

16 September 2005

THE SECRETARY OF STATE FOR TRANSPORT

and

GENESYS TELECOMMUNICATIONS LIMITED

PROJECT AGREEMENT

Herbert Smith LLP

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THIS AGREEMENT is made on 16 September 2005

BETWEEN:

- (1) **THE SECRETARY OF STATE FOR TRANSPORT** (the "**Authority**"); and
 - (2) **GENESYS TELECOMMUNICATIONS LIMITED** a company incorporated under the laws of England and Wales with company registered number 5295532 whose registered office is situated at Fluor Centre, Watchmoor Park, Riverside Way, Camberley, Surrey GU15 3YL (the "**Contractor**"),
- each one a "**Party**" and together the "**Parties**".

WHEREAS:

- (A) By a notice published in the Official Journal dated 7 August 2002 the Authority invited expressions of interest from appropriately qualified consortia for the provision of certain services in accordance with the Government's Private Finance Initiative.
- (B) The Parties have now agreed the terms on which the Contractor will provide the Services.
- (C) The Parties have agreed to enter into this Agreement and confirm that they have done or will do so under and pursuant to the Private Finance Initiative.

PART I - DEFINITIONS AND INTERPRETATION

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement (including the Recitals and Schedules), the following terms shall, unless the context otherwise requires, have the following meanings:

"A list Sub-contractors" means those Sub-contractors identified as such in Part 1 of Schedule 14 (Sub-contractors) and any replacement appointed in accordance with Clause 24;

"Acceptance Certificate" has the meaning given in Clause 26.2.2;

"Access Infrastructure" means any steps, gantry ladders and hoists, pathways and hardstandings (including hardstanding areas installed to provide access to transmission infrastructure), hand rails and guard rails and associated infrastructure installed to provide permanent access to any equipment (including equipment housings and buildings) located on the Project Road Network;

"Access Prevented State" has the meaning given in Section 16.6 of Schedule 1.1a (Transmission Service);

"Actual Service Start Date" means, in respect of the Transmission Service, the Aerial Site Service and the Consultancy Service (as the case may be), the date when the Contractor assumes all of its responsibilities under this Agreement in respect of the Transmission Service, the Aerial Site Service and the Consultancy Service (as appropriate) in accordance with Section 8 (Transition Process) and Annex F of Schedule 1.2 (Statement of Requirements: Processes);

"Actual Transfer Date" means, in respect of each RMC Area, the date on which the control of such RMC Area transfers to the Authority and/or a New Service Provider (as the case may be);

"Additional Permitted Borrowing" means on any date, the amount equal to any amount of principal outstanding under the Senior Financing Agreements in excess of the amount of

principal scheduled under the Senior Financing Agreements at Financial Close to be outstanding at that date, but only to the extent that:

- (A) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- (B) in respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under clause 11(d)(iii) of the Lenders' Direct Agreement as it applies to such Additional Permitted Borrowing and provided further that any such excess amount of principal which is invested as part of any Authority Service Variation or Contractor Service Variation shall not be counted as Additional Permitted Borrowing;

"Additional Permitted Borrowings Limit" means an amount equal to:

- (A) 10% of the Original Senior Commitment for any Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the amount outstanding under the Senior Financing Agreements is reduced to 50% or less of the Original Senior Commitment; and thereafter;
- (B) the higher of:
 - (i) 5% of the Original Senior Commitment; and
 - (ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in (A);

"Adjudicator" means the adjudicator appointed pursuant to Clause 68.2;

"Adjusted Estimated Fair Value of the Agreement" means the Estimated Fair Value of the Agreement, less an amount equal to the aggregate of:

- (A) the Tender Costs;
- (B) amounts that the Authority is entitled to set off or deduct under Clause 29.5 (Set Off); and
- (C) any amounts attributable to the prospect of any third party commercial exploitation, **plus** an amount equal to the aggregate of:
 - (i) all credit balances on any bank accounts held by or on behalf of the Contractor on the date that the Estimated Fair Value of the Agreement is calculated (other than the Retention Fund Account); and
 - (ii) any insurance proceeds and other amounts owing to the Contractor (and which the Contractor is entitled to retain), to the extent not included in (i);

to the extent that:

- (1) (i) and (ii) have not been directly taken into account in calculating the Estimated Fair Value of the Agreement; and
- (2) the Authority has received such amounts in accordance with this Agreement or such amounts are standing to the credit of the Joint Insurance Account;

"Ad Hoc Projects" means any of the projects referred to in Section 7.2.1.1 of Schedule 1.2 (Statement of Requirements: Processes) in respect of which the Authority has issued an Instruction to Proceed;

"Aerial Electronics" means all aerials, interconnecting cables, and other electronic equipment associated with the operation of an aerial which are installed by the Contractor or by its Sub-contractors or any of its or their respective sub-contractors in the provision of the Aerial Site Service;

"Aerial Infrastructure" means all equipment, other than Aerial Electronics, installed by the Contractor or by its Sub-contractors or any of its or their respective sub-contractors in the provision of the Aerial Site Service, including masts, buildings, foundations, cabins, power supplies, network data cables, ducts and framework with which aerials are fixed to a mast or structure and all other infrastructure up to and including the perimeter fencing;

"Aerial Infrastructure Removal Notice" has the meaning given in Clause 15.5.2;

"Aerial Site Service" means all or any of the services, operations and activities set out in Section 2 of Schedule 1.1b (Statement of Requirements: Other Services);

"Affected Party" has the meaning given in the definition of Force Majeure Event;

"Affiliate" means in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company and "holding company" and "subsidiary" shall have the meaning given to them in Section 736 of the Companies Act 1985;

"Agent" means The Governor and Company of the Bank of Scotland in its capacity as agent for the Senior Lenders under the Senior Financing Agreements;

"Agreement" or **"Project Agreement"** means this agreement and the Schedules;

"Agreement for Leased Assets" means any lease, hire purchase agreement, hire agreement, conditional sale agreement, novation agreement, or other arrangements pursuant to which the Contractor has the use of the Leased Assets including the Existing Leases;

"Ancillary Documents" means the documents which are listed under that heading in Schedule 3 (List of Initial Financing Agreements, Ancillary Documents and Project Documents) and any amendments to or replacements of such documents or any new documents of similar nature entered into after the Execution Date;

"Annual Leased Assets Report" means each report delivered by the Contractor to the Authority pursuant to Clause 61.9.2 (Leased Assets);

"Anticipated Arrangements" has the meaning given in Clause 60.1.3;

"Annual Seminar" has the meaning given in Clause 25.1.4;

"APB Distribution" means for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period;

"Appointed Representative" has the meaning given in the Lenders' Direct Agreement;

"Approved Sub-contractor List" means the list of potential sub-contractors set out in Part 2 of Schedule 14 (Sub-contractors) which is varied from time to time in accordance with Clause 24.8;

"Asbestos Event" has the meaning given in Clause 45.5.8(A);

"Asbestos Event Loss" means any loss, damage, cost or expense (including legal expenses on an indemnity basis) suffered by the Contractor or any Contractor Party in respect of death or personal injury (i) caused by an Asbestos Event or (ii) suffered at any time by a Transferring Employee in the course of such Transferring Employee's employment with an Existing Service Provider;

"Asbestos Removal Costs" has the meaning given in Clause 45.5.6(E)

"Asbestos Removal Works" has the meaning given in Clause 45.5.6(A);

"Asbestos Surveyor" has the meaning given in Clause 45.5.5;

"Assets" means:

- (A) the Legacy Assets;
- (B) the New Assets;
- (C) the Contractor Owned Assets; and
- (D) the Leased Assets;

"Associated Company" means in respect of a relevant company, a company which is a subsidiary, a Holding Company or a company that is a subsidiary of the ultimate Holding Company of that relevant company, and in the case of the Contractor shall include HoldCo and each of the Shareholders;

"Authority Amount" means:

- (A) where the delay and disruption costs are less than or equal to £25,000, such delay and disruption costs;
- (B) where the delay and disruption costs are more than £25,000 but less than or equal to £50,000, £25,000 plus half of the amount by which such delay and disruption costs exceed £25,000; and
- (C) where the delay and disruption costs exceed £50,000, £37,500,

in each case per event;

"Authority Call Off Works" means, in respect of any Call Off, those works for which the Authority is responsible for installation as described in Annex A (Table of Responsibilities) to Schedule 1.3 (Statement of Requirements: General Constraints) and which relate to such Call Off;

"Authority Contract Manager" means the Authority's contract manager appointed by the Authority from time to time pursuant to Clause 25.2 (Management Structure);

"Authority Data" means any data (in whatever format) supplied to the Contractor by the Authority, its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors in connection with the Project and any information processed, stored or transmitted onto the Project Systems by the Authority including Authority Personal Data;

"Authority Default" means any of the events of default set out in Clause 50.1 (Authority Default);

"Authority Default Assets" means all assets and rights to enable the Authority or a New Service Provider to own, operate and maintain the Project in accordance with this Agreement, including:

- (A) the Assets and assets subject to the Existing Leases;
- (B) any land or buildings;
- (C) any equipment;
- (D) any books and records (including operating and maintenance manuals, health and safety manuals and other know how);
- (E) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);
- (F) any revenues and any other contractual rights; and

(G) any Intellectual Property Rights,

but excluding any assets and rights in respect of which the Authority is full legal and beneficial owner other than the Legacy Assets and the New Assets;

"Authority Default Termination Sum" has the meaning given in Clause 55.1;

"Authority Event" has the meaning given to it in Part 1 of Schedule 8 (Authority Events);

"Authority Guidelines and Procedures" means the Manual for Contract Documents for Highways Works, the Design Manual for Roads and Bridges, the Trunk Road Maintenance Manual and specific interim advice, each as existing at the Execution Date and being something with which the Contractor must comply and as varied, amended or replaced from time to time pursuant to and in accordance with Clause 35 (Minor Variations), Clause 36 (Authority Service Variations) or Clause 37 (Contractor Service Variations);

"Authority Interim Advice Note on Asbestos Management" or the "IAN" means the interim advice note dated April 2005;

"Authority Material" means the Authority Data, the material identified as Authority Material in the IPR Register and any information, data, know how, text, drawings, diagrams, hardware designs, processes, databases, software, documents, inventions, developments, improvements or other similar material:

(A) provided by the Authority to the Contractor; or

(B) which arises from the Authority's use or operation or the Authority's Contractors' use or operation (on behalf of the Authority) of the Transmission Network or the Aerial Electronics,

and which relate to the activities of the Authority solely to the extent that such material is required by the Contractor for the purposes of fulfilling its obligations under this Agreement but excluding the Contractor Material, the Project Material, any Consultancy Material, the Project Data, the Third Party Material and the Project Systems;

"Authority Notice of Service Variation" has the meaning given in Clause 36.3 (Authority Notice of Service Variation);

"Authority Parties" means the Authority's officers, employees, agents, contractors and sub-contractors of any tier (other than the Contractor and its sub-contractors) and their directors, officers and employees;

"Authority Personal Data" means any information provided by the Authority, its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors to the Contractor or a Contractor Party that can be used to identify a living individual or could do so when combined with any other information held by or on behalf of the Authority, its directors, officers, representatives, agents, employees, servants, consultants, contractors and sub-contractors;

"Authority's Contractors" means any contractor appointed by the Authority other than the Contractor, the Sub-contractors and any of its or their respective sub-contractors;

"Authority's Invoice" has the meaning given in Clause 29.1.3;

"Authority's Normal Business" means the normal business operations of the Highways Agency in England as conferred on it by statute as at the Execution Date provided that such normal business operations are outside the scope of the Project and this Agreement and which excludes any commercial exploitation of any of the Intellectual Property Rights in the Contractor Material, the Project Material, any Consultancy Material and the Third Party Material;

"Authority Service Variation" means:

- (A) any change to the Contractor's obligations under this Agreement and/or the Statement of Requirements;
- (B) the definition of a new Service Type;
- (C) an increase in capacity of the Base Network beyond that defined by the Capacity Model;
- (D) any change to the Service Level Targets;
- (E) any change to the health and safety management systems referred to in Clause 20.1 (Health and Safety Manuals);
- (F) any change to the Authority Guidelines and Procedures; and/or
- (G) any change to any other guidance or procedure with which the Authority requires the Contractor to comply including the IAN

in each case which is proposed by the Authority pursuant to Clause 36.1 other than:

- (H) save as provided in (B) or (C) above and subject to Paragraph 2.5A of Part 4 of Schedule 30 (Payment Mechanism), the addition of land, roads or buildings to the Project Road Network to the extent that such additional land, roads or buildings are within England;
- (I) any change that the Contractor is required to implement in accordance with the Statement of Requirements;
- (J) any Minor Variation;
- (K) save as provided in (C) above, any Call Off or Ad Hoc Project;
- (L) any Value Engineering Change or Technology Price Review; and
- (M) any change to a Registered Document, other than where changes to a Registered Document are the result of any change or addition which is referred to in paragraphs (A) to (G) above,

but including any Authority Service Variation deemed to be requested pursuant to Clause 38 (Changes in Law) or any Authority Service Variation requested pursuant to Clause 35.9.6;

"Authority Service Variation Objection Notice" has the meaning given in Clause 36.4 (Authority Service Variation Objection Notice);

"Authority Service Variation Order" has the meaning given in Clause 36.11.3(A) or Clause 36.12.3 or Clause 36.12.10(A), as appropriate;

"Authority Works" means:

- (A) the PCO to RCC migration programme to a standard consistent with Good Industry Practice;
- (B) the M4 cabling works to the standard defined in the Design Manual for Roads and Bridges and specified for Highway Works; and
- (C) any works which are required to ensure that the Authority is not in breach of Clause 11.1.3;

"Base Case" means the financial model an extract of which is annexed to the Certificate of Commencement prepared by the Contractor and to be kept in safe custody pursuant to the Custody Agreement setting out the basis on which the financing of the Project and/or the costs of and revenue from the Project have been calculated by the Contractor (including the

assumptions used, the cell logic network for the financial model software and any accompanying documentation necessary to operate the financial model) as at the Effective Date;

"Base Network" has the meaning given in paragraph 17.2.3 of Schedule 1.1a (Statement of Requirements: Transmission Service);

"Base Network Upgrade" means the upgrade of the Base Network necessary to achieve the Build Completion Date;

"Base Price" has the meaning given in Clause 47.21.1;

"Base Senior Debt Termination Amount" means:

- (A) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the Contractor to the Senior Lenders under the Senior Financing Agreements and in respect of Permitted Borrowing; and
- (B) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Contractor to the Senior Lenders as a result of a prepayment under the Senior Financing Agreements and in respect of Permitted Borrowings subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible;

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below):

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account and the Retention Fund Account) held by or on behalf of the Contractor on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding under the Senior Financing Agreements and in respect of Permitted Borrowings;
- (iv) any Additional Permitted Borrowing and any interest and Default Interest on such Additional Permitted Borrowing; and
- (v) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have;

"Base Service Charge" means the amount referred to in Paragraph 2.2 of Part 4 of Schedule 30 (Payment Mechanism);

"Base Service Charge Date" means the latest of the second anniversary of the Effective Date, the Actual Service Start Date for the Transmission Service, the Actual Service Start Date for the Aerial Site Service, the Actual Service Start Date for the Consultancy Service, the Transmission Full Service Start Date and the Build Completion Date;

"BSC And MSC Monthly Charges" has the meaning given in Clause 26.1.2;

"BSC And MSC Monthly Contractor Report" means the report provided by the Contractor pursuant to Clause 26.1.2(A);

"BSC And MSC Monthly Invoice" has the meaning given in Clause 29.1.2;

"Build Completion Date" shall have the meaning given in Section F.15.1.1 of Schedule 1.2 (Statement of Requirements: Processes);

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for domestic business in the city of London;

"Call Off" means each of the items in respect of which a Standard Price is set out in Annex B of Schedule 30 (Payment Mechanism);

"Call Offs And Other Services Charge" has the meaning given in Clause 26.1.1(A)(1);

"Call Offs And Other Services Monthly Contractor Report" means the report provided by the Contractor pursuant to Clause 26.1.1 (A);

"Call Off Charge Monthly Invoice" has the meaning given in Clause 29.1.1;

"Camera Mast Service" means all or any of those services, operations and activities set out in section 4 of Schedule 1.1b (Statement of Requirements: Other Services);

"Camera Site Instance" means a distinct occurrence of a minimum unit of the Camera Mast Service;

"Capital Expenditure" means any expenditure which falls to be treated as capital expenditure in accordance with GAAP;

"CAWR" has the meaning given in Clause 45.5.1;

"CDM Regulations" means the Construction (Design and Management) Regulations 1994;

"Certificate of Commencement" has the meaning given in Clause 2.2.1;

"Change in Law" means the coming into effect after the Execution Date of:

- (A) any Legislation, other than any Legislation which as at the Execution Date has been published:
 - (i) in a draft Bill as part of a Government Departmental Consultation Paper;
 - (ii) in a Bill;
 - (iii) in a draft statutory instrument; or
 - (iv) as a proposal in the Official Journal of the European Communities;
- (B) any applicable notification, direction, decision, ruling, or any binding guidance issued by the Office of Communications under its functions under Section 1 of the Communications Act 2003 with which the Contractor is bound to comply; or
- (C) any applicable judgment of a relevant court of law, which changes a binding precedent;

"Change in Law Notice" has the meaning given in Clause 38.1 (Change in Law Notice in respect of a Qualifying Change in Law);

"Claim" means any claim, demand or proceeding;

"Clauses 11.22 and 16A Amount" means £7 million;

"Clause 45 Claim or Loss" has the meaning given in Clause 45.1.2(B);

"Clause 11.22 Threshold" means £50,000;

"Clause 11.22 Threshold Claim" has the meaning given in Clause 11.22.2 (E)(1);

"Client" has the meaning given in Clause 21.1;

"CM Project Escrow Agreement" has the meaning given in Clause 41.2.1;

"Code" has the meaning given in Clause 16.1.1;

"Code Activities" has the meaning given in Clause 16.1.2;

"Code of Practice" has the meaning given in Clause 20.2.3;

"Commercial Contract Breakage Costs" means all amounts due and payable by the Contractor by reason of the early termination of any Commercial Contract arising as a result of the termination of this Agreement subject to the Contractor mitigating all such costs to the extent reasonably practicable;

"Commercial Contracts" means those contracts entered into by the Contractor for the provision of services to Third Parties using the Transmission Network or Aerial Infrastructure;

"Commercial Revenue" means the revenue received by the Contractor from contracts for the provision of services to third parties using the Transmission Network or the Aerial Infrastructure;

"Commercial Revenue Adjustment" shall have the meaning given in Paragraph 2 of Part 2 of Schedule 30 (Payment Mechanism);

"Commercially Available" means, in relation to any materials (including software), such materials being readily available for purchase or to be licensed on reasonable commercial terms;

"Compensation Date" means the date that the Adjusted Estimated Fair Value of the Contract has been agreed or determined;

"Compensation Event" means breach by the Authority of any of its obligations under this Agreement;

"Competent Authority" means any regulatory, administrative, judicial or quasi judicial authority empowered to enforce Environmental Law;

"Conditions Precedent" means the conditions precedent contained in Schedule 24 (Conditions Precedent);

"Consequential Change" has the meaning given in Clauses 35.5.5 and 36.8.10;

"Consultancy Material" means any software, documents, information, know how, data, text, drawings, diagrams, processes, databases, inventions, developments, improvements or other materials specifically developed by or on behalf of the Contractor (including by a Sub-contractor, Shareholder or an Affiliate of any of the same or an Independent Party) in the course of the provision of any Consultancy Services but excluding the Contractor Material, the Authority Material, the Project Data, Third Party Material and the Project Systems;

"Consultancy Service" means all or any of those services, operations and activities set out in Section 3 of Schedule 1.1b (Statement of Requirements: Other Services);

"Contingent Funding Liabilities" means those liabilities of the Shareholders to the Contractor or the Senior Lenders pursuant to the Subordinated Financing Agreements;

"Contract Manager" means either the Authority Contract Manager or the Contractor Contract Manager (as applicable);

"Contract Month" means a calendar month with the exception of the first Contract Month which shall commence on the Effective Date and end on the last day of the calendar month in which the Effective Date arises and the last Contract Month which shall commence on

the first day of the month in which the Expiry Date or Termination Date (whichever is the earlier) arises and end on the Expiry Date or Termination Date (whichever is the earlier);

"Contract Review Board" means the board of four members from each Party appointed pursuant to Clause 25.2 (Management Structure);

"Contract Term" means the period from the Effective Date until the earlier of the Expiry Date and the Termination Date;

"Contract Year" means a period of 12 Contract Months starting on 1st April, with the exception of the first Contract Year which shall commence on the Effective Date and end on 31st March first occurring thereafter and the last Contract Year, which shall commence on 1st April immediately prior to the Expiry Date or Termination Date (whichever is the earlier) and end on the Expiry Date or Termination Date (whichever is the earlier);

"Contractor Contract Manager" means the contract manager for the Principal Sub-contract appointed by the Principal Sub-contractor from time to time pursuant to clause 25.2 of the Principal Sub-contract;

"Contractor Default" means any of the events of default set out in Clause 51.1 (Contractor Default);

"Contractor Employees" means those employees employed by the Contractor or any Sub-contractor (or its or their respective sub-contractors) or agent of the same, to perform the Services;

"Contractor Subordinated Secured Loan Note Instrument" means the subordinated secured loan note instrument dated on or about the date of this Agreement constituting subordinated secured loan notes issued by the Contractor;

"Contractor Material" means any software, documents, information, know how, data, text, drawings, diagrams, processes, databases, inventions, developments, improvements or other materials together with any enhancements, upgrades, developments, improvements and modifications to the same in which the Intellectual Property Rights: (i) are developed by or on behalf of the Contractor (including a Sub-contractor, Shareholder or Affiliate of the same) and owned by the Contractor (including by any of its Sub-contractors, Shareholders or Affiliates) whether prior to or after the Execution Date; (ii) have not been specifically developed for the purposes of the Project or the performance of the Contractor's obligations under this Agreement; and (iii) are used after the Effective Date by or on behalf of the Contractor (including by a Sub-contractor, Shareholder or Affiliate of the same) to perform the Contractor's obligations or to exercise the Contractor's rights in connection with this Agreement or the Project (but excluding any Consultancy Material, the Project Systems, the Project Data, the Third Party Material, the Authority Material and the Project Material);

"Contractor Notice of Change" has the meaning given in Clause 37.1 (Scope of Contractor Service Variation);

"Contractor Owned Asset" means any asset owned by the Contractor and used in the provision of the Services or the fulfilment of its obligations under the Commercial Contracts, including, but not limited to, the Project Material and excluding Aerial Electronics;

"Contractor Parties" means the Contractor's officers, employees, agents, contractors and sub-contractors of any tier and their directors, officers and employees;

"Contractor Personal Data" means any information provided by the Contractor, its directors, officers, representatives, agents, employees, servants, consultants, or Sub-

contractors (or any of its or their respective sub-contractors) to the Authority that can be used to identify a living individual or could do so when combined with any other information held by or on behalf of the Contractor;

"Contractor Service Variation" means any change to the Contractor's obligations under this Agreement, the Statement of Requirements and/or the Service Level Targets proposed by the Contractor pursuant to Clause 37 (Contractor Service Variation), excluding any change that the Contractor is required to implement in accordance with the Statement of Requirements, any change to the Registered Documents (other than where changes to a Registered Document are the result of a Contractor Service Variation) and, for the avoidance of doubt, any Minor Variation made pursuant to Clause 35 (Minor Variations) but including any Contractor Service Variation requested pursuant to Clause 35.9.6;

"Contractor's Share" means the percentage figure corresponding to the amount of Cumulative Capital Expenditure at the relevant time, as shown in the first column of the table set out below:

Cumulative Capital Expenditure (£ million)	Contractor's Share (%)
0-5 (inclusive)	100
5-8 (inclusive)	80
(8-10 (inclusive)	60
10-12 (inclusive)	40
12-14 (inclusive)	20
14-16 (inclusive)	10
16 and above	0

"Cost Databook" means the Microsoft Excel file "Revise and Confirm Cost Databook.xls", an extract of which as at the Execution Date is set out in Part 1 of Schedule 17 (Cost Model), prepared by the Contractor and to be kept in safe custody pursuant to the Custody Agreement, as updated from time to time with the approval of the Authority in accordance with Clause 8 (Custody of the Financial Model and Cost Model);

"Cost Matrix" means the Microsoft Excel file "Cost Matrix.xls" cost matrix, an extract of which as at the Execution Date is set out in Part 2 of Schedule 17 (Cost Model), prepared by the Contractor and to be kept in safe custody pursuant to the Custody Agreement, as updated from time to time with the approval of the Authority in accordance with Clause 8 (Custody of the Financial Model and Cost Model);

"Cost Model" means the Cost Databook and the Cost Matrix;

"CRP Process" means the Capture Requirements and Plan Process referred to in Section 5.13 of Schedule 1.2 (Statement of Requirements: Processes);

"Cumulative Capital Expenditure" means the aggregate of:

- (A) all Capital Expenditure that has been incurred as a result of each General Change in Law that has come into effect during the Service Period; and
- (B) the amount of Capital Expenditure that is agreed, or determined to be required, as a result of a General Change in Law under Clause 38.1 (Qualifying Change in Law);

"Custodian" means the Third Party responsible for the time being for the custody of the Financial Model under the Custody Agreement;

"Custody Agreement" means an agreement between the Parties, The Governor and Company of the Bank of Scotland and NCC Escrow International Limited in relation to the

custody of the Financial Model and Cost Model, the form of which is set out in Schedule 5 (Form of Custody Agreement);

"Data Protection Laws" means the Data Protection Act 1998, together with any orders, regulations or subordinate legislation made pursuant thereto, the Privacy and Electronic Communications (EC Directive) Regulations 2003, and all and any other law and regulation in any jurisdiction regarding data protection or privacy relevant to the Contractor's activities pursuant to this Agreement;

"Deemed Minor Variation" shall have the meaning given in Clause 35.1.2;

"Deemed New Agreement" means an agreement on the same terms and conditions as this Agreement, as at the Termination Date, but with the following amendments:

- (A) if this Agreement is terminated prior to a Relevant Assumption Date, then the Relevant Assumption Date shall be extended by a period to allow a New Contractor to achieve commencement of the Relevant Service;
- (B) any accrued Service Credits shall be cancelled;
- (C) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date; and
- (D) the New Contractor (had one been appointed) is granted the right to use the Legacy Assets and the New Assets as at the Termination Date and the Handback Contractor Owned Assets and Handback Leased Assets;

"Default Interest" means any increased margin that is payable to the Senior Lenders or which accrues as a result of any payment due to the Senior Lenders not being made on the date on which it is due;

"Designer" has the meaning given in Clause 21.1;

"Disclosed Data" has the meaning given in Clause 43.2.1;

"Discriminatory Change in Law" means a Change in Law the terms of which apply expressly to:

- (A) the Project and not to similar projects procured under the PFI;
- (B) the Contractor and not to other persons; and/or
- (C) PFI contractors and not to other persons;

"Dispute" has the meaning given in Clause 68.1.1;

"Dispute Resolution Procedure" means the dispute resolution procedure set out in Clause 68 (Dispute Resolution Procedure);

"Distribution" means:

- (A) whether in cash or in kind, any:
 - (i) dividend or other distribution in respect of share capital;
 - (ii) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
 - (iii) payments under the Subordinated Financing Agreements (whether of principal, interest, breakage costs or otherwise);
 - (iv) payments, loans, contractual arrangements or transfers of assets or rights to the extent (in each case) they were put in place after Financial Close and were neither in the ordinary course of business nor on reasonable commercial terms;

- (v) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms; or
- (B) the early release of any Contingent Funding Liabilities, the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;

"Document Management System" means the database system set up and operated by the Contractor listing any documents, computer records, specifications, formulae, evaluations, methods, processes, technical descriptions, reports, data, records, drawings, financial and other plans and estimates (the "Documents") used by the Parties in connection with the Project, such database system to maintain a master copy of each Document and identify the current version of each Document in force for a particular geographical region, the issuing authority for each Document and the history of each Document;

"Document Related Project Material" means any Registered Documents and any other documents, designs, specifications, information, know how, data, text, drawings, diagrams, databases, developments and improvements or other materials specifically developed by or on behalf of the Contractor (including by a Sub-contractor, Shareholder or Affiliate of the same) in the course of the Contractor performing its obligations or exercising its rights in connection with this Agreement or the Project which does not form part of Software Related Project Material and excluding any Consultancy Material, the Contractor Material, the Project Data, the Third Party Material, the Authority Material and the Project Systems;

"DPA" means the Data Protection Act 1998;

"Effective Date" shall have the meaning given to it in Clause 2.2.1;

"EEA" means from time to time the European Economic Area as created by The Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area;

"Emergency" means any unplanned event or circumstance where any road is closed (in whole or in part) pursuant to statutory powers afforded to the emergency services or to the Authority;

"Encumbrance" means any rights of whatever nature in respect of land, or any mortgage, charge, pledge, lien, assignment, option, right to acquire, right of pre-emption, security interest, trust arrangement and any other equity or preferential right or any agreement or arrangement to create any of them;

"Environment" means all and any of the media of air, land and water (including inland waters) and living organisms (including human beings) and systems supported by those media and, in relation to the media of air and water includes the air and water within natural or man-made structures above or below ground and includes all natural resources and the built environment;

"Environmental Condition" means the presence or effect of any and all Hazardous Substances in the Environment and any migration of any Hazardous Substances;

"Environmental Law" means all and any Laws, regulations, directives, statutes, subordinate legislation, common law, and other national and local laws, all judgements, orders, instructions or awards of any court or competent authority and (to the extent that they are legally enforceable) all codes of practice, industry agreements and guidance notes, which relate to the pollution of the Environment, the protection of the Environment and/or human health, the protection of natural amenity, the creation of noise or vibration, radiation, common law or statutory nuisance or the production, disposal, release, spillage, deposit or

escape, discharge, leak, emission, recovery, transport, handling or storage of or radiation from any Hazardous Substance or waste and which are in force from time to time;

"Environmental Loss" means all and any costs, expenses (including all legal and other professional fees and expenses and costs and expenses incurred in the carrying out of any investigatory, monitoring or remedial works), damages, liabilities (including third party liability), fines, penalties (to the extent permitted by Law) or Claims or Losses incurred or suffered under Environmental Law;

"Equity IRR" means the projected blended rate of return to the Relevant Persons over the full term of this Agreement, having regard to Distributions made and projected to be made;

"Equity Subscription Agreement" means the equity subscription agreement made on or about the date of this Agreement between HoldCo, the Contractor, HSBC, Fluor International Limited and Fluor Corporation;

"Escrow Agent" means NCC Escrow International Limited;

"Estimated Change in Project Costs" means the aggregate of any estimated increased Capital Expenditure, Operating Costs and financing costs less the aggregate of any estimated reduced Capital Expenditure, Operating Costs and financing costs (which may have a positive or a negative amount) other than any such costs or losses arising in respect of the Commercial Contracts;

"Estimated Fair Value of the Agreement" means the amount determined in accordance with Clause 56.2 (No Retendering Procedure) that a Third Party would pay to the Authority as the market value of the Deemed New Agreement;

"Excluded Ducts" means cross carriageway ducts and ducts which pass through structures;

"Execution Date" means the date of this Agreement;

"Executive" has the meaning given in Clause 21.1;

"Exempt Refinancing" means:

- (A) any Refinancing that was fully taken into account in the calculation of the Service Charge;
- (B) a change in taxation or change in accounting treatment;
- (C) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
 - (i) breach of representations and warranties or undertakings;
 - (ii) movement of monies between the Project Accounts in accordance with the terms of the Senior Financing Agreements as at Financial Close;
 - (iii) late or non provision of information, consents or licences;
 - (iv) amendments to Sub-contracts;
 - (v) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Financing Agreements);
 - (vi) restrictions imposed by the Senior Lenders on the dates at which the Senior Debt can be advanced to the Contractor under the Senior Financing Agreements and/or amounts released from the Proceeds Account during the Transition Period, each as defined in the Senior Financing Agreements and which are given as a result of any failure by the Contractor to ensure

that the construction work is performed in accordance with the agreed construction programme and which are notified in writing by the Contractor or the Senior Lenders to the Authority prior to being given;

- (vii) changes to milestones for drawdown and/or amounts released from the Proceeds Account during the Transition Period set out in the Senior Financing Agreements and which are given as a result of any failure by the Contractor to ensure that construction work is performed in accordance with the agreed construction programme and which are notified in writing by the Contractor or the Senior Lenders to the Authority prior to being given;
- (viii) failure by the Contractor to obtain any consent by statutory bodies required by the Senior Financing Agreements; or
- (ix) voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Financing Agreements;
- (D) any amendment, variation or supplement of any agreement (other than any Subordinated Financing Agreement) approved by the Authority as part of any Qualifying Variation under this Agreement;
- (E) any sale of shares in the Contractor by the Shareholders or securitisation of the existing rights and/or interests attaching to shares in the Contractor;
- (F) any sale or transfer of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements or securitisation of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements; or
- (G) any Qualifying Bank Transaction;

"Exempt Vehicles" means any vehicles used by the Contractor or any Contractor Party either on a one off basis or for the upgrade of the Base Network necessary to achieve the capabilities defined by the Link Table;

"Existing Contamination or Pollution Claims" means any legal requirement, direction, notice, order or obligation served or imposed by any Competent Authority or court of competent jurisdiction under Environmental Law and arising as a result of Existing Contamination or Pollution;

"Existing Contamination or Pollution" means all and any Hazardous Substances which were present at in or under the Project Road Network and/or any land or premises owned or occupied by the Authority or in the immediate vicinity of the Legacy Assets in each case prior to the Relevant Assumption Date in respect of any Relevant Service;

"Existing Leases" means the leases used for the provision of the Services, or services similar to the Services, prior to the Interim Service Start Date;

"Existing Service Providers" means Marconi Communications Ltd and Marconi Services Ltd;

"Exit Survey" has the meaning given in Clause 62.1.1;

"Expiry Date" means the last day of the Initial Service Period unless the Authority exercises its option pursuant to Clause 3.2 in which case it shall be the last day of the Secondary Service Period;

"Facility Agreement" means the NRTS Facility Agreement made on or about the Execution Date between the Contractor, HoldCo and various lenders;

"Failure or Shortage of Power" means the failure or shortage of power not including any failure or shortage of an electricity supply in respect of which the Contractor is required to be resilient in accordance with Section 15.15 of Schedule 1.1a (Statement of Requirements: Transmission Service);

"Final Leased Assets Report" means the report delivered by the Contractor to the Authority pursuant to Clause 61.10 (Final Leased Assets Report);

"Financial Close" means the Effective Date;

"Financial Model" means, the financial model, an extract of which is or is to be annexed to the Certificate of Commencement, prepared by the Contractor and to be kept in safe custody pursuant to the Custody Agreement setting out the basis on which the financing of the Project and/or the costs of and revenue from the Project have been calculated by the Contractor (including the assumptions used, the cell logic network for the financial model software and any accompanying documentation necessary to operate the financial model) as updated from time to time with the approval of the Authority in accordance with Clause 8 (Custody of Financial Model and Cost Model) and Schedule 25 (Financial Model Adjustment Mechanism);

"Financial Model Adjustment Mechanism" means the principles and procedures for adjusting the Financial Model following a Qualifying Event as set out in Schedule 25 (Financial Model Adjustment Mechanism);

"Financing Agreements" means all or any of the agreements or instruments entered into or to be entered into by the Contractor or any of its Associated Companies relating to the financing of the Project (including the Initial Financing Agreements, Senior Financing Agreements, Subordinated Financing Agreements and any agreements or instruments to be entered into by the Contractor or any of its Associated Companies relating to the rescheduling of their indebtedness or any Refinancing);

"First Party" has the meaning given in Clause 66.4;

"Force Majeure Event" means the occurrence after the Execution Date of:

- (A) war, civil war, armed conflict or terrorism;
- (B) nuclear, chemical or biological contamination unless the source or cause of the contamination is the result of actions of the Contractor; or
- (C) pressure waves caused by devices travelling at supersonic speeds,

which directly causes either Party (the "Affected Party") to be unable to comply with all or a material part of its obligations under this Agreement;

"Force Majeure Termination Sum" has the meaning given in Clause 57.1.1;

"Funding Notification" has the meaning given in Clause 36.12.4;

"Funding Request" has the meaning given in Clause 36.12.1(A);

"Future Rental Payments" has the meaning given in Clause 61.10.1 (D);

"GAAP" means the generally accepted accounting principles in the United Kingdom from time to time or any successor international accounting standards as may be agreed;

"General Change in Law" means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law;

"Gilt A" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model at Financial Close;

"Gilt B" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model as on the Termination Date;

"Good Industry Practice" means the exercise of that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced contractor or operator (as the case may be) seeking in good faith to comply with its contractual obligations, complying with all applicable Law (having regard to all applicable codes of practice to which such a person would reasonably and ordinarily be expected to have regard) and engaged in the same type of undertaking and with the same or similar circumstances and conditions;

"HA" or **"Highways Agency"** means the Authority;

"HA Premises" has the meaning given to it in Clause 16.6;

