

Service Provider and/or relevant Sub-Contractor or by any trade unions, elected employee representatives or staff associations in respect of all or any such Eligible Employees which Losses:

- 71.15.1 relate to pension rights in respect of periods of employment on and after the Service Commencement Date until the Expiry Date or Termination Date; or
- 71.15.2 arise out of the failure of the Service Provider and/or any relevant Sub-Contractor to comply with the provisions of this clause 71.15 (*Claims from Eligible Employees or Trade Unions*) before the Expiry Date or Termination Date, and the Service Provider agrees that clause 110 (*Third Party Rights*) shall not apply to this clause 71.15 (*Claims from Eligible Employees or Trade Unions*).

#### 71.16 Transfer of Employment of Eligible Employees

Where the employment of any Eligible Employee is transferred on a second and/or subsequent occasion during the Term to another employer (the "**New Employer**"), the Service Provider shall consult with and inform those Eligible Employees of the pensions provisions relating to that transfer and procure that the New Employer complies with the provisions of clauses 71.1 (*Membership of the Pension Scheme*) to 71.15 (*Claims from Eligible Employees or Trade Unions*) (inclusive) provided that for those purposes:

- 71.16.1 references to the Service Provider shall be deemed to be references to the New Employer;
- 71.16.2 references to the Service Commencement Date shall be deemed to be references to the date of the transfer to the New Employer; and
- 71.16.3 references to Eligible Employees shall be deemed to be references to the Eligible Employees transferred to the New Employer.

## **PART P - TERMINATION**

### **72. STEP-IN**

- 72.1 Authority's emergency step-in rights

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

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

72.1.2 to discharge a statutory duty;

(in each case a "**Step In Event**") then the Authority shall be entitled to take action in accordance with clause 72.2 below.

72.2 If clause 72.1 (*Authority's emergency step-in rights*) applies and the Authority wishes to take action, the Authority shall notify the Service Provider of the following:

72.2.1 the action it wishes to take;

72.2.2 the reason for such action;

72.2.3 the date it wishes to commence such action;

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

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

72.3 Following service of such notice under clause 72.2, the Authority shall take such action as notified under clause 72.2 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.

72.4 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 Services:

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

- 72.4.2 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 Monthly 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.
- 72.5 If the Required Action is taken as a result of a breach of the obligations of the Service Provider under the 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 Services:
- 72.5.1 the Service Provider shall be relieved of its obligations to provide such part of the Services; and
- 72.5.2 in respect of the period in which the Authority is taking Required Action, the Monthly 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 of operation in taking the Required Action.
- 72.5A On completion of any Required Action or, as the case may be on the cessation of the relevant Step-In Event, the Authority shall notify the Service Provider by prior notice as soon as reasonably practicable that it should resume provision of the Service in relation to that part of the Service affected by the Step-In and the Authority shall withdraw from the Step-In.
- 72.6 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 and the Service Provider shall be entitled to a Compensation Event in accordance with clause 46 (*Compensation Events*).

## 73. TERMINATION

### 73.1 Termination of this Contract

Without prejudice to clause 93 (*Continuing Obligations*) this Contract will terminate on the earlier of:

- 73.1.1 the Expiry Date;
- 73.1.2 the date of termination pursuant to clauses 68.14.1 and/or 68.14.2 (*Insurance*);
- 73.1.3 the date of termination by the Authority pursuant to clause 74 (*Voluntary Termination by the Authority*);
- 73.1.4 the date of termination by the Authority pursuant to clause 75 (*Service Provider Default*);
- 73.1.5 the date of termination by the Service Provider pursuant to clause 76 (*Termination by the Service Provider*);
- 73.1.6 the date of termination following a Prohibited Act pursuant to clause 77 (*Termination for Corrupt Gifts and Fraud*);
- 73.1.7 the date of termination following a Force Majeure Event pursuant to clause 78 (*Termination following a Force Majeure Event*); and
- 73.1.8 the date of termination pursuant to clause 3 (*Local Government (Contracts) Act 1997*).

### 73.2 Antecedent Breaches and Exclusive Right to Terminate

73.2.1 This clause 73 (*Termination*) and clauses 74 (*Voluntary Termination by the Authority*) to 78 (*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 80 (*Compensation on Termination*) no further liability shall attach in respect of such antecedent breaches.

73.2.2 Each and any of the events referred to in:

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

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

#### **74. VOLUNTARY TERMINATION BY THE AUTHORITY**

74.1 The Authority may terminate this Contract at any time on or before its Expiry Date by complying with its obligations under clause 74.2 to 74.4.

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

74.2.1 that the Authority is terminating this Contract under this clause 74 (*Voluntary Termination by the Authority*);

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

74.2.3 whether the Authority has chosen to exercise its option under clause 74.3 below.

74.3 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.

