose any confidential information to the Service Provider or any other person (and shall provide an undertaking to the Authority to such effect as a condition of its appointment) but shall be entitled to advise the Service Provider as to whether it considers that the Authority has acted in accordance with the Tender Process, and correctly determined the Adjusted Highest Compliant Tender Price.

- (f) The Tender Process Monitor shall enter into a confidentiality agreement with the Authority in a form acceptable to the Authority and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of the tender documentation and bids and shall be required to make written representations to the Authority regarding compliance with the Tender Process. All representations shall be made by the Tender Process Monitor in a timely manner as the Tender Process proceeds. The Authority shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the Service Provider in the event that the Service Provider refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with clause 70 (*Dispute Resolution*).
- (g) For all or any part of a Month, falling within the period from the Termination Date to the Compensation Date, the Authority shall pay to the Service Provider:
 - (i) the Post Termination Service Amount for that Month, on or before the date falling ten (10) Business Days after the end of the Month; and

- (ii) the Post Termination Service Amount for the Month ending on the Compensation Date, on or before the date falling twenty (20) Business Days after the Compensation Date.
- (h) If any Post Termination Service Amount is less than zero then it shall be carried forward and shall be set off against any future positive Post Termination Service Amounts. If any such Post Termination Service Amount has not been set off on or before the Compensation Date then it shall be taken into account in the calculation of the Adjusted Highest Compliant Tender Price.
- (i) The Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under material damage insurance policies and amounts (if any) standing to the credit of the Joint Insurance Account on the date that the New Contract is entered into.
- (j) As soon as practicable after tenders have been received, the Authority shall (acting reasonably) determine the Compliant Tenders and shall notify the Service Provider of the Adjusted Highest Compliant Tender Price.
- (k) If the Service Provider refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with clause 70 (*Dispute Resolution*), the Authority shall be entitled to enter into a New Contract. The Authority shall pay to the Service Provider the Adjusted Highest Compliant Tender Price on or before the date falling twenty (20) Business Days after it has been determined in accordance with clause 70 (*Dispute Resolution*) and the Authority shall pay interest to the Service Provider at the Senior Debt Rate on any amount of Adjusted Highest Compliant Tender Price which had been withheld, from the date specified in

paragraph (l) below until the date specified in this paragraph (k). For the avoidance of doubt, where there is an agreed amount and a disputed amount in respect of the Adjusted Highest Compliant Tender Price the Authority shall (where it is agreed that the Adjusted Highest Compliant Tender Price is a positive number) pay to the Service Provider the agreed amount no later than the date specified in paragraph (l) below with the disputed amounts being dealt with in accordance with this paragraph (k).

- (l) Subject to paragraphs (k) and (o), the Authority shall pay to the Service Provider an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the date of the New Contract.

- (m) The discharge by the Authority of its payment obligation in clauses 69.2.2.1(k) and/or 69.2.2.1(l) above shall be in full and final settlement of all the Service Provider's claims and rights against the Authority for breaches and/or termination of this Contract and the Project Documents whether under contract, tort, restitution or otherwise, save for any liability of the Authority which arose prior to the Termination Date that has not already been taken into account in the Adjusted Highest Compliant Tender Price.

- (n) Subject to paragraphs (o) and (r) below, if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to the Service Provider on or before the date falling two years after the Termination Date then the following provisions of this clause 69.2.2.1 shall not apply to that termination and the provisions of clause 69.2.3 (*No Retendering Procedure*) shall apply instead.

- (o) If the Adjusted Highest Compliant Tender Price is zero or a negative number then the Authority shall have no obligation to make any payment to the Service Provider and with effect from the time that the Authority gives notice of that event to the Service Provider, the Authority shall be released from all liability to the Service Provider for breaches and/or termination of this Contract and any other Project Document whether under contract, tort, restitution or otherwise save for any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price.
- (p) If the Adjusted Highest Compliant Tender Price is less than zero then an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by the Service Provider to the Authority on the date of the New Contract.
- (q) The Authority may elect at any time prior to the receipt of a Compliant Tender to follow the No Retendering Procedure under clause 69.2.3 (*No Retendering Procedure*) by notifying the Service Provider that this election has been made; and
- (r) If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify the Service Provider of this decision and pay to the Service Provider an amount equal to the Adjusted Highest Compliant Tender Price within twenty (20) Business Days of such notification.

69.2.3 No Retendering Procedure

- 69.2.3.1 If either the Authority is not entitled to retender the provision of the Project under clause 69.2.1 (*Retendering Election*) or the

Authority elects to require an expert determination in accordance with this clause 69.2.3 (*No Retendering Procedure*) then the following procedure shall apply:

- (a) Subject to clause 69.2.3.1(b), the Service Provider shall not be entitled to receive any Post Termination Service Amount.
- (b) If the Authority elects to require an expert determination in accordance with this clause 69.2.3 (*No Retendering Procedure*) after it has elected to follow the procedure under clause 69.2.2 (*Retendering Procedure*), then the Authority shall continue to pay to the Service Provider each Post Termination Service Amount until the Compensation Date, in accordance with clause 69.2.2 (*Retendering Procedure*).
- (c) In agreeing or determining the Estimated Fair Value of the Contract the Parties shall be obliged to follow the principles set out below:
 - (i) all forecast amounts should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Contract;
 - (ii) the total of all future payments of the full Annual Unitary Charge (assuming that all the Milestones are completed on time) forecast to be made shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate;
 - (iii) the total of all costs forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Termination Date Discount Rate and deducted from the

payment calculated pursuant to clause 69.2.3.1(c)(ii), such costs to include (without double counting):

- (1) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;
- (2) the costs of the Services forecast to be incurred by the Authority in providing the Project to the standard required; and
- (3) any rectification costs required to deliver the Project to the standard required (including any costs forecast to be incurred by the Authority to complete the works and additional operating costs required to restore operating services standards),

in each case such costs to be forecast at a level that will deliver the full Annual Unitary Charge referred to in clause 69.2.3.1(c)(ii) above.

- (d) If the Parties cannot agree on the Adjusted Estimated Fair Value of the Contract on or before the date falling twenty (20) Business Days after the date on which the Authority elected to require an expert determination in accordance with this clause 69.2.3 (*No Retendering Procedure*), then the Estimated Fair Value of the Contract shall be determined in accordance with clause 70 (*Dispute Resolution*).

- (e) The Authority shall pay to the Service Provider an amount equal to the Adjusted Estimated Fair Value of the Contract on the date falling forty (40) Business Days after the date on which the Adjusted Estimated Fair Value of the Contract has been agreed or determined in accordance with this clause 69.2.3 (*No Retendering Procedure*).
- (f) The discharge by the Authority of its obligations in clause 69.2.3.1(e) is in full and final settlement of all the Service Provider's claims and rights against the Authority for breaches and/or termination of this Contract or other Project Document whether in contract, tort, restitution or otherwise save for any liability that arose prior to the Termination Date (but not from the termination itself) that has not been taken into account in determining the Adjusted Estimated Fair Value of the Contract.
- (g) To the extent that the Adjusted Estimated Fair Value of the Contract is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Contract shall be due and payable by the Service Provider to the Authority on the Compensation Date.

69.3 Compensation following a Prohibited Act

69.3.1 On termination of this Contract in accordance with clause 64 (*Termination for Corrupt Gifts and Fraud*), then the Authority shall pay the Service Provider an amount equal to the Revised Senior Debt Termination Amount.

69.3.2 Such amount shall be paid in accordance with clause 69.7.5 (*Method of Payment*).

69.3.3 If termination occurs then the Authority may require the Service Provider to transfer its rights, title and interest in and to the Assets to the Authority.

69.4 Compensation following a Force Majeure Event or Uninsurability

69.4.1 On termination of this Contract under clause 65 (*Termination following a Force Majeure Event*) or clause 56.14.2 (*Insurance*) the Authority shall pay to the Service Provider the "Force Majeure Termination Sum" in accordance with clause 69.7.5 (*Method of Payment*).

69.4.2 Subject to clauses 69.4.4 to 69.4.6 below the Force Majeure Termination Sum shall be the amount equal to the aggregate of:

69.4.2.1 the Base Senior Debt Termination Amount;

69.4.2.2 the Junior Debt less an amount equal to the aggregate of payments of interest made by the Service Provider under the Subordinated Financing Agreements;

69.4.2.3 all amounts paid to the Service Provider by way of subscription for shares in the capital of the Service Provider less dividends and other distributions paid to the shareholders of the Service Provider (save to the extent deducted under clause 69.4.2.2 above); and

69.4.2.4 redundancy payments for employees of the Service Provider that have been or will be reasonably incurred by the Service Provider as a direct result of termination of this Contract and any Sub-Contractor Breakage Costs.

69.4.3 If the amounts referred to in clause 69.4.2.2 and/or clause 69.4.2.3 are less than zero, then, for the purposes of the calculation in clause 69.4.2 they shall be deemed to be zero.

69.4.4 If the aggregate of the amounts referred to in clauses 69.4.2.1, 69.4.2.2 and 69.4.2.3 is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in clause 69.4.2.4 provided always that:

69.4.4.1 the amount referred to in clause 69.4.2.4 shall only be paid to the extent that the Service Provider has demonstrated to the

reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and

69.4.4.2 if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle the Service Provider to terminate such Sub-Contract.

69.4.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Service Provider has wilfully, or through gross negligence, failed to comply with its obligations under clause 11.4.4.1 of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.

69.4.6 If the Service Provider has wilfully or through gross negligence failed to comply with its obligations under clause 11.4.4.2 of the Direct Agreement and there has been an overstatement of the cash balances by the Service Provider as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this clause 69.4, then the Force Majeure Termination Sum, shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.

69.4.7 Such amount shall be determined and paid in accordance with clause 69.7.5 (*Method of Payment*).

69.4.8 On termination, the Authority shall have the option to require the Contractor to transfer to the Authority all of its right, title and interest in and to the Assets.

69.5 Compensation on Termination for breach of the Refinancing Provisions

On termination of the Contract under clause 62.10 (*Termination by the Authority for breach of the Refinancing Provisions*), the Authority shall pay to the Service Provider an amount equal to the amount payable under clause 69.3.1 (*Compensation following a Prohibited Act*) in accordance with clause 69.7.5 (*Method of Payment*).

69.6 Relevant Discharge Terms

69.6.1 In the event of the making of a determination or order by a court of final jurisdiction on an application for judicial review or audit review (within the meaning of the Local Government (Contracts) Act 1997) the result of which is that this Contract does not have effect or is otherwise unenforceable, then the Service Provider shall be entitled to be paid by the Authority the sum equivalent to the Authority Default Termination Sum

69.6.2 The Authority shall pay the Authority Default Termination Sum in accordance with clause 69.7.5 (*Method of Payment*).

69.7 General

69.7.1 Costs

Other than in respect of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount the costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this clause 69 (*Compensation on termination*) shall only be such costs and/or expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred and shall only be counted once.

69.7.2 Ascertainment Of Compensation

69.7.2.1 The amount of any compensation paid pursuant to this clause 69 (*Compensation on termination*) including the identification and calculation of each element comprised in or to be deducted from it, the ascertainment of any amount or matter requiring to be estimated or anticipated and (where so required by the provisions of this clause 69 (*Compensation on termination*)) the

reasonableness of any amount or matter shall be as agreed between the Parties or, if they are unable to agree within a period which is reasonable in the light of the amounts and matters requiring to be so identified, ascertained or calculated, as referred to and determined in accordance with clause 70 (*Dispute Resolution*) and so that an interim or partial amount of compensation may be declared payable pending final determination where, because of difficulty in resolving particular elements comprised in it, undue delay would otherwise be caused in payment or commencement of payment of compensation.