"Handback Contractor Owned Assets" means all such Contractor Owned Assets with all related rights and interests which, taken together with the Legacy Assets and New Assets, and subject to the need for routine maintenance, will provide the Authority and/or the New Service Provider (as the case may be) with the capability referred to in Clause 61.1.1 but does not include those Contractor Owned Assets that are readily available in the open market and have not been materially modified or adapted to meet the specific needs of the Project;

"Handback Employees" means those Contractor Employees who are Contractor Employees immediately prior to the Relevant Transfer Date who are engaged wholly or mainly to perform the Services (or relevant part thereof, as the case may be);

"Handback Leased Assets" means:

- (A) all such Leased Assets as referred to in Clause 11.20.1 with all related rights and interests which, taken together with the Legacy Assets and New Assets, and subject to the need for routine maintenance, will provide the Authority and/or the New Service Provider (as the case may be) with the capability referred to in Clause 61.1.2 and which are, immediately prior to handback, intrinsic and/or essential to the provision of the Services; and
- (B) the Third Party Material the licences to which are to be transferred to the Authority pursuant to Clause 61.1.2(B) and all Commercially Available software which is licensed to the Authority subject to Clause 61.2 (Commercially Available Software);

"Handback Period" means the period commencing six months prior to the Expiry Date and terminating on the Expiry Date or, in the event of the early termination of this Agreement, the period commencing on the date of the termination notice and terminating on the Termination Date;

"Handback Plan" means the plan in the form set out in Registered Document PS-DS034 detailing the procedures and requirements to be followed by the Contractor during the Handback Period to effect a gradual handback of the Services and to permit the use of the Handback Contractor Owned Assets and the Handback Leased Assets in order to comply with the Contractor's obligations in Clause 61 (Handback of a Working System), as amended or updated in accordance with this Agreement;

"Hazardous Substance" means all and any substances (whether in solid, liquid or gaseous form) or organisms which alone or in combination with others is capable of causing harm or damage to human health, animals or plants or damage to property or harm to or pollution of the Environment and includes without limitation any waste;

"Head Licence" has the meaning given in Clause 39.11.1

"Health and Safety File" has the meaning given in Clause 21.1;

"Health and Safety Laws" means any Acts of Parliament, statutory instruments, codes of practice and statutory guidance pertaining to health and safety issues;

"Health and Safety Plan" has the meaning given in Clause 21.1;

"HoldCo" means the Contractor's Holding Company with registered number 5296748;

"HoldCo Subordinated Secured Loan Note Instrument" means the subordinated secured loan note instrument dated on or about the date of this Agreement constituting subordinated secured loan notes issued by HoldCo;

"Holding Company" has the meaning given to it in Section 736 of the Companies Act 1985, as amended by Section 144 of the Companies Act 1989;

"HSBC" means the Third Party Shareholder;

"i" is the agreed assumed forecast rate of increase in the Inflation Index which, for the avoidance of doubt, is equal to the Bank of England's prevailing long term inflation target;

"Implementation Notice" has the meaning given in Clause 47.5.4;

"Indemnified Party" has the meaning given in Clause 29.6;

"Indemnifying Party" has the meaning given in Clause 29.6;

"Independent Party" means any person other than the Parties, the Sub-contractors, Shareholders or Affiliates;

"Independent Surveyors" has the meaning given in Clause 62.1.2;

"Independent Tester" has the meaning given in Clause 11.7.3;

"Index" means the all items retail price index (excluding mortgage interest payments) published by the office for National Statistics from time to time or, failing such publication, such other index as may replace or supersede the same or, in the absence of a replacement or superseding index, such other index as the Parties may agree;

"Initial Financing Agreements" means the Financing Agreements put in place upon signature of this Agreement as listed under that heading in Schedule 3 (List of Initial Financing Agreements, Ancillary Documents and Project Documents);

"Initial Insurance Change Notice" has the meaning given in Clause 47.5.1;

"Initial Seminar" has the meaning given in Clause 25.1.1;

"Initial Service Period" means the period starting on the Effective Date and ending ten years and 6 months after such date;

"Insurance Costs Review Date" means the date 3 months prior to the second anniversary of the Effective Date and/or prior to every second anniversary thereafter until the earlier of the Termination Date and the Expiry Date;

"Insurance Saving" has the meaning given in Clause 47.21.4;

"Insurance Undertaking" has the meaning given in the rules from time to time of the Financial Services Authority;

"Insured Assets" means:

- (A) the Legacy Assets other than those Legacy Assets removed by the Contractor under the terms of this Agreement;
- (B) the New Assets;
- (C) such Contractor Owned Assets as would or might on expiry or termination of this Agreement be Handback Contractor Owned Assets; and
- (D) such Leased Assets as would or might on expiry or termination of this Agreement be Handback Leased Assets;

"Intellectual Property Rights" means all intellectual property rights including but not limited to all registered and unregistered trade marks, patents, service marks, trade secrets, design rights (whether registrable or otherwise), applications for any of the foregoing, copyrights and other rights in works of authorship (including rights in computer software), moral and artists' rights, domain names, semi conductor topography rights, database rights, know how, trade or business names and other similar rights or obligations, whether registrable or not, in any country (including the United Kingdom) for the full term of the rights together with any extensions or renewals;

"Interest Rate" means the rate of interest per annum determined by Barclays Bank Plc to be the offered rate for six month sterling deposits in the London interbank market which appears on Telerate Page 3750 (or such other page as may replace that page on the Dow Jones Telerate Service);

"Interim Service" means all of the services, operations and activities described in Schedule 26 (Interim Services);

"Interim Service Start Date" means the date on which the Contractor notifies the Authority that the Contractor has Taken On the Interim Service having satisfied all the requirements set out in Section F.9 of Annex F to Schedule 1.2 (Statement of Requirements: Processes);

"IPR Register" has the meaning given in Clause 39.4.1;

"IRR" means internal rate of return;

"Irrecoverable VAT" has the meaning given in Clause 38.4 (Payment of Irrecoverable VAT);

"Joint Insurance Account" means the joint bank account in the names of the Authority and the Contractor, with account number 06219704 and sort code 12-27-14 and held with the Account Bank (The Governor and Company of the Bank of Scotland);

"Junior Debt" means all amounts outstanding at the Termination Date under the Subordinated Financing Agreements;

"Law" means any applicable law, statute, proclamation, by law, directive, decision, regulation, rule, order, notice, rule of court or delegated or subordinate legislation and any applicable official request or requirement with which the Contractor is legally required to comply.

"Leased Asset" means any asset used by the Contractor to provide the Services and which are available to the Contractor pursuant to a lease, hire purchase agreement, hire agreement, conditional sale agreement or other arrangements pursuant to which title to such assets is retained by a Third Party including Third Party Material and assets subject to the Existing Leases;

"Legacy Asset" means any item owned by the Authority and used in the provision of the Services (or services similar to the Services) prior to the Relevant Assumption Date in respect of any Relevant Service and for the avoidance of doubt, excludes any Leased Assets;

"Legislation" means any Act of Parliament or subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, any exercise of the Royal Prerogative and any enforceable community right within the meaning of Section 2 of the European Communities Act 1972, in each case in the United Kingdom;

"Lenders' Direct Agreement" means an agreement between the Authority, the Senior Lenders and the Contractor in the form set out in Schedule 9 (Form of Lenders' Direct Agreement);

"Licence Restrictions" means those licence restrictions set out in Schedule 4 (Licence Restrictions);

"Licensed Asbestos Removal Contractor" has the meaning given in Clause 45.5.6(A);

"Link Table" means the relevant table set out in Annex A of Schedule 12 (Warranted Information);

"List of Non-HA Project Land" has the meaning given to it in Clause 16.13 as the same is updated from time to time pursuant to Clause 16.13;

"Live" has the meaning given in Part 1 of Schedule 30 (Payment Mechanism);

"Loan Note Subscription Agreement" means the agreement dated on or about the date of this Agreement made between HoldCo, the Contractor, HSBC, Fluor International Limited and the Security Trustee;

"Longstop Date" means the date falling three years after the Effective Date as the same may be postponed pursuant to the terms of this Agreement;

"Loss" means any loss, damage, cost or expense;

"Lump Sum Payments" means payments of sums of money, separate from the Service Charge, against a timetable to be agreed between the Parties or determined pursuant to the Dispute Resolution Procedure for the purposes of funding Capital Expenditure;

"Main Sub-contract" means the contract between the Principal Sub-contractor and the Main Sub-contractor dated on or about the date of this Agreement;

"Main Sub-contractor" means Alcatel Telecom Limited of Christchurch Way, Greenwich, London SE10 0AG, whose registered number is 2650571 and any replacement appointed in accordance with Clause 24;

"Main Sub-contractor Direct Agreement" means an agreement in the Agreed Form listed in Schedule 3 (List of Initial Financing Agreements, Ancillary Documents and Project Documents) and entered into by the Authority, the Principal Sub-contractor and the Main Sub-contractor;

"Mandated Cable Renewal" has the meaning given in Clause 14.5.1;

"Mandated Transmission Stations Renewal" has the meaning given in Clause 14.6.1;

"Minor Variation" means any change to the Contractor's obligations under the Statement of Requirements and/or the Service Level Targets proposed by either Party pursuant to Clause 35 (Minor Variations) provided that such change does not:

(A) have an impact on the Base Service Charge Date;

- (B) require any amendment to this Agreement, any Project Document and/or any Ancillary Document to which the Authority is a party other than the Statement of Requirements and/or the Service Level Targets as a result of the change; and
- (C) require any changes to the Service Credit Regime to accommodate the proposed Minor Variation,

and in relation to which the Estimated Change in Project Costs, whether a cost of or saving to the Contractor, resulting from its implementation do not exceed £100,000 NPV (adjusted for RPI) and/or, when taken together with the other Minor Variations which have occurred since the last Variation Cost Review, £500,000 NPV (adjusted for RPI);

"Minor Variation Cost Review Trigger Events" means those events set out in Clause 35.3.3;

"Minor Variation Notice" means the notice issued by the Party requesting a Minor Variation pursuant to Clause 35.4 (Minor Variation Notice);

"Minor Variation Period" has the meaning given in Clause 35.3.2;

"Minor Variation Response Notice" has the meaning given in Clause 35.5;

"Monthly Contractor Report" shall mean either the Call Offs and Other Services Monthly Contractor Report or the BSC and MSC Monthly Contractor Report, as the context may require;

"Monthly Invoice" means the Other Services Monthly Invoice, the BSC And MSC Monthly Invoice or each Call Off Charge Monthly Invoice, as the context may require;

"National Network" has the meaning given in paragraph 3.2 of Schedule 26 (Interim Services);

"National Motorway Communications System" or "NMCS" means the motorway traffic control and emergency telephone system developed to serve the motorways of England;

"Necessary Consents" means all approvals, consents, licences, authorisations, permissions, certificates and statutory agreements required from any competent authority and all consents and agreements from and with Third Parties necessary for the provision of the Services and those necessary for the conduct of the Project in accordance with this Agreement;

"Net Present Value" or "NPV" means the aggregate of the discounted values, calculated as of the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;

"New Asset" means, until their removal in accordance with the terms of this Agreement, any buildings, plant, equipment or hardware required by the Contractor to be installed on the Project Road Network or any other land or property belonging to the Authority or to any Third Party to enable it to provide the Services or fulfil its obligations under the Commercial Contracts, excluding:

- (A) Leased Assets;
- (B) Aerial Electronics; and
- (C) any buildings, plant, equipment or hardware which are not located on the Project Road Network and which are used by the Contractor solely to fulfil its obligations under the Commercial Contracts;

"New Contractor" means the person who has entered or who will enter into the Deemed New Agreement with the Authority;

"New Service Provider" means any new service provider who replaces the Contractor in providing any or all of the Services (or services similar to the Services) (or part or parts of any such Services) either on the Termination Date or the Expiry Date (whichever is the earlier) or the New Contractor;

"No Retendering Procedure" means the procedure set out in Clause 56.2 (No Retendering Procedure) as defined in Clause 56.1;

"Non-HA Project Land" means the land, buildings or roads (other than the Trunk Road Network, Other HA Land or HA Premises) which are, from time to time, listed in the List of Non-HA Project Land;

"Non Service Instance Asset" has the meaning given in Clause 15.4.1;

"Non Service Instance Asset Removal Notice" has the meaning given in Clause 15.4.3;

"Notice Date" means the later of the Termination Date and (if applicable) the date that the Adjusted Estimated Fair Value of the Agreement is agreed between the parties pursuant to Clause 56.2;

"NRTS Co" means the Contractor;

"NRTS Forward Programme" means the programme described in Section 5.13.5.1 of Schedule 1.2 (Statement of Requirements: Processes);

"NRTS Required Systems" has the meaning given in Annex B of Schedule 1.2 (Statement of Requirements: Processes);

"NRTS Web Site" means the website referred to in Section 5.9.2.20 of Schedule 1.2 (Statement of Requirements: Processes);

"NTMC contract" means the responsibilities assumed by the Existing Service Providers as specified in specifications MCE1292 and MCF1924;

"NTWC contract" means the responsibilities assumed by the Existing Service Providers as specified in specification MCL5058;

"Operating Costs" means any costs incurred in providing the Services which are treated as operating expenditure in accordance with GAAP;

"Original Senior Commitment" means the amount committed under the Senior Financing Agreements as at Financial Close (as adjusted to take into account any Minor Variation or Authority Service Variation or any Contractor Service Variation agreed pursuant to Clause 37.6);

"Other Asset" means any asset used in the delivery of the Services;

"Other HA Land" means the land or buildings owned or leased by the Authority to which the Contractor requires access in order to provide one or more of the Services other than the Trunk Road Network and HA Premises;

"Other Party" has the meaning given in Clause 66.4;

"Other Services Monthly Invoice" has the meaning given in Clause 29.1.1;

"Outline Proposal" has the meaning given in Clause 36.6;

"Part 1 Relevant Insurances" has the meaning given in Clause 47.21.1;

"Payment Deductions" means amounts calculated in accordance with Part 2 of Schedule 27 (Service Credit Regime);

"Payment Mechanism" means the regime set out in Schedule 30 (Payment Mechanism);

"Payment Schedule" has the meaning given in Clause 36.11.1(B) and in Clause 37.6.1(B);

"Peek Traffic Limited" means Peek Traffic Limited of Hazelwood House, Lime Tree Way, Chineham Business Park, Basingstoke, Hampshire, RG24 8WZ and whose registered number is 01490333;

"Performance Bond" means the performance bond to be delivered by the Contractor to the Authority pursuant to Clause 6.1 (Delivery of Documents), the form of which is set out in Schedule 20 (Form of Performance Bond) and any replacement in accordance with Clauses 6.3 or 6.4;

"Permitted Borrowing" means, without double counting, any:

- (A) advance to the Contractor under the Senior Financing Agreements;
- (B) Additional Permitted Borrowing; and
- (C) interest and, in respect of the Initial Financing Agreements only (prior to any subsequent amendment), other amounts accrued or payable under the terms of the Senior Financing Agreements;

except where the amount referred to in paragraphs (A) to (C) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;

"PFI" means the Government's Private Finance Initiative or any similar or replacement initiative;

"PFI Contractor" means a person that has contracted with the Government, a local authority or other public or statutory body to provide services under the PFI;

"Physical Damage Policies" has the meaning given in Clause 47.18.1;

"Planned Commencement Date" has the meaning given in Clause 31.1.1;

"Planned Maintenance Schedule" means the schedule described in section 5.9.2.14 of Schedule 1.2 (Statement of Requirements: Processes);

"Planning Supervisor" has the meaning given in Clause 21.1;

"Predicted Cable Renewal" has the meaning given in Clause 14.5.1;

"Predicted Cable Shortfall" has the meaning given in Clause 14.5.2;

"Predicted Transmission Stations Renewal" has the meaning given in Clause 14.6.1;

"Predicted Transmission Stations Shortfall" has the meaning given in Clause 14.6.2;

"Predictive Asset Management System" or **"PAMS"** has the meaning given in Clause 14.2 (Maintenance and Renewal);

"Preliminary Meeting" means the meeting to plan the Initial Seminar in accordance with Clause 25.1.1;

"Pre Refinancing Equity IRR" means the nominal post tax Equity IRR calculated immediately prior to the Refinancing;

"Principal Contractor" has the meaning given in Clause 21.1;

"Principal Sub-contract" means the contract between the Contractor and the Principal Sub-contractor dated on or about the date of this Agreement;

"Principal Sub-contractor Direct Agreement" means an agreement in the Agreed Form listed in Schedule 3 (List of Initial Financing Agreements, Ancillary Documents and

Project Documents) and entered into by the Authority, the Principal Sub-contractor and the Contractor;

"Principal Sub-contract Dispute" has the meaning given in Clause 68.3.1;

"Principal Sub-contractor" means Fluor Limited of Fluor Centre, Watchmoor Park, Riverside Way, Camberley, Surrey GU15 3YL, whose registered number is 1274885 and any replacement appointed in accordance with Clause 24.2;

"Proceeds Account" means account number 06219747 held at the Account Bank with sort code 12-27-14;

"Prohibited Act" means:

- (A) offering, giving or agreeing to give to any servant of the Crown or any person employed by or on behalf of the Authority or any other public body any gift or consideration of any kind as an inducement or reward:
 - (1) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Crown; or
 - (2) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Crown;
- (B) entering into this Agreement or any other contract with the Crown or the Authority in connection with which commission has been paid or has been agreed to be paid by the Contractor or on its behalf, or to its knowledge, unless, before the relevant contract is entered into, particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Authority;
- (C) committing any offence:
 - (1) under the Prevention of Corruption Acts 1889 – 1916;
 - (2) under any Legislation creating offences in respect of fraudulent acts; or
 - (3) at common law in respect of fraudulent acts in relation to this Agreement or any other contract with the Crown; or
- (D) defrauding or attempting to defraud or conspiring to defraud the Crown;

"Project" means the National Roads Telecommunications Services Project for the management and delivery of the Services, and associated matters in accordance with this Agreement;

"Project Accounts" means accounts referred to in and required to be established under the Senior Financing Agreements;

"Project Data" has the meaning given in Clause 39.5.1;

"Project Documents" means the agreements listed under that heading in Schedule 3 (List of Initial Financing Agreements, Ancillary Documents and Project Documents), and any amendments to or replacements of such documents or any document entered into after the Execution Date to which the Authority and the Contractor are a party (with or without any other person);

"Project Material" means the Software Related Project Material and the Document Related Project Material;

"Project Quality Manager" means the person appointed in accordance with Clause 22.4 (Project Quality Manager);

"Project Road Network" means the Trunk Road Network, Other HA Land and Non-HA Project Land;

"Project Systems" means unless otherwise agreed in writing between the Parties:

- (i) those interfaces that link the various software applications that provide the functionality described in Annex B of Schedule 1.2;
- (ii) the configuration, customisation and set-up of the various software applications that provide the functionality described in Annex B of Schedule 1.2;
- (iii) those elements of the systems listed in Annex B of Schedule 1.2 which are created to provide the functionality described in that Annex in order to meet the requirements of Schedule 1.2;
- (iv) those elements of software created to implement the interfaces and adapters required for the SCI, as referred to in Schedule 1.1a Section 12.11.6;
- (v) those elements of test equipment and software created to meet the requirements of Schedule 1.1a Section 14.7.1c; and
- (vi) those elements of the emulators created to meet the requirements of Schedule 1.1a Section 15.5.6,

which are specifically developed by or on behalf of the Contractor (including by a Sub-contractor, Shareholder or Affiliate of the same) for the purposes of performing the Contractor's obligations under this Agreement but excluding any Consultancy Material, the Project Data, the Contractor Material, the Project Material, the Third Party Material, the Authority Material and any material that is Commercially Available;

"Projected Leased Assets Amount" means the amount calculated in accordance with Clause 61.11.2 or Clause 61.12.2 (as the case may be);

"Projected Leased Assets Amount Objection Notice" has the meaning given in Clause 61.13;

"Proposed Budget" has the meaning given in Clause 36.7.2;

"Proposed Cancellation" has the meaning given in Clause 47.10.1;

"Proposed Scope" has the meaning given in Clause 47.10.1;

"Proposed Terms" has the meaning given in Clause 47.10.1;

"Protected Street" means a street designated as protected under section 61 of the New Roads and Street Works Act 1991;

"Protection Infrastructure" means any safety fencing, crash barriers and vegetation planted for the purpose of safety associated with any equipment, retaining walls and associated civil works located on the Project Road Network, (excluding safety fencing, crash barriers and vegetation planted for the purpose of safety located within the perimeter fence of an aerial site compound) but including retaining walls and associated civil works;

"Qualifying Bank Transaction" means:

- (A) the syndication by a Senior Lender, in the ordinary course of its business, of any of its rights or interests in the Senior Financing Agreements;
- (B) the grant by a Senior Lender of any rights of participation, or the disposition by a Senior Lender of any of its rights or interests (other than as specified in (A) above), in respect of the Senior Financing Agreements in favour of (i) any other Senior Lender (ii) any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to

Council Directive 2001/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state (iii) a local authority or public authority (iv) a trustee of a charitable trust which has (or has had at any time during the previous two years) assets of at least £10 million (or its equivalent in any other currency at the relevant time) (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two years) at least 50 members and assets under management of at least £10 million (or its equivalent in any other currency at the relevant time) (vi) an EEA or Swiss Insurance Undertaking (vii) a Regulated Collective Investment Scheme or (viii) any other institution in respect of which the prior written consent of the Authority has been given; or

- (C) the grant by a Senior Lender of any other form of benefit or interest in either the Senior Financing Agreements or the revenues or assets of the Contractor, whether by way of security or otherwise, in favour of (i) any other Senior Lender (ii) any institution specified in (B)(ii) to (vii) above or (iii) any other institution in respect of which the prior written consent of the Authority has been given;

"Qualifying Change in Law" means:

- (A) a Discriminatory Change in Law;
- (B) a Specific Change in Law; and/or
- (C) a General Change in Law which comes into effect after the Interim Service Start Date and which involves Capital Expenditure.

which was not foreseeable at the date of this Agreement;

"Qualifying Event" has the meaning given to it in Schedule 25 (Financial Model Adjustment Mechanism);

"Qualifying Refinancing" means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

"Qualifying Variation" means any Minor Variation, Authority Service Variation or Contractor Service Variation;

"Quality Management System" means the system referred to in Section 5.6.4.14 of Schedule 1.2 (Statement of Requirements: Processes);

"RCC area" means the geographic area administered by a Regional Control Centre;

"RPI" means retail price index;

"Real Base Case Project IRR" means the real pre tax Project IRR as set out in the Base Case;

"Receiving Party" has the meaning given in Clause 35.4;

"Recipient" has the meaning given in Clause 67.1.2;

"Records" has the meaning given in Clause 27.1 (Required Records);

"Rectification Programme" means the rectification programme proposed by the Contractor in accordance with Clause 51.2.2(B);

"Redundant Equipment List" means, in respect of each RMC Area, the list of equipment which the Contractor and the Authority have agreed as equipment which will be, as at the RMC Area Take On Date for the Transmission Service or the Camera Mast Service (as the case may be), no longer required, and which will not be reasonably likely in the future to

be required, in the provision of the Services or the performance of the Commercial Contracts, provided that the Parties may agree (notwithstanding the Execution Date having passed) to add any equipment situated in a RMC Area to the list, on or at any time prior to the relevant RMC Area Take On Date;

"Redundant Infrastructure" means cable ducts, buried cables and transmission stations, the removal of which is to be paid for in accordance with Paragraphs 2.17.27 to 2.17.34 of Part 4 of Schedule 30 (Payment Mechanism);

"Refinancing" means:

- (A) any amendment, variation, novation, supplement or replacement of any Financing Agreement (other than any Subordinated Financing Agreement);
- (B) the exercise of any right or the grant of any waiver or consent under any Financing Agreement (other than any Subordinated Financing Agreement);
- (C) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Financing Agreements (other than any Subordinated Financing Agreement) or the creation or granting of any other form of benefit or interest in either the Financing Agreements (other than any Subordinated Financing Agreement) or the contracts, revenues or assets of the Contractor whether by way of security or otherwise; or
- (D) any other arrangement put in place by the Contractor or another person which has an effect which is similar to any of (A) to (C) above or which has the effect of limiting the Contractor's ability to carry out any of (A) to (C) above;

"Refinancing Gain" means an amount equal to the greater of zero and $[(A - B) - C]$, where:

- A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Agreement following the Refinancing;
- B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Agreement following the Refinancing; and
- C = any adjustment required to raise the Pre Refinancing Equity IRR to the Threshold Equity IRR;

"Regional Control Centre" or "RCC" means a control centre facility from which the Authority or its designate (including, without limitation, the Police, or a local authority, as the case may be) operates the National Motorway Communications System;

"Regional Network" has the meaning given in paragraph 3.1 of Schedule 26 (Interim Services);

"Registered Document" means any document which the Contractor is required to produce and/or update pursuant to the Develop Registered Document Process at Section 4.2 of Schedule 1.2 (Statement of Requirements: Processes)

"Regulated Collective Investment Scheme" has the meaning given in the rules from time to time of the Financial Services Authority;

"Reinstatement Plan" has the meaning given in Clause 47.18.3(A);

"Reinstatement Works" has the meaning given in Clause 47.18.3(A);

"Related Persons" means any Shareholder, the Senior Lenders, any New Service Provider and any New Contractor;

"Relevant Assumption Date" means:

- (A) in respect of the Interim Service, the Interim Service Start Date;
- (B) in respect of the Transmission Service within an RMC Area, the RMC Area Take On Date for the Transmission Service in respect of that RMC Area;
- (C) in respect of the Camera Mast Service within an RMC Area, the RMC Area Take On Date for the Camera Mast Service in respect of that RMC Area;
- (D) in respect of the Aerial Site Service, the Actual Service Start Date in respect of the Aerial Site Service; and
- (E) in respect of the Consultancy Service, the Actual Service Start Date in respect of the Consultancy Service;

"Relevant Assumptions" means the assumptions that the sale of the Contractor is on the basis that there is no default by the Authority, that the sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of the Contractor and the Project is taken into account;

"Relevant Authority" means any court with the relevant jurisdiction and any local, national or supra national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom or of the European Union;

"Relevant Event" has the meaning given in Clause 15.6;

"Relevant Incident" has the meaning given in Clause 47.18.3;

"Relevant Insurances" means the insurances taken out by the Contractor in accordance with this Agreement;

"Relevant Person" means a Shareholder and any of its Affiliates;

"Relevant Proceeds" has the meaning given in Clause 47.18.3(B);

"Relevant Service" means each of the Interim Service, the Transmission Service within an RMC Area, Camera Mast Service within an RMC Area, the Aerial Site Service and the Consultancy Service;

"Relevant Service Period" means:

- (A) in respect of the Interim Service, the period from the Interim Service Start Date until the later of the Actual Service Start Date for the Transmission Service and the Build Completion Date;
- (B) in respect of the Transmission Service within an RMC Area, the period from the RMC Area Take On Date for the Transmission Service in respect of that RMC Area until the Actual Transfer Date for such RMC Area;
- (C) in respect of the Camera Mast Service within an RMC Area, the period from the RMC Area Take On Date for the Camera Mast Service in respect of that RMC Area until the Actual Transfer Date for such RMC Area;

- (D) in respect of the Aerial Site Service, the period from the Actual Service Start Date until the earlier of the Expiry Date and the Termination Date; and
- (E) in respect of the Consultancy Service, the period from the Actual Service Start Date until the earlier of the Expiry Date and the Termination Date;

"Relevant Services Transfer Date" means the date on which the part of the services similar to the Transmission Service, the Camera Mast Service, the Aerial Site Service or the Consultancy Service to which a Transferring Employee is wholly or mainly assigned pursuant to the Transmission Labour Team Contract 1/74 is assumed by the Contractor;

"Relevant Transfer Date" has the meaning given in Clause 60.5;

"Relief Event" means:

- (A) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot or civil commotion;
- (B) failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;
- (C) any accidental loss or damage to the Assets or to the Project Road Network or any roads, wayleaves or easements servicing it;
- (D) any failure or shortage of fuel or transport or Failure or Shortage of Power; and
- (E) any blockade or embargo which does not constitute a Force Majeure Event;
- (F) any:
 - (i) official or unofficial strike;
 - (ii) lockout;
 - (iii) go slow; or
 - (iv) other dispute,

generally affecting the construction or telecommunications industry or a significant sector of either of them;
- (G) any Existing Contamination or Pollution,

unless any of the events listed in paragraphs (A) to (G) inclusive arises (directly or indirectly) as a result of any wilful default or wilful act of the Contractor or any of its Sub-contractors or its or their respective sub-contractors;

"Remedial Handback Works" means the maintenance and/or replacement works required to bring the relevant Assets to the standard they would have been in if the Contractor had complied with its obligations under Clause 14 (Maintenance and Renewal);

"Remedial Handback Works Amount" means the Independent Surveyors' estimate of the cost of carrying out the Remedial Handback Works included in the schedule prepared pursuant to Clause 62.2.4;

"Remediation Works" means the minimum work required by a Competent Authority acting in accordance with Environmental Law which is necessary to abate, prevent, limit, dispose of, contain, remedy or ameliorate the presence of or effects of any Hazardous Substance;

"Renewal Quotation" means a quotation including fees and taxes for the renewal of the Part 1 Relevant Insurances, and based on the cover and deductibles for such insurance at the same level as those applying immediately prior to the Insurance Costs Review Date;

"Rental Payments" has the meaning given in Clause 61.9.1;

"Requesting Party" has the meaning given in Clause 35.4;

"Required Action" has the meaning given in Clause 33.3;

"Retention Fund Account" has the meaning given in Clause 62.3 (Retention Fund);

"Revised Senior Debt Termination Amount" means, subject to Clause 7.2 (Financing Agreements):

- (A) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the Contractor to the Senior Lenders under the Senior Financing Agreements including in respect of Permitted Borrowing other than any such amounts that are in respect of Additional Permitted Borrowings;
- (B) all amounts of Additional Permitted Borrowings including interest but excluding Default Interest outstanding at the Termination Date, including such Additional Permitted Borrowings accrued at that date; and
- (C) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Contractor to the Senior Lenders as a result of a prepayment under the Senior Financing Agreements including in respect of Permitted Borrowing, subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible,

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below):

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account held by or on behalf of the Contractor and the Retention Fund Account) on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding under the Senior Financing Agreements including in respect of Permitted Borrowing;
- (iv) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have; and
- (v) all APB Distributions;

"Revoking Party" has the meaning given in Clause 39.11;

"RMC Area" means an area for which a Regional Maintenance Contractor is, at the Effective Date, responsible;

"RMC Area Take On Date" has the meaning given in Paragraph 8.5.20.9 of Schedule 1.2 (Statement of Requirements: Processes);

"SC Project Escrow Agreement" has the meaning given in Clause 41.2.2;

"Secondary Service Period" has the meaning given in Clause 3.2 (Secondary Service Period);

"Security Trustee" means the Governor and Company of The Bank of Scotland;

"Senior Debt" means the financing provided by the Senior Lenders under the Senior Financing Agreements;

"Senior Debt Rate" means the non default interest rate as defined in the Facility Agreement (including the LIBOR rate, the Margin and Mandatory Cost rate as defined therein);

"Senior Financing Agreements" means the agreements in the Agreed Form listed under the heading "Initial Financing Agreements" in Schedule 3 (List of Initial Financing Agreements, Ancillary Documents and Project Documents) as at the Execution Date and as amended with the prior written approval of the Authority (if such consent is required under Clause 7.2 (Financing Agreements)) other than:

- (A) the debenture dated on or about the date of this Agreement between the Contractor and HoldCo as shareholder;
- (B) the debenture dated on or about the date of this Agreement between HoldCo, Fluor International Limited and HSBC;
- (C) the Equity Subscription Agreement;
- (D) the HoldCo Subordinated Secured Loan Note Instrument;
- (E) the Loan Note Subscription Agreement; and
- (F) the Contractor Subordinated Secured Loan Note Instrument;

"Senior Lender" means a person providing finance to the Contractor under the Senior Financing Agreements;

"Service Charge" means the amount payable for the Services in respect of a Contract Month calculated in accordance with Part 2 of Schedule 30 (Payment Mechanism);

"Service Credit Regime" means the regime governing the award of Payment Deductions and Service Credits as set out in Schedule 27 (Service Credit Regime);

"Service Credits" means points awarded to the Contractor, calculated in accordance with Part 3 of Schedule 27 (Service Credit Regime);

"Service Instance Asset" has the meaning given in Clause 15.3.1;

"Service Level Targets" means the service level targets set out in Annex A of Schedule 27 (Service Credit Regime);

"Service Period" means the Initial Service Period plus any extension to that period pursuant to Clause 3 (Term);

"Service Schedule" is set out in Section 5.10.5.4 of Schedule 1.2 (Statement of Requirements: Processes);

"Service Type Instance" or **"STI"** means a distinct occurrence of a minimum unit of the Transmission Service;

"Service Variation" means an Authority Service Variation, a Minor Variation or a Contractor Service Variation (as the case may be);

"Services" means all or any of the Transmission Service, the Interim Service, the Camera Mast Service, the Aerial Site Service and the Consultancy Service;

"Shared Areas" has the meaning given in Clause 21.5;

"Shareholder" means any person from time to time holding share capital in the Contractor or its Holding Company (otherwise than by way of a transfer by way of security for the

benefit of the Senior Lenders), the initial holders being those set out in Schedule 15 (Contractor's Details and Share Capital);

"Shares Charge" means the charge dated on or about the date of this Agreement given by HoldCo in favour of The Bank of Scotland;

"Software Documentation" means such materials and documentation in English relating to the relevant software as are necessary to enable reasonably experienced and competent personnel to operate, maintain, develop and modify the relevant software including, but not limited to, flow charts, diagrams, programmer's notes, programming tools, scripts, sub routines and other related materials and documentation;

"Software Related Project Material" means any software or any developments or improvements to such software specifically developed by or on behalf of the Contractor (including by a Sub-contractor, Shareholder or Affiliate of the same) in the course of the Contractor performing its obligations or exercising its rights in connection with this Agreement or the Project including any related Software Documentation but excluding all and any Document Related Project Materials, any Consultancy Material, the Contractor Material, the Project Data, the Third Party Material, the Authority Material and the Project Systems;

"Source Code" means, in respect of any software, the entirety of such software in an eye-readable form in which such software can be interpreted without undue difficulty by a programmer of reasonable skill and in such form that it can be compiled or interpreted into equivalent object code, together with all associated Software Documentation;

"Specific Change in Law" means any Change in Law that specifically refers to:

- (A) the provision of a telecommunications service or a network which utilises assets the same as or similar to those used in the provision of the Services;
- (B) the holding of shares in companies whose main business is providing a telecommunications service or a network which utilises assets the same as or similar to those used in the provision of the Services,

other than any Change in Law that only relates to the provision of a public telecommunications service or a public network or to the holding of shares in companies whose main business is providing a public telecommunications service or a public network;

"Standard Price" means each of the prices set out in Tables 1 to 11 and Tables 13 to 16 of Annex B of Schedule 30 (Payment Mechanism: Menu of Standard Prices);

"Statement of Requirements" means the statement of requirements contained in Schedule 1 (Statement of Requirements);

"Step 1a milestone event" has the meaning given in Section F.4.1 of Annex F to Schedule 1.2 (Statement of Requirements: Processes: Milestone Events);

"Step 3 milestone event" has the meaning given in Section F.6 of Annex F to Schedule 1.2 (Statement of Requirements: Processes: Milestone Events);

"Sub-contracts" means the agreements entered into by the Contractor or any Sub-contractor for the performance of its obligations under this Agreement;

"Sub-contractor" means any of the sub-contractors listed in Part 1 of Schedule 14 (Sub-contractors) and any of their respective replacements or substitutes;

"Sub-contractor Breakage Costs" means Losses (which in this definition shall mean all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses) and charges whether arising under statute, contract or at common law or in

connection with judgments, proceedings, internal costs or demands) that have been or will be reasonably and properly incurred by the Contractor as a direct result of the termination of this Agreement but only to the extent that:

- (A) the losses are incurred in connection with the Project and in respect of the provision of services or the completion of works, including:
 - (i) any materials or goods ordered or sub-contracts placed that cannot be cancelled without such losses being incurred;
 - (ii) any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
 - (iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project; and
 - (iv) redundancy payments; and
- (B) the losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms; and
- (C) the Contractor and the relevant Sub-contractor have each used their reasonable endeavours to mitigate the losses;

"Subordinated Financing Agreements" means the debenture dated on or about the date of this Agreement between the Contractor and HoldCo as shareholder, the debenture dated on or about the date of this Agreement between HoldCo, Fluor International Limited and HSBC, the Equity Subscription Agreement, the HoldCo Subordinated Secured Loan Note Instrument, the Contractor Subordinated Secured Loan Note Instrument and the Loan Note Subscription Agreement each as at the date of this Agreement or as amended with the prior written approval of the Authority;

"Subordinated Lender" means a person providing finance to the Contractor or to HoldCo under a Subordinated Financing Agreement;

"Suitable Substitute Contractor" has the meaning given in the Lenders' Direct Agreement;