74.4 This Contract will terminate on the date specified in the notice referred to in clause 74.2.

#### **75. SERVICE PROVIDER DEFAULT**

75.1 Service Provider Default

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

## 75.2 Termination Notice

The Termination Notice must specify:

- 75.2.1 the type and nature of the Service Provider Default that has occurred giving reasonable details; and
- 75.2.2 that in the case of any Service Provider Default falling within the limbs (a), (g), (h) and (m) of the definition of Service Provider Default, 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:
  - 75.2.2.1 in the case of a breach under limb (a) of the definition of Service Provider Default the Service Provider puts forward an acceptable rectification programme within twenty (20) Business Days after the date the Service Provider receives the Termination Notice (and implements such programme in accordance with its terms and rectifies the Service Provider Default in accordance with the programme); or
  - 75.2.2.2 in the case of a breach under limbs (g), (h) and (m) of the definition of Service Provider Default, the Service Provider rectifies the Service Provider Default within forty (40) Business Days after the date the Service Provider receives the Termination Notice; or
- 75.2.3 that in the case of any other Service Provider Default (not being limbs (a), (g), (h), and (m) of the definition of Service Provider Default) this Contract will terminate on the date falling forty (40) Business Days after the date the Service Provider receives the Termination Notice.

75.3 If the Service Provider either:

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

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

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

#### 75.4 Termination

If:

75.4.1 in the case of a Service Provider Default within limb (a) of the definition of that term no acceptable rectification programme has been put forward pursuant to clause 75.2.2.1 and the Service Provider fails to rectify the Service Provider Default within the time specified in the Termination Notice; or

75.4.2 in the case of a Service Provider Default within limbs (g), (h) and (m) of the definition of Service Provider Default, the Service Provider fails to rectify the Service Provider Default 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 in the case of a Service Provider Default within limbs (g), (h) and (m) of the definition of Service Provider Default and five (5) Business Days after the Authority serves a further notice on the Service Provider stating that the relevant default has not been rectified in accordance with the relevant default rectification programme, in the case of a Service Provider Default within limb (a) of the definition of Service Provider Default.

75.5 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.

## 75.6 Persistent Breach

75.6.1 If a particular breach, other than any breach for which Milestone Default Termination Points or Service Default Termination Points could have been awarded and/or Performance Adjustments and /or Availability Adjustments could have been made, has continued for more than twenty (20) Business Days or occurred more than three (3) times in any four (4) Month period then the Authority may serve a notice on the Service Provider:

75.6.1.1 specifying that it is a formal warning notice;

75.6.1.2 giving reasonable details of the breach; and

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

75.6.2 If, following service of such a warning notice, the breach specified has continued beyond twenty (20) Business Days or recurred three (3) or more times within the six (6) Month period after the date of service, then the Authority may serve another notice (a "**Final Warning Notice**") on the Service Provider:

75.6.2.1 specifying that it is a Final Warning Notice;

75.6.2.2 stating that the breach specified has been the subject of a warning notice served within the twelve (12) Month period prior to the date of service of the Final Warning Notice; and

75.6.2.3 stating that if such breach continues for more than twenty (20) Business Days or recurs in three (3) or more Months within the six (6) Month period after the date of service of the Final Warning Notice this Contract may be terminated.

75.6.3 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.

75.7 Replacement of a non-performing Sub-Contractor

75.7.1 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 to the Authority, be entitled to require that there be disregarded for the purposes of calculating whether a Service Provider Default has occurred pursuant to limbs (b), (k) or (l) of the definition of Service Provider Default:

75.7.1.1 any Milestone Default Termination Points, Service Default Termination Points, 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

75.7.1.2 any Milestone Default Termination Points, Service Default Termination Points, warning notices and/or Final Warning Notices incurred by the Service Provider in the two (2) Months following the date upon which the First Tier Sub-contractor was replaced and attributable to the performance or non-performance to that part of the Services in respect of which the First Tier 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 Term, of which only one (1) such notice may be given during the Core Investment Period.

75.7.2 The Authority shall still be entitled to make adjustments to the Annual Unitary Charge in accordance with this Contract during the period following the date upon which the Sub-Contractor was replaced, where the Service Provider serves a notice pursuant to this clause 75.7 (*Replacement of a non-performing Sub-Contractor*).

75.8 Termination by the Authority for breach of the Refinancing Provisions

75.8.1 If the Service Provider wilfully breaches clause 105.1 (*Refinancing*) then the Authority may terminate this Contract at any time on or before its Expiry Date by complying with its obligations under clauses 75.8.2 to 75.8.4 below.

75.8.2 If the Authority wishes to terminate this Contract under this clause 75.8 (*Termination by the Authority for breach of the Refinancing Provisions*), it must give notice to the Service Provider stating:

75.8.2.1 that the Authority is terminating this Contract under this clause 75.8 (*Termination by the Authority for breach of the Refinancing Provisions*);

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

75.8.2.3 whether the Authority has chosen to exercise its option under clause 75.8.3.

75.8.3 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.

75.8.4 This Contract will terminate on the date falling twenty (20) Business Days after the date of receipt of the notice referred to in clause 75.8.2.

**76. TERMINATION BY THE SERVICE PROVIDER**

76.1 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 forty (40) Business Days of becoming aware of the Authority Default.