Grossing up

69.7.2.2 If any amount of compensation payable by the Authority under clauses 69.1, 69.3, 69.4, 69.5, 69.6 (*Compensation on termination*) is subject to Tax payable to a Relevant Authority in the United Kingdom, then the Authority shall pay to the Service Provider such additional amount as will leave the Service Provider in the same after Tax position as it would have been had the payment not been subject to Tax, taking account of any relief, allowances deduction, setting off or credit in respect of Tax (whether available by choice or not) which may be available to the Service Provider to reduce the Tax to which the payment is subject.

Set-off on Termination

69.7.2.3 Except where expressly stated otherwise, the Authority is not entitled to set off any amount against any payment of termination compensation (whether payable as a lump sum or in instalments) under clause 69.1, clause 69.3, clause 69.4 and clause 69.5 (*Compensation on termination*), save to the extent that after such an amount has been set off, the Termination Payment made would be in an amount greater than or equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount, as the case may be, at that time.

69.7.3 Outstanding Senior Debt

69.7.3.1 The Authority shall be entitled to rely on the certificate of the Agent as conclusive as to the amount of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount outstanding at any relevant time.

69.7.3.2 The receipt by the Agent of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) shall discharge the Authority's obligation to pay such sums to the Service Provider.

69.7.4 Full Satisfaction

Any payment of compensation shall be in full satisfaction of any claim which can be made against the Authority by the Service Provider in relation to the termination of this Contract or any Project Document. The compensation payable under clauses 69.1, 69.3, 69.4, 69.5 (*Compensation on termination*) shall be the sole remedy of the Service Provider against the Authority in respect of termination of this Contract.

69.7.5 Method of Payment

69.7.5.1 The Authority shall pay to the Service Provider the Termination Sum, together with interest on any Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount element of the Termination Sum at the Senior Debt Rate, on or before the date falling forty (40) Business Days after the Notice Date provided that it may elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in accordance with clause 69.7.5.2 below.

69.7.5.2 The Authority may other than on an Authority Default, elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in instalments as follows:

- (a) where the **Base Senior Debt Termination Amount** of the **Revised Senior Debt, Termination Amount** or the **Adjusted Fair Value** of this Contract (as relevant) is greater than or equal to the **Outstanding Principal**:
- (i) in respect of that element of the **Base Senior Debt Termination Amount** or the **Revised Senior Debt Termination Amount** or the **Adjusted Estimated Fair Value** of the Contract (as relevant) representing the **Outstanding Principal** on the dates (the "**Instalment Dates**") and in the amounts that the **Service Provider** would have been required to pay principal to the **Senior Lenders** under the terms of the **Senior Financing Agreement** had the **Termination Date** not occurred; and
 - (ii) in respect of the sum (if any) remaining after deducting the **Outstanding Principal** from the **Base Senior Debt Termination Amount** or the **Revised Senior Debt Termination Amount** or the **Adjusted Estimated Fair Value** of the Contract (as relevant) in equal instalments on the **Instalment Dates**;
- (b) where the **Base Senior Debt Termination Amount** or the **Revised Senior Debt Termination Amount** or the **Adjusted Estimated Fair Value** of the Contract (as relevant) is less than the **Outstanding Principal**, on the **Instalment Dates** pro rata to the amounts that the **Service Provider** would have been required to pay as principal to the **Senior Lenders** under the terms of the **Senior Financing Agreement** had the **Termination Date** not occurred; or

(c) as the Parties may otherwise agree.

69.7.5.3 From the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the Senior Debt Rate and be payable on the next occurring Instalment Date.

69.7.5.4 If the Authority has elected to pay in accordance with clause 69.7.5.3 above, it may (on twenty (20) Business Days prior written notice to the Service Provider) elect to pay the outstanding parts of the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in full on any Instalment Date.

69.7.5.5 If the Authority:

(a) fails to make a payment to the Service Provider in accordance with clauses 69.7.5.1 and/or 69.7.5.2 and/or 69.7.5.3 above; or

(b) breaches clause 72 (*Assignment and sub-contracting*),

the Service Provider may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Contract, the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum and any accrued but unpaid interest to be immediately due and payable.

PART N - DISPUTE RESOLUTION

70. DISPUTE RESOLUTION

70.1 Consultation

70.1.1 Any Dispute arising in relation to any aspect of this Contract shall be resolved in accordance with this clause 70 (*Dispute Resolution*).

70.1.2 If a Dispute arises in relation to any aspect of this Contract, the Service Provider and the Authority shall first consult in good faith in an attempt to come to an agreement in relation to the Dispute.

70.1.3 If the Service Provider and the Authority fail to resolve the Dispute through such consultation within [REDACTED], either party may refer the matter to an Adjudicator selected in accordance with clause 70.2 (*Adjudication*) below. Without prejudice to clause 70.1.2 above, either party may give the other notice of the intention to refer the Dispute to adjudication and the Adjudicator shall be selected in accordance with clause 70.2 (*Adjudication*).

70.2 Adjudication

70.2.1 The Adjudicator nominated to consider a Dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts appointed in accordance with the following:

70.2.1.1 there shall be a single panel of experts. All the experts on the panel shall be wholly independent of the Service Provider, the Authority, the Sub-contractor and any of the major competitors of the Service Provider or the Sub-contractor;

70.2.1.2 the panel shall be comprised of three (3) experts who shall be appointed jointly by the Service Provider and the Authority. Such appointments shall take place within twenty (20) Business Days of the date of this Contract;

- 70.2.1.3 if any member of the panel resigns during the term of this Contract, a replacement expert shall be appointed by the Service Provider and the Authority as soon as practicable;
- 70.2.1.4 if the Authority and the Service Provider are unable to agree on the identity of the experts to be appointed to the panel, the President for the time being of the Chartered Institute of Arbitrators shall appoint such expert(s) within [REDACTED] Business Days of any application for such appointment by either Party.
- 70.2.2 Within [REDACTED] of appointment in relation to a particular Dispute, the Adjudicator shall require the parties to submit in writing their respective arguments. The Adjudicator shall, in his absolute discretion, consider whether a hearing is necessary in order to resolve the Dispute.
- 70.2.3 In any event, the Adjudicator shall provide to both parties his written decision on the Dispute, within [REDACTED] days of appointment (or such other period as the Parties may agree after the reference, or thirty (30) Business Days from the date of reference if the party which referred the Dispute agrees). Unless the Parties otherwise agree, the Adjudicator shall give reasons for his decision. Unless and until revised, cancelled or varied by the Arbitrator, the Adjudicator's decision shall be binding on both Parties who shall forthwith give effect to that decision (save where clauses 70.3.1.2 or 70.3.1.3 apply).
- 70.2.4 The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the Parties. Each Party shall bear its own costs arising out of the reference, including legal costs and the costs and expenses of any witnesses.
- 70.2.5 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.
- 70.2.6 The Adjudicator shall act 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 Contract.

70.2.7 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 76 (*Freedom of Information and Confidentiality*), 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.

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

70.3 Arbitration

70.3.1 If:

70.3.1.1 there is any Dispute in respect of matters referred to in clause 39 (*Changes to the Service*), clause 0 (

70.3.1.2

70.3.1.3 *Change of Law*), clause 32 (*Best Value and Continuing Value for Money*), clause 69.1, clause 69.2, 69.3 clause 69.4, or clause 69.5 (*Compensation on termination*); or

70.3.1.4 either Party is dissatisfied with or otherwise wishes to challenge the Adjudicator's decision made in accordance with clause 70.2.3; or

70.3.1.5 both Parties agree;

then either Party may (within thirty (30) Business Days of receipt of the Adjudicator's decision, where appropriate), notify the other Party of its intention to refer the Dispute to:

- 70.3.1.6 arbitration, in which case the provisions of this clause 70.3 (Arbitration) shall apply; or
- 70.3.1.7 the Courts of England and Wales if it relates to a question of law.
- 70.3.2 Such notification of arbitration served in accordance with clause 70.3.1 shall invite the other Party to concur in the appointment of a sole arbitrator who shall be a solicitor, barrister or arbitrator recognised by the Chartered Institute of Arbitrators of not less than ten (10) years' standing (the "Arbitrator"). If the Parties are unable within ten (10) Business Days to agree the identity of the Arbitrator either Party may request the President or the Vice President of the Chartered Institute of Arbitrators to make the appointment.
- 70.3.3 The Arbitrator 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 Contract, to vary or cancel the decision of the Adjudicator and, where appropriate to order financial compensation to be paid by one Party to the other. The arbitration shall take place in London.
- 70.3.4 The Arbitrator shall in his absolute discretion, make such procedural directions as he considers necessary such as ordering the Parties to provide written submissions within such time period as he considers appropriate and/or to attend such hearings as he deems necessary.
- 70.3.5 The Arbitrator shall deliver his decision on any matter referred to him within twenty (20) Business Days of concluding any hearings which may have been held in connection with the matter and in any event within three (3) Months (or such other period as the Parties may agree) of his appointment. The decision of the Arbitrator shall be final and binding on both Parties subject to clause 70.3.6. The costs of the arbitration will be in the discretion of the Arbitrator subject to clauses 70.3.7 and 70.3.8 below.
- 70.3.6 The parties hereby agree and consent pursuant to Sections 45(2)(a) and 69(2)(a) of the Arbitration Act 1996 that either party:
- 70.3.6.1 may appeal to the High Court on any question of law rising out of an award made in an arbitration under this Contract;

70.3.6.2 may apply to the High Court to determine any question of law arising in the course of the reference;

and the Parties agree that the High Court should have jurisdiction to determine any such question of law.

70.3.7 The Parties agree that the maximum recoverable costs which may be awarded to the successful Party in the arbitration shall not exceed one half of the sum claimed by the claimant in the arbitration ("the Claim Sum"). The Claim Sum is the aggregate of the total damage specified in the Claimant's Points of Claim or Statement of Case, and the total interest so specified (excluding in both cases any sums which are not quantified) notwithstanding any subsequent amendment of the same.

70.3.8 The Parties agree pursuant to Sections 61 and 62 of the Arbitration Act 1996 that, if the total sum (including interest) awarded to the claimant in the arbitration (less any sum (including interest) awarded to the respondent, in a counterclaim in the arbitration) does not exceed 20% of the Claim Sum as defined by clause 70.3.7 then the arbitrator in determining how costs are to be allocated shall not (if he is minded to make an award in the claimant's favour) award the claimant more than the lesser of:

70.3.8.1 50% of the maximum recoverable costs as defined and limited by reference to by clause 70.3.7; and

70.3.8.2 50% of the Claimant's recoverable costs.

70.4 Related Disputes

70.4.1 If any Dispute arising under this Contract raises issues which relate to any dispute between the Service Provider and the Operating Sub-contractor arising under the Operating Sub-contract or otherwise affects the relationship or rights of the Service Provider and/or the Operating Sub-contractor under the Operating Sub-contract ("Sub-Contract Dispute"), then the Service Provider may include as part of its submissions made to the Adjudicator or to the Arbitrator, where the Dispute is referred to arbitration, submissions made by the Operating Sub-Contractor.