"Supplier" has the meaning given in Clause 67.1.2;

"Surety" refers to the party so named in the Performance Bond;

"Surviving Clauses" has the meaning given to it in Clause 54.1;

"System Capability Report" means the report prepared by the Independent Surveyors detailing the revisions to the Handback Plan required and any other action (save in respect of any actions identified as Remedial Handback Works) required by the Contractor to enable the Contractor to fulfil its obligations under Clause 61 (Handback of a Working System) including any requirements to extend the term of and/or amend the Agreement(s) for Leased Assets and/or any other arrangements between the Contractor and Third Parties;

"System Capability Report Amount" means the Independent Surveyors' estimate of the cost of implementing the actions set out in the System Capability Report;

"Take On" or **"Taken On"** means the act of the Contractor assuming responsibility under this Agreement for an area of, or the whole of, a Service as set out in Section 8 of Schedule 1.2 (Statement of Requirements: Processes);

"Tax", "Taxation" or "Taxes" means any kind of tax, duty, levy or other charge (other than VAT) whether or not similar to any in force at the Execution Date and whether

imposed by a local, governmental or other Relevant Authority in the United Kingdom or elsewhere;

"Taxation Authority" means any local municipal, governmental, state, federal or other fiscal, customs or excise authority, body or official anywhere in the world with responsibility for, and competent to impose, collect or administer, any form of taxation;

"Technology Price Review" means the process by which Project Prices are reviewed pursuant to paragraph 5 of Part 2 of Schedule 30;

"Tender Costs" means the reasonable and proper costs of the Authority incurred in connection with any calculation of the Estimated Fair Value of the Agreement;

"Term Date" means the date falling 10 years and six months after the Effective Date;

"Termination Adjustment" means the sum of all credit balances in the Retention Fund Account (save for the Projected Leased Assets Amount if applicable on the Termination Date and save for any amounts required to perform the Remedial Handback Works or to effect any of the recommendations of the System Capability Report which the Authority shall be entitled to retain) less:

- (A) the cost of removing any Assets which have not been removed by the Contractor in accordance with a Non-Service Instance Asset Removal Notice and/or an Aerial Infrastructure Removal notice served by the Authority on the Contractor pursuant to Clauses 15.4 (Removal of Non Service Instance Assets) and 15.5 (Removal of Aerial Infrastructure or Aerial Electronics) prior to any termination notice; and
- (B) the aggregate of any excess as referred to in Clauses 62.6.3 (Retention Fund Account) and 62.6.4 (Retention Fund Account);

"Termination Date" means any date early termination of this Agreement takes effect in accordance with any of Clauses 46 (Force Majeure), 49 (Voluntary and Non Default Termination), 50 (Termination for Authority Default), 51 (Termination for Contractor Default), 52 (Termination for Corrupt Gifts and Fraud) or 53 (Termination for Breach of the Refinancing Provisions);

"Termination Date Discount Rate" means a discount rate expressed as $[(1 + \text{Real Base Case Project IRR} + \text{Gilt B} - \text{Gilt A}) \times (1+i) - 1]$;

"Termination Sum" means any compensation payable by the Authority to the Contractor on an early termination of this Agreement under Clauses 48 to 58 (inclusive);

"Third Party" means any person other than the Parties, Authority Parties and the Contractor Parties;

"Third Party Land" means any land owned by a Third Party other than the Project Road Network;

"Third Party Material" means any documents, information, know how, data, text, drawings, diagrams, processes, databases, inventions, developments, improvements or other materials (including Third Party Software) in which the Intellectual Property Rights are owned by an Independent Party and used by or on behalf of the Contractor to perform its obligations under this Agreement but excluding the Contractor Material, the Project Material, the Project Data, the Project Systems, the Authority Material and any Consultancy Material;

"Third Party Material Licence" has the meaning given in Clause 39.3.1;

"Third Party Shareholder" means HSBC Infrastructure Fund Management Limited (as General Partner for and on behalf of HSBC Infrastructure Fund II L.P.A and HSBC

Infrastructure Fund II L.P.B and HSBC Infrastructure Fund II L.P.C and HSBC Infrastructure Fund II L.P.D and HSBC Infrastructure Fund II L.P.E and HSBC Infrastructure Fund II L.P.F and HSBC Infrastructure Fund II L.P.G and HSBC Infrastructure Fund II L.P.J) a company incorporated in England & Wales (registered no. 3917449) having its registered office at 8 Canada Square, London E14 5HQ ("**HSBC**");

"Third Party Software" means any software and related documentation used by or on behalf of the Contractor to perform its obligations under this Agreement in which the Intellectual Property Rights are owned by an Independent Party but excluding the Project Material, the Project Systems, the Contractor Material, the Authority Material, the Project Data and any Consultancy Material;

"Threshold Equity IRR" means the nominal post tax Equity IRR as set out in the Financial Model as at the Effective Date;

"Total Minor Variation Cost" has the meaning given in Clause 35.13.1;

"TP Claim or Loss" means any Claim suffered or Loss incurred by any person other than the Parties;

"TP Project Escrow Agreement" has the meaning given in Clause 41.4;

"Transferring Employees" means those employees employed immediately prior to the Relevant Services Transfer Date by the Existing Service Provider(s) who at the Relevant Services Transfer Date are engaged wholly or mainly in performing services similar to the Transmission Service, the Camera Mast Service, the Aerial Site Service or the Consultancy Service for the Authority pursuant to the Transmission Labour Team Contract 1/74;

"Transmission Full Service Start Date" means the date set out in Table F2 1 of Annex F to Schedule 1.2 (Statement of Requirements: Processes);

"Transmission Network" means the telecommunications network used by the Contractor to provide the Services;

"Transmission Service" means all or any those services, operations and activities set out in Schedule 1.1a (Statement of Requirements: Transmission Service);

"Trunk Road Network" means all trunk roads in England for which the Secretary of State is the Highway Authority pursuant to the Highways Act 1980;

"TUPE" means the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended);

"Uninsurable" means, in relation to a risk, either that:

- (A) insurance is not available to the Contractor in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or
- (B) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;

"Utilities" means all utilities including gas, electricity, water, sewerage, heat, cable and telecommunications;

"Validate" means to validate a price by reference to market prices by, inter alia, the use of benchmarking clubs or consultants;

"Value Engineering Change" means a change to design, technology or equipment used in the delivery of any Call Off and which it is anticipated will result in cost savings in delivering Call Offs;

"Value Engineering Notice" has the meaning given in Clause 37.9.1;

"Variation Cost Review" means the determination pursuant to Clause 35.13.5 of any adjustment to the Service Charge and/or the payment of any Lump Sum Payment as a result of a Service Variation or a Change in Law, excluding any payments by the Authority made pursuant to Clause 35.12.1;

"Variation Period Start Date" has the meaning given in Clause 35.3.2;

"Variation Report" has the meaning given in Clause 36.7.3 (Variation Report); and

"VAT" means any value added taxes;

"Waived Non Compliance List" means the list of individually identified Legacy Assets that have been determined by the Contractor (using an objective assessment against the applicable standards) and agreed with the Authority to be non compliant against one or more aspects of one or more standards and which identifies for each individual characteristic of each such asset (a "Waived Asset") the specific clause(s) of the standard or standards with which the Waived Asset does not comply.

1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses and Schedules are references to clauses of and schedules to this Agreement and all references to Parts, Sections, paragraphs, Annexes or Appendices are references to parts, sections and paragraphs contained in, and annexes and appendices to, the Schedules;
- 1.2.3 the Schedules to this Agreement are an integral part of this Agreement and reference to this Agreement includes reference to the Schedules;
- 1.2.4 all references to agreements, documents or other instruments include (without prejudice to all relevant requirements for approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.5 any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re enacted;
- 1.2.6 any reference to time of day shall be a reference to London time;
- 1.2.7 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause, Schedule, Part, Section, paragraph, Annex or Appendix in which such word may be used;
- 1.2.8 words importing the singular include the plural and vice versa;
- 1.2.9 words importing a particular gender include all genders;
- 1.2.10 subject and without prejudice to Clause 63 (Assignment):
 - (A) **"person"** includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency or unincorporated

body of persons or association and a reference to a person includes a reference to that person's successors and assigns; and

(B) any reference in this Agreement to any group, individual or entity includes a reference to any successor of that group, individual or entity as reconstituted, redesignated or renamed;

- 1.2.11 references to "**Party**" means a party to this Agreement;
- 1.2.12 all monetary amounts are expressed in pounds sterling;
- 1.2.13 references to the word "**includes**" or "**including**" are to be construed without limitation;
- 1.2.14 references to a document being "**in the Agreed Form**" means in the form of a draft of such document initialled for the purpose of identification by or on behalf of the Parties;
- 1.2.15 references to "**sub-contractors**" are to sub-contractors of any tier and, for the avoidance of doubt, includes Sub-contractors;
- 1.2.16 at any time, save as otherwise expressly stated in this Agreement or any Project Document, where any sum is stated to be "**adjusted for RPI**" then at such time, the said sum shall be multiplied by I where I equals:

$$\frac{RPI_{x_n}}{RPI_{x_0}}$$

where RPI_{x_n} means the Index calculated for the month preceding by two months the relevant Contract Month; and

where RPI_{x_0} means the Index calculated for October 2004;

- 1.2.17 subject to any express provisions of this Agreement to the contrary, the obligations of either Party under this Agreement are to be performed at that Party's own cost and expense;
- 1.2.18 any obligation on a Party to do any act, matter or thing includes, unless expressly stated otherwise, an obligation to procure that it is done; and
- 1.2.19 any reference in this Agreement to a Party providing its consent shall be deemed to be a reference to prior written consent.

PART II – PRELIMINARY AND TERM

2. CONDITIONS PRECEDENT

2.1 Agreement Conditional

Except for Clauses 1 to 8 (inclusive), 9A, 42 and 63 to 79 (inclusive), which shall come into full force and effect on the Execution Date, the rights and obligations of the Parties under this Agreement shall come into effect on the Effective Date.

2.2 Satisfaction of Conditions

2.2.1 Immediately following:

- (A) satisfaction by the Contractor of all the Conditions Precedent set out in Part 1 of Schedule 24 (Conditions Precedent);
- (B) satisfaction by the Authority of the Conditions Precedent set out in Part 2 of Schedule 24 (Conditions Precedent); and
- (C) the agreement by the Contractor and the Authority of:
 - (1) the Base Service Charge;
 - (2) the Base Case Parameters; and
 - (3) the share capital of the Contractor and HoldCo,

the Contractor and the Authority shall sign a certificate of commencement (the "**Certificate of Commencement**") in the form set out in Schedule 2 (Form of Certificate of Commencement) and shall annex thereto an extract of the Financial Model. The date of such certificate of commencement shall be the Effective Date.

2.2.2 The Contractor shall use all reasonable endeavours to procure the satisfaction of the Conditions Precedent set out in Part 1 of Schedule 24 (Conditions Precedent) by the time specified in Clause 2.3 (Termination).

2.2.3 The Authority shall use all reasonable endeavours to procure the satisfaction of the Conditions Precedent set out in Part 2 of Schedule 24 (Conditions Precedent) by the time specified in Clause 2.3 (Termination).

2.2.4 The Contractor shall update the Authority as often as is reasonably required as to the Contractor's progress in procuring the satisfaction of the Conditions Precedent set out in Part 1 of Schedule 24 (Conditions Precedent).

2.2.5 The Authority shall update the Contractor as often as is reasonably required as to the Authority's progress in procuring the satisfaction of the Conditions Precedent set out in Part 2 of Schedule 24 (Conditions Precedent).

2.3 Termination

Each Party shall be entitled to terminate this Agreement, the Project Documents and any Ancillary Documents to which the Authority is a party in their entirety (but without prejudice to any rights and obligations which may have already accrued prior to that date) at any time on or after the date falling 20 Business Days after the Execution Date (or on such later date as may be agreed between the Parties) if the Effective Date has not occurred by that time. No compensation shall be payable on termination of this Agreement, the Project Documents and any Ancillary Documents to which the Authority is a party pursuant to this Clause 2.3.

3. TERM

3.1 Expiry of Term

Subject to Clause 2 (Conditions Precedent), Clause 54.1 (Survival of Provisions) and the following provisions of this Clause 3, this Agreement and the rights and obligations of the Parties to this Agreement shall commence on the Effective Date and shall remain in full force and effect until the end of the Contract Term unless this Agreement is terminated earlier in accordance with its terms.

3.2 Secondary Service Period

3.2.1 The Authority shall have an irrevocable option exercisable by written notice served on the Contractor not later than twelve months before the expiry of the Initial Service Period to require that the Contract Term and all relevant Project Documents and Ancillary Documents are extended on the same terms and conditions (subject to the following sentence) for a further period of two years beyond the expiry of the Initial Service Period (the "**Secondary Service Period**"). The Base Service Charge payable during the Secondary Service Period shall be determined pursuant to Clause 36 as if the extension of the term of this Agreement were an Authority Service Variation.

3.2.2 If the Authority exercises the option in accordance with Clause 3.2.1:

- (A) the Contract Term shall be extended by two years beyond the expiry of the Initial Service Period;
- (B) the Contractor shall be relieved from its obligation to ensure that the Authority (and/or the New Service Provider, as the case may be) has the capability to provide the Services (or services which are similar to the Services) to the standard required by the Statement of Requirements for two years following the Expiry Date or Termination Date, as the case may be; and
- (C) for the avoidance of doubt, the provisions of Clause 62 (Exit Survey) shall remain in full force and effect during the Secondary Service Period.

3.3 Extended Service Period Option

The Authority shall be entitled to extend the term of this Agreement by up to 10 years. Any such extension shall be subject to the Parties agreeing the period of and the terms of such extension.

4. PRECEDENCE OF DOCUMENTS

4.1 Priority

In the event of any discrepancy, inconsistency, divergence or anomaly arising between the provisions of this Agreement or between the provisions of this Agreement and the Registered Documents, the order of priority shall be as follows, save where expressly provided to the contrary:

- 4.1.1 Clauses 1 to 79 inclusive of this Agreement as amended in accordance with Clause 75 (Amendments) or Clause 35 (Minor Variations), Clauses 36 (Authority Service Variation), 37 (Contractor Service Variation) or 38 (Changes in Law);
- 4.1.2 Schedule 1 (Statement of Requirements) as amended in accordance with Clause 75 (Amendments) or Clauses 35 (Minor Variations), 36 (Authority Service Variation), 37 (Contractor Service Variation) or 38 (Changes in Law);

4.1.3 all other Schedules to this Agreement, as amended in accordance with Clause 75 (Amendments) or Clauses 35 (Minor Variations), 36 (Authority Service Variation), 37 (Contractor Service Variation) or 38 (Changes in Law);

4.1.4 the Registered Documents.

4.2 **Registered Documents**

The Contractor has prepared, and accepts sole responsibility for, the Registered Documents. Subject to Clause 4.3 (Discrepancies in Documentation), the Contractor shall be solely responsible for any discrepancies, errors or omissions in the Registered Documents and for any failure of the Registered Documents to comply with or be consistent with this Agreement, notwithstanding that the Registered Documents have been seen or acknowledged or approved or not objected to or commented on (or not commented on) by the Authority.

4.3 **Discrepancies in Documentation**

4.3.1 Each Party shall notify the other in writing forthwith upon becoming aware of any discrepancy, inconsistency, divergence or anomaly between any of the documents referred to in Clause 4.1 (Priority).

4.3.2 The notice issued pursuant to Clause 4.3.1 shall set out in precise detail any discrepancy, inconsistency, divergence or anomaly between the documents referred to in Clause 4.1 (Priority) and propose any amendments that may be required to such documents to resolve such discrepancy, inconsistency or divergence provided that such amendments reflect the order of priority set out in Clause 4.1 (Priority) such that the terms of those documents ranked higher in priority shall prevail.

4.3.3 The Parties shall seek to agree such amendments to resolve such discrepancy, inconsistency, divergence or anomaly as soon as reasonably practicable. Where the Parties fail to do so within 10 Business Days of a notice being issued under Clause 4.3.1 and either Party considers the discrepancy, inconsistency, divergence or anomaly to be material to its rights and obligations under this Agreement, then the Authority shall be entitled to choose between the relevant items and provided that such choice reflects the order of priority set out in Clause 4.1 (Priority) such that the terms of those documents ranked higher in priority shall prevail the Authority's choice shall bind the Parties. Any resulting amendment to this Agreement shall be made in writing and signed by duly authorised representatives of the Parties.

5. **DIRECT AGREEMENTS**

5.1 **Lenders' Direct Agreement**

The Contractor shall, on or prior to the Execution Date, procure that the Agent enters into the Lenders' Direct Agreement.

5.2 **Authority's Entry into Lenders' Direct Agreement**

Upon execution of the Lenders' Direct Agreement in accordance with Clause 5.1 (Lenders' Direct Agreement), the Authority shall, at the request of the Contractor, forthwith enter into the Lenders' Direct Agreement.

5.3 **Entry into other Agreements**

Without prejudice to Clause 7.1 (General Obligations), the Parties shall from time to time enter into other agreements mutatis mutandis substantially in the form of the Lenders'

Direct Agreement, in so far as the same may reasonably be required by the Agent for the purposes of a refinancing approved by the Authority pursuant to Clause 34 (Refinancing).

6. PERFORMANCE BOND

6.1 Delivery of Documents

The Contractor shall, prior to the Effective Date, unconditionally deliver to the Authority a performance bond (the "**Performance Bond**") in the Agreed Form in favour of the Authority in the sum of two million pounds (£2,000,000) duly executed by a bank or other institution approved by the Authority and in full force and effect as from the Effective Date.

6.2 Application of Proceeds

In the event that any payment is made by the Surety to the Authority under paragraph 5 of the Performance Bond, the Authority shall pay the proceeds of such payment into an interest bearing bank account to be applied:

- 6.2.1 in favour of the Authority in satisfying any liability incurred by the Authority as a consequence of any of the events referred to in Clause 6.4 (Demands under Performance Bond); or
- 6.2.2 provided the Authority is satisfied, in its sole and absolute discretion, that there are no outstanding liabilities, actual or contingent, of the nature described in Clause 6.2.1, on the fifth anniversary of the Effective Date, in favour of the Contractor (together with any accrued interest).

6.3 Provision of Replacement Performance Bond

The Contractor may replace the Performance Bond at any time, provided that the Authority receives a replacement Performance Bond:

- 6.3.1 substantially in the form of the existing Performance Bond (or in any other form acceptable to the Authority);
- 6.3.2 duly executed and delivered by a Surety with a credit rating which is equivalent to or higher than that, as at the Execution Date, of the original Surety; and
- 6.3.3 in the sum of two million pounds (£2,000,000) or such other sum as may be agreed between the Authority and the Contractor.

6.4 Demands under Performance Bond

The Performance Bond will be on terms that it is payable without further enquiry by the Surety to the Authority in full in England on first written demand by the Authority on the Surety, certifying as to any one or more of the following:

- 6.4.1 that this Agreement has terminated early as a consequence of the occurrence of Contractor Default pursuant to Clause 51 (Termination for Contractor Default);
- 6.4.2 that this Agreement has terminated early as a consequence of the Contractor having committed a Prohibited Act pursuant to Clause 52 (Termination for Corrupt Gifts and Fraud); or
- 6.4.3 that this Agreement has terminated early as a consequence of the Contractor having committed a breach of the Refinancing provisions pursuant to Clause 53 (Termination for Breach of the Refinancing Provisions).

7. ANCILLARY DOCUMENTS

7.1 General Obligations

The Contractor shall not without the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed) in relation to any of the Ancillary Documents (other than the Financing Agreements):

- 7.1.1 repudiate or accept the repudiation of or terminate or replace or permit the termination or replacement of all or part of any such Ancillary Document to which it is a party;
- 7.1.2 make or agree to any amendment to or variation of any such Ancillary Document to which it is a party; or
- 7.1.3 depart from or waive, settle or otherwise compromise or fail to enforce or pursue or allow to lapse any rights it may have under any such Ancillary Document to which it is a party,

save where the Contractor reasonably considers (at the time such action is contemplated) that the same will not materially and adversely affect the ability of the Contractor to perform its obligations under this Agreement, any of the Project Documents or any of the Ancillary Documents (other than the Financing Agreements) and will not materially increase the Authority's obligations or prejudice its rights under this Agreement, any of the Project Documents or any of the Ancillary Documents to which the Authority is a party (including the Authority's rights and remedies thereunder) in which case the prior written consent of the Authority shall not be required.

7.2 Financing Agreements

No amendment, waiver, exercise of a right under or supplement of any Financing Agreement shall increase the Authority's liability to compensate the Contractor upon termination of this Agreement unless:

- 7.2.1 the Contractor has obtained the prior written consent of the Authority to such increase in the Authority's liability (the giving or withholding of such consent to be in the absolute discretion of the Authority); or
- 7.2.2 the increase in the Authority's liability to compensate the Contractor upon termination of this Agreement is as a result of a Permitted Borrowing.

7.3 Delivery

If at any time an amendment is made to any Ancillary Document in accordance with Clause 7.1 (General Obligations) or Clause 7.2 (Financing Agreements), or the Contractor enters into a new Ancillary Document, the Contractor shall deliver to the Authority a conformed copy of each such amendment or new Ancillary Document within 10 Business Days of the date of its execution or creation together with a certified true copy thereof by an officer of the Contractor.

8. CUSTODY OF FINANCIAL MODEL AND COST MODEL

8.1 Delivery

Not later than 5 Business Days following the Effective Date, the Contractor shall deliver in an agreed electronic format two copies of the Financial Model and two copies of the Cost Model to the Custodian and a copy of the Financial Model and a copy of the Cost Model to the Authority.

8.2 **Custody**

The Financial Model and Cost Model shall be held by the Custodian in accordance with the provisions of the Custody Agreement.

8.3 **Inspection**

Either Party shall have the right to inspect and audit the Financial Model and Cost Model at all reasonable times.

8.4 **Amendments**

Unless otherwise agreed by the Parties, amendments to the Financial Model and Cost Model shall be made by the Contractor only and such amendments shall reflect and be consistent with the provisions of this Agreement provided that any such amendments shall be subject to the written approval of the Authority (such approval not to be unreasonably withheld or delayed).

8.5 **Failure to Agree Amendments**

If the Parties fail to agree the proposed amendments to the Financial Model or Cost Model such matter shall be referred to the Dispute Resolution Procedure.

8.6 **Amended Financial Model and Cost Model**

Following the approval of any amendment of the Financial Model or Cost Model by the Authority or determination of such matters in accordance with the Dispute Resolution Procedure, the Contractor shall promptly deliver in an agreed electronic format two copies of the revised Financial Model and Cost Model to the Custodian and a copy of the revised Financial Model and Cost Model to the Authority.

8.7 **Cost of Custody**

The cost of the custody arrangements shall be shared equally between the Parties.

PART III – PROVISION OF THE SERVICES AND COMMERCIAL CONTRACTS

9. PROVISION OF THE SERVICES

Subject to Clause 9A, the Contractor shall provide each Relevant Service during the Relevant Service Period for that Relevant Service in each case in accordance with, and subject to, the provisions of this Agreement.

9A CAMERA MAST SERVICE

The Contractor shall not be required to provide the Camera Mast Service unless otherwise agreed in writing between the Parties after the Execution Date. Any reference in this Agreement to the Camera Mast Service (other than in this Clause 9A) shall be of no effect prior to the Parties agreeing in writing that the Authority requires the provision of the Camera Mast Service.

10. COMMERCIAL CONTRACTS

10.1 Performance of Commercial Contracts

Subject to Clause 10.2 (Agreed Form), the Authority permits the Contractor to enter into Commercial Contracts and perform such Commercial Contracts, in each case in accordance with, and subject to, the provisions of this Agreement.

10.2 Agreed Form

10.2.1 Without prejudice to Clause 10.2.2, the Contractor shall not enter into any Commercial Contracts which are not agreed in writing by the Authority acting reasonably.

10.2.2 The Contractor acknowledges that the Authority shall be acting reasonably if it withholds its consent to the commercial exploitation of any data transmitted by the Authority via the Transmission Network which relates to the Authority's activities.

PART IV – ASSETS & ACCESS

11. OWNERSHIP AND USE OF ASSETS

11.1 Legacy Assets

11.1.1 Subject to Clause 11.1.2 the Authority permits, subject to the terms of this Agreement, the Contractor, its Sub-contractors (and any of its or their respective sub-contractors), the Contractor Employees, each counterparty to the Commercial Contracts, any Appointed Representative and Suitable Substitute Contractor to:

- (A) survey the Legacy Assets;
- (B) use, operate, repair and maintain the Legacy Assets;
- (C) replace, dispose of and store the Legacy Assets; and
- (D) enforce in the name of the Authority any repair and maintenance obligations and other liabilities with Third Parties in respect of the Legacy Assets,

as necessary or appropriate to provide each Relevant Service and perform the Commercial Contracts, in each case in accordance with, and subject to, this Agreement.

11.1.2 (A) The permissions granted pursuant to Clause 11.1.1(A) shall apply to all Legacy Assets from the Step 1a milestone event.

(B) The permissions granted pursuant to Clause 11.1.1(B) and (D) shall apply to:

- (1) those Legacy Assets that make up and support the Regional Network and National Network, from the Interim Service Start Date;
- (2) all other Legacy Assets in respect of the Transmission Service, from the Step 3 milestone event; and
- (3) all Legacy Assets in respect of the Aerial Site Service and Camera Mast Service (if applicable), from the Relevant Assumption Date in respect of the Aerial Site Service and Camera Mast Service (as the case may be).

(C) The permissions granted pursuant to Clause 11.1.1 (C) shall apply to the Legacy Assets which relate to a Relevant Service from the Relevant Assumption Date in respect of that Relevant Service.

In relation to Legacy Assets, the Contractor, its Sub-contractors (and any of its or their respective Sub-contractors), the Contractor Employees, each counterparty to the Commercial Contracts, any Appointed Representative and Suitable Substitute Contractor shall not have any permissions other than those set out in Clause 11.1.1.

11.1.3 Without prejudice to Clause 12 (Responsibility for the Assets) but subject to Clause 11.1.4, the Authority warrants that the information set out in Schedule 12 (Warranted Information) is (save to the extent indicated to the contrary in Schedule 12) true and accurate in all material respects as at the date specified in Schedule 12 in respect of the information.

- 11.1.4 Without prejudice to any liability for fraudulent mis statement, the Contractor shall not be entitled to any remedy for a breach of Clause 11.1.3 other than as described in Clause 11.22.

11.2 Existing Leases

- 11.2.1 Save as provided in Clause 11.3 (Performance of Existing Leases), the Contractor shall assume responsibility for the performance of the Existing Leases in respect of any Relevant Service from the Relevant Assumption Date in respect of that Relevant Service.
- 11.2.2 The Authority and the Contractor shall co operate and do anything which may reasonably be required to ensure, insofar as each is able, that the Existing Leases in respect of any Relevant Service are novated from the Authority to the Contractor or the Principal Sub-contractor on terms reasonably satisfactory to both the Authority and the Contractor or the Principal Sub-contractor (as appropriate), on or as soon as possible after the Relevant Assumption Date in respect of that Relevant Service.

11.3 Performance of Existing Leases

Pending the novation of the Existing Leases in respect of any Relevant Service:

- 11.3.1 the Authority shall as from the Relevant Assumption Date in respect of that Relevant Service permit the Contractor to bring claims under such Existing Leases in the name of the Authority as set out in Clause 11.3.3; and
- 11.3.2 the Contractor shall as from the Relevant Assumption Date in respect of that Relevant Service perform at its expense the outstanding obligations of the Authority under such Existing Leases provided that nothing in this Agreement:
- (A) shall require the Contractor to perform any obligation falling due for performance or which should have been performed before the Relevant Assumption Date in respect of that Relevant Service; or
 - (B) shall make the Contractor liable for any act, neglect, default or omission in respect of any such Existing Lease committed by the Authority, or occurring, prior to the Relevant Assumption Date in respect of that Relevant Service or for any Claim or Loss arising from any failure to obtain the consent or agreement of any Third Party or from any breach of such Existing Lease caused by this Agreement or its completion.
- 11.3.3 Subject to Clause 11.3.4(E) the Authority shall be liable to the Contractor for any Claims and Losses suffered or incurred by the Contractor as a result of a breach by a counterparty to an Existing Lease of any of the terms of the Existing Lease prior to its novation to the Contractor.
- 11.3.4 The Contractor shall be entitled to bring a claim in the name of the Authority against any counterparty to an Existing Lease for breach by such counterparty of the terms of the Existing Lease prior to its novation to the Contractor, provided that:
- (A) the Contractor fully indemnifies the Authority against all Claims and Losses in connection with the making of any claim thereunder;
 - (B) the Contractor gives such security in advance in respect of such indemnity as the Authority may deem reasonably appropriate;
 - (C) the conduct of any such claim and of any incidental negotiations shall be at the Contractor's expense;

- (D) the Contractor keeps the Authority fully informed about the conduct of any such claim; and
- (E) the Contractor's entitlement in respect of any matter to which this Clause 11.3 applies shall be limited to the amount recovered by the Authority from the counterparty to such Existing Lease in respect of the Claim or Loss referred to in Clause 11.3.3. This Clause 11.3.4(E) shall not limit or otherwise prejudice any right or entitlement of the Contractor arising other than pursuant to this Clause 11.3.

11.3.5 The Authority shall give to the Contractor all reasonable co operation, access and assistance as the Contractor shall reasonably request for the purposes of making any claim under Clause 11.3.4 as relates to Existing Leases.

11.4 **Indemnities relating to Existing Leases**

11.4.1 The Authority shall indemnify and keep indemnified the Contractor against all Claims and Losses which may be suffered or incurred by the Contractor as a result of a breach by the Authority of its obligations under the Existing Leases in respect of any Relevant Service arising prior to the Relevant Assumption Date in respect of that Relevant Service.

11.4.2 The provisions of Clauses 44.4 (Conduct of Claims) to 44.8 (Authority Handling of Claims) inclusive shall apply to the indemnity given in Clause 11.4.1, provided that in such Clauses references to the Authority shall be read as references to the Contractor and references to the Contractor shall be read as references to the Authority.

11.4.3 The Contractor shall indemnify and keep indemnified the Authority against all Claims and Losses which may be suffered or incurred by the Authority as a result of any act, neglect, default or omission on the part of the Contractor to perform or comply with any obligation of the Contractor under the Existing Leases in respect of any Relevant Service arising on or after the Relevant Assumption Date in respect of that Relevant Service or as a result of any breach by the Contractor of Clause 11.3 (Performance of Existing Leases).

11.4.4 The provisions of Clauses 44.4 (Conduct of Claims) to 44.8 (Authority Handling of Claims) inclusive shall apply to the indemnity given in Clause 11.4.3.

11.5 **New Assets**

The Contractor shall provide such New Assets as it deems necessary to enable it to provide the Services or perform the Commercial Contracts, in each case in accordance with, and subject to, the Statement of Requirements and shall comply with the Statement of Requirements in providing and installing such New Assets.

11.6 **Selection of New Assets**

The Contractor shall select any New Asset as suitable for its purposes on the basis of its own enquiries and not on the basis of any statements made by the Authority.

11.7 **Independent Tests**

11.7.1 The Authority may, in its absolute discretion and at any time, request independent tests of any New Assets to ascertain whether the Contractor has provided and installed any New Asset in accordance with the Statement of Requirements.

11.7.2 The Authority shall be entitled to exercise its right pursuant to Clause 11.7.1 to request independent tests of any New Assets as often as it reasonably considers it necessary from the date of the transfer of the relevant New Asset (in accordance

with Clause 11.9 (Transfer of Title)) up to the Expiry Date or Termination Date (whichever is the earlier).

11.7.3 Any independent tests requested by the Authority pursuant to this Clause 11.7 (Independent Tests) shall be carried out by an independent expert (the "**Independent Tester**") with appropriate technical skills and knowledge of assets similar to the New Assets, the Services and the Project. The Independent Tester shall be selected by agreement between the Parties or, in the absence of agreement within a reasonable time, determined in accordance with the Dispute Resolution Procedure. The costs of the Independent Tester shall be borne by:

- (A) the Authority, if the Independent Tester finds that the Contractor has complied with the Statement of Requirements in providing and installing any New Assets; and
- (B) the Contractor, if the Independent Tester finds that the Contractor has not complied with the Statement of Requirements in providing and installing any New Assets.

11.7.4 The Authority shall use its reasonable endeavours to procure that the Independent Tester minimises disruption to the provision of the Services.

11.7.5 If the independent tests referred to in this Clause 11.7 (Independent Tests) establish that the Contractor has not complied with the Statement of Requirements in providing and installing any New Asset, the Authority shall notify the Contractor immediately and following receipt of such notice, the Contractor shall use its best endeavours to remedy such failure to comply as soon as reasonably practicable.

11.7.6 Subject to Paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not be entitled to make any deductions or award any Service Credits under Clause 30 (Service Credit Regime) in the period during which the independent tests are being carried out to the extent that the Contractor is prevented from performing its obligations in relation to the provision of the Services by the carrying out of the independent tests.

11.7.7 The Contractor shall co operate in any such inspection in accordance with Section 5.6 (Facilitate Audit and Inspection) of Schedule 1.2 (Statement of Requirements: Processes).

11.8 **Right to Install New Assets**

The Authority hereby permits the Contractor and its Sub-contractors (and any of its or their respective sub-contractors) to install any New Asset in, on or under land comprising the Trunk Road Network and Other HA Land or on structures belonging to the Authority, subject to the Statement of Requirements.

11.9 **Transfer of Title**

The Contractor agrees that on installation of any New Asset the legal and beneficial title in the relevant New Asset shall transfer from the Contractor to the Authority and the Contractor shall take such steps as may be necessary to give effect to the provisions of this Clause 11.9.

11.10 **Right to Use**

From the date of the transfer of the relevant New Asset in accordance with Clause 11.9 (Transfer of Title) until the end of the Relevant Service Period in respect of each Relevant Service the Authority permits, subject to the terms of this Agreement, the Contractor, its

Sub-contractors (and any of its or their respective sub-contractors) and Contractor Employees to use, maintain, repair, replace, dispose of and store the relevant New Asset as necessary or appropriate to perform its obligations under this Agreement and for the purposes of providing such Relevant Services or performing the Commercial Contracts, in each case in accordance with, and subject to, this Agreement.

11.11 **Pre Execution Inspection**

Without prejudice to Clause 13 (Protection Infrastructure and Access Infrastructure), the Contractor shall be:

11.11.1 deemed prior to executing this Agreement to have examined the Existing Leases as to the adequacy of any rights and obligations under them in accordance with this Clause 11;

11.11.2 deemed prior to executing this Agreement to have:

- (A) satisfied itself as to the nature of the design, work, plant and materials necessary for the provision of the Services;
- (B) satisfied itself as to the means of communication with and access to the Project Road Network and other locations to which the Contractor will require access during the term of this Agreement and the adequacy of the rights of access set out in Clause 16 (Access) for those purposes;
- (C) satisfied itself as to the precautions and times and methods of working necessary to comply with the Statement of Requirements;
- (D) conducted its own analysis and review of all the materials made available to it by, or on behalf of, the Authority prior to the Execution Date; and
- (E) satisfied itself as to the existence of any radio licences necessary for the provision of the Services.

11.12 **No Warranties from the Authority**

Subject to Clause 11.1.3 and to the extent permitted by law, the permissions granted pursuant to Clauses 11.1.1, 11.1.2 and 11.10 and 11.21 are not subject to any warranty from the Authority to the Contractor, express or to be implied by statute, as to the description, quality, repair or fitness for purpose of the Legacy Assets or the New Assets and all such warranties are hereby expressly excluded.

11.13 **Warranties in respect of Legacy Assets**

11.13.1 The Authority shall, to the extent that it is legally entitled to do so, extend to the Contractor with effect from the Relevant Assumption Date in respect of each Service the benefit of any guarantee, condition, warranty or other contractual or legal right from which the Authority may benefit in respect of the Legacy Assets used in the provision of such Relevant Service from any supplier or manufacturer of such Legacy Assets or which is implied by law in favour of the Authority.

11.13.2 Subject to Clause 11.14.1(E) the Authority shall be liable to the Contractor for all Claims and Losses suffered or incurred by the Contractor as a result of a breach by a supplier or manufacturer of any guarantee, condition or warranty from which the Authority may benefit.

11.14 **Conduct of Claims**

11.14.1 The Contractor shall be entitled to bring a claim in the name of the Authority against any supplier or manufacturer for breach of any guarantee, condition or

warranty referred to in Clause 11.13 (Warranties in respect of Legacy Assets), provided that:

- (A) the Contractor fully indemnifies the Authority against all Claims and Losses in connection with the making of any claim thereunder;
- (B) the Contractor gives such security in advance in respect of such indemnity as the Authority may deem reasonably appropriate;
- (C) the conduct of any such claim and of any incidental negotiations shall be at the Contractor's expense;
- (D) the Contractor keeps the Authority fully informed about the conduct of any such claim; and
- (E) the Contractor's entitlement in respect of any matter to which Clause 11.13.2 or this Clause 11.14 applies shall be limited to the amount recovered by the Authority from the supplier or manufacturer of any guarantee, condition or warranty from which the Authority may benefit in respect of the Claim or Loss referred to in Clause 11.13.2. This Clause 11.14.1(E) shall not limit or otherwise prejudice any right or entitlement of the Contractor arising other than pursuant to Clause 11.13.2 or this Clause 11.14.