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

76.3 This Contract will terminate on the day falling forty (40) Business Days after the date the Authority receives the Termination Notice, unless the Authority rectifies the Authority Default within forty (40) Business Days of receipt of the Termination Notice.

## **77. TERMINATION FOR CORRUPT GIFTS AND FRAUD**

### **77.1 Prohibited Acts**

The Service Provider undertakes to the Authority that it will throughout the duration of this Contract use all reasonable endeavours to have in place adequate procedures (as referred to in section 7(2) of the Bribery Act 2010) designed to prevent persons associated with the Service Provider from bribing any person with the intention of obtaining or retaining business for the Service Provider or with the intention of obtaining or retaining an advantage in the conduct of business for the Service Provider.

If the Service Provider, a Sub-Contractor or any Key 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 77.2 to 77.7 below.

77.2 Notwithstanding clauses 77.3 to 77.6, 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, provided that if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Authority may not terminate the Contract unless, acting reasonably, it considers termination of the Contract to be in the best interests of the Project.

77.3 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 twenty (20) 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.

77.4 If the Prohibited Act is committed by a Sub-Contractor or any Key Sub-Contractor or by an employee of that Sub-Contractor or Key Sub-Contractor not acting independently of that Sub-Contractor or Key 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 provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Authority may not terminate the Contract unless, acting reasonably, it considers termination of the Contract to be in the best interests of the Project.

77.5 If the Prohibited Act is committed by an employee of a Sub-Contractor or Key Sub-Contractor acting independently of that Sub-Contractor or Key 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.

77.6 If the Prohibited Act is committed by any other person not specified in clauses 77.2 to 77.5, 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:

77.6.1 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 or Key Sub-Contractors) and (if necessary) procures the performance of such part of the Services by another person provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Authority may not terminate the Contract unless, acting reasonably, it considers termination of the Contract to be in the best interests of the Project;

77.6.2 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:

77.6.2.1 (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 Services (if applicable) and procures the performance of such part of the Services by another person; or

77.6.2.2 (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.

#### 77.7 Notice of termination

Any notice of termination under this clause 77 (*Termination for Corrupt Gifts and Fraud*) shall specify:

77.7.1 the nature of the Prohibited Act;

77.7.2 the identity of the party whom the Authority believes has committed the Prohibited Act;

77.7.3 where clause 77.6.2.2 applies, what reasonable actions the Authority requires to be taken in relation to the DNO;

77.7.4 the date on which this Contract will terminate, in accordance with the applicable provision of this clause 77 (*Termination for Corrupt Gifts and Fraud*); and

77.7.5 the Authority's chosen option under clause 80.3 (*Compensation following a Prohibited Act*).

## 78. TERMINATION FOLLOWING A FORCE MAJEURE EVENT

- 78.1 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 78.5 or 78.7), 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.
- 78.2 Nothing in clause 78.1 shall affect any entitlement to make Performance Adjustments or Availability Adjustments or any other deductions made as a result of schedule 4 (*Payment Mechanism*) in the period during which the Force Majeure Event is subsisting.
- 78.3 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.
- 78.4 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.
- 78.5 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 78.6, either Party may terminate this Contract by giving twenty (20) Business Days written notice to the other Party.

78.6 If the Contract is terminated under clause 78.5 or 78.7 compensation shall be payable by the Authority in accordance with clause 80.4 (*Compensation on Termination*) and the Authority may require the Service Provider to transfer its title, interest and rights in and to any Assets to the Authority.

78.7 If the Service Provider gives notice to the Authority under clause 78.5 that it wishes to terminate this Contract, then the Authority has the option either to accept such notice or to respond 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:

78.7.1 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 78.5 as if the Services the performance of which is affected by the Force Majeure Event ("**Affected Services**") were being fully provided without Performance Adjustments or Availability Adjustments in respect of such Affected Services, with Performance Adjustments and Availability Adjustments continuing to apply in respect of the non-provision of Services other than the Affected Services; and

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

78.8 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.

78.9 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.

**79. OTHER CONSEQUENCES OF TERMINATION OR EXPIRY**

79.1 Transfer of documents etc to the Authority

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, maintenance and/or replacement of the Project Network, Work Sites 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 or the Expiry Date (as the case may be) or material which is commercially sensitive to the Service Provider or to a Sub-contractor (and for the purposes of this clause 79.1, "commercially sensitive" shall mean information which would, if disclosed to a competitor of the Service Provider or a Sub-contractor, give that competitor a material competitive advantage over the Service Provider or a Sub-contractor and thereby materially prejudice the business of the Service Provider or a Sub-contractor provided always that at the time of providing such information to the Authority the Service Provider identified such information as being "commercially sensitive" and provided further that any information:

79.1.1 referred to in clause 70 (TUPE and Employment Matters); and

79.1.2 that the Authority (acting reasonably) has previously indicated as being essential for the purposes of maintaining the Project Network,

shall not be considered to be "commercially sensitive"). Documents, records, books, data and/or information kept or stored on computer shall be surrendered, released and/or handed-over to the Authority by whatever means and in whatever format the Authority may reasonably require.