- 70.4.2** The Adjudicator or the Arbitrator, as appropriate, shall not have jurisdiction to determine the Sub-Contract Dispute but the decision of the Adjudicator or the Arbitrator shall, subject to clause 70.3.1, be binding on the Service Provider and the Operating Sub-Contractor insofar as it determines the issues relating to the Sub-Contract Dispute.
- 70.4.3** Any submissions made by the Operating Sub-Contractor shall:
- 70.4.3.1** be made within the time limits applicable to the delivery of submissions by the Service Provider; and
 - 70.4.3.2** concern only those matters which relate to the Dispute between the Authority and the Service Provider under this Contract.
- 70.4.4** Where the Operating Sub-Contractor makes submissions in any reference before:
- 70.4.4.1** the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third ($\frac{1}{3}$) by the Authority and two-thirds ($\frac{2}{3}$) by the Service Provider; and
 - 70.4.4.2** the Arbitrator, the costs of the arbitration shall be in the discretion of the Arbitrator.
- 70.4.5** The Authority shall have no liability to the Operating Sub-Contractor arising out of or in connection with any decision of the Adjudicator or Arbitrator or in respect of the costs of the Operating Sub-Contractor in participating in the resolution of any Dispute under this Contract.
- 70.4.6** The Service Provider shall not allow the Operating Sub-Contractor access to any document relevant to the issues in dispute between the Authority and the Service Provider save where:
- 70.4.6.1** the document is relevant also to the issues relating to the Sub-Contract Dispute; and
 - 70.4.6.2** the Service Provider has first delivered to the Authority a written undertaking from the Operating Sub-Contractor addressed to the

Authority that they shall not use any such document otherwise than for the purpose of the dispute resolution proceedings under this Contract and that they shall not disclose such documents or any information contained therein to any third party other than the Adjudicator or Arbitrator or any professional adviser engaged by the Operating Sub-Contractor to advise in connection with the Dispute.

- 70.5 The Parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the Dispute and notwithstanding the referral of the Dispute for resolution under this clause 70 (*Dispute Resolution*) and shall give effect forthwith to every decision of the Adjudicator, the Arbitrator and/or Courts of England and Wales delivered under this clause 70 (*Dispute Resolution*).

PART O - GENERAL PROVISIONS

71. NO ADDITIONAL INCOME

- 71.1 Save as permitted by the Senior Financing Documents the Service Provider shall not, and shall procure that all Service Provider Parties shall not, make, or seek to make, any additional income from, or in any way connected to, the Project or on the provision of the Services, which activities shall include (for the avoidance of doubt):

71.1.1 installation of telecommunication masts;

71.1.2 Advertising;

71.1.3 congestion charging;

71.1.4 installation footway crossings; and

71.1.5 authorisation of lane rentals under NRSWA.

72. ASSIGNMENT AND SUB-CONTRACTING

- 72.1 **Binding on successors and assigns of the Service Provider and the Authority**

This Contract and all Project Documents to which the Authority and the Service Provider are a party shall be binding on and shall enure to the benefit of the Service Provider and the Authority and their respective successors and permitted assigns.

72.2 Sub-Contracting by the Service Provider

The Service Provider may only grant a Key Sub-Contract (other than the Operating Sub-Contract entered into on the date of this Contract) if:

72.2.1 the relevant Key Sub-Contract includes provisions in respect of the assignment of the Key Sub-Contract that are consistent with the provisions in respect of assignment of any Key Sub-Contract entered into at the date of this Contract and/or allow an assignment for the purposes of a bona fide internal restructuring within the Key Sub-Contractor's Group (provided that the assignee remains within the Key Sub-Contractor's Group and that if it ceases to be in such Group there are obligations requiring the assignee to assign the Key Sub-Contract to a company within the Key Sub-Contractor's Group);

72.2.2 the relevant Key Sub-Contract does not contain any provisions which materially adversely affect either:

72.2.2.1 the rights or liabilities of the Authority under this Agreement or any Project Document; or

72.2.2.2 the delivery of the Services;

72.2.3 the proposed Key Sub-Contractor has the competence, technical ability or sufficient financial standing to satisfactorily carry out those of the Services proposing to be sub-let or sub-contracted to it;

72.2.4 the proposed Key Sub-Contractor is being engaged in accordance with terms and conditions which are consistent with Good Industry Practice; and

72.2.5 the proposed Key Sub-Contractor has the legal capacity, power or authority to become a party to the Key Sub-Contract.

72.3 The sub-contracting by the Service Provider of any of the Services shall not relieve the Service Provider of any liability under this Contract for any breach of the obligations arising under this Contract, or for the actions of negligence and/or

defaults by any Sub-Contractor or any Sub-subcontractor and their respective agents and employees.

72.4 Subject to clause 62.9 (*Replacement of a non-performing Sub-Contractor*), the Service Provider shall not be released from any of its obligations under this Contract as a result of the termination of the appointment of a Sub-Contractor or Sub-subcontractor for any reason.

72.5 The Service Provider shall procure that no Sub-Contractor or Sub-subcontractor will sub-contract to any person any of its duties, obligations or responsibilities where one or more of the provisions set out in clause 72.3 apply to the person to whom the work is proposing to be sub-contracted.

72.6 For the avoidance of doubt, the indemnities in favour of the Authority contained in clause 55 (*Indemnity*) shall be extended to Losses incurred by the actions and omissions of any Sub-Contractors or Sub-subcontractors (and to such extent monies received by the Service Provider from any of its Sub-Contractors in respect of indemnities contained in the relevant Sub-Contract shall be held by the Service Provider on trust for the Authority).

72.7 The following procedure in this clause 72.7 shall apply if the Service Provider proposes to grant a Key Sub-Contract (a "**Replacement Proposal**"):

72.7.1 the Service Provider shall, as soon as reasonably practicable after the date on which it becomes aware that there is a reasonable likelihood of the need to replace the Key Sub-Contractor (the "**Date of Notification of Replacement Proposal**"), notify the Authority of such likelihood and an estimate of the date on which the Service Provider proposes to grant that Key Sub-Contract (the "**Proposed Replacement Date**");

72.7.2 following the Date of Notification of Replacement Proposal the Service Provider shall:

72.7.2.1 provide the Authority with:

- (a) all tender documentation prepared by the Service Provider in relation to any tender process in respect of the Replacement Proposal; and

- (b) a report which:
- (i) identifies the respondents to the tender process and the proposed Key Sub-Contractor; and
 - (ii) summarises the responses to the tender process, the basis on which the Service Provider has evaluated those responses and the basis on which the Service Provider considers the conditions set out in clause 72.2 (*Sub-Contracting by the Service Provider*) will be satisfied or will not be satisfied by each of the respondents and in particular the relevant Replacement Proposal; and

72.7.2.2 use reasonable endeavours to arrange meetings between the representatives of the Authority and the proposed Key Sub-Contractor;

72.7.3 the Authority may, no later than ten (10) Business Days following the receipt of the information set out in clause 72.7.2 above, notify the Service Provider that the Authority wishes to enter into consultations with the Service Provider in respect of one or more aspects of the relevant Replacement Proposal, together with reasonable particulars of the matters the Authority proposes be subject to such consultations, and request any additional information or documentation it may reasonably require to enable it to establish whether any Replacement Proposal satisfies each of the conditions set out in clause 72.2 (*Sub-Contracting by the Service Provider*);

72.7.4 following receipt by the Service Provider of a notification pursuant to clause 72.7.3, the Service Provider shall, where relevant, provide such additional information or documentation requested to the Authority within the period of four (4) Business Days (or such longer period as may be agreed between the Parties) or, if before the expiry of such period the Service Provider notifies the Authority that in the Service Provider's reasonable opinion the provision of such additional information or documentation by the expiry of such period is not practicable (having regard to the nature and quantity of the additional information or documentation so requested), as soon as reasonably practicable thereafter;

72.7.5 following receipt of the additional information or documentation referred to in clause 72.7.4, or, where no such information or documentation was requested, following receipt of the notification under clause 72.7.3 the Authority and the Service Provider shall enter into consultations on the aspect or aspects of the relevant Replacement Proposal referred to by the Authority in such notification for a period not more than five (5) Business Days, including holding a meeting or meetings during such period if requested by either Party, and shall use their respective reasonable endeavours to resolve any matters arising from such consultations;

72.7.6 if, at the expiry of the period of consultations referred to in clause 72.7.5, any matters arising from such consultations remain unresolved, the Service Provider may, at any time after such expiry and notwithstanding those unresolved matters, grant the proposed Key Sub-Contract, provided that such grant shall be without prejudice to the rights of either Party pursuant to clause 70 (*Dispute Resolution*) in relation to any Dispute concerning whether the conditions set out in clause 72.2 (*Sub-Contracting by the Service Provider*) are satisfied by the relevant Replacement Proposal.

72.8 Where the Proposed Replacement Date is within twenty (20) Business Days after the Date of Notification of Replacement Proposal, the Service Provider shall:

72.8.1 notify the Authority of those aspects (if any) of the procedure set out in clause 72.7 which the Service Provider considers (acting reasonably) it cannot comply with before the Proposed Replacement Date or which the Service Provider considers it is not reasonably practicable to comply with before the Proposed Replacement Date;

72.8.2 comply with the provisions of clause 72.7 that it can comply with (other than any notified under clause 72.8.1);

72.8.3 as soon as reasonably practicable and following the grant of any Key Sub-Contract to which the Proposed Replacement Date relates comply with any provisions of clause 72.7 notified under clause 72.8.1 to enable the Authority to establish whether the Service Provider has complied with the provisions of clause 72.2 (*Sub-Contracting by the Service Provider*),

provided that the grant of a Key Sub-Contract in the circumstances set out in this clause 72.8, shall be without prejudice to the rights of the Authority pursuant to clause 70 (*Dispute Resolution*) in relation to any Dispute concerning whether the conditions set out in clause 72.2 (*Sub-Contracting by the Service Provider*) are satisfied by the relevant Replacement Proposal.

72.9 Where the Service Provider enters into a Key Sub-Contract notwithstanding that there are unresolved matters pursuant to clause 72.7.6 or pursuant to clause 72.8 it acknowledges the rights of the Authority to refer the matter to Dispute Resolution pursuant to clause 70 (*Dispute Resolution*) and, if it is determined pursuant to Dispute Resolution that the conditions set out in clause 72.2 (*Sub-Contracting by the Service Provider*) have not been satisfied the Service Provider shall, within one (1) Month, take such action as may be necessary to achieve compliance with the conditions set out in clause 72.2 (*Sub-Contracting by the Service Provider*), failing which the Authority may exercise all or any of its rights and remedies under this Contract in respect of any failure to comply with those conditions.

72.10 Without prejudice to clause 72.8.3, the Service Provider shall be relieved from its obligations under clause 72.7 to the extent of any matters notified under clause 72.8.1.

72.11 Sub-Contractor Direct Agreement and Collateral Warranty

72.11.1 The Service Provider shall:

72.11.1.1 procure, prior to commencement of any Key Sub-Contract, that the Key Sub-Contractor enters into and delivers to the Authority a Sub-Contractor Direct Agreement and Collateral Warranty; and

72.11.1.2 in the event that any new or replacement Key Sub-Contractor(s) is appointed by the Service Provider or the Sub-Contractor (as the case may be) during the Contract Term deliver to the Authority (upon such appointment) an agreement in the form of the Sub-Contractor Direct Agreement and Collateral Warranty set out in Annexure 15 (*Form of Sub-Contractor Direct Agreement and Collateral Warranty*) duly executed by them as a deed.