11.14.2 The Authority shall give to the Contractor all reasonable co operation, access and assistance for the purposes of making any such claim under Clause 11.13 and this shall include:

- (A) subject to Clause 11.14.3, providing the Contractor with copies of all relevant contracts between the Authority and its suppliers and manufacturers whether appointed before or after the Execution Date; and
- (B) paying to the Contractor any proceeds received by the Authority from or on behalf of any of its suppliers and manufacturers in respect of any such claims.

11.14.3 Nothing in Clause 11.14.2(A) shall oblige the Authority to:

- (A) provide to the Contractor any information which is not in the Authority's possession or not in the possession of the Authority's agents, officers or employees or which the Authority does not have a contractual right to require the production of; and
- (B) disclose to the Contractor any information which:
 - (i) it would not be required to disclose pursuant to the Freedom of Information Act 2000; or
 - (ii) if disclosed, would result in the Authority being held liable for breaching any of its obligations or prejudicing any of its rights pursuant to the contract to which the information relates.

11.15 Restrictions on the Contractor

11.15.1 Subject to Clause 11.15.2 the Contractor shall:

- (A) not, and shall not purport to, charge, pledge, mortgage, sell or otherwise dispose of the Legacy Assets or New Assets at any time during the term of this Agreement other than as permitted or contemplated by this Agreement;

- (B) keep the Legacy Assets and New Assets free from any lien, distress, execution or other legal process other than in respect of general charges created in the normal course of business which cover New Assets, prior to the title in such New Assets being vested in the Contractor or transferring to the Authority under Clause 11.9 (whichever is the earlier), provided by any Sub-contractor;
- (C) not pledge, nor purport to pledge, the Authority's credit for any repairs to or maintenance or replacement of the Legacy Assets or New Assets or otherwise represent itself at any time as in any way the agent of the Authority; and
- (D) not, without the previous written consent of the Authority, attach the Legacy Assets or New Assets to any land or premises (other than land or premises owned by the Authority) so that they become, or in the opinion of the Authority may become, a fixture other than as permitted by this Agreement.

11.15.2 The restrictions set out in Clause 11.15.1 above shall not apply in respect of Contractor Owned Assets.

11.16 Duty to Notify

- 11.16.1 The Contractor shall, other than in respect of those created by the Initial Financing Agreements, throughout the term of this Agreement promptly notify the Authority of any mortgages or charges of all or any of the assets of the Contractor whether under a fixed or floating charge.
- 11.16.2 The Contractor shall, where requested by the Authority, provide satisfactory evidence of a written acknowledgement from any mortgagees or chargees that the Legacy Assets and New Assets are not within the scope of any such mortgage or charge.
- 11.16.3 The Contractor shall throughout the term of this Agreement promptly notify any landlord of any land or premises where the Legacy Assets and New Assets are at any time located that the Legacy Assets and New Assets are the property of the Authority.
- 11.16.4 Subject to Clause 11.16.5, the Contractor shall provide satisfactory evidence of such notification pursuant to Clause 11.16.3 and, where reasonably requested by the Authority, a written acknowledgement from any landlord that the New Assets have not and will not become a landlord's fixture or subject to any distress.

11.16.5

- (A) The Contractor shall use all reasonable endeavours to comply with its obligations in accordance with Clause 11.16.4.
- (B) Without prejudice to Clause 11.16.5(A), if the Contractor does not provide satisfactory evidence of such notification pursuant to Clause 11.16.3 and, where reasonably requested by the Authority, a written acknowledgement from any landlord that the New Assets have not and will not become a landlord's fixture or subject to any distress, the Contractor shall indemnify the Authority and keep the Authority fully and effectively indemnified against all Claims and Losses incurred or suffered by the Authority as a result of such failure.

11.17 Seizure of the Legacy Assets and New Assets

11.17.1 If the Legacy Assets or New Assets or any part thereof are seized or taken out of the Contractor's possession or control under any distress, execution or other legal process the Contractor shall promptly notify the Authority and shall:

- (A) promptly replace such Legacy Assets and New Assets or any part thereof; or
- (B) subject to Clause 11.17.2, to the extent that such Legacy Assets and New Assets or any part thereof are not replaced in accordance with Clause 11.17.1(A), indemnify the Authority against all Loss incurred by the Authority in retaking possession.

11.17.2 Where Clause 11.17.1(B) applies, the Contractor shall not be liable or be obliged to indemnify the Authority pursuant to Clause 11.17.1(B) for any Loss to the extent caused by the acts or omissions of the Authority or any Authority Party and in such circumstances any step taken pursuant to Clause 11.17.1(A) shall be treated as an Authority Service Variation.

11.18 Purpose of use of Legacy Assets and New Assets

The Contractor shall not use, or permit the use of, the Legacy Assets or New Assets for any purpose for which they are not designed or for any unlawful purpose or for any purpose other than provision of the Services or performance of the Commercial Contracts, in each case in accordance with, and subject to, the Statement of Requirements.

11.19 No Proprietary Interest

The permissions granted by the Authority to the Contractor in accordance with Clauses 11.1 (Legacy Assets) and 11.10 (Right to Use) are not intended to and shall not confer upon the Contractor any right or interest in the form of a lease or any other proprietary interest.

11.20 Leased Assets

11.20.1 If the Contractor is using, or intends to use, any Leased Assets which are:

- (A) installed or to be installed on the Project Road Network or any other land or property belonging to the Authority or to any Third Party; or
- (B) are intrinsic to the provision of the Services and not commonly used by contractors,

to perform the Services the provisions of Clauses 11.5, 11.6, 11.7, 11.8, 11.11, (other than Clause 11.11.1), 11.12, 11.15, 11.16, 11.7, 11.18, and Clause 61 (Handback of a Working System) shall be deemed to apply to such Leased Assets (and only those Leased Assets) as if they were New Assets.

11.20.2 The Contractor shall ensure that the counterparty to all agreements for Leased Assets (other than those subject to the Existing Leases) shall:

- (A) acknowledge and consent to the Authority using the relevant Leased Asset; and
- (B) without prejudice to Clause 33.6 (Performance by the Authority), agree to the fullest extent permitted by law that it shall not hold the Authority or any of its officers, representatives, agents, employees, servants, consultants, contractors (excluding the Contractor, its Sub-contractors and its or their respective sub-contractors), sub-contractors or advisers liable for any Claim or Loss (whether in contract, tort or otherwise

howsoever and whether or not arising out of any negligence on the part of the Authority or any of its officers, representatives, agents, employees, servants, consultants, contractors (excluding the Contractor, its Sub-contractors and its or their respective sub-contractors), sub-contractors or advisers) arising out of or resulting from the Authority's use of the relevant Leased Asset.

11.21 Inspection of Legacy Assets and Non Compliance

- 11.21.1 The Contractor shall be deemed prior to each Relevant Assumption Date in respect of any Relevant Service to have inspected and examined to its satisfaction the relevant Legacy Assets used in the provision of that Relevant Service.
- 11.21.2 Subject to Section 8.5 of Schedule 1.2 (Statement of Requirements: Processes), the Contractor shall be permitted to add Legacy Assets to be used in the provision of a Relevant Service to the Waived Non Compliance List up to the Relevant Assumption Date in respect of that Relevant Service.
- 11.21.3 Waived Assets shall be removed from the Waived Non Compliance List when:
 - (A) the Contractor has carried out remedial work to bring the Waived Asset (or the particular characteristic of the Waived Asset) up to compliance with the standard(s) against which it was waived;
 - (B) the Contractor has renewed the Waived Asset;
 - (C) the Contractor has removed the Waived Asset completely (because the Waived Asset had become redundant); or
 - (D) the Waived Asset has subsequently been shown to have been incorrectly included on the Waived Non Compliance List.
- 11.21.4 The Contractor shall during the inspections carried out pursuant to Clause 11.21.1 assess the risk of poor performance of Legacy Assets and plan and bear the costs of whatever remedial work it deems necessary to mitigate that risk.

11.22 Authority Works

- 11.22.1 Where the Authority has failed to procure the completion of the Authority Works and:
 - (A) during the period up to the Base Service Charge Date, the Contractor is, as a result of such failure, impeded in its ability to complete the upgrade of the Base Network necessary to achieve the capabilities defined by the Link Table;
 - (B) at any time, the Contractor is in compliance with such parts of the CRP Process as relate to the Authority Works in question and the Contractor has used and continues to use all reasonable endeavours to mitigate the effects of such failure to complete the Authority Works; and
 - (C) at any time, such failure is not due to the breach or default of the Contractor or any Contractor Party,
 the Contractor shall be entitled to relief and/or compensation (as applicable) in accordance with Clause 11.22.2.
- 11.22.2 The relief and/or compensation (as applicable) to which the Contractor shall be entitled pursuant to Clause 11.22.1 shall be as follows:

- (A) During the period up to the Base Service Charge Date, the Contractor shall be entitled to the payment of amounts equivalent to (and paid at the same time as) the Base Service Charge which would have been paid by the Authority to the Contractor if the Authority had not failed to procure the completion of the Authority Works.
- (B) During the period up to the Base Service Charge Date, the Longstop Date shall be postponed by such period as is reasonable taking account of the likely effect of the Authority's failure to procure the completion of the Authority Works.
- (C) At any time, the Authority shall not be entitled to terminate this Agreement pursuant to Clause 51 (Termination by Contractor Default) by reason of the failure of the Authority to procure the completion of the Authority Works.
- (D) At any time, subject to paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not, for the duration of the Authority's failure to procure completion of the Authority Works, be entitled to make deductions or award Service Credits under Clause 30 (Service Credit Regime) which would not have been deducted or awarded if the Authority had not failed to procure the completion of such Authority Works.
- (E) During the period up to the Base Service Charge Date, subject always to the Contractor using all reasonable endeavours to mitigate the consequences and costs flowing from the failure of the Authority to complete the Authority Works, direct delay and disruption costs flowing from such failure, provided that:
 - (1) no claim under this Clause 11.22 shall be made for a sum of less than £2,000 until the aggregate of all claims of less than that sum exceeds the Clause 11.22 Threshold, after which time those claims may be aggregated into one, each such claim being known as a "**Clause 11.22 Threshold Claim**";
 - (2) once a Clause 11.22 Threshold Claim has been made then Clause 11.22.2(E)(1) shall apply to all successive claims for a sum of less than £2,000 and this Clause 11.22.2(E)(2) shall apply on each occasion that a Clause 11.22 Threshold Claim is made, provided that a claim for a sum of £2,000 or more may be made at any time; and
 - (3) all delay and disruption costs claimed under this Clause 11.22.2(E) shall not, when aggregated together with the aggregate of claims made under Clause 16A, exceed the Clauses 11.22 and 16A Amount.

11.23 Authority Call Off Works

11.23.1 Where the Authority has failed to procure the completion of the Authority Call Off Works and:

- (A) the Contractor is, as a result of such failure, impeded in its ability to complete a Call Off; and

(B) the Contractor is in compliance with such parts of the CRP Process as relate to the Authority Call Off Works in question and the Contractor has used and continues to use all reasonable endeavours to mitigate the effects of such failure to complete the Authority Call Off Works; and

(C) such failure is not due to the breach or default of the Contractor or any Contractor Party,

the Contractor shall be entitled to relief in accordance with Clause 11.23.2.

11.23.2 The relief to which the Contractor shall be entitled pursuant to Clause 11.23.1 shall be as follows:

(A) During the period up to the Base Service Charge Date, the Contractor shall be entitled to the payment of amounts equivalent to (and paid at the same time as) the Base Service Charge which would have been paid by the Authority to the Contractor if the Authority had not failed to procure the completion of the Authority Call Off Works.

(B) During the period up to the Base Service Charge Date, the Longstop Date shall be postponed by such period as is reasonable taking account of the likely effect of the Authority's failure to procure the completion of the Authority Call Off Works.

(C) At any time, the Authority shall not be entitled to terminate this Agreement pursuant to Clause 51 (Termination for Contractor Default) by reason of the failure of the Authority to procure the completion of the Authority Call Off Works.

(D) At any time, subject to paragraph 6.3 of Part 2 of Schedule 27, (Service Credit Regime) the Authority shall not, for the duration of the Authority's failure to procure completion of the Authority Call Off Works, be entitled to make deductions or award Service Credits under Clause 30 (Service Credit Regime) which would not have been deducted or awarded if the Authority had not failed to procure the completion of such Authority Call Off Works.

11.24 Authority Contractors

Subject to Paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime) and subject to the Contractor using reasonable endeavours to mitigate the extent of such circumstances, the Authority shall not, where works are undertaken by or damage is caused by an Authority Contractor to assets in an RMC Area which has not been Taken On, be entitled to make deductions or award Service Credits under Clause 30 (Service Credit Regime) which would not have been deducted or awarded had such works not been undertaken or damage caused.

12. RESPONSIBILITY FOR THE ASSETS

12.1 Risk

12.1.1 The Contractor shall bear the risk of the loss of or damage to Legacy Assets used in the provision of any Relevant Service from the commencement of the Relevant Service Period in respect of that Relevant Service.

12.1.2 Notwithstanding the transfer of title to New Assets in accordance with Clause 11.9 the Contractor shall remain liable for any loss of or damage to any Leased Asset or New Asset.

12.1.3 Clauses 12.1.1 and 12.1.2 shall be without prejudice to Clause 30 (Service Credit Regime) and the indemnity or reimbursement obligation granted by the Authority to the Contractor under Clauses 11.4.1 (Indemnities relating to Existing Leases), 12.4.2 (Charges related to the Assets), 33.6 (Performance by the Authority), 39.7 (Intellectual Property Rights Indemnity), 44.11 (Authority Indemnity), 45.3.1 (Environmental Liability), 47.15.3 (Undertakings and Indemnities), 60.5.3 (Handback of Employees), 61.4.4 (Right to Use Contractor Owned Assets) and 66.4 (Review).

12.2 No Liability for the Authority

Without prejudice to the Authority's obligation to indemnify the Contractor under Clause 11.4.1 (Indemnities relating to Existing Leases), the Authority shall not be liable for any Claim or Loss affecting the Contractor caused directly or indirectly by any of the Assets or by any inadequacy of the Assets for any purpose or by any deficiency or defect in the Assets or the manner of their installation or the use or performance of the Assets or any repairs to the Assets or servicing of the Assets.

12.3 Authorisations related to the Assets

The Contractor shall obtain and keep in full force and effect all permissions, licences and other authorisations which may at any time be required in connection with the possession or use of the Assets and shall provide a copy to the Authority on the Authority's reasonable request. The Contractor shall comply with all requirements of Law relating to the possession or use of the Assets.

12.4 Charges related to the Assets

12.4.1 Throughout the period to which the permissions granted pursuant to Clauses 11.1 (Legacy Assets) and 11.10 (Right to Use) apply, the Contractor shall promptly pay all taxes and all other charges and expenses of whatever nature payable by the Contractor or the Authority in respect of the Assets or their use and shall produce to the Authority at the Authority's reasonable request the receipts for such payments.

12.4.2 Without prejudice to Clause 12.4.1, the Authority shall indemnify the Contractor against any Claims and/or Losses suffered by the Contractor as a result of the Authority's failure to pay any taxes or charges and expenses of whatever nature in respect of the Legacy Assets or their use prior to the Execution Date.

12.4.3 The provisions of Clauses 44.4 (Conduct of Claims) to 44.8 (Authority Handling of Claims) inclusive shall apply to the indemnity given in Clause 12.4.2, provided that in such Clauses references to the Authority shall be read as references to the Contractor and references to the Contractor shall be read as references to the Authority.

12.5 Exclusions

This Clause 12 (Responsibility for the Assets) shall not apply to any Protection Infrastructure or Access Infrastructure in respect of which maintenance responsibility has passed to, or remains with, the Authority in accordance with Clause 13 (Protection Infrastructure and Access Infrastructure), or to the Excluded Ducts.

13. PROTECTION INFRASTRUCTURE AND ACCESS INFRASTRUCTURE

13.1 Aerial Site Compounds

This Clause 13 (Protection Infrastructure and Access Infrastructure) shall not apply to any Protection Infrastructure or Access Infrastructure located within the perimeter fence of an aerial site compound.

13.2 Maintenance

Subject to Clause 13.1 (Aerial Site Compounds), following completion of the installation of the relevant Protection Infrastructure and/or Access Infrastructure by the Contractor, the responsibility for maintenance of Protection Infrastructure and Access Infrastructure installed by the Contractor in connection with the provision of the Services or performance of the Commercial Contracts shall pass to the Authority in accordance with the provisions set out in Annex A of Schedule 1.3 (Statement of Requirements: General Constraints).

13.3 Risk

Subject to Clause 13.1 (Aerial Site Compounds), the risk in, and responsibility for maintenance of, Protection Infrastructure and Access Infrastructure which as at Execution Date belongs to the Authority shall remain with the Authority.

14. MAINTENANCE AND RENEWAL

14.1 Contractor's Obligation

The Contractor shall ensure the maintenance, repair, service and replacement of the Assets in accordance with, and subject to, the Statement of Requirements, the Predictive Asset Management System and the Planned Maintenance Schedule. Without prejudice to, and subject to, the requirements of the Statement of Requirements, in setting and implementing its maintenance and renewal strategy, the Contractor shall act:

- 14.1.1 with due regard to the recommendations of any supplier and/or manufacturer of any of the Assets (including recommendations in respect of the working life expectancy of any of the Assets) and in a manner which does not prejudice the Contractor's or the Authority's (as the case may be) ability to make any claims under any warranty, condition or guarantee given by such suppliers and/or manufacturers;
- 14.1.2 in a manner which is consistent with the Contractor's obligations pursuant to Clause 61 (Handback of a Working System); and
- 14.1.3 in accordance with Good Industry Practice.

14.2 Predictive Asset Management System

14.2.1 Throughout the Contract Term the Contractor shall establish and maintain a register in relation to the Assets (the "**Predictive Asset Management System**").

14.2.2 The Predictive Asset Management System shall:

- (A) describe each Asset;
- (B) record the age and working life expectancy of each Asset;
- (C) detail the maintenance and replacement history of and strategy for each Asset in accordance with the Planned Maintenance Schedule;
- (D) detail maintenance procedures for each Asset;
- (E) record equipment specifications for each Asset;
- (F) record any associated health and safety information for each Asset;

- (G) record all supplier details for each Asset; and
- (H) record any other details required by Schedule 1.2 (Statement of Requirements: Processes).

14.2.3 Subject to Clause 14.1 (Contractor's Obligation), the Contractor shall operate its maintenance and renewal strategy in a manner which is consistent with the information recorded in the Predictive Asset Management System.

14.3 **Audit**

The Authority, acting reasonably and at its own cost, shall be entitled to carry out audits of the Predictive Asset Management System at any time or frequency using all reasonable endeavours to minimise any disruption to the provision of the Services. The Contractor shall co operate in any such audit in accordance with Section 5.6 (Facilitate Audit and Inspection) of Schedule 1.2 (Statement of Requirements: Processes).

14.4 **Exclusions**

This Clause 14 (Maintenance and Renewal) shall not apply to any Protection Infrastructure or Access Infrastructure in respect of which maintenance responsibility has passed to, or remains with, the Authority in accordance with Clause 13 (Protection Infrastructure and Access Infrastructure).

14.5 **Mandated Cable Renewals**

14.5.1 On the date which falls 2 years after the Effective Date and on each anniversary thereof the Contractor shall conduct an analysis of the output of the Predictive Asset Management System in order to determine whether, in its absolute discretion, it considers that the extent of cable renewal as described in Section 2.16 (Cable Repair/Replacement) of Schedule 1.3 (Statement of Requirements: General Constraints) throughout the Initial Service Period and making due allowance for contingencies (the "**Predicted Cable Renewal**"), will be less than 249 km (or equivalent) (the "**Mandated Cable Renewal**") and shall notify the Authority of the results of that analysis.

14.5.2 If:

- (A) the Contractor notifies the Authority pursuant to Clause 14.5.1; or
- (B) the Independent Surveyors conclude in the Exit Survey,

that the Predicted Cable Renewal will be less than the Mandated Cable Renewal (the amount of any shortfall being referred to as a "**Predicted Cable Shortfall**") then the Authority may, acting reasonably, direct the Contractor to carry out additional cable renewal, replacement and rejoining to those proposed by the Contractor but which are nevertheless appropriate having regard to the output of the Predictive Asset Management System and the criteria for cable renewal, replacement and rejoining set out in paragraph 8.7.5.3 of Schedule 1.2 (Statement of Requirements: Processes) of the Statement of Requirements and the Contractor shall comply with any such direction provided that the cost of such additional cable renewal, replacement and rejoining does not exceed the value of the Predicted Cable Shortfall.

14.6 **Mandated Transmission Stations Renewals**

14.6.1 On the date which falls 2 years after the Effective Date and on each anniversary thereof the Contractor shall conduct an analysis of the output of the Predictive Asset Management System in order to determine whether, in its absolute discretion, it considers that the extent of Transmission Stations renewal as

described in Section 8.7.13 of Schedule 1.2 (Statement of Requirements: Processes) throughout the Initial Service Period and making due allowance for contingencies (the "**Predicted Transmission Stations Renewal**"), will be less than 36 (the "**Mandated Transmission Stations Renewal**") and shall notify the Authority of the results of that analysis.

14.6.2 If:

- (A) the Contractor notifies the Authority pursuant to Clause 14.6.1; or
- (B) the Independent Surveyors conclude in the Exit Survey,

that the Predicted Transmission Stations Renewal will be less than the Mandated Transmission Stations Renewal (the amount of any shortfall being referred to as a "**Predicted Transmission Stations Shortfall**") then the Authority may, acting reasonably, direct the Contractor to carry out renewal of Transmission Stations additional to those proposed by the Contractor but which are nevertheless appropriate having regard to the output of the Predictive Asset Management System and the Contractor shall comply with any such direction provided that the cost of such additional renewal of Transmission Stations does not exceed the value of the Predicted Transmission Stations Shortfall.

15. REMOVAL OF ASSETS AND EQUIPMENT

15.1 Removal of Assets for Renewal and Telecommunications Bypasses

15.1.1 Clauses 15.1 to 15.5 shall not apply to any removal of an Asset as part of, or arising out of:

- (A) the renewal of an Asset under the NRTS Forward Programme as set out in Section 5.13.5 of Schedule 1.2 (Statement of Requirements: Processes); or
- (B) works carried out in accordance with Section 5.3 (Maintain Service Continuity) of Schedule 1.2 (Statement of Requirements: Processes).

15.1.2 The Authority shall not be required to make any payment in respect of the removal of an Asset referred to in Clause 15.1.1, the price of which shall be deemed to be included:

- (A) for Clause 15.1.1(A), in the Service Charge; and
- (B) for Clause 15.1.1(B), in the payment made in accordance with Paragraphs 2.17.13 to 2.17.16 of Part 4 of Schedule 30 (Payment Mechanism).

15.2 Removal of Equipment set out in the Redundant Equipment List

15.2.1 The Authority shall be entitled to require the Contractor to remove any equipment referred to in the Redundant Equipment List. The Contractor shall comply with any such requirement in accordance with Clause 15.2.2.

15.2.2 Any removal of equipment referred to in the Redundant Equipment List pursuant to Clause 15.2.1 shall be carried out in accordance with Section 7 (Ad Hoc Projects Processes) of Schedule 1.2 (Statement of Requirements: Processes).

15.2.3 The Authority shall pay the Contractor for the removal of any equipment referred to in the Redundant Equipment List pursuant to Clause 15.2.1 and required by the Authority to be removed in the following manner:

- (A) in respect of each Redundant Infrastructure, an amount determined in accordance with Paragraphs 2.17.27 to 2.17.34 of Part 4 of Schedule 30 (Payment Mechanism); and
 - (B) in respect of any other redundant equipment not covered by Clause 15.2.3(A) an amount for each such equipment determined in accordance with Paragraphs 6.2 to 6.17 of Part 4 of Schedule 30 (Ad Hoc Projects Charges).
- 15.2.4 The sum payable for each removal under Clause 15.2.3 or Clause 15.2.7 (as the case may be), shall be paid in the Monthly Invoice immediately after the completion of the relevant removal by the Contractor.
- 15.2.5 Removal of Redundant Equipment identified after the relevant RMC Area Take On Date for the Transmission Service or the Camera Mast Service (as the case may be)
- 15.2.6 The Authority shall be entitled to require the Contractor to remove any telecommunications equipment and infrastructure on the Project Road Network which has been identified after the relevant RMC Area Take On Date for the Transmission Service or the Camera Mast Service (as the case may be). The Contractor shall comply with any such requirement in accordance with the following provisions of this Clause 15.
- 15.2.7 Where the equipment identified and required by the Authority to be removed in Clause 15.2.6:
 - (A) has not at any time after the Execution Date formed part of the Transmission Network; and
 - (B) after identification, has been agreed by the Authority and the Contractor as being redundant prior to the Execution Date,

the provisions of Clause 15.2.2 and Clause 15.2.3 shall apply to the removal of equipment pursuant to this Clause 15.2.7, provided that in such Clauses references to "equipment referred to in the Redundant Equipment List pursuant to Clause 15.2.1" shall be read as references to "equipment identified after the relevant RMC Area Take On Date for the Transmission Service or the Camera Mast Service (as the case may be) pursuant to Clause 15.2.7".
- 15.2.8 Where the equipment identified and required by the Authority to be removed in Clause 15.2.6 has not been agreed by the Authority as being redundant prior to the Execution Date, such equipment shall be deemed to be a Non Service Instance Asset and the provisions of Clauses 15.4.3 to 15.4.10 shall apply.
- 15.3 **Removal of Redundant Service Instance Assets**
 - 15.3.1 For the purposes of this Clause 15 (Removal of Assets and Equipment), a **"Service Instance Asset"** shall mean an Asset which only delivers the requirements of one Service Type Instance or Camera Site Instance. For the avoidance of doubt, Service Instance Assets shall not include any Aerial Infrastructure or Aerial Electronics.
 - 15.3.2 The Authority shall be entitled to require the Contractor to remove any Service Instance Asset which is no longer required, and is not reasonably likely in the future to be required, in the provision of the Services or the performance of the Commercial Contracts.

- 15.3.3 Any removal of a Service Instance Asset carried out pursuant to Clause 15.3.2 shall be in accordance with Section 6.7 (Remove Service) of Schedule 1.2 (Statement of Requirements: Processes).
- 15.3.4 The Authority shall pay the Contractor for the removal of any Service Instance Asset required by the Authority to be removed pursuant to Clause 15.3.2 and such sum shall be determined in accordance with Paragraphs 2.17.23 to 2.17.26 of Part 4 of Schedule 30 (Payment Mechanism).
- 15.4 Removal of Non Service Instance Assets**
- 15.4.1 For the purposes of this Clause 15.4 (Removal of Non Service Instance Assets), a **"Non Service Instance Asset"** is any Asset which is not a Service Instance Asset, Aerial Infrastructure or Aerial Electronics.
- 15.4.2 The Contractor shall promptly notify the Authority of any Non Service Instance Asset which is:
- (A) no longer required, and is not reasonably likely in the future to be required, in the provision of the Services or the performance of the Commercial Contracts; or
 - (B) listed as redundant in accordance with Section 5.13.25.2 (Redundant Assets) of Schedule 1.2 (Statement of Requirements: Processes),
- and upon receiving approval from the Authority, the Contractor shall remove the relevant Non Service Instance Asset promptly and at its own cost.
- 15.4.3 If at any time the Authority believes that the Contractor has failed to remove any Non Service Instance Asset in accordance with Clause 15.4.2, or if an asset deemed to be a Non Service Instance Asset in accordance with Clause 15.2.8 (as the case may be) the Authority may give notice (a **"Non Service Instance Asset Removal Notice"**) to the Contractor requiring the Contractor to remove such Non Service Instance Asset.
- 15.4.4 Such Non Service Instance Asset Removal Notice shall specify in reasonable detail:
- (A) the identity and location of the relevant Non Service Instance Asset(s);
 - (B) the reason for the proposed removal including details (where practicable) in respect of the current use of the relevant Non Service Instance Asset(s); and
 - (C) the reasonable date by which the Authority wishes the Contractor to remove the relevant Non Service Instance Asset(s) and the reasonable time period within which the Authority requires such removal.
- 15.4.5 If the Contractor disputes the Non Service Instance Asset Removal Notice, the Contractor shall, within 10 Business Days of receipt of the Authority's Non Service Instance Asset Removal Notice inform the Authority of its objections. Either Party may refer any disagreements concerning a Non Service Instance Asset Removal Notice to the Dispute Resolution Procedure.
- 15.4.6 Where the Contractor withdraws an objection made pursuant to Clause 15.4.5 or the outcome of any referral to the Dispute Resolution Procedure is that the Contractor's objection made in accordance with Clause 15.4.5 is not upheld, the Contractor shall remove to the standard specified in Section 6.7 (Remove Service) of Schedule 1.2 (Statement of Requirements: Processes), and at its own expense, all Non Service Instance Assets listed in the Non Service Instance Asset

Removal Notice by the date specified in the Non Service Instance Asset Removal Notice.

- 15.4.7 Where the Authority accepts the Contractor's objection made pursuant to Clause 15.4.5, or the Dispute Resolution Procedure determines that the Contractor's objection is valid, Clause 15.4.2 shall not apply and Clauses 15.4.8 to 15.4.10 shall apply instead.
- 15.4.8 Where Clause 15.4.7 applies, the Authority shall have the right to require the Contractor to remove such Non Service Instance Asset.
- 15.4.9 Any removal of such Non Service Instance Asset carried out pursuant to Clause 15.4.8 shall be in accordance with Section 6.7 (Remove Service) of Schedule 1.2 (Statement of Requirements: Processes).
- 15.4.10 The Authority shall pay the Contractor for the removal of any Non Service Instance Asset pursuant to Clause 15.4.9 and such sum shall be determined in accordance with Paragraphs 2.17.23 to 2.17.26 of Schedule 30 (Payment Mechanism).

15.5 **Removal of Aerial Infrastructure or Aerial Electronics**

- 15.5.1 Subject to Clause 60.3 (Removal of Aerial Infrastructure and Aerial Electronics) and Clauses 15.5.5 to 15.5.10, the Contractor shall, at its own cost, remove any Aerial Infrastructure or Aerial Electronics where:
 - (A) such removal is necessary or desirable to facilitate maintenance or enhancement of the Project Road Network; or
 - (B) such Aerial Infrastructure or Aerial Electronics are no longer required, and are not reasonably likely to be required in the future, in the provision of the Services or performance of the Commercial Contracts.
- 15.5.2 If at any time the Authority believes that the Contractor has failed to remove any Aerial Infrastructure or Aerial Electronics in accordance with Clause 15.5.1, the Authority may give notice (an "**Aerial Infrastructure Removal Notice**") to the Contractor requiring the Contractor to remove such Aerial Infrastructure or Aerial Electronics.
- 15.5.3 Such Aerial Infrastructure Removal Notice shall specify in reasonable detail:
 - (A) the identity and location of the relevant Aerial Infrastructure or Aerial Electronics;
 - (B) the reason for the proposed removal including details (where practicable) in respect of the current use of the relevant Aerial Infrastructure or Aerial Electronics; and
 - (C) the reasonable date by which the Authority wishes the Contractor to remove the relevant Aerial Infrastructure or Aerial Electronics and the reasonable time period within which the Authority requires such removal.
- 15.5.4 If the Contractor disputes the Aerial Infrastructure Removal Notice, the Contractor shall, within 10 Business Days of receipt of the Authority's Aerial Infrastructure Removal Notice, inform the Authority in writing of its objection which shall be limited to the ground specified in Clause 15.5.5.

- 15.5.5 The Contractor may only object to an Aerial Infrastructure Removal Notice on the grounds that:
- (A) the date by which the Authority wishes the Contractor to remove the Aerial Infrastructure or Aerial Electronics and/or the time period within which the Authority requires such removal is unreasonable; and/or
 - (B) at the time of construction of the Aerial Infrastructure or Aerial Electronics which are the subject of the relevant Aerial Infrastructure Removal Notice, the Authority confirmed to the Contractor that the location of the Aerial Infrastructure or Aerial Electronics would not be affected by any planned or foreseeable maintenance or enhancement of the Project Road Network and the Contractor shall provide to the Authority as an enclosure to the objection supporting evidence of such confirmation.
- 15.5.6 Within 15 Business Days of receipt of the Contractor's objection and any supporting evidence provided pursuant to Clause 15.5.5(B), the Authority shall inform the Contractor whether it accepts the Contractor's objection. Either Party may refer any disagreement concerning an Aerial Infrastructure Removal Notice to the Dispute Resolution Procedure.
- 15.5.7 Where the Contractor withdraws an objection made pursuant to Clause 15.5.4 or the outcome of any referral to the Dispute Resolution Procedure is that the Contractor has failed to show that either the date and/or time period within which the Authority requires such removal is unreasonable or a confirmation by the Authority of the type referred to in Clause 15.5.5(B) was in fact given at the relevant time, the Contractor shall remove to the standard specified in Section 6.7 (Remove Service) of Schedule 1.2 (Statement of Requirements: Processes), and at its own expense, all Aerial Infrastructure or Aerial Electronics listed in the Aerial Infrastructure Removal Notice by the date specified in the Aerial Infrastructure Removal Notice.
- 15.5.8 Where the Authority accepts the Contractor's objection made pursuant to Clause 15.5.4, or the outcome of any referral to the Dispute Resolution Procedure is that the Contractor has shown that a confirmation by the Authority of the type referred to in Clause 15.5.5(B) was given at the relevant time, Clause 15.5.1 shall not apply and Clauses 15.5.9 to 15.5.11 shall apply instead.
- 15.5.9 Where Clause 15.5.8 applies, the Authority shall have the right to require the Contractor to remove such Aerial Infrastructure or Aerial Electronics.
- 15.5.10 Any removal of Aerial Infrastructure or Aerial Electronics carried out pursuant to Clause 15.5.9 shall be in accordance with Section 6.7 (Remove Service) of Schedule 1.2 (Statement of Requirements: Processes).
- 15.5.11 The Authority shall pay the Contractor for the removal of any Aerial Infrastructure and Aerial Electronics pursuant to Clause 15.5.10 and such sum shall be determined in accordance with Paragraph 4 of Part 4 of Schedule 30 (Calculation of Aerial Site Service Charge).

15.6 Relief

- 15.6.1 Subject to Clause 15.6.2 and to paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not, for the period commencing on the occurrence of the Relevant Event and ending on the remedy of the Relevant Event, be entitled to make any deductions or award any Service Credits under

Clause 30 (Service Credit Regime) which would not have been made or awarded had the Relevant Event not occurred. For the purpose of this Agreement, **"Relevant Event"** means:

- (A) the removal by the Authority of any Asset or any item of Aerial Electronics, Aerial Infrastructure, Access Infrastructure or Protection Infrastructure other than:
 - (i) in accordance with the terms of this Agreement; or
 - (ii) with the Contractor's consent; and
- (B) the removal, loss of or damage to any Asset or any item of Aerial Electronics, Aerial Infrastructure, Access Infrastructure or Protection Infrastructure caused by an Authority's Contractor other than:
 - (i) in accordance with the terms of this Agreement; or
 - (ii) with the Contractor's consent; and
- (C) the lack of implementation of a Telecommunications Bypass to the extent permitted by the provisions of Section 5.3.2.14 of Schedule 1.2 (Statement of Requirements: Processes).

15.6.2 The relief to which the Contractor shall be entitled following the occurrence of any Relevant Event shall only be given to the extent that the Contractor is in compliance with such parts of the CRP Process as relate to the Relevant Event in question and the Contractor has used and continues to use all reasonable endeavours to obtain access and mitigate the effects of the Relevant Event.

16. ACCESS

16.1 Right of Access to Trunk Road Network and other land owned by the Authority and Ofcom Direction

16.1.1 The Authority acknowledges the direction issued by Ofcom under Section 106 of the Communications Act 2003 to the Contractor on 12 May 2005 applying the code set out in paragraph 2(1) of Schedule 2 of the Telecommunications Act 1984 ("**Code**").

16.1.2 Subject to Clauses 16.3 and 16.4, the Authority confers on the Contractor the right for statutory purposes to carry out on, under or over the Trunk Road Network and Other HA Land those activities and operations set out in the Code ("**Code Activities**") in so far as these are necessary for the performance of the Services, from the Effective Date until the Expiry Date or Termination Date (whichever is the earlier).