79.2 Provision of Information

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

- 79.2.1 following the service of a Termination Notice;
- 79.2.2 following termination of this Contract when a Termination Notice is not served;
- 79.2.3 at any time during the Term immediately upon request from the Authority; and
- 79.2.4 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 Key Sub-Contractor employed in the provision of the Services and information relating to the Assets and/or Service Provider Equipment and/or Service Provider Party Equipment) and the Service Provider warrants that, to the best of its knowledge and belief, such information is accurate in all material respects.

#### 79.3 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:

- 79.3.1 vacate any of the Authority's facilities or premises where any part of the Services was or is being carried out; and
- 79.3.2 minimise any inconvenience to the Authority and any other Authority Party caused by such vacation; and
- 79.3.3 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.

#### 79.4 Assignment of Rights, etc.

On the Expiry Date (or if earlier, on the Termination Date) the Service Provider shall assign to the Authority or any person nominated by the Authority:

79.4.1 the benefit of all and any contracts or arrangements (as may be 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

79.4.2 take such action in relation to Intellectual Property Rights as is referred to in clause 84 (*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 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 79.4 (*Assignment of Rights, etc.*) as the attorney may think fit.

#### 79.5 Transfer of Assets

Without prejudice to part 1.2 of schedule 12 (*Demobilisation*) and unless or to the extent that the Authority elects 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.

#### 79.6 Co-operation by the Service Provider

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 Network, the Assets and the Services and the transition of the provision of the Services to the Authority or a Third Party nominated by the Authority.

During the final six (6) Months of the Term (where this expires by effluxion of time) or during the period of any Termination Notice of this Contract, and in either case for a reasonable period thereafter, the Service Provider shall co-operate fully with the transfer of responsibility for the Services (or any part of the Services) to the Authority or any New Service Provider of such services the same or similar to the Services, and for the purposes of this clause 79 (*Other Consequences of Termination or Expiry*) the meaning of the term "co-operate" shall include:

- 79.6.1 liaising with the Authority and/or any New Service Provider, and providing reasonable assistance and advice concerning the Services and their transfer to the Authority or to such New Service Provider;
- 79.6.2 allowing any New Service Provider access (at reasonable times and on reasonable notice) to the Project Network, Work Sites and any depots from which the Services are provided but not so as to interfere with or impede the provision of the Services;
- 79.6.3 providing to the Authority and/or to any New Service Provider all and any information concerning the Services which is reasonably required for the efficient transfer of responsibility for performance of the Services; and
- 79.6.4 transferring its rights, title and interest in and to the Assets to the New Service Provider with effect on and from the Expiry Date.

79.7 Retendering the Service on Expiry

- 79.7.1 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 wishes:
  - 79.7.1.1 to retender the provision of the Services; and/or
  - 79.7.1.2 the Service Provider to transfer all of its rights, title and interest in and to the Assets to the Authority.
- 79.7.2 If the Authority wishes to retender the provision of the Services then:
  - 79.7.2.1 the retendering shall be carried out on the basis that the Authority will contract with a Successor Service Provider to provide the new service on and from the Expiry Date;
  - 79.7.2.2 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

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

#### 79.8 Transfer of Responsibility

The Service Provider shall use all reasonable endeavours so as to facilitate the smooth transfer of responsibility for the Services to a New Service Provider or to the Authority, as the case may be, and the Service Provider shall take no action at any time during the Term or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer.

### 80. COMPENSATION ON TERMINATION

#### 80.1 Compensation Following an Authority Default or a Voluntary Termination

##### 80.1.1 If either:

80.1.1.1 the Service Provider terminates this Contract following an Authority Default pursuant to clause 76 (*Termination by the Service Provider*); or

80.1.1.2 the Authority terminates this Contract pursuant to clause 74 (*Voluntary Termination by the Authority*); or

80.1.1.3 clause 80.6 (*Relevant Discharge Terms*) applies,

the Authority shall pay the Service Provider "**the Authority Default Termination Sum**" in accordance with this clause 80.1 on the Termination Date.

80.1.2 Subject to clauses 80.1.4 to 80.1.6 below, the Authority Default Termination Sum shall be an amount equal to the aggregate of:

80.1.2.1 the Base Senior Debt Termination Amount;

80.1.2.2 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; and

80.1.2.3 the aggregate amount for which the share capital of the Service Provider and the amounts outstanding under the Subordinated Financing Agreements could have been sold on an open market basis based on the Relevant Assumptions.

80.1.3 On payment of the amount referred to in clause 80.1.2 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.

80.1.4 If the aggregate of the amounts referred to in clauses 80.1.2.1 and 80.1.2.2 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 80.1.2.2 provided always that:

80.1.4.1 the amount referred to in clause 80.1.2.2 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

80.1.4.2 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.

80.1.5 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 11.5.4 of the Direct

Agreement then in addition to the deduction of the Distribution referred to in limb (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.