72.11.2 Any Sub-Contractor Direct Agreement and Collateral Warranty will be subject to the rights of the Direct Agreement and the Senior Financing Agreements and shall impose no greater obligations or liabilities upon the relevant Key Sub-Contractor than are imposed on that Key Sub-Contractor under the Key Sub-Contract entered into.

72.11.3 Nothing shall reduce the Authority's absolute discretion as to whether or not to enter into any Sub-Contractor Direct Agreement and Collateral Warranty. Provided the Sub-Contractor Direct Agreement and Collateral Warranty is in substantially the same form as the Sub-Contractor Direct Agreement and Collateral Warranty referred to in clause 72.11.1, or in such form as is reasonable and appropriate having regard to the nature of those of the Services which are to be provided under the relevant Key Sub-Contract, the Authority shall act reasonably in determining whether or not to enter into any such Sub-Contractor Direct Agreement and Collateral Warranty.

72.12 Highways Surfacing Works Sub-Contractors Collateral Warranty

72.12.1 The Service Provider shall:

72.12.1.1 within ten (10) Business Days of the appointment of the Highways Surfacing Works Sub-Contractors deliver collateral warranties in the form of the Key Sub-Contractor Collateral Warranty from both the Highways Surfacing Works Sub-Contractors; and

72.12.1.2 in the event that any new or replacement Highways Surfacing Works Sub-Contractors are appointed by the Service Provider or sub-contractor to provide the same or similar services to those provided by the Highways Surfacing Works Sub-Contractors appointed at Service Commencement Date deliver to the Authority (upon such appointment) an agreement substantially in the form of collateral warranty set out in Annexure 8 (*Collateral Warranty*) duly executed by them as a deed.

72.12.2 Any such collateral warranty agreement entered into pursuant to clause 72.12.1 will be subject to the rights of the Direct Agreement and the Senior Financing Agreement and shall impose no greater obligations or liabilities

upon the Highways Surfacing Works Sub-Contractors than are imposed on that the relevant Highways Surfacing Works Sub-Contractors under the relevant Sub-Contract or Sub-subcontract entered into.

72.12.3 The Service Provider shall obtain the approval of the Authority to the terms of all Highways Surfacing Works Sub-Contracts prior to the commencement of a Highways Surfacing Works Sub-Contractor's obligations under the relevant Highways Surfacing Works Sub-Contract, such approval not to be unreasonably withheld or delayed.

72.13 Assignment by the Service Provider

72.13.1 Subject to clause 72.13.2, the Service Provider shall not, without the prior written consent of the Authority, assign, novate or otherwise dispose of this Contract or any other Project Document or any part thereof or any benefit or interest therein or thereunder.

72.13.2 Without prejudice to the provisions of clause 72.13.1 the Service Provider may subject to the Direct Agreement assign the benefit of this Contract or any other Project Document by way of charge or security (in a form previously approved by the Authority, such approval not to be unreasonably withheld or delayed) for the purposes of raising and/or securing finance for this Contract.

72.13.3 Within ten (10) Business Days of an assignment made pursuant to clauses 72.13.1 and 72.13.2 the Service Provider shall deliver to the Authority a certified copy of the assignment.

72.14 Assignment by the Authority

The rights and obligations of the Authority under this Contract and/or any other Project Document shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public body (being a single entity) having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Contract and the other Project Documents being:

72.14.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975;

72.14.2 any local authority which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Contract and the other Project Documents; or

72.14.3 any other public body whose obligations under whichever of this Contract and/or the other Project Documents are assigned, novated or otherwise transferred are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Service Provider) by the Authority or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under whichever of this Contract and/or the other Project Documents are assigned, novated or otherwise transferred.

72.15 Interface

72.15.1 The Authority hereby acknowledges that under the Contract there are certain reporting, notice, information and interface obligations upon the Service Provider which may be discharged by the Services Sub-Contractor on behalf of the Service Provider by liaising directly with the Authority (whether in meetings with the Authority (or others) or otherwise) or by providing reports, notices or other information to the Authority. The Authority acknowledges and agrees that the discharge of such obligations of the Service Provider by the Services Sub-Contractor will be deemed satisfaction of such obligations under the Contract by the Service Provider, provided always that:

72.15.1.1 each notice, or any information or report served upon the Authority by the Service Provider or Services Sub-Contractor shall state clearly, on the face of the notice or other document, the name, title and address of the person upon which any response to such notice, information or report is required to be served by, or on behalf of, the Authority pursuant to the terms of this Contract;

72.15.1.2 if the Services Sub-Contractor does not provide the relevant information the Service Provider shall remain responsible for discharging such reporting, notice, information and interface obligations and the Service Provider shall ensure that such

information is provided to the Authority in accordance with the terms of this Contract;

72.15.1.3 the Authority shall be entitled to rely on any such notice, report or information provided to it by the Services Sub-Contractor as if such notice, report or information has been provided by the Service Provider; and

72.15.2 The Authority further acknowledges and agrees that where there is a right of access or inspection granted to the Service Provider under the Contract, whether to any site or place or to any records or other documents, the Services Sub-Contractor shall be entitled to exercise the Service Provider's rights of access and inspection pursuant to this Contract subject to the same restrictions that apply to the Service Provider under this Contract provided that the Service Provider shall be bound by and liable for any actions of the Services Sub-Contractor arising from the exercise of such rights of access and inspection.

73. CHANGE OF OWNERSHIP OF THE SERVICE PROVIDER AND HOLDCO

73.1 Limitation on transfers of Shares in the Service Provider and Holdco

Subject to clause 73.2 (*Transfer of shares by way of Security*), from the date of this Contract until the issue of the Certificate of Completion of the Core Investment Period ("**Lock-In Period**"), the Service Provider shall procure that no Change of Ownership occurs.

73.2 Transfer of shares by way of Security

Any Change of Ownership arising as a consequence of:

73.2.1 the grant, perfection or enforcement of security in favour of the Senior Lenders over or in relation to any of the shares of the Contractor or Holdco, provided that any document conferring security over any shares has been approved by the Authority (such approval not to be unreasonably withheld or delayed); or

73.2.2 any change in beneficial or legal ownership of any shares that are listed on a recognised investment exchange (as defined in section 285 of the Financial Services and Markets Act 2000); or

73.2.3 any transfer of shares in the Service Provider or Holdco by a Shareholder and/or an Affiliate of a Shareholder to a Shareholder and/or an Affiliate of a Shareholder; or

73.2.4 any share transfer effected in accordance with clause 73.2A (*Permitted Share Transfers*),

shall be disregarded for the purposes of clause 73.1 (*Limitation on transfers of Shares in the Service Provider and Holdco*) above.

73.2A Permitted Share Transfers

Subject to obtaining the Authority's prior written consent (not to be unreasonably withheld or delayed), Amey Ventures Asset Holdings Limited ("AVAHL") may transfer or otherwise dispose of any of its legal, beneficial or equitable interest in its shareholding in Holdco in whole or in part to a third party investor provided always that the Authority shall be deemed to act reasonably in not giving its consent where:

- (a) any transfer or disposal would, in the Authority's reasonable opinion, have a material and adverse effect on the ability of the Service Provider to perform the Services during the Core Investment Period; or
- (b) the financial standing of the Service Provider or Holdco would, in the Authority's reasonable opinion, be worsened as a result of such transfer or disposal.

73.3 Authority's consent to a Restricted Share Transfer

The Service Provider shall obtain the Authority's prior written consent (which may be given subject to conditions) to any Restricted Share Transfer.

73.4 Notification

73.4.1 The Service Provider represents and warrants to the Authority that at the date of this Contract, the legal and beneficial ownership of the Service Provider and Holdco is as set out in schedule 28 (*Service Provider's Details*) and that

no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in the Service Provider or Holdco.

73.4.2 Where during the Lock-In Period, the holder of any share is an Affiliate of a Shareholder it shall be a breach of this clause 73 (*Change of ownership of the Service Provider and holdco*) if the shares held by that holder are not within twenty (20) days of that holder ceasing to be an Affiliate of a Shareholder transferred to a Shareholder or an Affiliate of a Shareholder.

73.4.3 The Service Provider shall inform the Authority as soon as reasonably practicable (and in any event within twenty (20) Business Days) of any Change of Ownership occurring.

73.4.4 The Authority may, not more than twice in any Contract Year, or at any time when a Service Provider Default is outstanding, require the Service Provider to inform it as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the Authority's request for details of any Change of Ownership.

73.4.5 The Service Provider's obligation under clauses 73.4.3 and 73.4.4 above shall, except where a legal transfer of shares has occurred, be limited to the extent of the Service Provider's awareness having made all reasonable enquiry.

74. CHANGES TO FINANCING AGREEMENTS, PROJECT DOCUMENTS AND SUPPLEMENTAL DOCUMENTS

74.1 The Service Provider has provided to the Authority copies of the Project Documents as listed in annexure 12 (*List of Project Documents*), of the Supplemental Documents and of the Initial Financing Agreements as listed in part 1 of annexure 2 (*Financing Agreements*).

74.2 Subject to clause 74.8, no amendment, waiver or exercise of a right under any Financing Agreement or Project Document shall have the effect of increasing the Authority's liabilities on early termination of this Contract unless:

74.2.1 the Service Provider has obtained the prior written consent of the Authority to such increased liability for the purpose of this clause 74.2; or

74.2.2 it is an Additional Permitted Borrowing.

74.3 The Service Provider shall perform its obligations under, and observe all of the provisions of, the Project Documents and (except in accordance with clause 72) shall not:

74.3.1 terminate, agree to the termination of, give notice to terminate or otherwise take action to terminate, repudiate or discharge or secure the termination of any Project Documents or treat the same as having been terminated, repudiated or discharged (provided that the termination of a Project Document in accordance with its terms which is not procured or facilitated by the Service Provider shall not be a breach of this clause 74.3.1);

74.3.2 make or agree to or purport to make any material variation of any Project Document;

74.3.3 in any material respect depart from its obligations (or waive, release, settle, compromise, allow to lapse or otherwise prejudice or vary any rights or claims it may have in a material respect), or procure that any counterparty to a Project Document in any material respect departs from its obligations (or waives, releases, settles, compromises, allows to lapse or otherwise prejudice or vary any rights or claims they may have in a material respect), under any Project Document (save for any rights or claims against the Service Provider); or

74.3.4 enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Project Document.

74.4 All additions, amendments, modifications and/or waivers to this Contract or any other Project Document to which the Authority is a party and notwithstanding any provision to the contrary in any Project Document, shall be binding only if made in writing and signed by a duly authorised representative of each of the parties to this Contract or to the relevant Project Document (as the case may be). All such additions, amendments and/or modifications shall be dated, numbered and attached or appended to this Contract or, as the case may be, the relevant Project Document.