16.2 Right of Access to Third Party Land

Subject to Clauses 16.3 and 16.4:

16.2.1 where the Authority has a contractual right of access for the Code Activities to any land occupied by a Third Party in respect of which the Authority has the right to grant a licence to the Contractor for the Code Activities, the Authority hereby grants a non exclusive licence to the Contractor for those activities in so far as it is possible for the Authority to do so and in so far as such rights are necessary for performance of the Services, from the Effective Date until the Expiry Date or Termination Date (whichever is the earlier);

- 16.2.2 where the Authority is unable for any reason to grant the Contractor a licence for the Code Activities over any land occupied by a Third Party the Contractor shall use best endeavours to obtain the right for statutory purposes (subject to reasonable commercial cost constraints) to carry out on, under or over such land, the Code Activities in so far as these are necessary for the performance of the Services, from the Effective Date until the Expiry Date or Termination Date (whichever is the earlier);
- 16.2.3 where the Contractor is unable for any reason to obtain the consent of the Third Party occupier of land to the carrying out of Code Activities in respect of that land the Contractor shall use best endeavours to obtain a court order under the provisions of paragraph 5 of Schedule 2 of the Telecommunications Act 1984.

16.3 Compliance with Statement of Requirements

The Contractor shall comply, and procure that each Contractor Party complies, at all times, with the requirements for access:

- 16.3.1 set out in the Statement of Requirements; and
- 16.3.2 in the period from the Effective Date to the RMC Area Take On Date for the Transmission Service in respect of each RMC Area, with the transition arrangements contemplated in the Statement of Requirements.

16.4 Compliance with Other Requirements

The rights conferred on the Contractor in Clauses 16.1.2, 16.2.1 and 16.6, or to be obtained by the Contractor pursuant to Clauses 16.2.2 and 16.2.3:

- 16.4.1 are without prejudice to any obligation (statutory or otherwise) upon the Contractor to obtain Necessary Consents from third parties, governmental organisations or the Secretary of State for Transport, and in particular where necessary the consent required under section 61 of the New Roads and Street Works Act 1991; and
- 16.4.2 shall not, without prejudice to Clauses 16.9, 16.10 and 16.11, entitle the Contractor to have access to any part of the Project Road Network, Third Party Land (other than Third Party Land where the Authority does not have the right to exclude access) or HA Premises in respect of which the Authority notifies the Contractor that the Authority or any Authority Party requires exclusive use of that part for a given period of time (the decision that exclusive use of that part of the Project Road Network, Third Party Land or HA Premises is so required shall be at the Authority's absolute discretion); and
- 16.4.3 shall be exercised by the Contractor:
- (A) in a good and workmanlike manner and with good and suitable workmanship and materials;
 - (B) to the satisfaction of any Relevant Authority exercising their statutory authority in relation to the relevant activities.
 - (C) using best endeavours to ensure that no damage, nuisance or annoyance shall be caused to the Project Road Network, Third Party Land or HA Premises or neighbouring premises;
 - (D) without interrupting or destroying any right or easement of which the Contractor is aware having consulted with the Authority (including the Authority's lands division) enjoyed over the Project Road Network, Third Party Land or HA Premises;

- (E) taking proper and sufficient precautions to avoid rendering any part of the Project Road Network, Third Party Land or HA Premises unsafe and to repair and make good to the reasonable satisfaction of the Authority any damage whatsoever caused to the Project Road Network, Third Party Land or HA Premises or to any structures thereon or drains or other service media; and
- (F) where the access is granted to Non-HA Project Land or Third Party Land by the Authority and the terms pursuant to which the Authority is entitled to grant access to such Non-HA Project Land or Third Party Land have been disclosed to the Contractor, so as not to cause the Authority to breach such terms.

16.5 **Motorway Passes**

The Contractor shall provide to the Authority a list of all Contractor Employees who may be required to stop on any motorway in connection with the provision of the Services together with such information about such Contractor Employees as the Authority may reasonably request. The Authority shall within a reasonable period issue to the Contractor passes for such Contractor Employees confirming that they are carrying out maintenance for the purposes of regulation 16(1)(f) of the Motorways Traffic (England and Wales) Regulations 1982.

16.6 **Access to HA Premises**

Subject to Clause 16.4, the Authority grants to the Contractor, its Sub-contractors (and any of its or their respective sub-contractors), the Contractor Employees, any Appointed Representative and Suitable Substitute Contractor for the purpose of enabling the Contractor to comply with its obligations under this Agreement and for the period from the Effective Date until the earlier of the Expiry Date and the Termination Date, a licence to obtain access to Regional Control Centres, the Coleshill Computer Centre at the Coleshill Communications Centre, Next to WCC Highways Maintenance Compound, Coleshill Heath Road, Near Coleshill, B46 3HL, the Yate Stores at Yate, Bristol and any other premises owned by the Authority which replace either Coleshill Computer Centre or Yate Stores (together the "**HA Premises**").

16.7 **Advertising**

- 16.7.1 Subject to Clauses 16.7.2 and 16.7.3, the Contractor shall not, and shall procure that its Sub-contractors, its or their respective sub-contractors and agents do not, undertake any advertising on any land comprising the Project Road Network, on any land and/or premises owned and/or occupied by the Authority or, save where such Third Party has given its consent to such advertising, on any premises used from time to time by the Contractor to perform its obligations under this Agreement and/or to perform the Commercial Contracts which are owned and/or occupied by a Third Party.
- 16.7.2 The Contractor, the Sub-contractors and its or their sub-contractors and agents shall be entitled to advertise on the Exempt Vehicles provided that such advertisements do not prejudice the standing or reputation of the Authority.
- 16.7.3 Vehicles used by the Contractor, the Sub-contractors and its and their sub-contractors in connection with the Project which are not Exempt Vehicles shall be branded or marked in accordance with the Authority's policy from time to time regarding the branding or marking of vehicles.

16.8 CRP Process

The Contractor shall liaise with the Authority's Contractors in accordance with, and shall comply with, the CRP Process in accordance with the requirements of Section 5.13 (Capture Requirements and Plan) of Schedule 1.2 (Statement of Requirements: Processes).

16.9 Trunk Road Network, Other HA Land and HA Premises

16.9.1 Without prejudice to the Contractor's rights in respect of Relief Events and Force Majeure Events and subject to Clause 16.12 and to Section 16 of Schedule 1.1a (Statement of Requirements: Transmission Service), if the Contractor is unable to obtain access to the Trunk Road Network, Other HA Land or HA Premises (or any part of them) due to an Emergency, the Contractor shall not be entitled to any relief and/or claim compensation under this Agreement.

16.9.2 Save as specified in Clause 16.9.1, where the Contractor is prevented by the Authority or any Authority Party from obtaining access to the land referred to in Clause 16.9.1 and:

- (A) during the period prior to the Base Service Charge Date, such access was for the development of the Base Network necessary to undertake the capabilities defined in the Link Table;
- (B) at any time, the Contractor is in compliance with the CRP Process and the Contractor has used and continues to use all reasonable endeavours to obtain access and mitigate the effects of any delay; and
- (C) at any time, the prevention of access is not due to the breach or default of the Contractor or any Contractor Party,

the Contractor shall be entitled to relief and/or compensation (as applicable) in accordance with Clause 16.9.3.

16.9.3 The relief and/or compensation (as applicable) to which the Contractor shall be entitled pursuant to Clause 16.9.2 shall be as follows:

- (A) During the period up to the Base Service Charge Date, the Contractor shall be entitled to the payment of amounts equivalent to (and paid at the same time as) the Base Service Charge which would have been paid by the Authority to the Contractor if the access had not been prevented as described in Clause 16.9.2.
- (B) During the period up to the Base Service Charge Date, the Longstop Date shall be postponed by such period as is reasonable taking account of the likely effect of the prevention of access as described in Clause 16.9.2.
- (C) At any time, the Authority shall not be entitled to terminate this Agreement pursuant to Clause 51 (Termination for Contractor Default) by reason of the prevention of access as described in Clause 16.9.2.
- (D) At any time, subject to paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not, for the duration of the prevention of access, as described in Clause 16.9.2, be entitled to make deductions or award Service Credits under Clause 30 (Service Credit Regime) which would not have been deducted or awarded had the access not been prevented as described in Clause 16.9.2.
- (E) During the period up to the Base Service Charge Date, provided that at least 5 Business Days notice of the prevention of access has not been given by the Authority to the Contractor and subject always to the

Contractor using all reasonable endeavours to mitigate the consequences and costs flowing from the prevention of access, direct delay and disruption costs flowing from the prevention of access, as described in Clause 16.9.2, provided that such delay and disruption costs shall not exceed the Authority Amount per event of access prevention and £3 million in aggregate.

16.9.4 The Authority agrees that:

- (A) if it is required by Law to charge the Contractor or any Contractor Party a fee for obtaining access to the Trunk Road Network or Other HA Land then, to the extent that such fees have been incurred in connection with providing the Services it will reimburse the same to the Contractor; and
- (B) other than as required by Law, it will not charge a fee to any Contractor Party for obtaining access to the Trunk Road Network or Other HA Land in order to provide the Services.

16.10 Project Road Network not comprising the Trunk Road Network or Other HA Land

16.10.1 Without prejudice to the Contractor's rights in respect of Relief Events and Force Majeure Events and subject to Clause 16.12 and to Section 16 of Schedule 1.1a (Statement of Requirements: Transmission Service), if the Contractor is unable to obtain access to the Project Road Network (or any part of it) not comprising the Trunk Road Network or Other HA Land due to an Emergency, the Contractor shall not be entitled to any relief and/or claim compensation under this Agreement.

16.10.2 Save as specified in Clause 16.10.1 and without prejudice to Clause 16.10.4, where the Contractor is prevented by the Authority or any Authority Party from obtaining access to the land referred to in Clause 16.10.1 and:

- (A) during the period prior to the Base Service Charge Date, such access was for the development of the Base Network necessary to undertake the capabilities defined in the Link Table;
- (B) at any time, the Contractor is in compliance with the CRP Process and the Contractor has used and continues to use all reasonable endeavours to obtain access and mitigate the effects of any delay; and
- (C) at any time, the prevention of access is not due to the breach or default of the Contractor or any Contractor Party,

the Contractor shall be entitled to relief and/or compensation (as applicable) in accordance with Clause 16.10.3.

16.10.3 The relief to which the Contractor shall be entitled pursuant to Clause 16.10.2 shall be as follows:

- (A) During the period up to the Base Service Charge Date, the Contractor shall be entitled to the payment of amounts equivalent to (and paid at the same time as) the Base Service Charge which would have been paid by the Authority to the Contractor if the access had not been prevented as described in Clause 16.10.2.
- (B) During the period up to the Base Service Charge Date, the Longstop Date shall be postponed by such period as is reasonable taking account of the likely effect of the prevention of access as described in Clause 16.10.2.

- (C) At any time, the Authority shall not be entitled to terminate this Agreement pursuant to Clause 51 (Termination for Contractor Default) by reason of the prevention of access as described in Clause 16.10.2.
 - (D) At any time, subject to paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not, for the duration of the prevention of access, as described in Clause 16.10.2, be entitled to make deductions or award Service Credits under Clause 30 (Service Credit Regime) which would not have been deducted or awarded had the access not been prevented, as described in Clause 16.10.2.
- 16.10.4 If, in order to gain access to the Project Road Network (or any part of it) not comprising the Trunk Road Network or Other HA Land to provide the Services, any Contractor Party is required to pay a fee which is in excess of a commercially reasonable cost for obtaining such access, provided the fee has not arisen by reason of the breach or default of a Contractor Party, the Authority shall, at its option, either:
- (A) reimburse to the Contractor the amount of such fee which exceeds a commercially reasonable cost for obtaining such access; or
 - (B) request an Authority Service Variation the purpose of which is to relieve the Contractor of the requirement to obtain access to such land.

16.11 Third Party Land

- 16.11.1 Without prejudice to the Contractor's rights in respect of Relief Events and Force Majeure Events and subject to Clause 16.12 and to Section 16 of Schedule 1.1a (Statement of Requirements: Transmission Service), if the Contractor is unable to obtain access to Third Party Land due to an Emergency, the Contractor shall not be entitled to any relief and/or claim compensation under this Agreement.
- 16.11.2 Save as specified in Clause 16.11.1, where the Contractor is unable to obtain access to Legacy Assets (or any New Asset which replaces a Legacy Asset) despite using its best endeavours (subject to reasonable commercial cost constraints) to obtain such access and:
- (A) during the period up to the Base Service Charge Date, such access was for the development of the Base Network necessary to undertake the capabilities defined in the Link Table;
 - (B) at any time, the Contractor is in compliance with the CRP Process and the Contractor has used and continues to use all reasonable endeavours to mitigate the effects of any delay; and
 - (C) at any time, the prevention of access is not due to the breach or default of the Contractor or any Contractor Party,
- the Contractor shall be entitled to relief in accordance with Clause 16.11.3.
- 16.11.3 The relief to which the Contractor shall be entitled pursuant to Clause 16.11.2 shall be as follows:
- (A) During the period up to the Base Service Charge Date, the Contractor shall be entitled to the payment of amounts equivalent to (and paid at the same time as) the Base Service Charge which would have been paid by the Authority to the Contractor if the access had not been prevented as described in Clause 16.11.2.

- (B) During the period up to the Base Service Charge Date, the Longstop Date shall be postponed by such period as is reasonable taking account of the likely effect of the prevention of access as described in Clause 16.11.2.
- (C) At any time, the Authority shall not be entitled to terminate this Agreement pursuant to Clause 51 (Termination for Contractor Default) by reason of the prevention of access as described in Clause 16.11.2.
- (D) At any time, subject to paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not, for the duration of the prevention of access, as described in Clause 16.11.2, be entitled to make deductions or award Service Credits under Clause 30 (Service Credit Regime) which would not have been deducted or awarded had the access not been prevented, as described in Clause 16.11.2.

16.11.4 If the Contractor is unable to obtain access to Third Party Land on which the Contractor wishes to place New Assets, the Contractor shall not be entitled to any relief and/or claim compensation under this Agreement.

16.12 Emergencies

- 16.12.1 Without prejudice to the Authority's rights in respect of Force Majeure Events, if the Contractor is unable to gain access to the Project Road Network, Third Party Land or HA Premises (or any part of either of them) due to an Emergency the Authority shall not be entitled to terminate this Agreement to the extent that the Contractor is prevented from carrying out its obligations by the Emergency.
- 16.12.2 The Authority shall not, for the duration of any Access Prevented State which arises as a result of any Emergency, be entitled to make deductions or award Service Credits under Clause 30 (Service Credit Regime) in respect of any part(s) of the Project Road Network, Third Party Land or HA Premises which would not have been made or awarded had the Emergency not arisen.

16.13 Non-HA Project Land

- 16.13.1 The Authority shall, by the Effective Date, provide to the Contractor a list of all land, roads and buildings within England of which it is aware (other than the Trunk Road Network, Other HA land or HA Premises) on which there is located a Service Delivery Point or Other Asset (the "**List of Non-HA Project Land**").
- 16.13.2 The Contractor shall use reasonable endeavours to identify any further land, roads and buildings within England (other than the Trunk Road Network, Other HA land or HA Premises) on which there is located a Service Delivery Point or Other Asset and which is not listed on the List of Non-HA Project Land. The Contractor shall update the List of Non-HA Project Land to take account of any such land, roads and buildings promptly following becoming aware of the same and shall, at the same time, provide an updated List of Non-HA Project Land to the Authority.
- 16.13.3 If the Contractor fails to comply with its obligation pursuant to Clause 16.13.2, the Authority shall be entitled to update the List of Non-HA Project Land and shall, at the same time, provide an updated List of Non-HA Project Land to the Contractor.

16A. AUTHORITY EVENTS

16A.1 If:

- 16A.1.1 during the period up to the Base Service Charge Date, the Contractor is, as a result of an Authority Event, impeded in its ability to complete the development of the Base Network necessary to undertake the capabilities defined in the Link Table;
- 16A.1.2 at any time, the Contractor is in compliance with such parts of the CRP Process as relate to the Authority Event in question and the Contractor has used and continues to use all reasonable endeavours to mitigate the effects of the Authority Event; and
- 16A.1.3 at any time, the Authority Event is not due to the breach or default of the Contractor or any Contractor Party,

the Contractor shall be entitled to relief and/or compensation (as applicable) in accordance with Clause 16A.2.

16A.2 The relief and/or compensation (as applicable) to which the Contractor shall be entitled pursuant to Clause 16A.1 shall be as follows:

- 16A.2.1 During the period up to the Base Service Charge Date, the Contractor shall be entitled to the payment of amounts equivalent to (and paid at the same time as) the Base Service Charge which would have been paid by the Authority to the Contractor if the Authority Event had not occurred.
- 16A.2.2 During the period up to the Base Service Charge Date, the Longstop Date shall be postponed by such period as is reasonable taking account of the likely effect of the Authority Event.
- 16A.2.3 At any time, the Authority shall not be entitled to terminate this Agreement pursuant to Clause 51 (Termination for Contractor Default) by reason of the occurrence of the Authority Event.
- 16A.2.4 At any time, subject to paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not, for the duration of the Authority Event, be entitled to make deductions or award Service Credits under Clause 30 (Service Credit Regime) which would not have been deducted or awarded if such Authority Event had not occurred.
- 16A.2.5 During the period up to the Base Service Charge Date, subject always to the Contractor using all reasonable endeavours to mitigate the consequences and costs flowing from the occurrence of the Authority Event, direct delay and disruption costs flowing from such failure, provided that such delay and disruption costs shall not, when aggregated together with the aggregate of claims made under Clause 11.22, exceed the Clauses 11.22 and 16A Amount.

16A.3 If:

- 16A.3.1 the Contractor is, as a result of an Authority Event, impeded in its ability to complete a Call Off; and
- 16A.3.2 the Contractor is in compliance with such parts of the CRP Process as relate to the Authority Event in question and the

Contractor has used and continues to use all reasonable endeavours to mitigate the consequences of the Authority Event; and

16A.3.3 the Authority Event is not due to the breach or default of the Contractor or any Contractor Party,

the Contractor shall be entitled to relief in accordance with Clause 16A.4.

16A.4 The relief to which the Contractor shall be entitled pursuant to Clause 16A.3 shall be as follows:

16A.4.1 at any time, the Authority shall not be entitled to terminate this Agreement pursuant to Clause 51 (Termination for Contractor Default) by reason of the occurrence of the Authority Event.

16A.4. at any time, subject to paragraph 6.3 of Part 2 of Schedule 27, the Authority shall not, for the duration of the Authority Event, be entitled to make deductions or award Service Credits under Clause 30 (Service Credit Regime) which would not have been deducted or awarded if such Authority Event had not occurred.

PART V - GENERAL OBLIGATIONS

17. OVERALL STANDARDS OF PERFORMANCE

- 17.1 The Contractor shall, subject to Clause 4.1 (Priority), perform the Services at all times:
- 17.1.1 in accordance with Good Industry Practice;
 - 17.1.2 in accordance with all relevant British Standards and codes of practice to which the Contractor would be expected to have regard;
 - 17.1.3 in accordance with the Statement of Requirements and the other terms and conditions of this Agreement;
 - 17.1.4 in compliance with all Law and Necessary Consents;
 - 17.1.5 subject to Clause 17.4, in compliance with the Registered Documents;
 - 17.1.6 in a manner that is not likely to be injurious to health or cause damage to property;
 - 17.1.7 in a manner that is consistent with the Authority discharging its functions and statutory duties and that would reasonably be expected not to lower the reputation of the Authority in the eyes of any Third Party;
 - 17.1.8 in a manner which, to the extent reasonably practicable, minimises inconvenience and disruption to the Authority, its employees, staff and personnel, any other contractor to the Authority and any Third Party including any disruption as a result of lane closures for the purposes of undertaking maintenance, repairs and installation works; and
 - 17.1.9 having regard to the e-Government Interoperability Framework and the e-Government Metadata Standard.
- 17.2 The Contractor shall be responsible for all equipment, goods and materials brought onto the Project Road Network or any other premises owned or occupied by the Authority by or on behalf of the Contractor or any Sub-contractor (or any of its or their respective sub-contractors) in each case whether or not intended to be used in the provision of the Services.
- 17.3 The Contractor shall only conduct the business which is the subject matter of this Agreement.
- 17.4 The Contractor shall not change any of the Registered Documents without the prior written consent of the Authority and without following the procedure set out in sections 4.2.2.66 to 4.2.2.73 (inclusive) of Schedule 1.2. The Authority may only withhold its consent to a proposed change in the Registered Documents where the proposed change, if implemented, would:
- 17.4.1 prevent or prejudice the ability of the Contractor to meet its obligations under this Agreement; or
 - 17.4.2 reduce the capability, functionality or features of:
 - (A) the Services;
 - (B) the transmission equipment and software;
 - (C) the NRTS Required Systems; or
 - (D) the overall technical solution,
- provided that, without prejudice to Schedule 8 (Authority Events), the Authority may not withhold its consent to a change to a Registered Document where that

change is consequential upon an Authority Service Variation, a Contractor Service Variation or a Minor Variation (as applicable).

17.5 The content of the Registered Documents from time to time shall be without prejudice to the Contractor's obligation to perform the Services at all times in accordance with the Statement of Requirements.

17.6 To the extent that the performance of the Contractor's obligations under this Agreement would contravene any Law as at the Effective Date:

17.6.1 the Authority shall not be entitled to terminate this Agreement pursuant to Clause 51 (Termination for Contractor Default) by reason of any such contravention of Law; and

17.6.2 the Contractor shall, as soon as reasonably practicable, request a Contractor Service Variation to remedy the circumstances giving rise to the contravention of Law and the Authority shall not unreasonably withhold its consent to any such Contractor Service Variation. Any such Contractor Service Variation which is implemented shall be implemented at the cost of the Contractor.

This Clause 17.6 shall be without prejudice to the Authority's right to make deductions or award any Service Credits under Clause 30.

17.7 Each Party to this Agreement shall comply with Schedule 1.

18. NECESSARY CONSENTS

The Contractor shall:

18.1.1 obtain all Necessary Consents required in order for the Contractor lawfully to perform the Services and the Commercial Contracts;

18.1.2 deliver to the Authority a copy of each Necessary Consent promptly following its issue; and

18.1.3 comply with any condition, restriction or limitation imposed by the Necessary Consents.

The Authority shall use its reasonable endeavours to provide the Contractor with all such assistance as the Contractor reasonably requires in order to comply with this Clause 18.

19. FOSSILS AND ANTIQUITIES

19.1 Property

As between the Parties, all fossils, antiquities, human remains and other objects having artistic, historic or monetary value which may be found on or at the Project Road Network or any other land or premises owned or occupied by the Authority are or shall become the property of the Authority.

19.2 Discovery

Upon the discovery of any such item during the course of performing its obligations under this Agreement, the Project Documents, any Ancillary Documents to which the Authority is a party or under the Commercial Contracts, the Contractor shall:

19.2.1 immediately inform the Authority Contract Manager of such discovery;

19.2.2 take all steps not to disturb the object and, if necessary, cease any operation or installation insofar as the carrying out of such operation or installation would endanger the object or prevent or impede its excavation; and

- 19.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

19.3 Action

The Authority shall promptly and in any event within 10 Business Days issue a notice to the Contractor specifying what action the Authority reasonably requires the Contractor to take in relation to the object and such notice shall be deemed to be an Authority Notice of Service Variation pursuant to Clause 36 (Authority Service Variation).

20. HEALTH AND SAFETY

20.1 Health and Safety Manuals

- 20.1.1 The Contractor shall procure that all aspects of the Services are carried out in accordance with health and safety management systems pursuant to this Clause 20 (Health and Safety) and in accordance with the Statement of Requirements.
- 20.1.2 The health and safety management systems referred to in Clause 20.1 (Health and Safety Manuals) shall be reflected in appropriate health and safety management systems manuals and shall:
- (A) to the extent reasonably practicable comply with the Authority's health and safety management systems;
 - (B) take account of all current guidelines for restrictions on exposure to electromagnetic fields including those produced by the National Radiological Protection Board, the American Conference of Governmental Industrial Hygienists and the International Commission on Non Ionising Radiation Protection;
 - (C) take account of Good Industry Practice; and
 - (D) to the extent reasonably practicable, take account of the health and safety management systems of Third Parties with whom the Contractor is required to liaise pursuant to Schedule 1.2 (Statement of Requirements: Processes).
- 20.1.3 The Contractor shall ensure that all risk assessments which it undertakes in connection with the provision of the Services or the performance of the Commercial Contracts take into account any potential impact on Third Parties including road users and other contractors.
- 20.1.4 The Contractor shall prepare, or procure the preparation of appropriate health and safety management systems manuals, and comply, and procure compliance by the Sub-contractors (or any of its or their respective sub-contractors), in all respects with the appropriate health and safety management systems manuals.
- 20.1.5 The Contractor shall not commence or permit the commencement of any aspect of the Services or the performance of the Commercial Contracts before those parts of the health and safety management systems manuals which concern such aspect of the Services or performance of the Commercial Contracts have been submitted to the Authority Contract Manager for information and comment. The Contractor shall consider and take account of the reasonable comments of the Authority before commencing or permitting the commencement of the Services or the performance of the Commercial Contracts.

- 20.1.6 Without prejudice to the generality of Clause 20.1.8, the Contractor shall procure the further development of the health and safety management systems manuals submitted in accordance with this Clause 20 (Health and Safety) over the term of this Agreement to ensure the continued compliance with Clause 20.1.2.
- 20.1.7 The Contractor shall, from time to time, submit to the Authority Contract Manager any changes to any health and safety management systems manuals required for such health and safety management systems manuals to continue to comply with the requirements set out in Clause 20.1.2. The Authority Contract Manager may comment on any such proposed change prior to the same being adopted.
- 20.1.8 If the Contractor fails to propose any change required pursuant to Clause 20.1.7, the Authority Contract Manager may propose such change and the Contractor shall be obliged to give reasonable consideration to the Authority's comments and recommendations and any such change shall be dealt with as though it had been proposed by the Contractor.
- 20.1.9 If there is no reasonable objection to a change proposed pursuant to Clause 20.1.7 or Clause 20.1.8, the health and safety management systems manuals shall be amended to incorporate such change.
- 20.1.10 The Authority, acting reasonably and at its own cost, shall be entitled to carry out audits of the Contractor's health and safety management systems manuals and records and notifications at any time and may carry out other periodic monitoring, spot checks and auditing of the same at any time or frequency, provided this has no material effect on the provision of the Services, in accordance with Section 5.6 (Facilitate Audit and Inspection) of Schedule 1.2 (Statement of Requirements: Processes).

20.2 **Observance of Health and Safety Law**

- 20.2.1 The Contractor shall be responsible for the observance by itself, its Contractor Employees, its Sub-contractors and its or their respective sub-contractors undertaking the Project, of all current and relevant health and safety precautions necessary for the protection of its employees, sub-contractors and any other persons including all precautions required to be taken by Law (including, for the avoidance of doubt, Health and Safety Laws) and shall co operate fully with the Authority to ensure the proper discharge of these duties.
- 20.2.2 From time to time during the term of this Agreement, the Contractor shall deliver to the Authority copies of any amendment to its health and safety policy.
- 20.2.3 The Contractor shall observe, perform and discharge any Code of Practice ("**Code of Practice**") for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work Act 1974 in connection with such regulations except to the extent that to do so would involve carrying out works to the Access Infrastructure or the Protection Infrastructure, responsibility for which remains with the Authority.
- 20.2.4 The Contractor shall immediately notify the Authority in writing upon receipt by the Contractor or any of its Sub-contractors (or any of its or their respective sub-contractors) of any improvement, enforcement or prohibition notices under any Health and Safety Laws.
- 20.2.5 The Contractor shall notify the Authority in writing of any accidents to the Contractor Employees, or the employees of the Contractor's sub-contractors or

agents which ordinarily are required to be reported under the Health and Safety at Work Act 1974 and the Contractor shall notify the Authority in writing of any health and safety hazards arising as a result of performance of this Agreement.

- 20.2.6 The Contractor shall, at its own expense, comply with all requirements of statute and common law in relation to the Authority's land to which it has access (whether or not such requirements are imposed on the owner, occupier or any other person).

21. CDM REGULATIONS

21.1 Definitions

In this Clause 21 (CDM Regulations), "**Client**", "**Executive**", "**Designer**", "**Health and Safety File**", "**Health & Safety Plan**", "**Planning Supervisor**" and "**Principal Contractor**" have the same meanings as in the CDM Regulations.

21.2 Appointment of Contractor

Subject to Clause 21.5 (Shared Areas), insofar as the CDM Regulations apply to the works to be undertaken by the Contractor:

- 21.2.1 the Contractor represents and warrants to the Authority that it is and shall continue to be competent to perform the duties imposed on a Client by the CDM Regulations;
- 21.2.2 the Authority hereby appoints the Contractor as the only Client pursuant to Regulation 4(1) of the CDM Regulations;
- 21.2.3 forthwith following execution of this Agreement the Contractor shall send to the Executive (copied to the Authority) a declaration in accordance with Regulation 4(3) and 4(4) of the CDM Regulations and forthwith upon its receipt of a copy of the notice from the Executive that it has received such declaration the Contractor shall send a copy of the same to the Authority; and
- 21.2.4 during the period commencing on the Effective Date and ending on the Expiry Date or Termination Date (whichever is the earlier), the Contractor shall not terminate, withdraw or derogate in any manner from its declaration or its acceptance of its responsibilities as Client for the purposes of the CDM Regulations.

21.3 Right to Appoint Named Sub-contractors

Without prejudice to any of the Contractor's obligations under this Agreement, save to the extent that the Authority determines, pursuant to Clause 21.5, that an Authority Party should be the Client, the Authority agrees with the Contractor that, insofar as the CDM Regulations apply to the undertaking of work by the Contractor or a Contractor Party, the Contractor may appoint the Principal Sub-contractor as its agent pursuant to Regulation 4(1) of the CDM Regulations to act as the Client under the CDM Regulations in respect of such works. The Contractor acknowledges that, it is the Contractor's responsibility to satisfy itself that the Principal Sub-contractor is competent to perform the duties imposed on a Client by the CDM Regulations and this Clause 21.3 (Right to Appoint Named Sub-contractors) shall not derogate in any manner whatsoever from Clause 21.2 (Appointment of Contractor) or the obligations of the Contractor thereunder.

21.4 Works undertaken by the Contractor

Save to the extent that the Authority determines, pursuant to Clause 21.5, that the Authority Party should be the Client, in respect of the works to be undertaken by the Contractor:

21.4.1 Provision of Information

the Authority agrees to provide to the Contractor, within a reasonable time period, such necessary and relevant information which is in the Authority's knowledge and possession as the Contractor may reasonably request from the Authority from time to time (or to direct the Contractor to the relevant Authority Party holding such information within a reasonable time) for the sole purpose of enabling the Contractor to discharge its obligations as Client under the CDM Regulations in relation to the carrying out of works (but not further or otherwise), together with such information, which is in the Authority's knowledge and possession, as is relevant to the functions of the Planning Supervisor. The provisions set out in Clause 43.2 (Disclaimers) shall apply to information provided by the Authority under this Clause 21;

21.4.2 Contractor's Obligations

without prejudice to Clause 21.2 (Appointment of Contractor), the Contractor shall carry out and comply with or procure (where appropriate) the carrying out and compliance with all the obligations, requirements and duties of a Client, Designer, Planning Supervisor and Principal Contractor arising under the CDM Regulations;

21.4.3 Health and Safety File

without prejudice to the generality of Clause 21.4.2 (Contractor's Obligations), the Contractor shall, in accordance with the CDM Regulations, prepare and keep up to date a Health and Safety File so as to contain all information required for the Health and Safety File by the CDM Regulations, such file to be in hard copy and a further copy on a computer or other suitable electronic device previously approved by the Authority (such approval not to be unreasonably withheld or delayed);

21.4.4 Amendments to Health and Safety File

when the Contractor carries out works which require an amendment or addition to the Health and Safety File, such amendments to the Health and Safety File shall be made by the Contractor forthwith in order to ensure that the Health and Safety File contains all the information required by the CDM Regulations;

21.4.5 Right to Inspect Health and Safety File

the Contractor shall at all reasonable times and without charge make the Health and Safety File available for inspection when requested by or on behalf of the Authority. The Contractor shall provide without charge copies of the Health and Safety File (or extracts of such file) as reasonably requested from time to time by the Authority; and

21.4.6 Delivery of Health and Safety File

on the Expiry Date or Termination Date (whichever is the earlier), the Contractor shall deliver to the Authority the Health and Safety File in the form and content required by the CDM Regulations.

21.5 **Shared Areas**

Insofar as:

- 21.5.1 any works are to be carried out on any site by any Authority Party at the same time as the Contractor is also to carry out works on any part or parts or the whole of such site ("**Shared Areas**"); and

- 21.5.2 the CDM Regulations apply to any such works being carried out by any Authority Party,
- in respect of such works to be undertaken in such Shared Areas the Authority shall determine (acting reasonably, having regard to the relative scope and scale of works to be performed on the Shared Area by the Authority Party and the Contractor) whether the Contractor or the Authority Party should be the Client responsible in the Shared Area.
- 21.6 Where, in accordance with the provisions of Clause 21.5, the Authority determines that:
- 21.6.1 the Authority Party should be the Client, in relation to the works to be undertaken by the Authority Party in such Shared Areas:
- (A) the Authority shall procure that the Authority Party assume the duties imposed on a Client by the CDM Regulations;
 - (B) the Authority shall procure that the Authority Party appoints a Principal Contractor;
 - (C) the Authority shall procure that a copy of the Health and Safety Plan prepared by the Principal Contractor referred to in Clause 21.6.1(B) is provided to the Contractor; and
 - (D) insofar as the CDM Regulations apply to the works to be undertaken by the Contractor in any of the Shared Areas the Contractor shall and shall procure that its Sub-contractors (and any of its or their respective sub-contractors) and others authorised by the Contractor undertaking works in the relevant Shared Areas shall comply with the relevant Health and Safety Plan referred to in Clause 21.6.1(C) and with all reasonable instructions of the Principal Contractor referred to in Clause 21.6.1(B); or
- 21.6.2 the Contractor should be the Client, in relation to the works to be undertaken by the Contractor in such Shared Areas:
- (A) the Contractor shall assume the duties imposed on a Client by the CDM Regulations;
 - (B) the Contractor shall appoint a Principal Contractor;
 - (C) the Contractor shall procure that a copy of the Health and Safety Plan prepared by the Principal Contractor referred to in Clause 21.6.2(B) is provided to the Authority; and
 - (D) insofar as the CDM Regulations apply to the works to be undertaken by the Authority Party in any of the Shared Areas the Authority shall and shall procure that any Authority's Contractors and others authorised by the Authority undertaking works in the relevant Shared Areas shall comply with the relevant Health and Safety Plan referred to in Clause 21.6.2(C) and with all reasonable instructions of the Principal Contractor referred to in Clause 21.6.2(B).

22. QUALITY MANAGEMENT

22.1 Quality Management Systems

- 22.1.1 The Contractor shall procure that all aspects of the Services are the subject of Quality Management Systems in respect of the issues set out in Schedules 1.2 (Statement of Requirements: Processes) and 1.3 (Statement of Requirements:

General Constraints) and in accordance with this Clause 22 (Quality Management).

- 22.1.2 The Quality Management Systems referred to in Clause 22.1.1 shall comply with:
- (A) BS EN ISO 9001:2000 (or such other quality standard as may replace or supersede the same or, in the absence of a replacement or a superseding quality standard, such other quality standard as the Parties may agree);
 - (B) to the extent reasonably practicable, the Authority's Quality Management Systems; and
 - (C) Good Industry Practice.
- 22.1.3 The Contractor shall prepare, or procure the preparation of, and comply, and procure compliance by the Sub-contractors (or any of its or their respective sub-contractors), in all respects with the Quality Management Systems.
- 22.1.4 The Contractor shall not commence or permit the commencement of any aspect of the Services before those parts of the Quality Management Systems which concern such aspect have been submitted to the Authority Contract Manager for information and comment. The Contractor shall consider and take account of the reasonable comments of the Authority before commencing or permitting the commencement of the Services.
- 22.1.5 Without prejudice to the generality of Clause 22.1.6, the Contractor shall procure the further development of the Quality Management Systems submitted in accordance with Clause 22.1.4 over the term of this Agreement to ensure the continued compliance with Clause 22.1.2.
- 22.1.6 The Contractor shall, from time to time, submit to the Authority Contract Manager any changes to any Quality Management Systems required for such Quality Management Systems to continue to comply with the requirements set out in Clause 22.1.2. The Authority Contract Manager may comment on any such proposed change prior to the same being adopted.
- 22.1.7 If the Contractor fails to propose any change required pursuant to Clause 22.1.6, the Authority Contract Manager may propose such change and the Contractor shall be obliged to give reasonable consideration to the Authority's comments and recommendations and any such change shall be dealt with as though it had been proposed by the Contractor.
- 22.1.8 If there is no reasonable objection to a change proposed pursuant to Clause 22.1.6 or Clause 22.1.7, the Quality Management Systems shall be amended to incorporate such change.

22.2 Quality Procedures

If any Quality Management Systems refer to, rely on or incorporate any quality procedure, such quality procedure or the relevant parts thereof shall be submitted to the Authority Contract Manager at the time that the relevant Quality Management Systems or change to the Quality Management Systems is submitted in accordance with Clauses 22.1.4, 22.1.6 or 22.1.7 and the content of such quality procedure shall be taken into account in the consideration of the relevant Quality Management Systems or change to the relevant Quality Management Systems pursuant to such Clauses.

22.3 Additional Information

Notwithstanding any other provision of this Clause 22 (Quality Management), the Contractor shall provide to the Authority Contract Manager such information as it may reasonably require to demonstrate compliance with this Clause 22 (Quality Management).