80.1.6 If the Service Provider has wilfully or through gross negligence failed to comply with its obligations under clause 11.5.4 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 80.1 (*Compensation Following an Authority Default or a Voluntary Termination*), 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.

## 80.2 Compensation following a Service Provider Default

### 80.2.1 Retendering Election

80.2.1.1 Subject to clause 80.2.1.2, the Authority shall be entitled either to:

- (a) retender the provision of the Project in accordance with clause 80.2.2 (*Retendering Procedure*); or
- (b) require an expert determination in accordance with clause 80.2.3 (*No Retendering Procedure*).

80.2.1.2 The Authority shall be entitled to retender the provision of the Project in accordance with clause 80.2.2 (*Retendering Procedure*) 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 6 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 80.2.3 (*No Retendering Procedure*) shall apply.

#### 80.2.2 Retendering Procedure

80.2.2.1 If the Authority elects to retender the provision of the Project pursuant to clause 80.2.1 (*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 clauses 89 (*Confidentiality*) and 90 (*Freedom of Information*) 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 the Dispute Resolution Procedure.

- (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 that 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 the Dispute Resolution Procedure, 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 the Dispute Resolution Procedure 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 clause 80.2.2.1(l) below until the date specified in this clause 80.2.2.1(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 clause 80.2.2.1(l) below with the disputed amounts being dealt with in accordance with this clause 80.2.2.1(k).

- (l) Subject to clauses 80.2.2.1(k) and 80.2.2.1(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 80.2.2.1(k) and/or 80.2.2.1(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 clauses 80.2.2.1(o) and 80.2.2.1(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 80.2.2.1 shall not apply to that termination and the provisions of clause 80.2.3 (*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 procedure under clause 80.2.3 (*No Retendering Procedure*) by notifying the Service Provider that this election has been made.
- (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.

80.2.3 No Retendering Procedure

80.2.3.1 If either the Authority is not entitled to retender the provision of the Project under clause 80.2.1 (*Retendering Election*) or the Authority elects to require an expert determination in accordance with this clause 80.2.3 (*No Retendering Procedure*) then the following procedure shall apply:

- (a) Subject to clause 80.2.3.1(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 80.2.3 (*No Retendering Procedure*) after it has elected to follow the procedure under clause 80.2.2 (*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 80.2.2 (*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 and Capital Contributions

(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 (including the costs of achieving any unachieved Milestones) 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 80.2.3.1(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 80.2.3.1(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 80.2.3 (*No Retendering Procedure*), then the Estimated Fair Value of the Contract shall be determined in accordance with the Dispute Resolution Procedure.

- (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 80.2.3 (*No Retendering Procedure*).
- (f) The discharge by the Authority of its obligations in clause 80.2.3.1(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.

### 80.3 Compensation following a Prohibited Act

80.3.1 On termination of this Contract in accordance with clause 77 (*Termination for Corrupt Gifts and Fraud*), then the Authority shall pay the Service Provider an amount equal to the Revised Senior Debt Termination Amount.

80.3.2 Such amount shall be paid in accordance with clause 80.7.7 (*Method of Payment*).

80.3.3 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.

80.4 Compensation following a Force Majeure Event or Uninsurability

80.4.1 On termination of this Contract under clause 78 (*Termination following a Force Majeure Event*) or clause 68 (*Insurance*) the Authority shall pay to the Service Provider the "**Force Majeure Termination Sum**" in accordance with clause 80 (*Compensation on Termination*).

80.4.2 Subject to clauses 80.4.4 to 80.4.6 below the Force Majeure Termination Sum shall be the amount equal to the aggregate of:

80.4.2.1 the Base Senior Debt Termination Amount;

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

80.4.2.3 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 80.4.2.2 above); and

80.4.2.4 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.

80.4.3 If the amounts referred to in clause 80.4.2.2 and/or clause 80.4.2.3 are less than zero, then, for the purposes of the calculation in clause 80.4.2 they shall be deemed to be zero.

80.4.4 If the aggregate of the amounts referred to in clauses 80.4.2.1, 80.4.2.2 and 80.4.2.3 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 80.4.2.4 provided always that:

80.4.4.1 the amount referred to in clause 80.4.2.4 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

80.4.4.2 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.

80.4.5 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 6.2 the Direct Agreement then in addition to the deduction of the Distribution referred to in limb (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.

80.4.6 If the Service Provider has wilfully or through gross negligence failed to comply with its obligations under clause 6.2 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 80.4 (*Compensation following a Force Majeure Event or Uninsurability*), 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.

80.4.7 Such amount shall be determined and paid in accordance with clause 80.7.7 (*Method of Payment*).

80.4.8 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.

#### 80.5 Compensation on Termination for breach of the Refinancing Provisions

On termination of the Contract under clause 75.8 (*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 80.3 (*Compensation following a Prohibited Act*) in accordance with clause 80.7.7 (*Method of Payment*).

#### 80.6 Relevant Discharge Terms

80.6.1 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

80.6.2 The Authority shall pay the Authority Default Termination Sum in accordance with clause 80.7.7 (*Method of Payment*).