- 74.5 Any amendments to the Supplemental Documents shall require the Authority's prior written consent which consent shall not be unreasonably withheld or delayed unless the proposed change would increase the liability of the Authority under clause 69 (*Compensation on Termination*) or clause 45 (*Payment and Financial Matters*) in which case the Authority may give or withhold its consent in its absolute discretion.
- 74.6 Without prejudice to the provisions of this clause 74 (*Changes to Financing Agreements, Project Documents and Supplemental Documents*) and clause 93 (*Refinancing*) the Service Provider shall not, without the prior written consent of the Authority, enter into new Financing Agreements or terminate, amend, waive its rights or otherwise deal with its Financing Agreements if the same may reasonably be expected to have a material adverse effect on the ability of the Service Provider to perform its obligations under the Project Documents or this Contract.
- 74.7 Without prejudice to this clause 74 (*Changes to Financing Agreements, Project Documents and Supplemental Documents*), if at any time an amendment is made to any Project Document, Financing Agreement or Supplemental Document, or the Service Provider enters into a new Project Document, Financing Agreement or Supplemental Document (or any agreement which affects the interpretation or application of any Project Document, Financing Agreement or Supplemental Document), the Service Provider shall deliver to the Authority a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation (as the case may be), certified as a true copy by an officer of the Service Provider.
- 74.8 If:
- 74.8.1 at any time before the expiry of the Availability Period (as defined in the Credit Agreement), the Agent at the Service Provider's request grants a waiver, in writing and in accordance with the Senior Financing Agreements (but without increasing or otherwise amending the Total Commitments (as defined in the Credit Agreement)) of any condition relating to a Utilisation (as defined in the Credit Agreement) made or to be made before the expiry of the Availability Period (a "Relevant Utilisation") under the Credit Agreement (each such waiver being a "Drawstop Waiver");

74.8.2 the Service Provider gives to the Authority, within five (5) Business Days after the date of the relevant Drawstop Waiver, notice of the relevant Drawstop Waiver, together with full particulars of it, including:

74.8.2.1 the circumstances giving rise to the need for the relevant Drawstop Waiver;

74.8.2.2 the condition or conditions to the Relevant Utilisation to which the relevant Drawstop Waiver relates;

74.8.2.3 details of any conditions or other terms to which the relevant Drawstop Waiver is subject; and

74.8.2.4 a copy of the relevant Drawstop Waiver; and

74.8.3 after the date of the relevant Drawstop Waiver, this Contract is terminated,

then clause 74.2 shall not apply to any increase in the Authority's liabilities on such termination arising solely as a result of the making of the Relevant Utilisation in accordance with the relevant Drawstop Waiver, but only to the extent that the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) as at the Termination Date is, solely as a result of the making of the Relevant Utilisation in accordance with the relevant Drawstop Waiver, greater than the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) would have been as at the Termination Date had the Relevant Utilisation not been made.

75. COMPLIANCE WITH LEGISLATION

75.1 Without prejudice to any other specific obligations under this Contract, the Service Provider shall perform its respective obligations under this Contract and any other Project Document in accordance with all applicable Legislation from time to time in force subject to any consequential effect or otherwise referred to in clause 0 (

75.2

75.3 *Change of Law*).

75.4 Without prejudice to the generality of clause 0 (

75.5

75.6 *Change of Law*) and clause 75.1, the Service Provider shall give all notices and pay all fees required to be paid or given by any Legislation and/or in relation to all Consents relevant to the provision of the Services and as required for the proper performance of the Service Provider's duties and obligations under this Contract and under any other Project Document.

76. FREEDOM OF INFORMATION AND CONFIDENTIALITY

76.1 The Parties agree that the provisions of this Contract and each Project Document shall, subject to clause 76.2 below, not be treated as Confidential Information and may be disclosed without restriction.

76.2 Clause 76.1 above shall not apply to provisions of this Contract or a Project Document designated as Commercially Sensitive Information and listed in part 1 of schedule 31 (*Commercially Sensitive Information*) to this Contract which shall, subject to clause 76.4 below, be kept confidential for the periods specified in that part 1 of schedule 31 (*Commercially Sensitive Information*).

76.3 The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Contract and Project Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

76.4 Clauses 76.2 and 76.3 shall not apply to:

76.4.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Contract for the performance of those obligations;

76.4.2 any matter which a Party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this clause 76 (*Freedom of Information and Confidentiality*);

76.4.3 any disclosure to enable a determination to be made under clause 70 (*Dispute Resolution*) or in connection with a dispute between the Service Provider and any of its subcontractors;

- 76.4.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 76.4.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 76.4.6 any provision of information to the Parties' own professional advisers or insurance advisers or to the Senior Lenders or the Senior Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Service Provider to enable it to carry out its obligations under this Contract, or may wish to acquire shares in the Service Provider and/or Holdco in accordance with the provisions of this Contract to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 76.4.7 any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to:
- 76.4.7.1 any proposed new Service Provider, its advisers and lenders, should the Authority decide to retender this Contract; or
- 76.4.7.2 any person in connection with schedule 8 (*Electricity Market Test*);
- 76.4.8 any registration or recording of the Consents and property registration required;
- 76.4.9 any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to any

person engaged in providing services to the Authority for any purpose related to or ancillary to this Contract; or

76.4.10 any disclosure for the purpose of:

76.4.10.1 the examination and certification of the Authority's or the Service Provider's accounts;

76.4.10.2 any examination pursuant to the Audit Commission Act 1998 of the economy, efficiency and effectiveness with which the Authority has used its resources;

76.4.10.3 complying with a proper request from either Party's insurance adviser, or insurer on placing or renewing any insurance policies; or

76.4.10.4 (without prejudice to the generality of clause 76.4.4 above) compliance with the FOIA and/or the Environmental Information Regulations,

provided that, for the avoidance of doubt, neither clause 76.4.10.4 nor clause 76.4.4 above shall permit disclosure of Confidential Information otherwise prohibited by clause 76.3 above where that information is exempt from disclosure under section 41 of the FOIA.

76.5 Where disclosure is permitted under clause 76.4, other than clauses 76.4.2, 76.4.4, 76.4.5, 76.4.8 and 76.4.10, the Party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Contract.

76.6 For the purposes of the Audit Commission Act 1998, the Audit Commission may examine such documents as it may reasonably require which are owned, held or otherwise within the control of the Service Provider and any Sub-Contractor and may require the Service Provider and any Sub-Contractor to produce such oral or written explanations as it considers necessary. For the avoidance of doubt it is hereby declared that the carrying out of an examination under section 5 of the Audit Commission Act 1998 in relation to the Service Provider is not a function exercisable under this Contract.

- 76.7 The Service Provider shall not make use of this Contract or any information issued or provided by or on behalf of the Authority in connection with this Contract otherwise than for the purpose of this Contract, except with the written consent of the Authority.
- 76.8 Where the Service Provider, in carrying out its obligations under this Contract, is provided with information relating to people/users, the Service Provider shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Service Provider has sought the prior written consent of that person/user and has obtained the prior written consent of the Authority.
- 76.9 On or before the Expiry Date, the Service Provider shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to people/users including any documents in the possession, custody or control of a sub-contractor, are delivered up to the Authority.
- 76.10 The parties acknowledge that the Audit Commission has the right to publish details of this Contract (including Commercially Sensitive Information) in its relevant reports to Parliament.
- 76.11 The provisions of this clause 76 (*Freedom of Information and Confidentiality*) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

76.12 Freedom of information

76.12.1 The Service Provider acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall facilitate the Authority's compliance with its FOIA Information disclosure requirements pursuant to the same in the manner provided for in clauses 76.12.2 to 76.12.7 (inclusive) below.

76.12.2 Where the Authority receives a Request for Information in relation to FOIA Information that the Service Provider is holding on its behalf and which the Authority does not hold itself the Authority shall refer to the Service Provider such Request for FOIA Information that it receives as soon as practicable and in any event within ten (10) Business Days of receiving a Request for Information and the Service Provider shall:

76.12.2.1 provide the Authority with a copy of all such FOIA Information in the form that the Authority requires as soon as practicable and in any event within ten (10) Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and

76.12.2.2 provide all necessary assistance as reasonably requested by the Authority in connection with any such FOIA Information, to enable the Authority to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.

76.12.3 Following notification under clause 76.12.2, and up until such time as the Service Provider has provided the Authority with all the FOIA Information specified in clause 76.12.2.1, the Service Provider may make representations to the Authority as to whether or not or on what basis FOIA Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:

76.12.3.1 whether FOIA Information is exempt from disclosure under the FOIA and the Environmental Information Regulations; and

76.12.3.2 whether FOIA Information is to be disclosed in response to a Request for Information,

and in no event shall the Service Provider respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.

76.12.4 The Service Provider shall ensure that all FOIA Information held on behalf of the Authority is retained for disclosure for at least six (6) years (from the date it is acquired) and shall permit the Authority to inspect such FOIA Information as requested from time to time.

76.12.5 The Service Provider shall transfer to the Authority any Request for Information received by the Service Provider as soon as practicable and in any event within two (2) Business Days of receiving it.

76.12.6 The Service Provider acknowledges that any lists provided by him listing or outlining Confidential Information, are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of FOIA and the Environmental Information Regulations.

76.12.7 In the event of a request from the Authority pursuant to clause 76.12.2 above, the Service Provider shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of the Service Provider's estimated costs of complying with the request to the extent these would be recoverable if incurred by the Authority under section 12(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FOIA and as set out in the Fees Regulations ("Appropriate Limit") the Authority shall inform the Service Provider in writing whether or not it still requires the Service Provider to comply with the request and where it does require the Service Provider to comply with the request the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as the Authority is entitled to under section 10 of the FOIA. In such case, the Authority shall notify the Service Provider of such additional days as soon as practicable after becoming aware of them and shall reimburse the Service Provider for such costs as the Service Provider incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.

76.12.8 The Service Provider acknowledges that (notwithstanding the provisions of clauses 76.1 to 76.10) the Authority may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000 ("FOIA Code"), be obliged under the FOIA, or the Environmental

Information Regulations to disclose FOIA Information concerning the Service Provider or the Project:

76.12.8.1 in certain circumstances without consulting with the Service Provider; or

76.12.8.2 following consultation with the Service Provider and having taken its views into account,

provided always that where clause 76.12.8.1 above applies the Authority shall, in accordance with the recommendations of the FOIA Code, draw this to the attention of the Service Provider prior to any disclosure.

77. CONSENTS AND APPROVALS

77.1 Good faith and diligent pursuance of obligations

Each Party shall and shall procure that any representative(s) appointed upon its behalf pursuant to this Contract shall act in good faith and deal in a timely and diligent manner in relation to the carrying of any service, duty or obligation under this Contract and any other Project Document.

77.2 Service Provider's obligations

Neither the giving of any approval, inspection, knowledge of the terms of any Contract or document nor the review of any document or course of action by or on behalf of the Authority or any person authorised by the Authority pursuant to this Contract and any other Project Document shall relieve the Service Provider of any of its obligations under this Contract or any Project Document.

77.3 Examination by the Authority or its representatives

Without limitation to clause 77.2 (*Service Provider's obligations*), no examination or lack of examination by the Authority or any person authorised on its behalf of the Service Provider's drawings, documents, calculations or details relating to the design, construction, completion, commissioning and testing of any Project Network Parts or the management or provision of the Services or otherwise nor any comment, rejection or approval expressed by such person in regard thereto, either with or without

modifications, shall in any respect relieve or absolve the Service Provider from any obligations or liability under or in connection with any Project Documents.