22.4 Project Quality Manager

As soon as reasonably practicable after the Execution Date, the Contractor shall appoint a Project Quality Manager who shall be independent of the project management team. The identity of the Project Quality Manager and the terms and conditions of his engagement shall be subject to the approval of the Authority (such approval not to be unreasonably withheld or delayed). Without limitation, the terms and conditions of engagement of the Project Quality Manager shall require him to:

- 22.4.1 ensure the effective operation of the Quality Management Systems;
- 22.4.2 audit the Quality Management Systems at regular intervals and report the findings of such audit to the Authority;
- 22.4.3 review all Quality Management Systems at intervals agreed with the Authority to ensure their continued suitability and effectiveness; and
- 22.4.4 liaise with the Authority on all matters relating to quality management.

22.5 Quality Monitoring

- 22.5.1 The Authority shall be entitled to carry out audits of the Contractor's Quality Management Systems (including any quality procedures) in accordance with Section 5.6 (Facilitate Audit and Inspection) of Schedule 1.2 (Statement of Requirements: Processes) and perform other periodic monitoring and spot checks provided this has no material effect on the provision of the Services or the performance of the Commercial Contracts.
- 22.5.2 In exercising its rights under Clause 22.5.1, the Authority shall use all reasonable endeavours to minimise any disruption to the provision of the Services or to the carrying out of the Commercial Contracts by the Contractor.
- 22.5.3 Subject to Clause 22.5.4 and to Paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not be entitled to make any deductions or award any Service Credits under Clause 30 (Service Credit Regime) in the period during which the audits, periodic monitoring or spot checks referred to in Clause 22.5.1 are being carried out to the extent that the Contractor is prevented from performing its obligations in relation to the provision of the Services by the carrying out of the audits, periodic monitoring or spot checks.
- 22.5.4 If the audits, other periodic monitoring or spot checks referred to in Clause 22.5 (Quality Monitoring) establish that the Contractor has not complied with this Agreement (including the Statement of Requirements), the Authority's entitlement to make deductions or any deductions made or the Authority's entitlement to award any Service Credits or any Service Credits awarded under Clause 30 (Service Credit Regime) during the period in which the audits, other periodic monitoring and/or spot checks are being carried out shall not be affected by the carrying out of the audits, other periodic monitoring and/or spot checks.

23. EMPLOYEES

23.1 Application of TUPE

It is hereby acknowledged by the Authority and the Contractor that the transfer of the services similar to the Transmission Service, the Camera Mast Service, the Aerial Site Service or the Consultancy Service under the Transmission Labour Team Contract 1/74 from the Existing Service Providers to the Contractor or to any Sub-contractor (or to any of its or their respective sub-contractors) constitutes a "relevant transfer" for the purposes of TUPE and the Authority and the Contractor agree and intend and (in the case of the Contractor) shall take all reasonable steps to procure that on each occasion on which the Contractor or any Sub-contractor (or any of its or their respective sub-contractors) sub-contracts the Services (or part or parts of the Services) and on each occasion on which any Sub-contractor (or its respective sub-contractors) is replaced by another Sub-contractor or sub-contractor (as the case may be) in respect of the provision of the Services (or part or parts of the Services) there shall be a relevant transfer for the purposes of TUPE.

23.2 Transfer of Transferring Employees

23.2.1 The Authority will use its reasonable endeavours to assist in the transfer of the Transferring Employees from the Existing Service Providers to the Contractor or to any Sub-contractor (or any of its or their respective sub-contractors) pursuant to TUPE but the Authority shall be under no obligation to compel any Transferring Employee to transfer to the Contractor or to any Sub-contractor (or any of its or their respective sub-contractors).

23.2.2 The Contractor agrees that the contract of employment of each Transferring Employee shall have effect (subject to Regulation 5(4A) of TUPE) from the Relevant Services Transfer Date and thereafter as if originally made between each such Transferring Employee and the Contractor or any Sub-contractor (or any of its or their respective sub-contractors), except insofar as such contract relates to an occupational pension scheme. For the purposes of determining continuity of service, the Contractor shall (and shall procure that any Sub-contractor (or any of its or their respective sub-contractors shall)) recognise any period of employment with the Existing Service Providers.

23.2.3 The Authority shall not (and shall use its best endeavours to procure that any Existing Service Provider shall not), except with the prior written consent of the Contractor (such consent not to be unreasonably withheld), or in good faith in the normal course of business, or as required by Law, vary the terms and conditions of employment of any Transferring Employee or remove any person performing the services similar to the Transmission Service, the Aerial Site Service, the Camera Mast Service or the Consultancy Service under the Transmission Labour Team Contract 1/74 which shall become the Services under this Agreement or deploy additional or different persons to perform the services similar to the Transmission Service, the Aerial Site Service, the Camera Mast Service or the Consultancy Service under the Transmission Labour Team Contract 1/74 which shall become the Services under this Agreement, or increase the number of persons performing the services similar to the Transmission Service, the Aerial Site Service, the Camera Mast Service or the Consultancy Service under the Transmission Labour Team Contract 1/74 which shall become the Services under this Agreement after the date of this Agreement and prior to the Relevant Services Transfer Date.

- 23.2.4 The Contractor shall procure that Peek Traffic Limited invites each Transferring Employee to join the Peek Traffic Pension Scheme. The Contractor shall procure that Peek Traffic Limited makes relevant contributions to the Peek Traffic Pension Scheme in accordance with its obligations under the Transfer of Employment (Pension Protection) Regulations 2005.

23.3 Contractor Indemnity

The Contractor shall indemnify the Authority against:

- 23.3.1 any Claim by a Contractor Employee (or where applicable his appropriate employee representative) in relation to his employment with the Contractor or a Sub-contractor (and any of its or their respective sub-contractors), or the Contractor's or Sub-contractor's (and any of its or their respective sub-contractor's) agents, or the termination of that employment;

- 23.3.2 any Claim by any Transferring Employee arising from any actual or alleged significant change to his detriment pursuant to Regulation 5(5) of TUPE,

and the Contractor shall indemnify the Authority against any Losses arising out of or in connection with such Claims.

23.4 Information

- 23.4.1 The Contractor shall comply with Regulation 10(3) of TUPE and will provide, or shall use its best endeavours to procure that any Sub-contractor (or any of its or their respective sub-contractors) provides the Existing Service Provider(s) with such information as is necessary to discharge its or their obligations under Regulation 10 of TUPE (and will indemnify the Authority against any Claims and Losses arising out of its failure to provide such information).

- 23.4.2. The Authority shall use its reasonable endeavours to procure that the Existing Service Provider(s) shall comply with its or their obligations under Regulation 10 of TUPE.

- 23.4.3 The Authority shall use its best endeavours to procure that, within 10 Business Days following the Relevant Services Transfer Date, the Existing Service Provider(s) shall:

- (A) deliver to the Contractor the PAYE certificates relating to each of the Transferring Employees duly completed up to the Relevant Services Transfer Date; and
- (B) account to the Contractor with the cash equivalent calculated by reference to each of the Transferring Employee's terms and conditions of any accrued entitlements, including salary, holiday and/or accrued contractual bonus or other similar entitlement in respect of each of the Transferring Employees up to the Relevant Services Transfer Date.

- 23.4.2 The Authority shall use its best endeavours to procure that the Existing Service Provider(s) shall, following the date of this Agreement and on a continuing basis, provide to the Contractor such information or documents as the Contractor and any Sub-contractor (and any of its or their respective sub-contractors) may reasonably require relating to the terms and conditions, pensions, benefits or any other matter concerning such Transferring Employees or their employment with the Existing Service Provider(s) prior to the Relevant Services Transfer Date.

23.5 Contract Manager and other Employees

The Contractor shall (without limitation to its other obligations under this Agreement):

- 23.5.1 ensure that its Contract Manager or his deputy are the persons responsible for the operation of the Services and that they perform the responsibilities referred to in Clause 26 (Reports and Information);
- 23.5.2 provide all Contractor Employees, and the Contractor's agents and Sub-contractors (and any of its or their respective sub-contractors) with a form of identification acceptable to the Authority and use its best endeavours to ensure that all Contractor Employees, Sub-contractors (and any of its or their respective sub-contractors) and agents, display that identification at all times when performing the Services;
- 23.5.3 use its reasonable endeavours to procure that, while any Contractor Employee, or any of the Contractor's agents or Sub-contractors (or any of its or their respective sub-contractors) are performing the Services, such persons will conform to normal and reasonable standards of staff behaviour and to the Authority's security practice (to the extent that the Contractor should be aware of the same) and co operate with any requirements of organisations liaising with the Authority including, but not limited to, the security practices carried out by the Police in respect of access to Police Control Offices; and
- 23.5.4 to the extent that it is not prohibited from doing so by any Law, on request supply written details of all Contractor Employees and their qualifications and experience and, if so requested by the Authority, provide a list of the names and business contact details of all persons who may require admission, in connection with the performance of this Agreement, to any premises occupied by or on behalf of the Authority or access to the Project Road Network specifying the capacities in which they are concerned with this Agreement and giving such other particulars as the Authority may reasonably require.

23.6 Conduct and Qualifications

- 23.6.1 The Contractor shall use its best endeavours to procure that only such persons as have all qualifications and registrations as are required by Law with respect to their several trades or callings are engaged in the provision of the Services.
- 23.6.2 The Contractor shall use its best endeavours to procure that all Contractor Employees are at all times properly and adequately notified, trained and instructed with regard to the task that the Contractor Employee has to perform, all provisions of this Agreement relevant to the duties to be performed, any relevant operational policies of the Authority and all health and safety matters.

23.7 Contractor's Policies and Procedures

The Contractor shall notify the Authority of the Contractor's policies and procedures in respect of the conduct of employees and the Contractor shall from time to time submit to the Authority any changes that the Contractor makes to such policies and procedures. The Authority shall be entitled to comment on such policies and procedures and any proposed changes to them and the Contractor shall be obliged to give reasonable consideration to the Authority's comments and recommendations.

23.8 Investigation of Contractor Employees

The Authority may require the Contractor to investigate or procure the investigation of any Contractor Employee who, in the reasonable opinion of the Authority, misconducts himself

or is incompetent or negligent in the proper performance of his duties and such person shall be dealt with in accordance with the Contractor's policies and procedures.

23.9 Removal of Contractor Employees

If any Contractor Employee conducts himself in such a way as to jeopardise:

23.9.1 the health, safety or well being of any employees of the Authority or any contractor of the Authority or any other Third Party; or

23.9.2 the standards and reputation of the Authority,

the Authority shall be entitled to require the immediate removal of such Contractor Employee from the provision of the Services or the performance of the Commercial Contracts and the Contractor shall use its best endeavours to procure such removal. The Contractor shall not be excused performance of its obligations under this Agreement as a result of removing such Contractor Employee.

23.10 Non discrimination

The Contractor shall comply, and shall use its best endeavours to procure that any Sub-contractor (and any of its or their respective sub-contractors) and its agents comply, with all and any anti discrimination and equal opportunities laws, and shall operate, and shall use its best endeavours to procure that any Sub-contractor, (and any of its or their respective sub-contractors) and its agents operate, an appropriate equal opportunities policy.

23.11 Sub-contractors

In the event that the Contractor or a Sub-contractor enters into any sub-contract in connection with this Agreement for the provision of the Services (or part or parts of the Services), the Contractor shall impose, or shall use its best endeavours to procure that any Sub-contractor shall impose, obligations on the relevant Sub-contractor or sub-contractor (as the case may be) in the same terms as those imposed on it pursuant to this Clause 23 and shall use its best endeavours to procure that such Sub-contractor complies, or (as the case may be) procures that the relevant sub-contractor complies, with such terms.

24. SUB-CONTRACTORS

24.1 Sub-contracting

For the avoidance of doubt, the appointment of the Principal Sub-contractor and the Main Sub-contractor as Sub-contractors each on the terms of the relevant document in the Agreed Form is approved.

24.2 Principal Sub-contractor and the Main Sub-contractor Termination and Appointment of Replacement Sub-contractors

24.2.1 The Contractor shall not terminate the engagement of the Principal Sub-contractor and shall procure that the Principal Sub-contractor does not terminate the engagement of the Main Sub-contractor without obtaining the prior written consent of the Authority to the appointment of any proposed substitute and of the material terms of engagement of the proposed substitute (such approval not to be unreasonably withheld).

24.2.2 Where the Contractor proposes a substitute in accordance with this Clause 24.2 the Authority shall within 10 Business Days of receipt of such a request notify the Contractor whether it accepts the proposed substitute and the material terms of engagement of the proposed substitute.

- 24.2.3 If the Principal Sub-contractor or the Main Sub-contractor cease to act at any time the Contractor shall immediately appoint or in the case of the Main Sub-contractor procure that the Principal Sub-contractor appoints a replacement, subject to the prior approval of the Authority both as to the substitute to be appointed and the material terms of engagement of the proposed substitute (such approval not to be unreasonably withheld or delayed).
- 24.2.4 In providing its approval to any proposed substitute for either of the Principal Sub-contractor or of the Main Sub-contractor, the Authority shall, acting reasonably, only be entitled to consider whether the proposed substitute has the required technical ability, competence, experience and financial resources to be able to perform satisfactorily the obligations to be placed upon it.
- 24.2.5 The Contractor shall, and shall procure that the Principal Sub-contractor and the Main Sub-contractor, enter into the Principal Sub-contractor Direct Agreement and the Main Sub-contractor Direct Agreement, respectively, on or prior to Execution Date. The Contractor shall, and shall procure that any sub-contractor which is a replacement for the Principal Sub-contractor or the Main Sub-contractor shall, on or before the date of execution of the relevant sub-contract, enter into a direct agreement in substantially the same form as the Principal Sub-contractor Direct Agreement or the Main Sub-contractor Direct Agreement, as appropriate.

24.3 A List Sub-contractors – Appointment of Replacement A List Sub-contractors

- 24.3.1 The Contractor shall not and shall procure that the Principal Sub-contractor does not appoint any of the entities referred to in Paragraphs 1.4, 1.7, 1.8, 1.9, 1.10 or 1.11 of Part 1 of Schedule 14 without obtaining the prior written consent of the Authority (such consent not to be unreasonably withheld).
- 24.3.2 The Contractor shall not appoint and shall procure that no Sub-contractor appoints a replacement for any A List Sub-contractor without obtaining the prior written consent of the Authority (such approval not to be unreasonably withheld).
- 24.3.3 Where the Contractor or any Sub-contractor proposes to appoint any entity or proposed substitute to which Clause 24.3.1 or 24.3.2 applies, the Authority shall within 10 Business Days of receipt of such a request notify the Contractor whether it accepts or rejects such entity or proposed substitute.
- 24.3.4 In providing its approval to such entity or proposed substitute, the Authority shall only be entitled to consider whether such entity or proposed substitute has the required technical ability, competence, experience and financial resources to be able to perform the obligations to be placed upon it satisfactorily provided that the Authority shall not be entitled to withhold its consent to any proposed substitute which is, at the time when the approval is sought, on the Approved Sub-contractor List in respect of the function to be fulfilled by the proposed substitute.

24.4 Qualifications of Sub-contractors

- 24.4.1 The Contractor shall ensure that any Sub-contractor or its or their respective sub-contractors employed in the provision of the Services have the required technical ability, competence, experience and financial resources to be able to perform the obligations to be placed upon it satisfactorily and is a member of any professional body of which membership is common practice for businesses of a similar type as the relevant Sub-contractor or sub-contractor.

- 24.4.2 After the Execution Date, the Contractor shall make available to the Authority, as early as reasonably practicable before contracting with any proposed new or replacement Sub-contractor, such information as may be reasonably required to satisfy the Authority that any proposed new or replacement Sub-contractor fulfils the requirements set out in Clause 24.4.1.

24.5 Contractor Responsibilities

- 24.5.1 The Contractor shall be directly responsible for the management and supervision of any Sub-contractors and any of its or their respective sub-contractors appointed to perform any obligation or exercise any right under this Agreement.
- 24.5.2 The sub-contracting of any part of the Services or the performance of the Commercial Contracts or any other obligation under this Agreement shall not relieve or excuse the Contractor from any liability or obligation under this Agreement nor shall performance of the Contractor's obligations be affected by the appointment of any Sub-contractor or its or their respective sub-contractors or any delegation of its duties under this Agreement.
- 24.5.3 As between the Parties, the Contractor shall be responsible for the acts, defaults, omissions and neglect of its officers, representatives, agents, employees, consultants, workmen, contractors and Sub-contractors and of the officers, representatives, agents, employees, consultants, workmen, contractors or sub-contractors of any of them, as fully as if they were the acts, defaults, omissions or neglect of the Contractor.
- 24.5.4 The Authority may require the Contractor to investigate or procure the investigation of any Sub-contractor (or any of its or their respective sub-contractors) who, in the reasonable opinion of the Authority, misconducts itself or is incompetent or negligent in the proper performance of its duties.
- 24.5.5 If, in the performance of its obligations under the relevant Sub-contract or sub-contract, any Sub-contractor (or any of its or their respective sub-contractors) behaves in such a way as to jeopardise:
- (A) the health, safety or well being of any employees of the Authority or any contractor of the Authority or any other Third Party; or
 - (B) the standing and reputation of the Authority,
- and if, having regard to all the circumstances, it is reasonable to do so, the Authority shall, subject to Clause 24.5.6, be entitled to give notice in writing to the Contractor requiring the immediate removal of such Sub-contractor or sub-contractor from the provision of the Services or the performance of the Commercial Contracts, and the Contractor shall procure such removal.
- 24.5.6 The Authority shall not be entitled to require the immediate removal of a Sub-contractor or sub-contractor pursuant to Clause 24.5.5 if, within 5 Business Days of receipt of such notice, the Contractor terminates or procures the termination of the relevant Sub-contract or sub-contract and procures the performance of such part of the Services by another person.
- 24.5.7 The Contractor shall not be excused performance of its obligations under this Agreement as a result of:
- (A) any action taken by it to remove or procure the removal of such Sub contractor or sub-contractor (as the case may be) pursuant to Clause 24.5.5; or

(B) any other remedial action taken by it pursuant to Clause 24.5.6.

24.5.8 Subject to Clause 30.2, where any sub-contractor is engaged in order that the Contractor can provide any Services, the Contractor shall procure that such sub-contractor complies with all obligations, processes and constraints which are applicable to the Contractor's provision of such Services and that all officers, employees and agents of such sub-contractor comply with all obligations, processes and constraints which are applicable to the Contractor's officers, employees and agents in the provision of such Services.

24.6 **Contractor Knowledge**

Without limitation to its actual knowledge, the Contractor shall, for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project and the Services as is held (or as ought reasonably to be held) by its officers, representatives, agents, employees, consultants, workmen, contractors and Sub-contractors and its or their respective sub-contractors, in the relevant circumstances.

24.7 **Payments**

The Contractor shall use all reasonable endeavours (and shall procure that the Principal Sub-contractor uses all reasonable endeavours) to ensure that all other sub-contracts entered into by any Sub-contractor (or any of its or their respective sub-contractors) comply with Government policy from time to time regarding the time when the relevant sub-contractor is entitled to payment for services provided by that sub-contractor.

24.8 **Approved Sub-contractor List**

24.8.1 The Contractor shall be entitled to nominate potential sub-contractors as candidates for the Approved Sub-contractor List. Any such nomination shall state the function in respect of which such potential sub-contractor is nominated.

24.8.2 A potential sub-contractor nominated by the Contractor in respect of any function shall be added to the Approved Sub-contractor List if, in the reasonable opinion of the Authority, it has the required technical ability, competence, experience and financial resources to perform satisfactorily the obligations which would be placed on it if it were to become an A List Sub-contractor. Any such potential sub-contractor which is approved shall be approved only in respect of the function for which it is approved.

24.8.3 If the Authority becomes aware of any information in relation to a potential sub-contractor which, had it been known to the Authority when it made its decision to approve that potential sub-contractor as being eligible for the Approved Sub-contractor List, would have changed the Authority's decision pursuant to Clause 24.8.2, the Authority shall promptly give notice to the Contractor that it intends to remove such potential sub-contractor from the Approved Sub-contractor List and such potential sub-contractor shall be removed from the Approved Sub-contractor List immediately on the giving of such notice.

25. **CONTRACT MANAGEMENT**

25.1 **Preliminary Meeting**

25.1.1 Within 15 Business Days of the Effective Date, each Party's Contract Manager, the Project Quality Manager and senior representatives of the Authority and the Contractor shall meet (the "**Preliminary Meeting**") to plan a seminar (the "**Initial Seminar**") on team building. The representatives at the meeting shall agree:

- (A) the Initial Seminar's agenda;
 - (B) mutual goals and objectives and how to achieve such mutual goals and objectives;
 - (C) the identity of the Initial Seminar's attendees;
 - (D) the Initial Seminar's date, duration and location provided that the Initial Seminar shall be held no later than 3 Contract Months following the Effective Date.
- 25.1.2 The Initial Seminar shall take place in accordance with the proposals agreed at the Preliminary Meeting.
- 25.1.3 The Contractor Contract Manager shall be responsible for taking the minutes of the Preliminary Meeting and of the Initial Seminar and supplying a copy of the minutes to the Authority Contract Manager within 5 Business Days of the Preliminary Meeting and of the Initial Seminar.
- 25.1.4 The Parties shall meet annually (the "**Annual Seminar**") following the Initial Seminar to discuss how the relationship between the Parties is progressing by reference to the objectives set out for the Initial Seminar.
- 25.1.5 The Contractor Contract Manager shall be responsible for taking the minutes of the Annual Seminar and supplying a copy of the minutes to the Authority Contract Manager within 5 Business Days of each Annual Seminar.
- 25.2 **Management Structure**
 - 25.2.1 The Authority and the Contractor shall each appoint:
 - (A) as from the Effective Date, a full time Contract Manager and deputy; and
 - (B) as soon as reasonably practicable, four representatives to be members of the Contract Review Board in accordance with Clause 25.2.2,
 and each Party shall ensure that at all times during the Contract Term that there are appointees to such positions.
 - 25.2.2 The Contractor's members on the Contract Review Board shall include the Contractor Contract Manager/ the Principal Sub-contractor Contract Manager, the Contractor Commercial Manager, the Contractor Managing Director and the Principal Sub-contractor deputy Contract Manager.
 - 25.2.3 The Authority's members on the Contract Review Board shall include the Authority Contract Manager/Project Leader (NRTS) (who shall chair the Contract Review Board), the Deputy Project Leader (NRTS), the Technical Leader (NRTS), the Group Manager (Traffic Operations) and the Department's Agent.
- 25.3 **Initial Representatives**

The initial Authority Contract Manager and Contractor Contract Manager and their deputies and the members of the Contract Review Board shall be:

 - 25.3.1 Authority:
 - Authority Contract Manager/Project Leader (NRTS) – David Raby
 - Deputy Authority Contract Manager/Deputy Project Leader (NRTS) – Phil Graham
 - Technical Leader (NRTS) – David Bradbrook
 - Group Manager (Traffic Operations) – Barry Moore

Department's Agent – David Threlfall

25.3.2 Contractor:

Contractor Contract Manager/Principal Sub-contractor Contract Manager – Bruce Hovermale

Contractor Commercial Manager – Vacant

Contractor Managing Director – Michael McKee (interim Managing Director)

Deputy Contractor Contract Manager/Principal Sub-contractor deputy Contract Manager – Vacant

25.4 **Change of Representatives**

25.4.1 The Authority may, at any time and from time to time having given the Contractor prior written notice, terminate the appointment of the Authority Contract Manager or his deputy and may, having consulted the Contractor and taken due consideration of such consultation, appoint a substitute Authority Contract Manager or deputy (as the case may be).

25.4.2 The Contractor may, with the prior written consent (not to be unreasonably withheld or delayed) of the Authority Contract Manager, terminate the appointment of the Contractor Contract Manager or his deputy or the Project Quality Manager, and appoint a substitute Contractor Contract Manager or deputy or Project Quality Manager (as the case may be). The Authority shall give or refuse consent within 10 Business Days of receipt of written notice of all of the following from the Contractor:

- (A) the curriculum vitae of the proposed appointee;
- (B) the job specification and full details of the responsibilities of the proposed appointee; and
- (C) such other information as the Authority may reasonably require in respect of the intended appointment or replacement.

25.4.3 Each Party may, at any time and from time to time having given the other Party prior written notice, terminate the appointment of any of their respective members of the Contract Review Board and may, subject to Clauses 24.5.1 and 24.4.2, having consulted the other Party and taken due consideration of such consultation, appoint a substitute member or substitute members. Any notice under this Clause 25.4 (Change of Representatives) shall specify the date on which such termination or substitution shall have effect, which date shall, other than in the case of an emergency, be such as will not cause unnecessary inconvenience to the other Party or cause it to breach any of its obligations under this Agreement, the Project Documents or the Ancillary Documents.

25.5 **Authority**

25.5.1 Save as provided for in Clause 25.6 (Extent of Authority), the Contractor Contract Manager and his deputy shall have the full authority to act on behalf of the Contractor for the purposes of this Agreement and the Authority Contract Manager and his deputy shall have the full authority to act on behalf of the Authority to exercise the functions ascribed to him in this Agreement and such other functions in respect of the Project Documents and/or any Ancillary Documents to which the Authority is a party as the Authority may notify to the Contractor from time to time in writing. Each Party shall be entitled to treat any act of the other Party's Contract Manager and/or his deputy in connection with

this Agreement as being expressly authorised by that Party and neither shall be required to determine whether an express authority has in fact been given.

- 25.5.2 All communications from the Authority Contract Manager to the Contractor and from the Contractor Contract Manager to the Authority which are intended to have a binding effect shall be in writing or given orally and, if given orally, shall be confirmed in writing within 4 Business Days of issue.

25.6 Extent of Authority

Neither the Authority Contract Manager nor the Contractor Contract Manager nor either of their deputies shall have the authority to:

- 25.6.1 agree any variation or amendment to this Agreement, any Project Documents or any Ancillary Documents;
- 25.6.2 agree to any material waiver by the Authority or the Contractor (as the case may be) of any term of this Agreement, any Project Documents or any Ancillary Documents; or
- 25.6.3 terminate this Agreement or purport to serve any notice to terminate this Agreement.

25.7 Availability for Consultation

Each Party shall ensure that its Contract Manager or its deputy is available for consultation with the other Party's Contract Manager or its deputy at all reasonable times giving due consideration to the magnitude of the relevant issue.

25.8 Contract Managers

- 25.8.1 The Contract Managers or their deputies shall meet not less than once a month throughout the Contract Term at such location as the Authority Contract Manager (acting reasonably) may from time to time decide. Either Party's Contract Manager may convene a meeting with the other Party's Contract Manager at any time on giving not less than 5 Business Days' written notice.
- 25.8.2 The Contractor Contract Manager shall submit to the Authority Contract Manager the reports specified in Clause 26.1 (Required Reports) and a draft agenda at least 5 Business Days prior to a scheduled meeting.
- 25.8.3 The Contract Managers of both Parties shall ensure that appropriately qualified, experienced and informed staff are available to attend progress meetings, as necessary or as requested by the Authority Contract Manager.
- 25.8.4 The Contractor Contract Manager shall be responsible for taking the minutes of each meeting and supplying a copy of the minutes to the Authority Contract Manager within 5 Business Days of the meeting. The minutes shall be signed and dated by the Contract Managers at the next meeting.
- 25.8.5 The Contractor Contract Manager shall maintain a central library of all communications between the Authority and the Contractor.

25.9 Quality Meetings

- 25.9.1 The Project Quality Manager shall meet with the Authority Contract Manager not less than once every 3 months throughout the Contract Term at such location as the Authority Contract Manager may from time to time decide (acting reasonably). Either Party may convene a meeting to discuss quality issues at any time on giving not less than 5 Business Days' written notice.

- 25.9.2 The Project Quality Manager shall submit to the Authority Contract Manager the reports specified in Clause 26.1 (Required Reports) and a draft agenda at least 5 Business Days prior to a scheduled meeting.
- 25.9.3 The Authority Contract Manager and the Project Quality Manager shall ensure that appropriately qualified, experienced and informed staff are available to attend such meetings to discuss quality issues, as necessary or as requested by the Authority Contract Manager.
- 25.9.4 The Project Quality Manager shall be responsible for taking the minutes of each meeting and supplying a copy of the minutes to the Authority Contract Manager within 5 Business Days of the meeting. The minutes shall be signed and dated by the Authority Contract Manager and the Project Quality Manager at the next meeting held to discuss quality issues.

25.10 Contract Review Board

- 25.10.1 The Contract Review Board shall meet not less than once every 3 months throughout the Contract Term at such location as the Authority Contract Manager (acting reasonably) may from time to time decide. A member of the Contract Review Board may convene a meeting at any time upon giving not less than 5 Business Days' written notice to the members of the other Party's Contract Review Board.
- 25.10.2 The Contract Review Board shall meet at such location as may be specified by the Authority Contract Manager (acting reasonably).
- 25.10.3 The Contract Review Board shall be responsible for:
 - (A) reviewing the performance of the Contractor under this Agreement;
 - (B) discussion of the strategic aims of the Parties and any actual or proposed measures intended to improve the quality or efficiency of the Services;
 - (C) attempting to resolve disputes which the Parties are unable to resolve and which have been referred to the Contract Review Board in accordance with Clause 68 (Dispute Resolution Procedure); and
 - (D) other items as agreed by the Contract Review Board.
- 25.10.4 The Contractor Contract Manager shall submit not less than 5 Business Days prior to the next Contract Review Board meeting to each member of the Contract Review Board a highlight report that summarises the monthly reports, submitted by the Contractor in accordance with Section 2.2 (Manage Contract) of Schedule 1.2 (Statement of Requirements: Processes) in the three Contract Months immediately preceding the Contract Month in which the Contract Review Board meeting is held, highlighting any material issues arising from such meetings between the Contract Managers.
- 25.10.5 In addition to the highlight report referred to in Clause 25.10.4, the Contract Review Board may require presentations or reports to the Contract Review Board from its members or such other appropriately qualified, experienced and informed staff of the Parties, as necessary or as requested by the chairman of the Contract Review Board.
- 25.10.6 A Contractor member on the Contract Review Board shall be responsible for taking the minutes of each meeting and supplying a copy of the minutes to the other members of the Contract Review Board within 5 Business Days of the

meeting. The minutes shall be signed and dated by the members at the next meeting of the Contract Review Board.

25.11 Other Meetings

The Contractor shall participate in such other meetings as are reasonably necessary to perform the Services and its obligations under this Agreement.

PART VI – REPORTS AND MONITORING

26. REPORTS AND INFORMATION

26.1 Required Reports

26.1.1 No later than the third Business Day of each Contract Month, the Contractor shall submit to the Authority:

(A) a monthly report (the "**Call Offs And Other Services Monthly Contractor Report**") setting out:

(1) the following elements of the Service Charge (together, the "**Call Offs And Other Services Charge**"):

- (a) Camera Mast Service Charge, (including a breakdown providing each Camera Mast Call Off Charge);
 - (b) Aerial Site Service Charge;
 - (c) Consultancy Service Charge;
 - (d) Aggregate Miscellaneous Charges;
 - (e) Aggregate Transmission Call Off Charges (including a breakdown providing each Transmission Service Call Off Charge); and
 - (f) Aggregate Transmission Miscellaneous Charges,
- each such amount being due in respect of the preceding Contract Month;

(2) any adjustments required as a result of the operation of the Service Credit Regime;

(3) any adjustments required as a result of the operation of the Commercial Revenue Adjustment;

(4) subject to Clause 26.4.4, any adjustments to reflect previous over payments and/or under payments (each adjustment stated separately) under this Agreement;

(5) subject to Clause 26.4.4, any other amount, save any amount in respect of which an invoice has been issued pursuant to the provisions of this Agreement, due and payable from one Party to the other under this Agreement, insofar as such amount has been finally ascertained; and

(6) the net amount owing by the Authority to the Contractor or by the Contractor to the Authority having regard to each of the above amounts;

(B) work papers clearly setting out the derivation of each of the amounts in the Call Offs And Other Services Monthly Contractor Report; and

(C) such other reports relevant to each of the Call Off Charges as may be agreed between the Parties from time to time.

26.1.2 No later than the fifteenth day of each Contract Month, the Contractor shall submit to the Authority:

(A) a monthly report (the "**BSC And MSC Monthly Contractor Report**") setting out:

- (1) the following elements of the Service Charge (together, the **"BSC And MSC Monthly Charges"**):
 - (a) the Base Service Charge or, in the Transition Period, the Interim Service Monthly Fee, due for that Contract Month;
 - (b) the Aggregate Transmission Marginal Service Charges and any Interim Base Service Charge due in respect of the preceding Contract Month;
 - (c) in the Transition Period, the Interim Service Variable Fee, the Aggregate Existing Service Type Instances Fee and the Aggregate New Service Type Instances Fee due in respect of the preceding Contract Month;
- (2) any adjustments required as a result of the operation of the Service Credit Regime;
- (3) subject to Clause 26.4.4, any adjustments to reflect previous over payments and/or under payments (each adjustment stated separately) under this Agreement;
- (4) subject to Clause 26.4.4, any other amount, save any amount in respect of which an invoice has been issued pursuant to the provisions of this Agreement, due and payable from one Party to the other under this Agreement insofar as such amount has been finally ascertained;
- (5) the net amount owing by the Authority to the Contractor or by the Contractor to the Authority having regard to each of the above amounts; and
- (6) amounts retained pursuant to Clause 62.3;
- (B) work papers clearly setting out the derivation of each of the amounts in the BSC And MSC Monthly Contractor Report; and
- (C) such other reports as may be agreed between the Parties from time to time.

26.2 Agreement of Monthly Contractor Report

- 26.2.1 Within 10 Business Days of receipt of each Monthly Contractor Report and other information in accordance with Clause 26.1, the Authority shall notify the Contractor of its approval of or objection to the Monthly Contractor Report (or a part thereof). If the Authority does not respond within such 10 Business Day period then, subject to Clause 26.2.3, it shall be deemed to have approved the relevant Monthly Contractor Report. The Authority shall only be entitled to object to a Monthly Contractor Report in accordance with Clause 26.4.
- 26.2.2 If the Authority approves the Monthly Contractor Report (or a part thereof), then:
 - (A) the Authority shall send to the Contractor an acceptance certificate (the **"Acceptance Certificate"**) setting out its approval of the relevant Monthly Contractor Report (or a part thereof); and
 - (B) Clause 29.1 shall apply in respect of the undisputed amounts.
- 26.2.3 Any approval or deemed approval of a Monthly Contractor Report pursuant to Clause 26.2.1 shall be without prejudice to the Authority's right to object, on the basis of the grounds set out in Clause 26.4.1, to any of the amounts set out in that

Monthly Contractor Report following such approval or deemed approval pursuant to Clause 26.4.

26.3 Examination of Records

Without limitation to any other provision of this Agreement, the Authority shall have the right, at all reasonable times and at its own expense, to examine the books and Records of the Contractor which are relevant to this Agreement to the extent necessary to verify the accuracy of any accounting statement, charge, computation or Claim made pursuant to any provision of this Agreement and otherwise to verify compliance by the Contractor with its obligations thereunder, provided that such books and records need not (unless the same contain information relating to a bona fide dispute) be preserved longer than the period specified in respect of such books and Records in Clause 27.4 (Copies).

26.4 Objections to Monthly Contractor Report

26.4.1 The Authority shall be entitled to object to a Monthly Contractor Report if it considers (acting reasonably) that:

- (A) any Monthly Contractor Report (or a part thereof) has not been compiled in accordance with the provisions of this Agreement or has been based on erroneous information or data; or
- (B) there is an inaccuracy in the content of the Monthly Contractor Report which affects the amount payable by one Party to the other where such amount exceeds £1000; or
- (C) there has been an over payment and/or under payment under this Agreement.

26.4.2 Any dispute regarding the content of the Monthly Contractor Report shall be resolved in accordance with the Dispute Resolution Procedure.

26.4.3 The Contractor shall, within 5 Business Days of the agreement or determination of any Monthly Contractor Report issue a revised Monthly Contractor Report which reflects such agreement or determination. Any such agreed or determined Monthly Contractor Report shall take account of sums previously agreed and invoiced pursuant to Clauses 26.2.2 and 29.

26.4.4 Where the Contractor becomes aware of any previous under payment(s) resulting from the erroneous non recording of certain Service Type Instances in the relevant Service Schedule as Live, nothing in this Agreement shall entitle the Contractor to claim retrospectively, a refund for the operation of such Service Type Instances, or an adjustment of any resulting under payment(s) against a prospective Monthly Invoice.

26.5 Further Information

Without prejudice to information provided by the Contractor to the Authority pursuant to this Agreement the Contractor shall, at any time and from time to time, provide to the Authority such further information in respect of the Project as the Authority may reasonably require provided that such further information relates to the Project.

26.6 Financial Information

Without prejudice to the generality of Clause 26.5 (Further Information), the Contractor shall furnish to the Authority as soon as they become publicly available and, in any event, not later than 6 months after the close of its statutory accounting period, a copy of the audited financial statements of the Contractor prepared in accordance with Law and GAAP for such period, including in each case a balance sheet prepared as at the end of such

accounting period and a profit and loss account and cashflow statement in respect of such accounting period.