#### 80.7 General

##### 80.7.1 Costs

The costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this clause 80 (*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.

#### 80.7.2 Ascertainment Of Compensation

The amount of any compensation paid pursuant to this clause 80 (*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 80 (*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 the Dispute Resolution Procedure 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.

#### 80.7.3 Grossing up

If any amount of compensation payable by the Authority under clauses 80.1 (*Compensation following an Authority Default or a Voluntary Termination*), 80.3 (*Compensation following a Prohibited Act*), 80.4 (*Compensation following a Force Majeure Event or Uninsurability*), 80.5 (*Compensation on Termination for breach of Refinancing Provisions*), and 80.6 (*Relevant Discharge Terms*) 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.

#### 80.7.4 Set-off on Termination

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 clauses 80.1 (*Compensation following an Authority Default or a Voluntary Termination*), 80.3

*(Compensation following a Prohibited Act)*, 80.4 *(Compensation following a Force Majeure Event or Uninsurability)*, 80.5 *(Compensation on Termination for breach of Refinancing Provisions)*, 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.

#### 80.7.5 Outstanding Senior Debt

80.7.5.1 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.

80.7.5.2 The receipt by the Agent of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount or elements thereof as relevant shall discharge the Authority's obligations to pay such sums to the Service Provider.

#### 80.7.6 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 80.1 *(Compensation following an Authority Default or a Voluntary Termination)*, 80.3 *(Compensation following a Prohibited Act)*, 80.4 *(Compensation following a Force Majeure Event or Uninsurability)*, 80.5 *(Compensation on Termination for breach of Refinancing Provisions)* shall be the sole remedy of the Service Provider against the Authority in respect of termination of this Contract.

#### 80.7.7 Method of Payment

80.7.7.1 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 80.7.7.2 below.

80.7.7.2 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 Estimated 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 (disregarding any changes to such amounts or dates that have not been approved by

the Authority other than changes giving rise to an Additional Permitted Borrowing) 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 Agreements (disregarding any changes to amounts or dates that have not been approved by the Authority other than changes giving rise to an Additional Permitted Borrowing) had the Termination Date not occurred; or
- (c) as the Parties may otherwise agree.

80.7.7.3 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.

80.7.7.4 If the Authority has elected to pay in accordance with clause 80.7.7.2 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.

80.7.7.5 If the Authority:

(a) fails to make a payment to the Service Provider in accordance with clauses 80.7.7.1 and/or 80.7.7.2 and/or 80.7.7.3 above; or

(b) breaches clause 85.3 (*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.

## 81. DEMOBILISATION

During the twenty four (24) 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 12 (*Demobilisation*) the Parties shall comply with their respective obligations as set out in schedule 12 (*Demobilisation*).

## 82. HANDBACK PROCEDURE

### 82.1 General

Without prejudice to any other requirements of this Contract, 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) complies with the applicable Expiry Condition Requirements.

## 82.2 Compliance with the Expiry Condition A Requirements

### 82.2.1 Project Networks Parts

- 82.2.1.1 The Service Provider shall ensure that all Project Network Parts comply with the Expiry Condition A Requirements on the Expiry Date.
- 82.2.1.2 The Service Provider shall undertake and complete the Final Service Inspection 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 A Requirements in the final Contract Year.
- 82.2.1.3 If the Final Service Inspection identifies that any Project Network Parts do not comply with the Expiry Condition A Requirements the Service Provider shall:
- (a) notify the Authority, in writing, (within five (5) Business Days of completion of the Final Service Inspection) of which Performance Targets within the Expiry Condition A Requirements have not been complied with; and
  - (b) update the Service Provider Programmes in accordance with clause 23 (*Updates and Changes to Service Provider Programmes*) in order to ensure that any Project Network Parts identified pursuant to clause 82.2.1.3 shall meet the Expiry Condition A Requirements as soon as reasonably practicable and, in any event, no later than four (4) Months prior to the Expiry Date.
- 82.2.1.4 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 82.2.1.3 shall meet the Expiry Condition A Requirements.

82.2.1.5 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:

- (a) whether the Service Provider has complied with the Service Provider Programmes (as updated pursuant to clause 82.2.1.3(b));
- (b) whether all Project Network Parts comply with the Expiry Condition A Requirements; and
- (c) what works are included in the Service Provider Programmes in the forthcoming two (2) Months which are required in order to comply with Expiry Condition A Requirements.

82.2.1.6 Following the Service Provider's notification under clause 82.2.1.5 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:

- (a) whether all Project Network Parts comply with Expiry Condition A Requirements;
- (b) the works that are required in order to ensure that such Project Network Parts comply with the Expiry Condition A Requirements at the Expiry Date; and

- (c) an estimate of the cost of the works referred to above in clause 82.2.1.6(b) (in the reasonable opinion of the Independent Certifier).