78. CONTINUING OBLIGATIONS

Save as otherwise expressly provided in this Contract (other than clause 2.2):

78.1 termination of this Contract shall be without prejudice to any accrued rights and obligations under this Contract as at the Termination Date; and

78.2 termination of this Contract shall not affect the continuing rights of the Authority and the Service Provider under clause 6 (*Surveys and Inspections*), clause 7 (*Latent Defects*), clause 29 (*Administration of highway claims*), clause 45 (*Payment and financial matters*), clause 55 (*Indemnity*), clause 61 (*Termination*), clause 62 (*Termination by the Authority*), clause 63 (*Termination by the Service Provider*), clause 64 (*Termination for Corrupt Gifts and Fraud*), clause 65 (*Termination following a Force Majeure Event*), clause 66 (*De-Mobilisation Procedures*), clause 68 (*Handback Procedure*), clause 69 (*Compensation on termination*), clause 70 (*Dispute Resolution*), clause 72 (*Assignment and sub-contracting*), clause 76 (*Freedom of Information and Confidentiality*), clause 81 (*Data Protection Act*), clause 91 (*Public Relations and Publicity*), clause 92 (*Service Provider Records*), clause 95 (*Sole Remedy*), clause 101 (*Law of the Contract and Jurisdiction*), schedule 27 (*Administration of Third Party Claims*), or under any other provision of this Contract which is expressed to survive termination or which it is required to give effect to such termination or the consequences of such termination.

79. COSTS AND EXPENSES

Each Party shall bear its own costs and expenses (including advisers' fees and expenses) in connection with the preparation, negotiation, execution and completion of this Contract and the Project Documents.

80. COUNTERPARTS

This Contract may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

81. DATA PROTECTION ACT

- 81.1** In relation to all Personal Data, the Service Provider shall at all times comply with the DPA as a data controller if necessary, including maintaining a valid and up-to-date registration or notification under the DPA covering the data processing to be performed in connection with the Services.
- 81.2** The Service Provider and any Sub-Contractor shall only undertake processing of Personal Data reasonably required in connection with the Services and shall not transfer any Personal Data to any country or territory outside the EEA.
- 81.3** The Service Provider shall not disclose Personal Data to any Third Parties other than:
- 81.3.1** to employees and Sub-Contractors to whom such disclosure is reasonably necessary in order for the Service Provider to carry out the Services; or
- 81.3.2** to the extent required under a court order,
- provided that any disclosure under clause 81.3.1 is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this clause 81 (*Data Protection Act*) and that the Service Provider shall give notice in writing to the Authority of any disclosure of Personal Data it or a Sub-Contractor is required to make under clause 81.3.2 immediately it is aware of such a requirement.
- 81.4** The Service Provider shall bring into effect and maintain all technical and organisational measures to prevent unauthorised or unlawful processing of Personal Data and accidental loss or destruction of, or damage to, Personal Data including taking reasonable steps to ensure the reliability of staff having access to the Personal Data.
- 81.5** The Authority may, at reasonable intervals, request a written description of the technical and organisational methods employed by the Service Provider and the Sub-Contractors referred to in clause 81.4. Within twenty (20) Business Days of such request, the Service Provider shall supply written particulars of all such measures detailed to a reasonable level such that the Authority can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.

82. COMMISSION FOR LOCAL ADMINISTRATION

The Commission for Local Administration ("CLA") may investigate complaints of injustice in consequence of maladministration against the Authority under the Local Government Act 1974 which can include complaints relating to the Project. If such a complaint is made the Service Provider shall:

- 82.1 fully and promptly answer whether oral or written communications from the CLA and send to the Authority's Representative a copy of any communication to the CLA at the same time as it is sent to the CLA;
- 82.2 co-operate fully and courteously in any investigation by the CLA; and
- 82.3 fully and promptly respond to any communication from the Authority's Representative concerning the complaint so that the Authority may answer any issue raised by the CLA directly with the Authority.

83. DISCRIMINATION

83.1 No Discrimination

The Service Provider shall not and shall procure that any relevant Sub-Contractor or Sub-subcontractor shall not unlawfully discriminate against any Employee on the grounds of, without limitation:

- 83.1.1 age (subject to a relevant employee being aged below 65 years);
- 83.1.2 colour;
- 83.1.3 race;
- 83.1.4 nationality
- 83.1.5 disability;
- 83.1.6 ethnic or national origin;
- 83.1.7 marital status;
- 83.1.8 religion or religious belief or similar philosophical belief as defined by the Employment Equality (Religion or Belief) Regulations 2003;

83.1.9 sex;

83.1.10 sexuality (including sexual orientation);

83.1.11 trade union membership or activity;

83.1.12 responsibility for dependents, where a relevant Employee has sole or substantial responsibility for familial or non-familial dependents; and

83.1.13 in particular but without limitation the Service Provider and the Sub-Contractor shall not discriminate on the grounds of nationality in the selection of Sub-Contractors and Sub-subcontractors.

83.2 Sub-Contractor and Sub-subcontractor policy

The Service Provider shall and shall procure that any relevant Sub-Contractor or Sub-sub contractor shall:

83.2.1 adopt a policy to comply with their respective statutory obligations under the Race Relations Act 1976 as amended from time to time ("RRA") and the Service Provider agrees that it will not and will procure that any relevant Sub-Contractor or Sub-subcontractor will not discriminate against any Employee or prospective Employee or former Employee on racial grounds within the meaning of the RRA in contravention of part II of the RRA; and

83.2.2 confirm the details of the policy adopted pursuant to clause 83.2.1 above (i) in instructions to those concerned with recruitment, training and promotion, (ii) to Employees and all trade unions and/or other employee representatives or staff associations or similar body representing the Employees; and (iii) in all recruitment advertisements or other relevant recruitment literature; and

83.2.3 on request provide the Authority with copies of the documentation referred to in sub clauses 83.2.1 and 83.2.2 above.

83.3 Finding of unlawful discrimination

If any court or tribunal, or the Commission for Racial Equality, should make any finding of unlawful discrimination against the Service Provider or any relevant Sub-Contractor or Sub-subcontractor, then the Service Provider shall take all necessary

steps to prevent recurrence of such unlawful discrimination and shall deliver to the Authority full details of the steps taken to prevent such recurrence.

83.4 Compliance with Commission for Racial Equality Code of Practice

The Service Provider shall and shall procure that any relevant Sub-Contractor or Sub-subcontractor shall take all reasonable steps to comply with the code of practice issued by the Commission for Racial Equality for the elimination of racial discrimination and the promotion of equal opportunity in employment as amended from time to time or replaced by any similar code of practice whether issued by the Commission for Racial Equality or any replacement for that organisation and the Service Provider shall provide such information as the Authority may reasonably request for the purposes of ascertaining compliance with this clause.

83.5 Authority's personnel policies

The Service Provider shall and shall procure that any relevant Sub-Contractor or Sub-subcontractor shall make known the Authority's personnel policies to all Employees and all trade unions and/or other employee representative or staff association or any other body representing the Employees and more particularly but without limitation these policies shall be provided to any or all Employees responsible for recruitment, training and promotion.

84. ECONOMIC AND MONETARY UNION

84.1 Continuity of Contracts

Without prejudice to Article 3 of Regulation (EC) No. 103/97 of 15th June 1997 of the Council of Ministers of the European Union, the introduction of the euro shall not, of itself:

84.1.1 have the effect of altering any provision of, or (in whole or in part) of discharging, cancelling, rescinding, terminating or otherwise excusing performance under this Contract or any of the Project Documents; or

84.1.2 give either of the Parties to this Contract or any of the parties to the Project Documents the right unilaterally to alter any provision of, or (in whole or in part) to discharge, cancel, rescind, terminate or otherwise avoid its obligations under this Contract or any of the Project Documents.

84.2 Sterling references

If, following the introduction of the euro, Sterling is substituted by the euro as the currency of the United Kingdom, then all references in this Contract and the Project Documents to "Sterling" or "£" shall be construed as references to "euro" or "€" (as the case may be), at the agreed Sterling-euro conversion rate on the date of that substitution. Provided that the provisions of this clause 84 (*Economic and Monetary Union*) shall not apply during any transitional period when Sterling is a sub-unit of the euro, unless the Parties otherwise agree.

84.3 Consequential Changes

Without prejudice to clauses 84.1 (*Continuity of Contracts*) and 84.2 (*Sterling references*), the Parties will negotiate in good faith in order to agree any amendments to this Contract and the Project Documents which the Authority determines to be reasonably necessary as a result of the introduction of the euro (and, if relevant, so as to ensure that the terms of this Contract and the Project Documents reflect then current market practices and conventions relating to the introduction of the euro).

85. ENTIRE AGREEMENT

85.1 This Contract and the Project Documents and the other contracts referred herein constitute the entire agreement between the Parties and supersede any previous agreement or arrangements between the Parties in respect of the Services.

85.2 In entering into this Contract, no Party may rely on any representation, warranty, collateral contract or other assurance (except those set out in this Contract and any Project Document) made by or on behalf of any other Party before the signature of this Contract and each of the Parties waives all rights and remedies which, but for this clause, might otherwise be available to it in respect of any such representation, warranty, collateral contract or other assurance provided that nothing in this clause 85 (*Entire Agreement*) shall limit or exclude any liability for fraud.

86. LIAISON

86.1 The Parties shall work together to ensure that Liaison Procedures are developed and finalised no later than twelve (12) Months from the date of this Contract, and in so doing the Parties shall have regard to the Network Board and the procedures set out in clause 43.5.1.1 (*Anticipated methods of monitoring*).

86.2 In agreeing the Liaison Procedures, neither Party shall agree to a provision within the same that prevents the Service Provider from performing the Services in accordance with the provisions of this Contract.

86.3 The Authority may at any time, by written notice to the Service Provider, require the Parties to comply with the Liaison Procedures where the Authority (acting reasonably) deems such compliance appropriate.

86.4 Notwithstanding clause 86.3, the Parties shall at all times comply with the Liaison Procedures when required to do so under this Contract including in respect of those obligations relating to consultation, co-operation, discussion, reaching agreement and passing information as are contained in the following clauses and schedules:

86.4.1 clause 18.4.2 (*Gypsies and Travellers*);

86.4.2 clause 67 (*Other Consequences of termination or expiry*);

86.4.3 clause 84.3 (*Consequential Changes*);

86.4.4 clause 91.6 (*Publicity*); and

86.4.5 part 2 of schedule 22 (*Liaison Procedure*).

87. INTEREST ON LATE PAYMENTS

A Party shall pay interest to the other Party on any amount payable under this Contract that is not paid by the first Party on the due date, from the period from that date to the date of payment at a rate equal to [REDACTED] the Bank of England Base Rate.

88. LANGUAGE – ENGLISH TO BE LANGUAGE OF PROJECT DOCUMENTS

English shall be the language of this Contract and all documentation or information required or produced in the course of or in connection with the Service Provider's performance of this Contract shall be in English.

89. NOTICES

Any notice to be given or served by one Party to the other Party under this Contract shall be served as follows (except as expressly permitted otherwise in clause 6.1.2.2(a) (*Surveys and Inspections*) and 35.21.6 (*Specified Licences*)):

89.1 Such notice shall either be delivered personally or by first class pre-paid post or by facsimile transmission to the relevant address or facsimile number as set out in clauses 89.2 or 89.3 (as the case may be) or to such other address or facsimile number as a Party may have notified in writing to the other Party by not less than five (5) Business Days prior notice. Service shall be deemed to have been effected as follows:

89.1.1 if personally delivered, at the time of delivery to the addressee;

89.1.2 if sent by first class pre-paid post on the second (2nd) Business Day after it is put in the post; and

89.1.3 if sent by facsimile transmission, at the time of transmission or, if the time of transmission is outside normal working hours (which shall be deemed to be 9.00am to 5.00pm Monday to Friday excluding public holidays), at 9.00am upon the next Business Day.