27. RECORDS

27.1 Required Records

The Contractor shall keep, maintain and update, as appropriate:

- 27.1.1 any record, notice, certificate or other document required to be produced and/or maintained by the Contractor pursuant to this Agreement, any Project Document and any Ancillary Document to which the Authority is a party;
- 27.1.2 such additional records as may be agreed between the parties from time to time;
- 27.1.3 a full record of particulars of the costs of performing the Services including those costs relating to design, construction, maintenance, operation and finance; and
- 27.1.4 a full record of particulars in respect of Commercial Revenue,

(together the "**Records**") and when requested by the Authority, the Contractor shall provide to the Authority:

- (A) a summary of any of the costs referred to in Clause 27.1.3, including details of any funds held by the Contractor 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 Contractor of its obligations under this Agreement;
- (B) any information provided by it to the Senior Lenders during the term of this Agreement; and
- (C) 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 27.1.

27.2 Books of Account

Compliance with Clause 27.1 (Required Records) shall require the Contractor to keep books of account in accordance with GAAP with respect to the Agreement showing in detail:

- 27.2.1 administrative overheads;
- 27.2.2 payments made to Sub-contractors;
- 27.2.3 capital and revenue expenditure;
- 27.2.4 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 31 (Compensation Events), Clause 35 (Minor Variations), Clause 36 (Authority Service Variation), Clause 37 (Contractor Service Variation) or Clause 38 (Changes in Law),

and the Contractor shall have the books of account evidencing the items listed in Clauses 27.2.1 to 27.2.4 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.

27.3 Health, safety and maintenance records

The Contractor shall maintain or procure that the following are maintained:

- 27.3.1 a full record of all incidents relating to health, safety and security which occur during the term of the Agreement; and
- 27.3.2 full records of all maintenance procedures carried out during the term of the Agreement,
- 27.3.3 and the Contractor shall have the items referred to in Clause 27.3.1 and 27.3.2 available for inspection by the Authority upon reasonable notice, and shall present a report of them to the Authority as and when requested.

27.4 Examination by representatives of the Authority, Comptroller and Auditor General

The Contractor shall permit records referred to in this Clause 27 to be examined and copied by the Authority's representatives and by the Comptroller and Auditor General and his representatives.

27.5 Audit

The Records shall be kept in good order and in such form as to be capable of audit (including by electronic means) by the Authority Contract Manager or by any person authorised by the Authority. The Contractor shall make such Records available for inspection by or on behalf of the Authority at all reasonable times and shall co operate in any such inspection in accordance with Section 5.6 (Facilitate Audit and Inspection) of Schedule 1.2 (Statement of Requirements: Processes). The Contractor shall, on the Authority's request, make available to the Authority any software necessary to review such Records.

27.6 Copies

The Authority shall be entitled to request, free of charge, at any time, a reasonable number of copies of any of the Records.

27.7 Retention of Records

- 27.7.1 In the event that the Authority wishes to enter into another contract for the operation and management of the Project the Contractor shall comply with all reasonable requests of the Authority to provide information relating to the Contractor's costs of operating and maintaining the Project.
- 27.7.2 Except where this Agreement prescribes longer periods or as otherwise stated in this Agreement, all Records shall be retained for the period prescribed by Law for the retention of such Records.
- 27.7.3 Where the period for the retention of any Records has expired, the Contractor shall notify the Authority as to what it intends to do with such Records. If it intends to dispose of them or subsequently decides to dispose of them, the Contractor shall notify the Authority. If the Authority, within 30 Business Days of such notice, elects to receive those Records or any part of them, the Contractor shall deliver up such Records (or, where those Records are required by Law to remain with the Contractor, copies thereof) to the Authority in the manner and at the location as the Authority shall reasonably specify.
- 27.7.4 Upon the expiry or termination for whatever reason of this Agreement, the Contractor shall deliver up to the Authority, in the manner and at such location as the Authority shall reasonably specify, all Records which were in existence at the Expiry Date or Termination Date, whichever is the earlier, (or, where those Records are required by Law to remain with the Contractor, copies thereof) or such part of such Records as the Authority may specify by notice to the Contractor. The Authority shall make available to the Contractor all the Records

the Contractor delivers up pursuant to this Clause 27.7.4 at reasonable times and subject to reasonable notice.

27.8 Computer Records

To the extent that the Records of the Contractor are to be created or maintained on a computer or other electronic storage device, the Contractor shall agree with the Authority Contract Manager a procedure for back up and off site storage for copies of such Records and shall adhere to such procedures and shall use reasonable endeavours to cause each Sub-contractor and its or their respective sub-contractors to implement and adhere to such procedures.

27.9 Confidentiality

All information referred to in this Clause 27 is subject to the obligations set out in Clause 42 (Confidentiality).

PART VII - PAYMENT AND PERFORMANCE

28. MONTHLY PAYMENTS

The Authority shall pay the Contractor the Service Charge in respect of each Contract Month calculated in accordance with Schedule 30 (Payment Mechanism).

29. INVOICING AND PAYMENT

29.1 Monthly Invoices

29.1.1 Subject to Clauses 26.2 and 29.1.3 and no later than the fifteenth Business Day of each Contract Month, the Contractor shall deliver to the Authority:

- (A) a copy of the Acceptance Certificate (where applicable) sent by the Authority to the Contractor pursuant to Clause 26.2.2(A);
- (B) an invoice (the "**Other Services Monthly Invoice**") setting out:
 - (1) the relevant amount (excluding any Call Off Charges) stated in any agreed or determined Call Offs And Other Services Monthly Contractor Report issued in the previous Contract Month in accordance with Clause 26; and
 - (2) any VAT payable in respect of the above amounts accompanied by a valid VAT invoice from the Contractor to the Authority, where the Other Services Monthly Invoice shows a net amount owing by the Authority to the Contractor;
- (C) an invoice for each Transmission Service Call Off Charge and Camera Mast Call Off Charge (each a "**Call Off Charge Monthly Invoice**") setting out:
 - (1) the relevant Call Off Charge from any agreed or determined Call Offs And Other Services Monthly Contractor Report issued in the previous Contract Month in accordance with Clause 26; and
 - (2) any VAT payable in respect of such Call Off Charge accompanied by a valid VAT invoice from the Contractor to the Authority, where the Call Off Charge Monthly Invoice shows a net amount owing by the Authority to the Contractor.

29.1.2 Subject to Clauses 26.2 and 29.1.3 and no later than the fifth Business Day of each Contract Month, the Contractor shall deliver to the Authority an invoice (the "**BSC And MSC Monthly Invoice**") setting out:

- (A) a copy of the Acceptance Certificate (where applicable) sent by the Authority to the Contractor pursuant to Clause 26.2.2(A);
- (B) the amount stated in any agreed or determined BSC And MSC Monthly Contractor Report issued in the previous Contract Month as agreed or determined in accordance with Clause 26; and
- (C) any VAT payable in respect of the above amounts accompanied by a valid VAT invoice from the Contractor to the Authority, where the BSC and MSC Monthly Invoice shows a net amount owing by the Authority to the Contractor.

29.1.3 If a Monthly Contractor Report shows a net amount owing by the Contractor to the Authority, the Authority shall issue an invoice (the "**Authority's Invoice**")

for such amount accompanied (if necessary) by a valid VAT invoice promptly following the receipt by the Authority of the Monthly Invoice.

- 29.1.4 If the Contractor fails to comply with its obligations pursuant to Clause 26 or Clauses 29.1.1 and 29.1.2, the Authority may do so on its behalf.

29.2 Due Date for Payments

29.2.1

- (A) The Authority shall pay to the Contractor the amount of each Other Services Monthly Invoice and each Call Off Charge Monthly Invoice issued by the Contractor not later than 10 Business Days following the receipt by the Authority of such Monthly Invoices pursuant to Clause 29.1.
- (B) The Authority shall pay to the Contractor the amount of each BSC And MSC Monthly Invoice no later than the twenty eighth day of the Contract Month in which the Authority receives such Monthly Invoice from the Contractor pursuant to Clause 29.1.

- 29.2.2 The Contractor shall pay to the Authority the amount of the Authority's Invoice issued by the Authority no later than 10 Business Days following receipt by the Contractor of the Authority's Invoice.

- 29.2.3 Should the due date for any payment pursuant to this Agreement not be a Business Day, the due date for such payment shall be deemed to be the Business Day next following the due date.

29.3 Payments

All payments under this Agreement shall be made in pounds sterling by electronic transfer of funds for value on the due date and shall be made to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made. Any payments to be made under this Agreement shall be calculated without double counting.

29.4 Late Payments

If any payment due under this Agreement remains unpaid after its due date, such payment shall bear interest calculated from day to day at a rate per annum equal to the Interest Rate plus 2 per cent per annum from the day after the date on which the payment was due to (and including) the date of payment. The right of either Party to receive interest in respect of the late payment of any sum due shall be without prejudice to any other rights that Party may have under this Agreement.

29.5 Set Off

Subject to the provisions on the ring fencing of Senior Debt in Clauses 55 to 59 (inclusive) (Compensation on Termination provisions) whenever any sum of money, the amount of which is not disputed, is due and payable to the Contractor under this Agreement, such sum may be reduced by the amount of any sum then due to the Authority from the Contractor under this Agreement.

29.6 Indemnity Payments

Where a Party (the "**Indemnified Party**") becomes entitled to indemnification under this Agreement from the other Party (the "**Indemnifying Party**"):

- 29.6.1 the amount of any indemnity payment shall be agreed between the Parties or, if they are unable to agree within a period of 10 Business Days, may be referred by

either Party to and determined in accordance with the Dispute Resolution Procedure;

- 29.6.2 if the calculation of the amount of any indemnity payment is referred to the Dispute Resolution Procedure in accordance with Clause 29.6.1, the Indemnifying Party shall pay to the Indemnified Party the undisputed amount, if any, within 25 Business Days following agreement of such undisputed amount; and
- 29.6.3 the Indemnifying Party shall pay to the Indemnified Party any amount which is determined as being payable pursuant to the Dispute Resolution Procedure within 25 Business Days of such determination.

30. SERVICE CREDIT REGIME

30.1 Service Credit Regime

The Contractor shall be subject to Payment Deductions and shall be awarded Service Credits in respect of each Contract Month calculated in accordance with Schedule 27 (Service Credit Regime).

30.2 Exclusive Remedies

- 30.2.1 Subject to Clause 30.2.2, in the event of a breach by the Contractor of its obligations to provide or procure the provision of the Services, the only remedy of the Authority against the Contractor in respect of such breach shall be as provided for in the Service Credit Regime and the Payment Mechanism.
- 30.2.2 Clause 30.2.1 shall be without prejudice to:
 - (A) any remedies expressly provided for in this Agreement (including, but without limitation, the Authority's rights pursuant to the provisions of Clauses 44 and 48 to 62 (inclusive) of this Agreement) provided that, when considering whether a breach of this Agreement is one to which Clause 51.1.1 may apply:
 - (1) a delay in achieving the Build Completion Date shall not be taken into account;
 - (2) the abandonment of the Project by the Contractor shall not be taken into account;
 - (3) the accumulation of Service Credits shall not be taken into account; and
 - (B) any right of the Authority to seek declaratory or injunctive relief or an order for specific performance pursuant to the Dispute Resolution Procedure.
- 30.2.3 Without prejudice to Clause 30.2.4, neither Party shall have any additional right or remedy arising by common law (including, without limitation, to any rights in tort, actions brought in negligence and/or nuisance), in equity, by statute or otherwise howsoever in relation to matters for which an express right or remedy is stated in this Agreement.
- 30.2.4 To the extent permitted by law, each Party excludes its right to bring claims against the other in tort in connection with any matter contemplated by this Agreement.

31. COMPENSATION EVENTS

31.1 Delays due to a Compensation Event

31.1.1 If as a direct result of the occurrence of a Compensation Event:

- (A) the Contractor is unable to commence provision of a Service on or before its planned commencement date (the "**Planned Commencement Date**");
- (B) the Contractor is unable to comply with its obligations under this Agreement; and/or
- (C) the Contractor incurs costs or loses revenue (but not for the avoidance of doubt, in respect of the Commercial Contracts),

then the Contractor is entitled to apply for relief from its obligations and/or claim compensation under this Agreement.

31.1.2 To obtain relief and/or claim compensation the Contractor shall:

- (A) as soon as practicable, and in any event within 15 Business Days after it becomes aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement and/or the Contractor to incur costs or lose revenue (but not, for the avoidance of doubt, in respect of the Commercial Contracts), give to the Authority a notice of its claim for an extension of time for the commencement of provision of the Service, payment of compensation and/or relief from its relevant obligations under this Agreement;
- (B) within 10 Business Days of receipt by the Authority of the notice referred to in Clause 31.1.2(A) above, give full details of the Compensation Event and the extension of time and/or any Estimated Change in Project Costs claimed; and
- (C) demonstrate to the reasonable satisfaction of the Authority that:
 - (1) the Compensation Event was the direct cause of the Estimated Change in Project Costs and/or any delay in the achievement of the Planned Commencement Date; and
 - (2) the Estimated Change in Project Costs, time lost and/or relief from the obligations under this Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice.

31.2 Calculation of Compensation, Extension of Time and Relief

31.2.1 In the event that the Contractor has complied with its obligations under Clause 31.1.2 above, then:

- (A) the Longstop Date shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay;
- (B) in the case of an additional cost being incurred by the Contractor:
 - (1) on or before the Base Service Charge Date; or
 - (2) as a result of Capital Expenditure being incurred by the Contractor at any time,

the Authority shall compensate the Contractor for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred in accordance with Clause 31.2.5;

(C) in the case of a payment of compensation for the Estimated Change in Project Costs that does not result in Capital Expenditure being incurred by the Contractor referred to in Clause 31.1.1(B) above but which reflects a change in the costs being incurred by the Contractor after the Base Service Charge Date, the Authority shall compensate the Contractor in accordance with Clause 31.2.5;

(D) the Authority shall give the Contractor such relief from its obligations under this Agreement as is reasonable for such a Compensation Event.

31.2.2 The occurrence of a Compensation Event shall not give rise to any extension of the term of this Agreement.

31.2.3 In the event that information is provided after the dates referred to in Clause 31.1.2 above, the Contractor shall not be entitled to any extension of time, compensation or relief from its obligations under this Agreement in respect of the period for which the information is delayed.

31.2.4 If the Parties cannot agree the extent of any compensation, delay incurred or relief from the Contractor's relevant obligations under this Agreement, or the Authority disagrees that a Compensation Event has occurred (or as to its consequences) or that the Contractor is entitled to any relief under this Clause 31 (Compensation Events), the Parties shall resolve the matter in accordance with Clause 68 (Dispute Resolution Procedure).

31.2.5 Any payment of compensation referred to in Clause 31.2.1 shall be calculated in accordance with the Financial Model Adjustment Mechanism.

31.2.6 The Authority acknowledges that it acts through its officers, employees and agents and that the acts or omissions of such officers, employees and agents, when commissioned with the authority of the Authority, can cause the occurrence of a Compensation Event.

31.2.7 Subject to Paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not be entitled to make any deductions or award any Service Credits under Clause 30 (Service Credit Regime) in the period during which the Contractor is prevented from performing its obligations in relation to the provision of the Services as a result of the Compensation Event.

32. RELIEF EVENTS

32.1 Delays due to a Relief Event

If and to the extent that a Relief Event:

32.1.1 is the direct cause of a delay in the Base Service Charge Date; and/or

32.1.2 adversely affects the ability of the Contractor to perform any of its obligations under this Agreement,

the Contractor shall be entitled to apply for relief from any rights of the Authority arising under Clause 51 (Termination for Contractor Default).

32.2 Procedure for obtaining relief

32.2.1 To obtain relief, the Contractor must:

- (A) as soon as practicable, and in any event within 10 Business Days after it becomes aware that the Relief Event has caused or is likely to cause delay and/or adversely affect the ability of the Contractor to perform its other obligations, give to the Authority a notice of its claim for relief from its obligations under this Agreement, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;
- (B) within 5 Business Days of receipt by the Authority of the notice referred to in Clause 32.2.1(A), give full details of the relief claimed; and
- (C) demonstrate to the reasonable satisfaction of the Authority that:
 - (i) the Contractor and its Sub-contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;
 - (ii) the Relief Event directly caused the delay to the Base Service Charge Date;
 - (iii) the time lost and/or relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice, without incurring material expenditure; and
 - (iv) the Contractor is using reasonable endeavours to perform its obligations under this Agreement.

32.2.2 In the event that the Contractor has complied with its obligations under 32.2.1:

- (A) the Longstop Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or
- (B) the Authority shall not be entitled to exercise its rights to terminate the Agreement under Clause 51 (Termination for Contractor Default).

32.2.3 Nothing in Clause 32.2.2 shall affect any entitlement to make deductions or any deductions made or any entitlement to award any Service Credits or any Service Credits awarded under Clause 30 (Service Credit Regime) during the period in which the Relief Event is subsisting.

32.2.4 The occurrence of a Relief Event shall not:

- (A) give rise to any extension of the term of this Agreement; nor
- (B) give rise to any compensation payable to the Contractor.

32.2.5 In the event that information required by Clause 32.2.1 above is provided after the dates referred to in that Clause, the Contractor shall not be entitled to any relief during the period for which the information is delayed.

32.2.6 The Contractor shall notify the Authority if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

- 32.2.7 If the Parties cannot agree the extent of the relief required, or the Authority disagrees that a Relief Event has occurred or that the Contractor is entitled to any postponement of the Longstop Date and/or relief from other obligations under this Agreement, the Parties shall resolve the matter in accordance with Clause 68 (Dispute Resolution Procedure).

33. STEP IN RIGHTS

33.1 Authority Step In

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

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

- 33.1.2 to discharge a statutory duty,

the Authority shall be entitled to take action in accordance with Clauses 33.2 and 33.3 below.

33.2 Notice

If Clause 33.1 applies and the Authority wishes to take action, the Authority shall notify the Contractor in writing of the following:

- 33.2.1 the action that it wishes to take;

- 33.2.2 the reason for such action;

- 33.2.3 the date it wishes to commence such action;

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

- 33.2.5 to the extent practicable, the effect on the Contractor and its obligation to provide the Services during the period such action is being taken.

33.3 Required Action

Following service of such notice, the Authority shall take such action as notified under Clause 33.2 above and any consequential additional action as it reasonably believes is necessary (together the "**Required Action**") and the Contractor shall give all reasonable assistance to the Authority while it is taking such Required Action.

33.4 No Contractor Breach

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

- 33.4.1 the Contractor shall be relieved from its obligations to provide such part of the Services; and

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

33.5 Contractor Breach

If the Required Action taken by the Authority is taken as a result of a breach of the obligations of the Contractor under this Agreement then to the extent that the Required Action is taken and prevents the Contractor from providing any part of the Services:

- 33.5.1 without prejudice to any rights of the Authority in relation to the breach giving rise to the need for the Authority to take the Required Action, the Contractor shall be relieved of its obligations to provide such part of the Services; and
- 33.5.2 in respect of the period in which the Authority is taking the Required Action, the Contractor shall provide the Authority with reasonable assistance at the Contractor's expense and the Service Charge due from the Authority to the Contractor in respect of the Services affected by the Authority's Required Action shall equal the amount the Contractor would receive if it were providing and satisfying all of its obligations in relation to such affected Services in full over that period less an amount equal to all the Authority's costs of operation in taking the Required Action including, without limitation, relevant administration expenses such as general staff costs and overheads; and
- 33.5.3 in carrying out any Required Action, the Authority shall act reasonably (including avoiding, to the extent reasonably practicable, action which would detrimentally affect any compensation payable to the Contractor pursuant to Clauses 49.2 (Compensation on Voluntary Termination), 53.2 (Compensation on Termination for Breach of the Refinancing Provisions), 55 (Compensation on Termination for Authority Default), 56 (Compensation on Termination for Contractor Default), 57 (Compensation on Termination for Force Majeure) and 58 (Compensation on Termination for Corrupt Gifts and Fraud)).

33.6 Performance by the Authority

- 33.6.1 In carrying out any Required Action pursuant to Clauses 33.1 and 33.3, the Authority shall, having regard to all the circumstances, act in accordance with Good Industry Practice and shall act reasonably (including avoiding, to the extent reasonably practicable, action which would detrimentally affect any compensation payable to the Contractor pursuant to Clauses 55 (Compensation on Termination for Authority Default), 56 (Compensation on Termination for Contractor Default), 57 (Compensation on Termination for Force Majeure), 58 (Compensation on Termination for Corrupt Gifts and Fraud), 49.2 (Compensation on Voluntary Termination) and 53.2 (Compensation on Termination for Breach of the Refinancing Provisions)) and shall, subject to the provisions of Clause 33.5.2, indemnify the Contractor against any Claims and/or Losses suffered by the Contractor as a result of not so doing.
- 33.6.2 Where Clause 33.4 applies, in carrying out any Required Action pursuant to Clause 33.1, the Authority shall procure that the Services are delivered to the same standards and specifications as are applicable to the Contractor under this Agreement.
- 33.6.3 The provisions of Clauses 44.4 (Conduct of Claims) to 44.8 (Authority Handling of Claims) inclusive shall apply to the indemnity given in Clause 33.6.1, provided that in such Clauses references to the Authority shall be read as references to the Contractor and references to the Contractor shall be read as references to the Authority.

33.7 Authority Step Out

Once the Authority is aware of a date when it will have taken all the Required Action that it reasonably believes is necessary pursuant to Clauses 33.1 and 33.3, the Authority shall notify the Contractor of the date and, from that date, the Authority shall cease to take the Required Action and the Contractor shall no longer be relieved of its obligations to provide any part of the Services affected by the Required Action.

34. REFINANCING

34.1 Limitation on Refinancing

The Contractor shall obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and the Contractor shall at all times act in good faith with respect to any Refinancing.

34.2 Share of Refinancing Gain

34.2.1 The Authority shall be entitled to receive a 50 per cent share of any Refinancing Gain arising from a Qualifying Refinancing.

34.2.2 The Authority shall not withhold or delay its consent to a Qualifying Refinancing in order to obtain a greater than 50 per cent share of the Refinancing Gain.

34.3 Details of Proposed Refinancings

The Contractor 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).

34.4 Payment of Refinancing Gain

The Authority shall have the right to receive its share of any Refinancing Gain as:

34.4.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;

34.4.2 a reduction in the Service Charge over the remaining term of this Agreement; or

34.4.3 a combination of any of the above.

34.5 Negotiations relating to Refinancing Gain

The Authority and the Contractor 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 34.4 (Payment of Refinancing Gain)). 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 68 (Dispute Resolution Procedure).

34.6 Calculation of Refinancing Gain

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 Contractor within 20 Business Days of any Qualifying Refinancing.

PART VIII – VARIATIONS AND CHANGES IN LAW

35. MINOR VARIATIONS

35.1 Scope of Minor Variation

- 35.1.1 Either Party shall be entitled to request a Minor Variation in accordance with this Clause 35 (Minor Variations) provided that neither Party may request a Minor Variation which may require the Services to be performed in a way which infringes any Law.
- 35.1.2 Either Party may request that a change to the Contractor's obligations that does not fall within the definition of a Minor Variation but instead falls within the definition of an Authority Service Variation or a Contractor Service Variation (as applicable), should nevertheless be treated as a Minor Variation. Such a request shall be a request for a deemed Minor Variation ("**Deemed Minor Variation**"). If the Requesting Party would like to request a Deemed Minor Variation in accordance with this Clause 35.1.2, it shall set out in sufficient detail the justification for such a request when providing the information required in the Minor Variation Notice.

35.2 Adherence to the Processes

In considering and implementing any Minor Variations (or Deemed Minor Variations (as the case may be)) the relevant procedures and requirements set out in the Development Processes of Section 4 of Schedule 1.2 (Statement of Requirements: Processes) shall be followed in addition to the procedure set out in this Clause 35 (Minor Variations).

35.3 Funding of Minor Variations

- 35.3.1 All costs of implementing a Minor Variation (or a Deemed Minor Variation (as the case may be)) in any Minor Variation Period (as defined in Clause 35.3.2) shall be for the account of the Contractor until a Minor Variation Cost Review Trigger Event (as defined in Clause 35.3.3) occurs.
- 35.3.2 A Minor Variation Period means the period running from the date of the implementation of the most recent Variation Cost Review with the exception of the first Minor Variation Period which shall commence on the Effective Date (the "**Variation Period Start Date**") to the earlier of the next Variation Cost Review, the Termination Date and the Expiry Date.
- 35.3.3 Any Minor Variation shall be subject to a Variation Cost Review upon the occurrence of the earlier of the following events:
- (A) when taken together with the aggregate agreed or determined Estimated Change in Project Costs of other Minor Variations, whether a cost of or saving to the Contractor, which have been implemented since the most recent Variation Period Start Date, the Estimated Change in Project Costs exceeds £500,000 NPV (adjusted for RPI); or
 - (B) three complete Contract Years having occurred since the most recent Variation Period Start Date; or
 - (C) an Authority Service Variation or a Contractor Service Variation is agreed or determined and not withdrawn under Clause 36 (Authority Service Variation) or Clause 37 (Contractor Service Variation) (as the case may be),

(together "**Minor Variation Cost Review Trigger Events**"). A Variation Cost Review shall be carried out in accordance with Clause 35.13.

- 35.3.4 The Authority shall reimburse to the Contractor any reasonable third party costs incurred by the Contractor in preparing a Minor Variation Response Notice, where the Minor Variation to which such Minor Variation Response Notice relates is not implemented.

35.4 **Minor Variation Notice**

If either Party wishes to request a Minor Variation (or a Deemed Minor Variation (as the case may be)), it (the "**Requesting Party**") shall serve on the other Party (the "**Receiving Party**") a written notice (a "**Minor Variation Notice**") setting out:

- 35.4.1 the date of the Minor Variation Notice;
- 35.4.2 the originator of the requirement for the Minor Variation (or the Deemed Minor Variation (as the case may be));
- 35.4.3 the reason for the Minor Variation (or the Deemed Minor Variation (as the case may be));
- 35.4.4 the date by which the Requesting Party seeks implementation of the Minor Variation (or the Deemed Minor Variation (as the case may be)) to be effected; and
- 35.4.5 the information required pursuant to Clause 35.12 (Prior to a Variation Cost Review).

35.5 **Response to Minor Variation Notice**

Promptly following the service of a Minor Variation Notice the Contractor shall serve on the Authority a notice (a "**Minor Variation Response Notice**") setting out:

- 35.5.1 the Estimated Change in Project Costs of implementing the Minor Variation (or the Deemed Minor Variation (as the case may be)) calculated in a manner consistent with Clause 36.8.5;
- 35.5.2 sufficient details of the Minor Variation (or the Deemed Minor Variation (as the case may be)) and the derivation of the Estimated Change in Project Costs provided pursuant to Clause 35.5.1 to enable the Authority to calculate the likely costs of implementing the Minor Variation (or the Deemed Minor Variation (as the case may be));
- 35.5.3 an outline of suggested drafting changes to the Statement of Requirements and/or the Service Level Targets which will be required as a result of the Minor Variation (or the Deemed Minor Variation (as the case may be));
- 35.5.4 any Necessary Consents (including any planning approval) which, in the opinion of the Contractor, will need to be obtained to give effect to the Minor Variation (or the Deemed Minor Variation (as the case may be)) including any such Necessary Consents which are required to be obtained or which it would be Good Industry Practice to obtain prior to the implementation of the Minor Variation (or the Deemed Minor Variation (as the case may be)) and the extent to which the Contractor proposes that the implementation of the Minor Variation (or the Deemed Minor Variation (as the case may be)) should be conditional on any Necessary Consent being obtained;
- 35.5.5 any other change to the Services (a "**Consequential Change**") which would result from or reasonably be required in order to facilitate the implementation of

the proposed Minor Variation (or the Deemed Minor Variation (as the case may be)) (and if the Contractor has identified any Consequential Change, it shall, in providing any information or estimates required pursuant to this Clause 35.5 (Response to Minor Variation Notice) take into account and provide for and set out the anticipated effects of any such Consequential Change and references to any Minor Variation in this Clause 35 (Minor Variations) shall be deemed to include any Consequential Change and in particular for the purposes of acceptance or withdrawal or agreement or determination of issues in respect of a Minor Variation, a Minor Variation and any related Consequential Changes shall be treated as one Minor Variation);

35.5.6 whether any relief is required from the provisions of Clause 30 (Service Credit Regime) if the Services are not performed in accordance with the Statement of Requirements and/or the Service Level Targets as a result of disruption caused by the implementation of the Minor Variation (or the Deemed Minor Variation (as the case may be));

35.5.7 in the case of a Deemed Minor Variation:

- (A) the Contractor's opinion on any impact on the Base Service Charge Date and/or an estimate of any required postponement of the Longstop Date;
- (B) any amendment required to this Agreement, any Project Document and/or any Ancillary Document to which the Authority is a party as a result of the Deemed Minor Variation; and
- (C) whether any relief is required from the provisions of Clause 30 (Service Credit Regime) if the services are not performed in accordance with the Statement of Requirements and/or the Service Level Targets as a result of the proposed Deemed Minor Variation; and

35.5.8 where the Contractor is the Receiving Party, whether it rejects the Minor Variation or the Deemed Minor Variation together with the reason for such rejection.

35.6 **Response to Minor Variation Response Notice**

35.6.1 Subject to Clause 35.6.3, within 10 Business Days of the Authority receiving a Minor Variation Response Notice, the Authority shall either confirm in writing to the Contractor that it accepts the Minor Variation (or the Deemed Minor Variation (as the case may be)) on the terms of the Minor Variation Response Notice (other than Clause 35.5.8) or set out the grounds on which it disagrees with the Minor Variation Response Notice and/or, where the Authority is the Receiving Party, rejects the Minor Variation (or the Deemed Minor Variation (as the case may be)).

35.6.2 The Receiving Party shall only be entitled to reject, in the case of a Minor Variation, on the grounds set out in Clause 35.8 (Grounds for Rejection of a Minor Variation) or, in the case of a Deemed Minor Variation, on the grounds set out in Clause 35.7 (Grounds for Rejection of a Deemed Minor Variation).

35.6.3 If the Authority (acting reasonably) requires further information in order to accept or reject the Minor Variation Response Notice it shall inform the Contractor of this within 10 Business Days of receipt of a Minor Variation Response Notice. The Contractor shall promptly supply any further information requested pursuant to this Clause 35.6.3 and the Authority shall within 10 Business Days of receiving

the relevant further information confirm in writing whether or not it agrees to the Minor Variation Response Notice.

- 35.6.4 If the Authority fails to respond to the Contractor within the time periods set out in Clauses 35.6.1 and 35.6.3 (if applicable), then the Contractor shall promptly provide the Authority with a written reminder. If the Authority has not responded in writing after 5 Business Days of the date of the reminder, then the Minor Variation (or the Deemed Minor Variation (as the case may be)) will be deemed to have been accepted on the terms of the Minor Variation Response Notice.

35.7 Grounds for Rejection of a Deemed Minor Variation

Each Party shall, in its absolute discretion, be entitled to reject a request, pursuant to Clause 35.1.2, for a Deemed Minor Variation. If the Receiving Party does not agree that a change to the Contractor's obligations should be treated as a Deemed Minor Variation, it shall state this in its written response and the Requesting Party shall then only be entitled to pursue the relevant change through the Authority Service Variation procedure pursuant to Clause 36 (Authority Service Variation) or the Contractor Service Variation procedure pursuant to Clause 37 (Contractor Service Variation) (as applicable).

35.8 Grounds for Rejection of a Minor Variation

- 35.8.1 Subject to Clause 35.8.2, the Authority shall, at any time and in its sole discretion, be entitled to reject any Minor Variation. The Authority shall not be obliged to give reasons for such a rejection and shall be entitled (acting reasonably) to oblige the Contractor to pursue the relevant change through the Contractor Service Variation procedure pursuant to Clause 37 (Contractor Service Variation).

- 35.8.2 The Authority shall not reject a Minor Variation which is required in order to conform to a Change in Law. The costs of a Minor Variation resulting from a Qualifying Change in Law (including any resulting variation in the Service Charge) shall be dealt with in accordance with Clause 38 (Changes in Law).

- 35.8.3 The Contractor shall be entitled to reject a Minor Variation if it reasonably believes that:

(A) without prejudice to Clause 35.1.2, the change requested in the Minor Variation Notice is not a Minor Variation in which case the Contractor shall state in its written response which of the following reasons apply:

- (1) the Estimated Change in Project Costs, whether a cost of or saving to the Contractor, of implementing the proposed Minor Variation will exceed (a) £100,00 NPV (adjusted for RPI) and/or, (b) when taken together with the aggregate agreed or determined Estimated Change in Project Costs of other Minor Variations which have been implemented during the relevant Minor Variation Period, £500,000 NPV (adjusted for RPI);
- (2) the proposed Minor Variation will have an impact on the Base Service Charge Date;
- (3) the proposed Minor Variation will require amendment to this Agreement, any Project Document and/or any Ancillary Document to which the Authority is a party other than the Statement of Requirements and/or the Service Level Targets; and/or

- (4) the proposed Minor Variation will require changes to the Service Credit Regime;
- (B) the Minor Variation is not technologically feasible;
- (C) the Minor Variation would, if implemented, contravene any Law or require the Services to be performed in a manner which is inconsistent with Good Industry Practice;
- (D) the Contractor would be required to implement the Minor Variation within an unreasonable period of time;
- (E) the Minor Variation would, if implemented (taking into account the effect of implementing any previous Minor Variation, Authority Service Variation or Contractor Service Variation), either:
 - (1) result in the Contractor being in breach of; or
 - (2) have a material adverse effect on the ability of the Contractor to perform,
 its obligations under any Project Document or any Ancillary Document;
- (F) the Minor Variation would, if implemented, cause an unacceptable health and safety risk to the Contractor Employees, the Authority and/or Third Parties;
- (G) the Minor Variation would, if implemented, cause any Necessary Consents to be revoked; and/or
- (H) the Minor Variation would, if implemented, result in a change in the nature of the Project (including a material change in the Project's risk profile).

35.9 Dealing with Rejection of a Minor Variation

- 35.9.1 If either Party disagrees that the other Party is entitled to reject a Minor Variation, the Parties shall meet with a view to establishing whether the rejection is valid or otherwise. If, within 10 Business Days of receipt of any written response rejecting the Minor Variation, the validity of the rejection remains to be agreed, either Party shall be entitled to refer any dispute as to whether the Minor Variation may be rejected pursuant to Clause 35.8.3 to the Dispute Resolution Procedure.
- 35.9.2 If it is agreed or determined in accordance with the Dispute Resolution Procedure that the relevant rejection is not permitted by Clause 35.8, the Parties shall either agree the terms of the Minor Variation Response Notice or either Party shall be entitled to refer the terms of the Minor Variation Response Notice to the Dispute Resolution Procedure.
- 35.9.3 Any dispute as to whether the ground for objection set out in Clause 35.8.3(A)(1) applies shall be referred to an Adjudicator appointed pursuant to the Dispute Resolution Procedure who shall be instructed to determine the Estimated Change in Project Costs of the Minor Variation on a reasonable basis.
- 35.9.4 If the Adjudicator appointed pursuant to Clause 35.9.3 and in accordance with the Dispute Resolution Procedure determines that the ground for objection set out in Clause 35.8.3(A)(1) applies and that therefore the relevant rejection is permitted, Clause 35.9.6 shall apply.

- 35.9.5 If the Adjudicator appointed pursuant to Clause 35.9.3 and in accordance with the Dispute Resolution Procedure determines that the ground for objection set out in Clause 35.8.3(A)(1) does not apply and that therefore the relevant rejection is not permitted, Clauses 35.10 and 35.11 (Performance of a Minor Variation) shall apply.
- 35.9.6 If it is determined that the relevant rejection is permitted by Clause 35.8, the Minor Variation Notice shall be deemed to be withdrawn (but, for the avoidance of doubt, if it was determined that the consent was permitted to be withheld because of any of the reasons set out in Clause 35.8.3(A) the Requesting Party shall be entitled to pursue the relevant change through the Authority Service Variation procedure pursuant to Clause 36 (Authority Service Variation) or the Contractor Service Variation procedure pursuant to Clause 37 (Contractor Service Variation) (as applicable)).
- 35.9.7 The Parties shall bear their own costs incurred in the process of dealing with any dispute concerning any rejection by the Contractor pursuant to Clause 35.8.3.
- 35.10 Agreeing the Estimated Change in Project Costs and the Minor Variation**
 - 35.10.1 Unless the Estimated Change in Project Costs have been determined pursuant to Clause 35.9.5, prior to the implementation of the Minor Variation (or the Deemed Minor Variation (as the case may be)) the Parties shall agree the Estimated Change in Project Costs of the Minor Variation (or the Deemed Minor Variation (as the case may be)).
 - 35.10.2 Any failure to agree the Estimated Change in Project Costs of the Minor Variation (or the Deemed Minor Variation (as the case may be)) pursuant to Clause 35.10.1 shall be resolved by either Party referring the matter to an Adjudicator in accordance with the Dispute Resolution Procedure who shall be instructed to determine the Estimated Change in Project Costs on a reasonable basis and in a manner consistent with Clause 36.8.5.
 - 35.10.3 The Parties shall ensure that the figure (and a full breakdown of its component elements including the elements attributable to Capital Expenditure and Operating Costs) agreed pursuant to Clause 35.10.1 or determined pursuant to Clauses 35.9.3 or 35.10.2 is recorded on the Minor Variation Notice.
 - 35.10.4 Once the Estimated Change in Project Costs has been agreed or determined pursuant to Clause 35.9.5 or this Clause 35.10, the Minor Variation shall be deemed to be agreed on the terms of the Minor Variation Notice as varied by the agreed or determined Estimated Change in Project Costs.
 - 35.10.5 Where, in connection with a Minor Variation or Deemed Minor Variation, it is necessary to determine the Estimated Change in Project Costs of that Minor Variation or Deemed Minor Variation, such Estimated Change in Project Costs shall be calculated in a manner consistent with Clause 36.8.5.
- 35.11 Performance of a Minor Variation**
 - 35.11.1 Where the Minor Variation (or the Deemed Minor Variation (as the case may be)) is agreed or deemed to be agreed pursuant to Clauses 35.6.1, 35.6.4, 35.9.2 or 35.10, the Contractor shall forthwith implement the Minor Variation (or Deemed Minor Variation (as the case may be)) on the terms agreed or deemed to be agreed.
 - 35.11.2 The Contractor shall notify the Authority of completion of the Minor Variation (or the Deemed Minor Variation (as the case may be)).