82.2.1.7 Where the Independent Certifier gives a notification under clause 82.2.1.6(b) and 82.2.1.6(c) the Authority shall be entitled to retain, in addition to the retention made in accordance with clause 82.4.1, the cost provided by the Independent Certifier pursuant to clause 82.2.1.6(c) until such time as the Authority is required to reimburse the Service Provider with the balance of the Retention Fund Account pursuant to clause 82.5 (*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 82.2.1.6) prior to the Expiry Date.

82.2.1.8 If the Service Provider disputes the contents of the notice given by the Independent Certifier pursuant to clause 82.2.1.6 the matter shall be referred to the Dispute Resolution Procedure provided that until such time as the matter in dispute is agreed or determined in accordance with the Dispute Resolution Procedure, the Authority shall be entitled to proceed on the basis of the contents of the notice given by the Independent Certifier pursuant to clause 82.2.1.6 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 82.5 (*Application of the Retention Fund Account*).

## 82.2.2 Structures

82.2.2.1 The Service Provider shall ensure that all Structures comply with Expiry Condition A Requirements on the Expiry Date.

82.2.2.2 The Service Provider shall:

- (a) on or before the date on which Year 23 expires, complete all works required to be carried out to Structures, 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 the nineteenth Contract Year ("Year 19") pursuant to Performance Standard 2 so that such Structures comply with the Expiry Condition A Requirements; and
- (b) make available to the Independent Certifier the results of such inspections and assessments referred to in clause 82.2.2.2(a) above, prior to the commencement of Year 19 or as soon as possible thereafter, and the Service Provider shall take account of any reasonable representations made by the Independent Certifier in relation to the works required to be carried out when developing the Service Provider Programmes referred to at clause 82.2.2.3 below.

82.2.2.3 The Service Provider shall, on or before the date on which Year 23 expires, complete all works required to be carried out to Structures, 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 the nineteenth Contract Year ("Year 19") pursuant to Performance Standard 2 so that such Structures comply with the Expiry Condition A Requirements.

- 82.2.2.4 The Service Provider shall ensure that all works referred to in clause 82.2.2.3 are incorporated within the Service Provider Programmes for completion on or before the date on which Year 23 expires and the Service Provider shall perform the Services in accordance with the Service Provider Programmes.
- 82.2.2.5 The Service Provider shall, on or before the date on which Year 24 expires, complete all works required to be carried out to Structures 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 Performance Standard 2 so that such Structures comply with the Expiry Condition A Requirements.
- 82.2.2.6 The Service Provider shall undertake all works identified as being required to Structures as a result of General Inspections, Special Inspections and/or Structural Assessments carried out in Year 23, Year 24 and until six (6) Months prior to the Expiry Date so as to ensure that such Structures comply with Expiry Condition A Requirements.
- 82.2.2.7 The Service Provider shall complete all works required to Structures as identified by any Principal Inspections carried out by the Service Provider in Year 23 pursuant to PS2, on or before the date on which Year 24 expires to the extent that Good Industry Practice for the maintenance of Structures would require such works to be completed by the Expiry Date so that such Structures meet the Expiry Condition A Requirements.

82.2.2.8 The Service Provider shall complete all works required to Structures, as identified by any Principal Inspections carried out by the Service Provider in Year 24 pursuant to Performance Standard 2, 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 would require such works to be completed by the Expiry Date so that such Structures meet the Expiry Condition A Requirements.

82.2.2.9 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 82.2.2.3 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 82.2.2.3; and
- (c) whether all Structures comply with the Expiry Condition A Requirements and if any Structures do not comply with the Expiry Condition A Requirements, provide full details as to which Structures do not comply with which Performance Targets within the Expiry Condition A Requirements.

82.2.2.10 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 82.2.2.3 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 82.2.2.3;
- (c) whether all Structures comply with the Expiry Condition A Requirements and if any Structures do not comply with the Expiry Condition A Requirements, provide full details as to which Structures failed to comply with which Performance Targets within the Expiry Condition A Requirements; and
- (d) the cost of the works identified in 82.2.2.9 (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).

82.2.2.11 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 82.2.2.5 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 82.2.2.5;
- (c) whether all Structures comply with the Expiry Condition A Requirements and if any Structures do not comply with the Expiry Condition A Requirements, provide full details as to which Structures do not comply with which Performance Targets within the Expiry Condition A Requirements.

82.2.2.12 The Independent Certifier shall notify the Authority and the Service Provider (in writing) no more than five (5) Business Days prior to the end of Year 24 of the following:

- (a) whether the works required to in clause 82.2.2.5 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 82.2.2.5;
- (c) whether all Structures comply with the Expiry Condition A Requirements and if any Structures do not comply with the Expiry Condition A Requirements, provide full details as to which Structures do not comply with which Performance Targets within the Expiry Condition A Requirements; and
- (d) the cost of the works identified in 82.2.2.11 (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).

82.2.2.13 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 comply with the Expiry Condition A Requirements;
- (b) if any Structures 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 comply with Expiry Condition A Requirements.