89.2 For the purposes of clause 89.1 the Service Provider's details are:

Position: Managing Director Amey Ventures

Address: 5th Floor, 1 Waterhouse Square, 138 – 142 Holborn, London, EC1N 2ST

Facsimile:

Attention: Keith Cottrell

89.3 For the purposes of clause 89.1 the Authority's details are:

Position: Acting Chief Highway Engineer

Address: Zone 17, 4th Floor, 1 Lancaster Circus Queensway, Birmingham B4 7DQ

Facsimile No: 0121 303 6451

Attention: John Blakemore

89.4 In proving service under this clause 89 (*Notices*) it shall be sufficient to prove that personal delivery was made, or as the case may be, that the letter was properly

addressed and posted or, as the case may be, the facsimile transmission was properly addressed and despatched.

90. PARTNERSHIP - NO PARTNERSHIP BETWEEN THE PARTIES

Nothing in this Contract or, as the case may be, any Project Document shall be construed as establishing or implying a partnership or joint venture between the Parties or shall be deemed to constitute either Party as the agent of any of the other or to allow either Party to hold itself out as acting on behalf of the other.

91. PUBLIC RELATIONS AND PUBLICITY

91.1 No communication with press or public statements without prior approval of Authority's Press Representative

The Service Provider shall not by itself, its employees or agents and shall procure that any Key Sub-Contractor shall not communicate with representatives of the press, television, radio or other communications media on any matter concerning this Contract without the prior written approval of the Authority's Press Representative.

91.2 Other than when required or to facilitate the provision of the Services, no facilities to photograph or film in or upon any property used in relation to the Project shall be given or permitted by the Service Provider unless the Authority's Press Representative has given his prior written approval (not to be unreasonably withheld or delayed).

91.3 Neither Party shall make any public statement or public announcement in relation to the Project without prior written approval (such approval not to be unreasonably withheld or delayed) by the Press Representative of the other Party of the content of such statement or announcement unless, in the case of the Authority, such statement or announcement is for Parliamentary, governmental (including local government), statutory (including a request for information under the Freedom of Information Act 2000) or judicial purposes.

91.4 The Service Provider shall procure that any Key Sub-Contractor shall not make any public statement or public announcement in relation to the Project, without the prior

written approval of both Parties' Press Representative (such approval not to be unreasonably withheld or delayed) of the content of such statement or announcement.

91.5 The Service Provider shall and shall procure that any Key Sub-Contractor shall not use any crest, logo, livery or trademark of the Authority without the prior written approval of the Authority (which may be withheld or given subject to conditions at its absolute discretion).

91.6 Publicity

The Parties shall:

91.6.1 develop procedures and strategies for dealing with any publicity relating to the Project;

91.6.2 develop procedures and strategies dealing with key media issues, which shall include (without limitation) the following in relation to the Services, the Project:

91.6.2.1 issues which are likely to be controversial;

91.6.2.2 issues which are likely to attract national, regional or local interest; and

91.6.2.3 issues which are likely to affect any local community;

91.6.3 co-operate in relation to the organisation or holding of any event, exhibition or public meeting by either Party in relation to the Services, the Project, and the contents of and participants in such event, exhibition or public meeting; and

91.6.4 operate on the basis of mutual respect for the respective roles of each of the Parties, in each case in accordance with the Partnership Working Method Statement.

91.7 Press Representatives

The Parties shall each from time to time nominate a representative ("Press Representative") who shall be responsible for any publicity relating to the Project.

The Press Representative of the Parties for the time being shall be as set out below until such time as either Party notifies the other otherwise:

Service Provider	Name:	Keith Cottrell
	Telephone:	[REDACTED]
	Mobile:	[REDACTED]
	E-mail:	keith.cottrell@amey.co.uk
Authority	Name:	Deborah Harries
	Telephone:	[REDACTED]
	Mobile:	[REDACTED]
	E-mail:	deborah_harries@birmingham.gov.uk

91.8 Department for Transport

The Service Provider shall advertise the Government's financial contribution to the Contract in any significant publicity it produces in relation to this Contract, including any promotional material for the Contract which shall display the Department for Transport's logo in accordance with the requirements from time to time of the Department for Transport. The Service Provider shall report to the Monthly Project Meetings on any publicity it proposes to undertake in accordance with this clause 91.8 which is to be undertaken in the Month following the Monthly Project Meeting.

92. SERVICE PROVIDER RECORDS

92.1 Records

The Service Provider shall:

- 92.1.1 at all times maintain a full record of particulars of the costs of performing the Services including those relating to the design, construction, maintenance, operation and finance;
- 92.1.2 when requested by the Authority, provide a summary of any of the costs referred to in clause 92.1.1, including details of any funds held by the Service Provider specifically to cover such costs, in such form and detail as the Authority may reasonably require to enable the Authority to monitor the performance by the Service Provider of its obligations under this Contract; and
- 92.1.3 provide such facilities as the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this clause 92 (*Service Provider Records*).

92.2 Books of account

Compliance with clause 92.1 (*Records*) shall require the Service Provider to keep (and where appropriate to procure that the sub-contractors shall keep) books of account in accordance with best accountancy practice with respect to this Contract showing in detail:

- 92.2.1 administrative overheads;
- 92.2.2 payments made to Sub-Contractors and sub-contractors;
- 92.2.3 capital and revenue expenditure;
- 92.2.4 such other items as the Authority may reasonably require to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of clause 33 (*Relief Events, Compensation Events and Excusing Causes*), schedule 18 (Change Protocol), clause 0 (
- 92.2.5
- 92.2.6 *Change of Law*),

and the Service Provider shall have (and procure that the sub-contractors shall have) the books of account evidencing the items listed in clauses 92.2.1 to 92.2.4 available

for inspection by the Authority (and any expert) upon reasonable notice, and shall present a report of these to the Authority as and when requested.

92.3 Records of incidents maintenance, vehicles and stores

The Service Provider shall maintain or procure that the following are maintained:

92.3.1 without prejudice to the provisions of clause 92.4 (*Third Party Claims Information*), a full record of all incidents relating to health, safety and security which occur during the term of this Contract;

92.3.2 full records of all maintenance procedures carried out during the term of this Contract;

92.3.3 a full record of the type, description, proposed use, registration details, servicing record, fleet name and garage location of each Service Provider's Specialist Vehicle, together with details of whether such Service Provider's Specialist Vehicle is owned outright or leased by the Service Provider (and, where leased, details of the lessor, the terms of the lease, and whether the lease is a finance lease or an operating lease);

92.3.4 an accurate and up-to-date Service Provider's Plant Schedule and Service Provider's Materials Schedule,

and the Service Provider shall have the items referred to in clauses 92.3.1 to 92.3.4 available for inspection by the Authority upon reasonable notice, and shall present a report of them to the Authority as and when requested.

92.4 Third Party Claims Information

The Service Provider shall (and, where relevant, shall procure that its Sub-Contractors also shall) maintain and provide to the Authority:

92.4.1 every three (3) Months following the Service Commencement Date; and

92.4.2 in any event, within five (5) Business Days of any request from the Authority;

up-to-date details of:

- 92.4.3 all Claims made by a Third Party against the Service Provider or against the Authority and passed to the Service Provider for handling pursuant to clause 55.4 (Indemnity);**
- 92.4.4 the Sub-Contractor (if any) with which ultimate liability for any such Claim rests;**
- 92.4.5 the scope of each Sub-Contractor's activities in respect of the Project;**
- 92.4.6 the number of Claims to which clause 92.4.3 applies that are made in each Contract Year (and, where relevant, to date in the then current Contract Year);**
- 92.4.7 any Claim made against the Service Provider which is at a level for which cover is provided within an insurance policy and which is subsequently passed to an insurer to handle (with such details to include any set reserve);**
- 92.4.8 which Sub-Contractor is handling each such Claim, or, if the Service Provider is itself handling any such Claim, a statement to that effect;**
- 92.4.9 the value of Claims settled to date, grouped by Contract Year in which the Claim was incurred;**
- 92.4.10 the value of Claims received but not yet settled, grouped by Contract Year in which the Claim was incurred;**
- 92.4.11 the nature (including cause, and whether such Claim is in respect of personal injury or damage to property) of each Claim (suitably edited where necessary to comply with any applicable Law);**
- 92.4.12 the location of incident in respect of which each Claim was made (grouped by postcode to the extent possible);**
- 92.4.13 the number of Claims in respect of which the relevant insurer, Claims handler or Service Provider Party has issued (to the claimant/or their representative) a denial of liability, grouped by Contract Year in which the Claim was incurred; and**
- 92.4.14 the number of Claims received in each three (3) Month period following the Service Commencement Date that are not addressed within the period**

specified in paragraph 3.7 of the Pre-Actions Protocol for Personal Injury Claims 2006 (or any successor thereto).

- 92.5 The Service Provider shall permit records referred to in this clause 92 (*Service Provider Records*) to be examined and copied by the Controller and other representatives of the Authority, and by the Audit Commission.
- 92.6 The records referred to in this clause 92 (*Service Provider Records*) shall be retained for a period of at least five (5) Years after the Service Provider's obligations under this Contract have come to an end.
- 92.7 Upon termination of this Contract, and in the event that the Authority wishes to enter into another contract for the operation and management of the Project the Service Provider shall (and shall ensure that the Sub-Contractors shall) comply with all reasonable requests of the Authority to provide information relating to the Service Provider's costs of operating and maintaining the Project.
- 92.8 Upon the acquisition of any Service Provider's Specialist Vehicle (whether such acquisition is by way of purchase or lease), or upon any change to any of the details (other than servicing record) of any Service Provider's Specialist Vehicle listed pursuant to clause 92.3.3, the Service Provider shall give written notice to the Authority of the updated details (as listed pursuant to clause 92.3.3 (*Records of incidents, maintenance, vehicles and stores*)) of such Service Provider's Specialist Vehicle.
- 92.9 The Service Provider shall:
- 92.9.1 provide to the Authority on 31 March, 30 June, 30 September and 31 December each year a document listing all information provided by it to the Senior Lenders during the preceding three (3) Month period and, at the request of the Authority, provide to the Authority any information provided by it to the Senior Lenders during the term of this Contract and any other information relating to the Project that the Authority may reasonably require;
- 92.9.2 provide to the Authority copies of its annual report and accounts within thirty (30) days of publication;

92.9.3 provide to the Authority a copy of the Senior Lenders' Financial Model at Financial Close and (as the same may be amended) within thirty (30) days of any amendment thereto;

92.9.4 promptly upon the occurrence of an event of default under the Credit Agreement notify the Authority of such a default; and

92.9.5 use all reasonable endeavours to assist the Authority in its preparation of any report required by the Department of Transport or HM Treasury, from time to time.

92.10 Interim Project Report

The Authority may, in the circumstances referred to in clause 92.9.4 above (regardless of whether the Senior Lenders have exercised any enforcement or similar rights under the Senior Financing Agreements) require the Service Provider to provide an Interim Project Report and to attend and use all reasonable endeavours to ensure that the Senior Lenders attend, such meetings as the Authority may convene to discuss such Interim Project Report and the circumstances giving rise to it.

93. REFINANCING

93.1 The Service Provider shall obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and the Service Provider shall at all times act in good faith with respect to (a) any Refinancing and (b) any potential or proposed Refinancing under clause 93.9 (*Authority right to request refinancing*).

93.2 The Authority shall be entitled to receive:

93.2.1 a 50 per cent share of any Refinancing Gain arising from a Qualifying Refinancing, in respect of any Refinancing Gain up to (when considered in aggregate with all previous Qualifying Refinancings) a Refinancing Gain of £1 million;

93.2.2 a 60 per cent share of any further Refinancing Gain arising from a Qualifying Refinancing, in respect of any Refinancing Gain up to (when considered in aggregate with all previous Qualifying Refinancings) a Refinancing Gain of £3 million; and also

93.2.3 a 70 per cent share of any other Refinancing Gain arising from a Qualifying Refinancing.

- 93.3 The Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater share of the Refinancing Gain than that specified in clause 93.2.**
- 93.4 The Service Provider shall promptly provide the Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing (whether that Refinancing is a Qualifying Refinancing or not).**
- 93.5 The Authority shall have the right to elect to receive its share of any Refinancing Gain as:**
- 93.5.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;**
 - 93.5.2 a reduction in the Annual Unitary Charge over the remainder of the Contract Term; or**
 - 93.5.3 a combination of any of the above.**
- 93.6 The Authority and the Service Provider will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Authority's share of the Refinancing Gain (taking into account how the Authority has elected to receive its share of the Refinancing Gain under clause 93.5 above). If the Parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Authority's share, the dispute shall be determined in accordance with clause 70 (*Dispute Resolution*).**
- 93.7 The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each Party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Authority will be paid to the Authority by the Service Provider within twenty eight (28) days of any Qualifying Refinancing.**

93.8 Without prejudice to the other provisions of this clause 93, the Service Provider shall (a) notify the Authority of all Notifiable Financings on becoming aware of the same and again when they are entered into and provide full details of the same and (b) include a provision in the Financing Agreements whereby it is entitled to be informed of any proposals which the Senior Lenders may have to refinance the Financing Agreements.

93.9 Authority right to request refinancing

93.9.1 If the Authority (acting reasonably) considers the funding terms generally available in the market to be more favourable than those reflected in the Financing Agreements, the Authority may, by notice in writing to the Service Provider, require the Service Provider to request potential funders to provide terms for a potential Refinancing (a "Refinancing Notice").

93.9.2 The Refinancing Notice shall set out in reasonable detail the grounds upon which the Authority believes such funding terms to be available. The Service Provider and Authority shall meet to discuss the Refinancing Notice within twenty eight (28) days. Such a meeting will consider the evidence available to both Parties about the availability of funding terms for a potential Refinancing. The Authority shall be entitled to withdraw the Refinancing Notice at or before such a meeting, or within ten days following the meeting.

93.9.3 If the Authority serves a Refinancing Notice which is not withdrawn pursuant to clause 93.9.2, then the Service Provider shall:

93.9.3.1 act promptly, diligently and in good faith with respect to the potential Refinancing;

93.9.3.2 use all reasonable endeavours to obtain the most favourable available terms from existing and/or new lenders for any potential Refinancing (provided that the Service Provider shall not be required to propose refinancing in a manner which a prudent board of directors of a company operating the same business in the United Kingdom to that operated by the Service Provider, in similar circumstances, would not approve), for the avoidance of doubt also being terms which are likely to generate

a positive Refinancing Gain after the deduction of costs in accordance with the provisions of clause 93.7; and

either:

- (a) as soon as reasonably practicable after receipt of the Refinancing Notice, provide to the Authority (i) full details of the proposed Refinancing, including a financial model and the basis for the assumptions used in the financial model and evidence to the reasonable satisfaction of the Authority that these assumptions represent the most favourable available terms for the potential Refinancing on the basis set out in clause 93.9.3.1 above and (ii) initial drafts of any changes to this Contract including in relation to potential compensation on termination which might be required to give effect to the proposed Refinancing; or
- (b) if the Service Provider (acting reasonably) believes that it is not possible to obtain funding terms which are more favourable than those reflected in the Financing Agreements in accordance with the requirements of clause 93.9.3.1, provide evidence to the reasonable satisfaction of the Authority for such belief and evidence to the reasonable satisfaction of the Authority that the Service Provider has complied with its obligations in clauses 93.9.3 and 93.9.3.1.

93.9.4 Following receipt of the information referred to in clause 93.9.3.2(a), the Authority shall (in its absolute discretion) either:

- 93.9.4.1 instruct the Service Provider to implement the proposed Refinancing; or

93.9.4.2 instruct the Service Provider to discontinue the proposed Refinancing

provided that if the Authority reasonably considers that the requirements of clause 93.9.3.2(a) have not been satisfied, the Authority may require the Service Provider to satisfy its obligations under clause 93.9.3.2(a) whereupon the provisions of clauses 93.9.3 and 93.9.4 shall apply as if the Authority had served a Refinancing Notice.

93.9.5 If the Authority instructs the Service Provider to implement the proposed Refinancing:

93.9.5.1 the Service Provider shall, as soon as reasonably practicable, use all reasonable endeavours to procure that such proposed Refinancing is implemented;

93.9.5.2 such proposed Refinancing shall be deemed to be a Qualifying Refinancing; and

93.9.5.3 the provisions of clauses 93.1 to 93.8 shall apply.

93.9.6 If:

93.9.6.1 the Authority instructs the Service Provider to discontinue the potential Refinancing pursuant to clause 93.9.4.2; or

93.9.6.2 the requirements of clause 93.9.3.2(b) are satisfied,

then, the Authority shall reimburse the Service Provider for the reasonable and proper professional costs incurred by the Service Provider in relation to the potential Refinancing, such costs to be paid to the Service Provider by the Authority within twenty eight (28) days after receipt of a valid invoice in respect of such amount. Such costs shall not include any internal management costs incurred by the Service Provider except insofar as (a) it can be demonstrated to the reasonable satisfaction of the Authority that such costs have been incurred in place of professional costs which would in the normal course of such business have been paid to third parties

and (b) the Authority has, by prior written agreement, approved the use of such internal management resource.

93.9.7 The Authority shall be entitled to issue a Refinancing Notice under clause 93.9.1 at any time but not more than once in any two-year period. For the avoidance of doubt, a Refinancing Notice that has been withdrawn under clause 93.9.2 has been issued for the purpose of this clause 93.9.7.

94. SEVERABILITY

If any term, condition or provision contained in this Contract shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Contract.

95. SOLE REMEDY

95.1 Common Law Rights for the Authority

Subject to:

95.1.1 the provisions in clause 95.3; and

95.1.2 any other express right of the Authority pursuant to this Contract; and

95.1.3 the Authority's right to claim, on or after termination of this Contract, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Contract by the Service Provider save to the extent that the same has already been recovered by the Authority pursuant to this Contract or has been taken into account to calculate any compensation payable by the Authority pursuant to clause 69 (*Compensation on termination*);

the sole remedy of the Authority in respect of a failure to provide the Services in accordance with:

(a) the Output Specification; or

(b) any of the provisions of this Contract listed in the Sole Remedy List; or

- (c) any other provision of this Contract which, if breached, results in the making of an Adjustment which fully compensates the Authority for the Loss suffered by it as a result of such breach ,

shall be the operation of schedule 4 (*Payment Mechanism*).

95.2 Common Law Rights for the Service Provider

Without prejudice to any entitlement of the Service Provider:

95.2.1 to specific performance of any obligation under this Contract;

95.2.2 to injunctive relief; or

95.2.3 to enforce any payment obligation under or in relation to or for breach of this Contract in accordance with clause 70 (*Dispute Resolution*),

the Service Provider shall not be entitled to any common law or equitable rights including rights to damages or to any other rights under contract, tort or otherwise in relation to any breach of this Contract to the extent that this Contract provides an express remedy in relation to the breach.

95.3 Nothing in clause 95.1 (*Common Law Rights for the Authority*) or clause 95.2 (*Common Law Rights for the Service Provider*) shall prevent or restrict the right of the Authority or the Service Provider (as appropriate) to seek injunctive relief or a decree of specific performance or other discretionary remedies of the court.

96. THIRD PARTY RIGHTS

Subject to clause 57.1.1 (*Contracts (Rights of Third Parties) Act 1999*) and the rights of any Transferring Employee pursuant to section 102 of the Local Government Act 2003, no term of this Contract is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a Party to this Contract.

97. WAIVER

97.1 No term or provision of this Contract shall be considered as waived by any Party to this Contract unless a waiver is given in writing by that Party.

97.2 No waiver under clause 97.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Contract unless (and then only to the extent) expressly stated in that waiver.

98. LOCAL GOVERNMENT (CONTRACTS) ACT 1997

98.1 Consent

The Service Provider hereby consents to the issue by the Authority of a certificate under Section 3 of the 1997 Act in respect of this Contract and the Direct Agreement.

98.2 The Parties agree and acknowledge that they have consented to this Contract being a certified contract within the meaning of Section 2 of the 1997 Act.

98.3 Certification Requirements

The Authority shall satisfy the Certification Requirements with respect to this Contract and the Direct Agreement on or before the date of Financial Close.

98.4 Unenforceability of Contract

In the event of the making of a determination or order by a court of final jurisdiction or an application for judicial review or audit review (within the meaning of the 1997 Act) the result of which is that this Contract does not have effect or is otherwise unenforceable, then the Service Provider shall be entitled to be paid by the Authority the sum equivalent to the Authority Default Termination Sum.

98.5 Relevant Discharge Terms

The relevant discharge terms within the meaning of Section 6 of the 1997 Act are set out in clause 69.6 (*Relevant Discharge Terms*).

99. NON-SOLICITATION

99.1 The Service Provider shall not and shall ensure that any Service Provider Party shall not solicit the employment or recruitment of or recruit any Authority Party or agency worker to work for the Service Provider (or the Service Provider Party) during all or any part of the Mobilisation Period (whether or not for the performance of any part of the Services or the delivery of any part of the Mobilisation Plan) whom the Authority

designates by notice in writing to the Service Provider prior to the date of this Contract as a key worker.

99.2 For the purposes of clause 99.1, "solicit" includes any response by the Service Provider or Service Provider Party to an enquiry concerning employment by a key worker except to indicate that such recruitment is prohibited by the Authority.

100. NO DOUBLE RECOVERY

Notwithstanding any other provision of this Contract, neither Party shall be entitled to recover compensation or make a claim under this Contract in respect of any loss that it has incurred to the extent that it has already been compensated in respect of that loss pursuant to this Contract.

101. LAW OF THE CONTRACT AND JURISDICTION

This Contract, and any non-contractual obligation arising out of or in connection with this Contract, shall be governed by the laws of England and Wales and, subject to clause 70 (*Dispute Resolution*), the Parties submit to the exclusive jurisdiction of the courts of England and Wales.

102. MITIGATION

Each of the Parties shall at all times take all reasonable steps to mitigate any loss and/or costs incurred in accordance with the provisions of this Contract.

103. SUB-CONTRACTORS

The Authority shall not contend that:

103.1 the Service Provider has not suffered or incurred or will not suffer or incur, any damage, loss, cost or expense; or

103.2 the Authority's liabilities to the Service Provider should be in any way reduced or extinguished,

by reason of any provision in any sub-contract to the effect that the entitlement of the relevant sub-contractor in respect of any matter shall be limited by reference to the amount of the Service Provider's entitlement against the Authority under this Contract in respect of such matter.

Executed as a deed by the Parties or their duly authorised representatives on the date of this Contract.

The Common Seal of)
BIRMINGHAM CITY COUNCIL)
was hereunto affixed to this deed in the)
presence of:

Authorised Signatory

EXECUTED as a DEED
by **AMEY BIRMINGHAM**
HIGHWAYS LIMITED acting by:

Attorney (signature)

Name (Block Capitals)

Witness (signature)

Name (Block Capitals)

Address of Witness