82.2.2.14 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 82.2.2.10(d); or
- (b) the average of the costs identified pursuant to clause 82.2.2.12(d) if such average is higher than the amount identified pursuant to clause 82.2.2.14(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 82.5 (*Application of the Retention Fund Account*).

82.2.2.15 If the Service Provider disputes any of the contents of the notice provided by the Independent Certifier pursuant to this clause 82.2.2, the matter shall be referred to the Dispute Resolution Procedure provided that until such time as the matter in dispute is agreed or determined pursuant to the Dispute Resolution Procedure, the Authority shall be entitled to proceed on the basis of the Independent Certifier's notice provided pursuant to this clause 82.2.2 and shall be entitled to carry out any retention in accordance with clause 82.2.2.13 until such time as the Authority is required to reimburse the Service Provider with the balance from the Retention Fund Account pursuant to clause 82.5 (*Application of the Retention Fund Account*).

### 82.3 Compliance with the Expiry Condition B Requirements

82.3.1 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 Management Information System, the Depot(s) and the Isle of Wight Traffic Model comply with the Expiry Condition B Requirements.

82.3.2 If any of the inspections, surveys, tests and/or assessments carried out by the Authority or its nominee pursuant to clause 82.3.1 identify that the Management Information System, the Depot(s) and/or the Isle of Wight Traffic Model do not comply with the Expiry Condition B Requirements, 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:

82.3.2.1 which requirements in the Depot Leases and which Performance Targets within the Expiry Condition B Requirements the Service Provider has failed to comply with; and

82.3.2.2 an estimate of the cost required to ensure that the Management Information System, the Depot(s) and/or the Isle of Wight Traffic Model comply with the Expiry Condition B 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).

82.3.3 The Authority shall be entitled to retain an amount equal to the estimate provided by the Independent Certifier identified pursuant to clause 82.3.2 and the Service Provider shall be under no obligation to carry out any works in order to ensure that the Management Information System, the Depot(s) and/or the Isle of Wight Traffic Model comply with the Expiry Condition B Requirements prior to the Expiry Date unless otherwise instructed by the Authority.

82.3.4 If the Service Provider disputes the costs provided by the Authority or its nominee pursuant to clause 82.3.2, the Service Provider shall be entitled to

refer the matter to the Dispute Resolution Procedure provided that until such time as the matter in dispute is agreed or determined in accordance with the Dispute Resolution Procedure, 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 82.3.3 until such time as the Authority is required to reimburse the Service Provider with the balance from the Retention Fund Account pursuant to clause 82.5 (*Application of the Retention Fund Account*).

#### 82.4 Retention Fund Account

82.4.1 The Parties shall ensure that the Retention Fund Account is opened at least thirty six (36) Months prior to the Expiry Date and that all monies retained pursuant to this clause 82 (*Handback Procedure*) shall be paid into the Retention Fund Account.

82.4.2 The Authority shall withhold from the Service Provider ten percent (10%) of the Monthly Unitary Charge in the last twelve (12) Months 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 82 (*Handback Procedure*). The application of monies from the Retention Fund Account in accordance with this clause 82 (*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.

82.4.3 Notwithstanding any other provisions of this Contract, the Authority may retain additional amounts from the Monthly Unitary Charge to those permitted pursuant to clause 82.4.2 in accordance with the provisions of clauses 82.2.1.7, 82.2.1.8, 82.2.2.13, 82.2.2.14, 82.3.3 and 82.3.4 (as applicable).

#### 82.5 Application of the Retention Fund Account

82.5.1 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 82 (*Handback Procedure*).

82.5.2 Upon the earlier of the expiry of the fifteen (15) Month period commencing on the Expiry Date and the date upon which the following occurs:

82.5.2.1 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

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

82.5.2.3 there are no ongoing Disputes pursuant to the Dispute Resolution Procedure,

the Authority shall within twenty (20) Business Days 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.

82.5.3 Independent Certifier's Report

82.5.3.1 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 82 (*Handback Procedure*).

82.5.3.2 Subject to clause 82.5.3.3, 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.

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

## **PART Q - GENERAL PROVISIONS**

### **83. DISPUTE RESOLUTION PROCEDURE**

#### 83.1 Consultation

83.1.1 Any Dispute arising in relation to any aspect of the Contract shall be resolved in accordance with this clause 83 (*Dispute Resolution Procedure*).

83.1.2 Subject to clause 83.1.7 below, if a Dispute arises in relation to any aspect of this Contract, the Service Provider and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the Dispute in accordance with the following:

83.1.2.1 in the first instance, the Parties shall seek to resolve such Dispute at a meeting of the Highways PFI Board occurring after such Dispute has arisen;

83.1.2.2 if the Parties are unable to resolve such Dispute at the relevant meeting of the Highways PFI Board or at such other meeting as may be agreed between the Parties, either Party may by written notice refer such Dispute to the Second Management Level for resolution;

83.1.2.3 if the Parties are unable to resolve such Dispute at the Second Management Level within five (5) Business Days of the date of notice pursuant to clause 83.1.2.2, either Party may by written notice refer such Dispute to the Senior Management Level for resolution; and