35.12 Prior to a Variation Cost Review

- 35.12.1 Notwithstanding Clause 35.3.1, the Authority shall nevertheless, in its sole discretion, be entitled to fund any new Capital Expenditure element of the Estimated Change in Project Costs agreed or determined in relation to a Minor Variation (or a Deemed Minor Variation (as the case may be)) by means of a Lump Sum Payment payable upon notification of completion of the Minor Variation (or Deemed Minor Variation (as the case may be)) pursuant to Clause 35.11.2.
- 35.12.2 The Parties shall ensure that the amount of any Lump Sum Payment and its payment and receipt is recorded on the Minor Variation Notice.

35.13 Variation Cost Review

- 35.13.1 The Contractor shall, upon the occurrence of a Minor Variation Cost Review Trigger Event, calculate the aggregate of the Estimated Change in Project Costs agreed or determined in relation to Minor Variations (or Deemed Minor Variations (as the case may be)) agreed or deemed to be agreed during the relevant Minor Variation Period less the aggregate of any Lump Sum Payments that have been made pursuant to Clause 35.12 (Prior to a Variation Cost Review) during the relevant Minor Variation Period (the "**Total Minor Variation Cost**"). The Contractor shall notify the Authority in writing of the Total Minor Variation Cost identifying which elements are attributable to Capital Expenditure and which elements are attributable to Operating Costs.
- 35.13.2 If a Minor Variation Cost Review Trigger Event occurs pursuant to Clause 35.3.3(C), the Total Minor Variation Cost shall be recovered in accordance with the provisions of Clause 36 (Authority Service Variation) or Clause 37 (Contractor Service Variation) (as applicable). If a Minor Variation Cost Review Trigger Event occurs pursuant to Clause 35.3.3(A) or 35.3.3(B), the remainder of this Clause 35.13 (Variation Cost Review) shall apply.
- 35.13.3 Within 5 Business Days of the Authority receiving the notification of the Total Minor Variation Cost:
 - (A) the Authority shall fund the Capital Expenditure element of the Total Minor Variation Cost by means of a Lump Sum Payment; and
 - (B) the Parties shall meet to agree the impact of the Total Minor Variation Cost (less any Lump Sum Payment made by the Authority pursuant to 35.13.3(A)) on the Service Charge, calculated in accordance with the Financial Model Adjustment Mechanism.
- 35.13.4 If within 10 Business Days of the Parties meeting to agree the impact of the Total Minor Variation Cost, the Parties cannot agree on the impact, either Party may refer the matter to the Dispute Resolution Procedure.
- 35.13.5 Following a Variation Cost Review, the monthly Service Charge shall be revised in accordance with the issues agreed or determined pursuant to Clause 35.13.3 or 35.13.4 (as applicable).
- 35.13.6 Following a Variation Cost Review, the Parties shall ensure that it is recorded on all relevant Minor Variation Notice(s) that such Minor Variation (or Deemed Minor Variation (as the case may be)) has been the subject of a Variation Cost Review.

36. AUTHORITY SERVICE VARIATION

36.1 Scope of Authority Service Variation

The Authority shall be entitled to request an Authority Service Variation in accordance with this Clause 36 (Authority Service Variation) provided that the Authority may not request an Authority Service Variation which may require the Services to be performed in a way which infringes any Law.

36.2 Adherence to the Processes

In considering and implementing any Authority Service Variation the relevant procedures and requirements set out in the Development Processes of Section 4 of Schedule 1.2 (Statement of Requirements: Processes) shall be followed in addition to the procedure set out in this Clause 36 (Authority Service Variation).

36.3 Authority Notice of Service Variation

If the Authority requires an Authority Service Variation, or is deemed to have requested an Authority Service Variation pursuant to Clause 38.2.2 or Clause 47.19, it shall serve on the Contractor a written notice (an "**Authority Notice of Service Variation**") setting out:

- 36.3.1 the date of the Authority Notice of Service Variation;
- 36.3.2 the reason for the Authority Service Variation;
- 36.3.3 sufficient details of the Authority Service Variation to enable the Contractor to calculate and provide the Estimated Change in Project Costs in accordance with Clause 36.8 (Contents of Variation Report);
- 36.3.4 an indication as to whether the Authority wishes to fund any Capital Expenditure by means of Lump Sum Payments or whether the Authority may require the Contractor to provide or obtain external financing for such Capital Expenditure (giving rise to an adjustment to the Service Charge);
- 36.3.5 full details of any amendments proposed to the Statement of Requirements and/or the Service Level Targets including any drafts of such amendments;
- 36.3.6 the date by which the Authority wishes the Authority Service Variation to have been implemented;
- 36.3.7 the reasonable date by which the Contractor is required to submit its Variation Report, being not less than 20 Business Days after the date of service of the Authority Notice of Service Variation or, if the Contractor issues an Authority Service Variation Objection Notice pursuant to Clause 36.4.1, not less than 10 Business Days after the date of agreement or determination that such objections are not valid; and
- 36.3.8 any other information that the Authority reasonably considers would assist the Contractor in preparing its Variation Report including action the Authority proposes to take.

36.4 Authority Service Variation Objection Notice

- 36.4.1 Within 15 Business Days of receiving an Authority Notice of Service Variation the Contractor shall either confirm in writing to the Authority that it will prepare an Outline Proposal (as defined in Clause 36.6) for the Authority or (subject to Clause 36.4.2) issue a notice (an "**Authority Service Variation Objection Notice**") setting out in detail the grounds on which the Contractor objects to the proposed Authority Service Variation, provided that the Contractor shall only be entitled to object to an Authority Service Variation if:

- (A) the Authority Service Variation is not technologically feasible;
- (B) the Authority Service Variation would, if implemented, contravene any Law or require the Services to be performed in a manner which is inconsistent with Good Industry Practice;
- (C) the Authority Service Variation would, if implemented (taking into account the effect of implementing any previous Service Variation), either:
 - (1) result in the Contractor being in breach of; or
 - (2) have a material adverse effect on the ability of the Contractor to perform,
 its obligations under any Project Document or any Ancillary Document;
- (D) the Authority Service Variation would, if implemented, cause an unacceptable health and safety risk to the Contractor Employees, the Authority, the Authority Parties or Third Parties;
- (E) the Contractor would be required to implement the Authority Service Variation within an unreasonable period of time;
- (F) the Authority Service Variation would, if implemented, cause any Necessary Consents to be revoked; or
- (G) the Authority Service Variation would, if implemented, result either alone or together with other Authority Service Variations and Minor Variations which have been implemented since the Effective Date in a change in the nature of the Project (including a material change in the Project's risk profile) or the Services.

36.4.2 The Contractor shall not be entitled to object to any proposed Authority Service Variation deemed to be requested by the Authority pursuant to Clause 38.2.2.

36.5 Dealing with Objections

- 36.5.1 If the Authority disagrees with the objections raised by the Contractor, the Parties shall meet with a view to establishing whether the objections are valid. If, within 10 Business Days of receipt of any Authority Service Variation Objection Notice, the validity or otherwise of the Contractor's objections remains to be agreed, either Party may refer the question of validity to the Dispute Resolution Procedure.
- 36.5.2 If the Authority agrees with the objections in the Authority Service Variation Objection Notice, or it is determined under the Dispute Resolution Procedure that the objections in the Authority Service Variation Objection Notice are valid, the proposed Authority Notice of Service Variation shall be deemed to be withdrawn.
- 36.5.3 The Parties shall bear their own costs incurred in the process of dealing with any Authority Service Variation Objection Notice under Clauses 36.4 (Authority Service Variation Objection Notice) and 36.5 (Dealing with Objections).

36.6 Variation Report/Outline Proposal

If:

- 36.6.1 the Contractor does not issue an Authority Service Variation Objection Notice under Clause 36.4 (Authority Service Variation Objection Notice) within the period specified in that Clause; or

36.6.2 it is either agreed or determined under Clause 36.5 that the objections set out in an Authority Service Variation Objection Notice are not valid,

the Contractor shall as soon as reasonably practicable issue a proposal (an "**Outline Proposal**") to the Authority in accordance with Clause 36.7 (Outline Proposal).

36.7 **Outline Proposal**

36.7.1 The Outline Proposal shall specify an estimate of the price, a provisional timetable and a summary of method of implementation of the Authority Service Variation and shall be accompanied by a suggested budget for the Contractor to develop the Variation Report.

36.7.2 If having considered the Outline Proposal the Authority wishes to proceed with the Authority Service Variation it shall notify the Contractor and confirm either that the suggested budget is agreed by the Authority or propose an alternative budget (the "**Proposed Budget**").

36.7.3 Following the notification referred to in Clause 36.7.2 the Contractor shall as soon as reasonably practicable issue a report (a "**Variation Report**") to the Authority in accordance with Clause 36.8 (Contents of Variation Report). The Contractor shall keep the Authority informed as to the costs incurred in preparing the Variation Report and also when those costs exceed the Proposed Budget. If the costs incurred by the Contractor in preparing Variation Report exceed the Proposed Budget the Authority shall either:

- (A) inform the Contractor that it is increasing the amount of the Proposed Budget; or
- (B) withdraw the request for the Authority Service Variation.

36.8 **Contents of Variation Report**

The Variation Report shall include details of the following:

36.8.1 the Contractor's opinion on any impact on the Base Service Charge Date and/or an estimate of any required postponement of the Longstop Date;

36.8.2 the Contractor's opinion on any other anticipated impact of the Authority Service Variation on the provision of the Services;

36.8.3 any agreement or response to the Authority's proposals pursuant to Clauses 36.3.5 and 36.3.8;

36.8.4 any amendment required to this Agreement and/or any Project Document or Ancillary Document as a result of the proposed Authority Service Variation;

36.8.5 any Estimated Change in Project Costs in relation to the provision of the Services (but not, for the avoidance of doubt, in relation to the performance of the Commercial Contracts) that results from the Authority Service Variation including:

- (A) details of the derivation of the Estimated Change in Project Costs arising from the Authority Service Variation determined in accordance with Paragraphs 2 to 5 of Part 1 of Schedule 25 (Financial Model Adjustment Mechanism) and in accordance with the following principles:
 - (1) where a unit cost exists in the Cost Databook for a line item, that unit cost shall be used to determine the increased or reduced Capital Expenditure or Operating Costs (as the case may be) for that line item;

- (2) where a unit cost does not exist in the Cost Databook for a line item but does exist in the Cost Matrix for that line item, the costs set out in the Cost Matrix shall be used to determine the increased or reduced Capital Expenditure or Operating Costs (as the case may be) for that line item;
 - (3) where a unit cost is not specified in the Cost Databook or the Cost Matrix for a line item, the increased or reduced Capital Expenditure or Operating Costs (as the case may be) shall be at a level equal to the level which represents an arms' length market price for such unit cost provided that where the Authority is not satisfied (acting reasonably) that all such costs represent arms' length market prices and the Estimated Change in Project Costs over the remaining life of the project (based on reasonable assumptions regarding the volume of Call Offs) is expected to exceed £250,000, the Authority shall be entitled to direct that such costs are put out to competitive tender and the Contractor shall comply with any such direction;
 - (4) the multipliers, mark up factors and percentage add ons as specified in the Cost Model shall be applied to the costs referred to in paragraphs (1) to (3) above;
 - (5) the financing costs shall reflect competitive market terms;
 - (B) evidence that the Contractor has used reasonable endeavours to oblige its Sub-contractors and its or their respective sub-contractors to minimise any increase in costs and maximise any reduction in costs;
 - (C) any Total Minor Variation Cost to be recovered in accordance with Clause 35.13 (Variation Cost Review) should a Variation Cost Review take place in respect of the Authority Service Variation;
- 36.8.6 any loss of revenue that results from the Authority Service Variation (but not, for the avoidance of doubt, in relation to the performance of the Commercial Contracts);
- 36.8.7 the Contractor's proposals for the funding of any new Capital Expenditure and its proposals for Lump Sum Payments and/or adjustments to the Service Charge to reflect the Authority Service Variation calculated in accordance with the Financial Model Adjustment Mechanism and if the Authority indicated in the Authority Notice of Service Variation that it may require the Contractor to seek to obtain external financing for any Capital Expenditure, whether, and the terms on which, the Contractor reasonably believes that it could obtain such external financing;
- 36.8.8 the proposed methods of certification of any works required in connection with the Authority Service Variation;
- 36.8.9 any Necessary Consents (including any planning approval) which, in the opinion of the Contractor, will need to be obtained to give effect to the Authority Service Variation including any such Necessary Consents which are required to be obtained or which it would be Good Industry Practice to obtain prior to the implementation of the Authority Service Variation and the extent to which the Contractor proposes that the implementation of the Authority Service Variation should be conditional on any Necessary Consent being obtained;

- 36.8.10 any other change to the Services (a "**Consequential Change**") which would result from or reasonably be required in order to facilitate the implementation of the proposed Authority Service Variation (and if the Contractor has identified any Consequential Change, it shall, in providing any information or estimates required pursuant to this Clause 36.8 (Contents of Variation Report), take into account and provide for and set out the anticipated effects of any such Consequential Change and references to any Authority Service Variation in this Clause 36 (Authority Service Variation) shall be deemed to include any Consequential Change and in particular for the purposes of acceptance or withdrawal, or agreement or determination pursuant to Clause 36.10 (Agreeing the Variation Report and Tendering of Variations), of the Authority Service Variation, an Authority Service Variation and any related Consequential Changes shall be treated as one Authority Service Variation);
- 36.8.11 the steps and measures (which shall be as detailed as reasonably practicable in the circumstances) the Contractor intends to take in order to implement the Authority Service Variation, including the length of time and programme for implementing the Authority Service Variation, taking into account the length of time required to obtain any Necessary Consents identified pursuant to Clause 36.8.9 and to implement any Consequential Change;
- 36.8.12 the identity of the sub-contractors and/or consultants (if any) which the Contractor intends to engage for the purposes of effecting the Authority Service Variation;
- 36.8.13 whether any relief is required from the provisions of Clause 30 (Service Credit Regime) if the Services are not performed in accordance with the Statement of Requirements and/or the Service Level Targets as a result of disruption caused by the implementation of the Authority Service Variation; and
- 36.8.14 any changes to the Service Credit Regime required as a result of the proposed Authority Service Variation.

36.9 Additional Information including cost comparison exercise

- 36.9.1 The Authority may request from the Contractor such additional information as the Authority reasonably requires for the purposes of considering the Variation Report and shall make any such request as soon as reasonably practicable after receiving the Variation Report. Such additional information may include the results of a cost comparison exercise carried out by or on behalf of the Contractor at the request of the Authority to Validate a price generated by the use of the Cost Model (where the Cost Model was used) or to Validate a price produced other than by using the Cost Model. Such a request may only be made where the Authority (acting reasonably) is not satisfied that the price generated by the Contractor is an arms' length market price.
- 36.9.2 The Contractor shall provide any information requested by the Authority in accordance with Clause 36.9.1 as soon as reasonably practicable after receiving such request.

36.10 Agreeing the Variation Report and Tendering of Variations

- 36.10.1 As soon as reasonably practicable after the Authority receives the Variation Report or, if the Authority has requested additional information in accordance with Clause 36.9.1, as soon as reasonably practicable after the Authority receives such additional information, the Parties shall meet to discuss and attempt to agree

the issues set out in the Variation Report (or any revisions made pursuant to Clause 36.10.2). Where:

- (A) the Contractor has carried out a cost comparison exercise under Clauses 36.8.5(A) or 36.9.1;
- (B) the Authority is not satisfied (acting reasonably) that the costs of all elements of the proposed Variation which have been validated by the cost comparison exercise represent arms' length market prices; and
- (C) the estimated change in Estimated Change in Project Costs represented by the elements of the price referred to in Clause 36.10.1(B) is expected to exceed £250,000 over the remaining life of the project (based on reasonable assumptions regarding the volume of Call Offs),

then the Authority may where appropriate require the Contractor to procure that such elements of the Authority Service Variation be put out to competitive tender.

36.10.2 As a result of the discussions and the results of any competitive tender exercise undertaken pursuant to Clauses 36.8.5(A) or 36.9.1, the Authority may modify the Authority Notice of Service Variation and, if the Authority Service Variation gives rise to new Capital Expenditure, the Authority shall notify the Contractor whether or not it requires the Contractor to provide or seek to obtain external financing for such Capital Expenditure.

36.10.3 The Contractor shall, as soon as practicable and in any event not more than 15 Business Days after receipt of any modification or notification pursuant to Clause 36.10.2, notify the Authority of any revisions to the Variation Report.

36.10.4 If the Parties cannot agree on the contents of the Variation Report within a period of 40 Business Days from the date of the Variation Report or, if the Contractor is required to notify the Authority of any revisions to the Variation Report or any competitive tender exercise in accordance with Clauses 36.8.5 or 36.9.1, a period of 40 Business Days from the date of receipt by the Authority of such notification, either Party may refer the matter for determination to the Dispute Resolution Procedure.

36.11 Authority Service Variations with no External Financing

36.11.1 Within 10 Business Days of a Variation Report being agreed or determined which does not provide for Capital Expenditure to be funded through external financing the Authority shall issue to the Contractor for its approval a schedule setting out:

- (A) the timing of the payments of the Lump Sum Payment reflecting the amount and timing of the relevant Capital Expenditure to be incurred by the Contractor in carrying out the Authority Service Variation to the extent that the relevant Capital Expenditure is to be borne by the Authority; and
- (B) where payment for part of the Authority Service Variation reflects the carrying out of or progress towards an element of change within the Authority Service Variation, an objective means of providing evidence confirming that the part of the Authority Service Variation corresponding to the relevant payment date under the payment schedule has been duly carried out (a "**Payment Schedule**").

36.11.2 If the Parties cannot agree on the Payment Schedule and/or the evidence required pursuant to Clause 36.11.1(B) within a reasonable time, either Party may refer the matter to the Dispute Resolution Procedure.

36.11.3 Within 30 Business Days of a Variation Report being agreed or determined which does not provide for Capital Expenditure to be funded through external financing the Authority shall:

- (A) issue to the Contractor an order ("**Authority Service Variation Order**") requiring the Contractor to implement the Authority Service Variation in accordance with the Variation Report, as agreed or determined. The Authority and the Contractor shall comply with the terms of any such Authority Service Variation Order; or
- (B) notify the Contractor that it is withdrawing the Authority Notice of Service Variation, provided that it shall not be entitled to withdraw an Authority Notice of Service Variation in circumstances where it is deemed to have requested an Authority Service Variation pursuant to Clause 38.2.2.

If the Authority does not comply with Clauses 36.11.3(A) or 36.11.3(B) within the time period specified in this Clause 36.11.3, it shall be deemed to have notified the Contractor that it is withdrawing the Authority Notice of Service Variation, except in circumstances where it is deemed to have requested an Authority Service Variation pursuant to Clause 38.2.2 in which case it shall be deemed to have issued an Authority Service Variation Order in accordance with Clause 36.11.3(A).

36.12 **Authority Service Variations with External Financing**

36.12.1 Within 30 Business Days of a Variation Report being agreed or determined which provides for the Capital Expenditure to be funded through external financing the Authority shall:

- (A) issue to the Contractor a request ("**Funding Request**") requiring the Contractor to use reasonable endeavours to obtain the external financing provided for in the Variation Report, as agreed or determined; or
- (B) notify the Contractor that it is withdrawing the Authority Notice of Service Variation, provided that it shall not be entitled to withdraw an Authority Notice of Service Variation in circumstances where it is deemed to have requested an Authority Service Variation pursuant to Clause 38.2.2.

If the Authority does not comply with Clause 36.12.1(A) or Clause 36.12.1(B) within the time period specified in this Clause 36.12.1, it shall be deemed to have notified the Contractor that it is withdrawing the Authority Notice of Service Variation, except where the Authority Notice of Service Variation is required in circumstances where it is deemed to have requested an Authority Service Variation pursuant to Clause 38.2.2 in which case it shall be deemed to have issued a Funding Request.

36.12.2 If the Authority issues, or is deemed to issue, a Funding Request pursuant to Clause 36.12.1(A) the Contractor shall use reasonable endeavours to obtain the external financing provided for in the Variation Report, as agreed or determined, on the terms envisaged by the Variation Report.

- 36.12.3 If the Contractor obtains the external financing provided for in the Variation Report, as agreed or determined, on the terms specified in the Variation Report, it shall notify the Authority accordingly. Within 15 Business Days of receipt of such notification the Authority shall issue to the Contractor an order ("**Authority Service Variation Order**") requiring the Contractor to implement the Authority Service Variation in accordance with the Variation Report, as agreed or determined. The Authority and the Contractor shall comply with the terms of any such Authority Service Variation Order.
- 36.12.4 If, having used reasonable endeavours pursuant to Clause 36.12.2 for a period of 60 Business Days after the date of the Funding Request (or such longer period as the Parties may agree), the Contractor has been unable to obtain the external financing provided for in the Variation Report, as agreed or determined, on the terms specified in the Variation Report, it shall issue to the Authority a notice giving details of the best terms (if any) on which it is able to obtain such financing and the modifications which would be required to the agreed or determined Variation Report if the Authority Service Variation were to be funded on such terms ("**Funding Notification**").
- 36.12.5 Within 30 Business Days of receiving a Funding Notification, the Authority shall:
- (A) notify the Contractor that it is withdrawing the Authority Notice of Service Variation, provided that it shall not be entitled to withdraw the Authority Notice of Service Variation in circumstances where it is deemed to have requested an Authority Service Variation pursuant to Clause 38.2.2; or
 - (B) notify the Contractor that it will instead fund the relevant Capital Expenditure by means of a Lump Sum Payment and set a schedule for payment of the same; or
 - (C) notify the Contractor that it accepts the terms on which the Contractor can obtain the external financing.
- 36.12.6 If the Authority does not comply with Clause 36.12.5(A), Clause 36.12.5(B) or Clause 36.12.5(C) within the time period specified in Clause 36.12.5 the Contractor shall promptly provide the Authority with a written reminder. If the Authority has not responded after 5 Business Days of the date of the reminder, the Authority shall be deemed to have notified the Contractor that it is withdrawing the Authority Notice of Service Variation, except in circumstances where it is deemed to have requested an Authority Service Variation pursuant to Clause 38.2.2 in which case it shall be deemed to have notified the Contractor that it accepts the terms on which the Contractor can obtain the external financing in accordance with Clause 36.12.5(C).
- 36.12.7 Within 15 Business Days of receiving a notification or a deemed notification from the Authority pursuant to Clause 36.12.5(B) or 36.12.5(C) the Contractor shall submit to the Authority a revised Variation Report.
- 36.12.8 As soon as practicable after the Authority receives a revised Variation Report the Parties shall meet to discuss and attempt to agree the revisions.
- 36.12.9 If the Parties are unable to agree the revisions to the Variation Report within a period of 15 Business Days from the date of receipt of the revised Variation Report by the Authority, either Party may refer the matter for determination to the Dispute Resolution Procedure.

36.12.10 Within 30 Business Days of a revised Variation Report being agreed or determined in accordance with Clause 36.12.8 or Clause 36.12.9, the Authority shall:

- (A) issue to the Contractor an order ("**Authority Service Variation Order**") requiring the Contractor to implement the Authority Service Variation in accordance with the revised Variation Report, as agreed or determined. The Authority and the Contractor shall comply with the terms of any such Authority Service Variation Order; or
- (B) notify the Contractor that it is withdrawing the Authority Notice of Service Variation provided that it should not be entitled to withdraw an Authority Notice of Service Variation in circumstances where it is deemed to have requested an Authority Service Variation pursuant to Clause 38.2.2.

36.12.11 If the Authority does not comply with Clause 36.12.10(A) or 36.12.10(B) within the time period specified in Clause 36.12.10, it shall be deemed to have notified the Contractor that it is withdrawing the Authority Notice of Service Variation, except in circumstances where it is deemed to have requested an Authority Service Variation pursuant to Clause 38.2.2 in which case it shall be deemed to have issued an Authority Service Variation Order in accordance with Clause 36.12.10(A).

36.13 Implementation of Authority Service Variation

Upon receipt of any Authority Service Variation Order (which the Contractor shall review and confirm (by counter signature) as being in accordance with the agreed or determined Authority Service Variation Order):

- 36.13.1 the Contractor shall forthwith implement the relevant Authority Service Variation in accordance with the terms of the Variation Report, as agreed or determined, subject to any Necessary Consent being obtained where the Variation Report specifies that the implementation of the Authority Service Variation is conditional on such Necessary Consent;
- 36.13.2 the Statement of Requirements and/or the Service Level Targets (as appropriate) shall be deemed to be amended as specified in the Variation Report, as agreed or determined;
- 36.13.3 this Agreement, any Project Document and/or any Ancillary Document to which the Authority is a party shall be deemed to be amended as specified in the Variation Report, as agreed or determined;
- 36.13.4 the Service Credit Regime shall be deemed to be amended as specified in the Variation Report, as agreed or determined;
- 36.13.5 the Authority shall:
 - (A) make any Lump Sum Payments in accordance with the Payment Schedule; and
 - (B) the Base Service Charge shall be revised,
 in each case, in accordance with the provisions of the Variation Report;
- 36.13.6 to the extent stipulated by the Variation Report, as agreed or determined, the Authority shall not make payment deductions and the Contractor shall not incur any Service Credits;

36.13.7 the relevant procedures and requirements set out in the Development Processes of Section 4 of Schedule 1.2 (Statement of Requirements: Processes) shall be followed as applicable; and

36.13.8 the Longstop Date shall be postponed by such period as has been agreed or determined.

36.14 Payment of Lump Sum Payments

36.14.1 The Authority shall make a payment to the Contractor within 15 Business Days of receipt by the Authority of invoices presented to the Authority in accordance with the agreed or determined Payment Schedule, such invoices to be accompanied by the relevant evidence (where applicable) that the relevant part of the Authority Service Variation has been carried out.

36.14.2 If payment is not made in accordance with Clause 36.14.1, the Authority shall pay interest to the Contractor on the amount unpaid from the date 15 Business Days after receipt of the relevant invoice until (and including) the date of payment at a rate per annum equal to the Interest Rate plus 2 per cent per annum.

36.15 Non implementation of Authority Service Variation

The Authority shall reimburse the Contractor its reasonable costs properly incurred in preparing a Variation Report where the relevant Authority Service Variation is not implemented other than where the reason for such non implementation is that the costs of the Authority Service Variation as set out in the Variation Report are materially greater than those set out in the Outline Proposal as a result of the negligence or wilful default of the Contractor.

36.16 Breach of terms of Authority Service Variation Order

The Authority shall not be entitled to terminate this Agreement as a result of any failure by the Contractor to complete any works required to implement an Authority Service Variation Order but shall instead be entitled to suspend payment of any sums to be paid in respect of such Authority Service Variation pending completion of such works.

37. CONTRACTOR SERVICE VARIATION

37.1 Scope of Contractor Service Variation

If the Contractor wishes to request a Contractor Service Variation it shall serve a notice on the Authority ("**Contractor Notice of Change**").

37.2 Adherence to the Processes

In considering and implementing any Contractor Service Variation the relevant procedures and requirements set out in the Development Processes of Section 4 of Schedule 1.2 (Statement of Requirements: Processes) shall be followed in addition to the procedure set out in this Clause 37 (Contractor Service Variation).

37.3 Contractor Notice of Change

The Contractor Notice of Change shall include all the information which the Contractor is required to provide in a Variation Report, as detailed in Clause 36.8 (Contents of Variation Report), to the extent that such information is relevant to the proposed Contractor Service Variation and details of the following:

37.3.1 the Contractor's reasons for proposing the Contractor Service Variation; and

37.3.2 any date or dates by which any decision by the Authority is critical.

37.4 Evaluation of the Contractor Notice of Change

37.4.1 The Authority shall evaluate the Contractor Notice of Change in good faith taking into account all relevant issues, including whether:

- (A) a change in the Service Charge will occur or any Lump Sum Payment is required;
- (B) the Contractor Service Variation will affect the quality of the Services or the likelihood of successful delivery of the Services;
- (C) the Contractor Service Variation will interfere with the relationship of the Authority with Third Parties;
- (D) the financial strength of the Contractor is sufficient to perform the changed Services;
- (E) the residual value of the Assets would or might, if this Agreement were to terminate, be reduced;
- (F) the Contractor Service Variation would or might adversely affect the Contractor's ability to comply with its obligations pursuant to Clause 61 (Handback of a Working System); or
- (G) the Contractor Service Variation materially affects the risks or costs to which the Authority is exposed.

37.4.2 As soon as reasonably practicable after the Authority receives the Contractor Notice of Change, the Parties shall meet to discuss and attempt to agree the issues set out in the Contractor Notice of Change (or any modifications made pursuant to Clause 37.4.3).

37.4.3 As a result of the discussions undertaken pursuant to Clause 37.4.2 the Contractor may modify the Contractor Notice of Change and shall notify the Authority as soon as reasonably practicable of any such modifications.

37.5 Rejection of the Contractor Notice of Change

Save where the Variation has been proposed to comply with a Change in Law, the Authority may, at any time and in its sole discretion, reject the Contractor Notice of Change by issuing a notice of objection to the Contractor and the Authority shall not be obliged to give reasons for such a rejection.

37.6 Acceptance of the Contractor Notice of Change and Payment Schedule

37.6.1 The Authority may accept the Contractor Notice of Change as modified pursuant to Clause 37.4.3 (if applicable) by notifying the Contractor and shall if relevant include within its notice to the Contractor a payment schedule setting out:

- (A) timing of the payments of the Lump Sum Payment reflecting the amount and timing of the relevant Capital Expenditure to be incurred by the Contractor in carrying out the Contractor Service Variation to the extent that the relevant Capital Expenditure is to be borne by the Authority; and
- (B) where payment for part of the Contractor Service Variation reflects the carrying out of or progress towards an element of change within the Contractor Service Variation, an objective means of providing evidence confirming that the part of the Contractor Service Variation corresponding to the relevant payment date under the payment schedule has been duly carried out (the "**Payment Schedule**").

- 37.6.2 If the Parties cannot agree on the Payment Schedule and/or the evidence required pursuant to Clause 37.6.1(B) within a reasonable time, either Party may refer the matter to the Dispute Resolution Procedure.

37.7 Implementation of Contractor Service Variation

Upon receipt of notification from the Authority that it accepts the Contractor Notice of Change or, where applicable, upon notification from the Contractor that it accepts the Payment Schedule or determination of the Payment Schedule:

- 37.7.1 the Contractor shall forthwith implement the relevant Contractor Service Variation in accordance with the terms of the Contractor Notice of Change, subject to any Necessary Consent being obtained where the Contractor Notice of Change specifies that the implementation of the Contractor Service Variation is conditional on such Necessary Consent;
- 37.7.2 the Statement of Requirements and/or Service Level Targets shall be deemed to be amended as specified in the Contractor Notice of Change;
- 37.7.3 this Agreement, any Project Document and/or any Ancillary Document to which the Authority is a party shall be deemed to be amended as specified in the Contractor Notice of Change;
- 37.7.4 the Service Credit Regime shall be deemed to be amended as specified in the Contractor Notice of Change;
- 37.7.5 the Authority shall make any Lump Sum Payments in accordance with Clause 37.8 (Payment of Lump Sums) and the monthly Service Charge shall be revised, in each case, in accordance with provisions specified in the Contractor Notice of Change;
- 37.7.6 to the extent stipulated by the Contractor Notice of Change, the Authority shall not make payment deductions and the Contractor shall not incur any Service Credits; and
- 37.7.7 the relevant procedures and requirements set out in the Development Processes of Section 4 of Schedule 1.2 (Statement of Requirements: Processes) shall be followed as applicable.

Unless the Authority specifically accepts a Contractor Notice of Change which provides for an increase in the Service Charge or payment by way of Lump Sum Payment, there shall be no increase in the Service Charge or any Lump Sum Payment made by the Authority as a result of the Contractor Service Variation proposed by the Contractor. Where the Contractor Service Variation gives rise to a saving to the Contractor, the change in Service Charge shall be calculated on the basis that 51% of any saving shall be for the account of the Authority and 49% of any saving shall be for the account of the Contractor. Any such saving shall be calculated having deducted all associated costs from the cost savings and having applied all multipliers, mark up factors and percentage add ons as specified in the Cost Model as at the Effective Date.

37.8 Payment of Lump Sums

- 37.8.1 The Authority shall make a payment to the Contractor within 15 Business Days of receipt by the Authority of invoices presented to the Authority in accordance with the agreed or determined Payment Schedule, such invoices to be accompanied by the relevant evidence (where applicable) that the relevant part of the Contractor Service Variation has been carried out.

- 37.8.2 If payment is not made in accordance with Clause 37.8.1, the Authority shall pay interest to the Contractor on the amount unpaid from the date 15 Business Days after receipt of the relevant invoice until (and including) the date of payment at a rate per annum equal to the Interest Rate plus 2 per cent per annum.

37.9 Value Engineering Changes

- 37.9.1 If either Party wishes to request a Value Engineering Change it shall serve a notice on the other Party (a "**Value Engineering Notice**").
- 37.9.2 A Value Engineering Notice shall include all the information which the Contractor is required to provide in a Variation Report, as detailed in Clause 36.8 (Contents of Variation Report), to the extent that such information is relevant to a Value Engineering Change and details of the following:
- (A) the proposing Party's reasons for proposing the Value Engineering Change;
 - (B) the standards, requirements, output specifications, technology and/or equipment affected by the proposed Value Engineering Change; and
 - (C) any date or dates by which any decision by the other Party is critical.
- 37.9.3 As soon as reasonably practicable, following receipt of a Value Engineering Notice the Parties shall meet to discuss and attempt to agree the issues set out in the Value Engineering Notice. No failure to agree the contents of a Value Engineering Notice may be referred by either Party to the Dispute Resolution Procedure.
- 37.9.4 The Contractor shall implement any agreed Value Engineering Change in accordance with the terms of the agreed Value Engineering Notice subject to any Necessary Consent being obtained where the Value Engineering Notice specifies that the Value Engineering Change is conditional on any Necessary Consent.
- 37.9.5 Where, having deducted all associated costs from the cost savings and having applied all multipliers, mark up factors and percentage add ons as specified in the Cost Model as at the Effective Date, an overall net saving results from a Value Engineering Change agreed pursuant to this Clause 37.9, then the charges for the Call Offs which relate to such Value Engineering Change shall be lowered by 51% of the saving and the Cost Model shall be updated to take account of such change.

38. CHANGES IN LAW

38.1 Change in Law Notice in respect of a Qualifying Change in Law

If a Qualifying Change in Law occurs or is shortly to occur, then either Party may write to the other to express an opinion on its likely effects (a "**Change in Law Notice**"), giving details of its opinion of:

- 38.1.1 any necessary changes in the Services;
- 38.1.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;
- 38.1.3 whether relief from compliance with obligations is required, including the obligation of the Contractor to achieve the Base Service Charge Date;
- 38.1.4 whether any relief is required from the provisions of Clause 30 (Service Credit Regime) if the Services are not performed in accordance with the Statement of

Requirements or a manner consistent with the Service Level Targets as a result of disruption caused by the implementation of the relevant Qualifying Change in Law;

- 38.1.5 any loss of revenue that will result from the relevant Qualifying Change in Law (but not, for the avoidance of doubt, in relation to the performance of the Commercial Contracts);
- 38.1.6 any Estimated Change in Project Costs that directly result from the Qualifying Change in Law; and
- 38.1.7 any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the Service Period,

in each case giving in full detail the procedure for implementing the change in Service. Responsibility for the costs of implementation (and any resulting variation to the Service Charge) shall be dealt with in accordance with Clauses 38.2 to 38.3 below.

38.2 Consequences of a Change in Law Notice

- 38.2.1 As soon as practicable after receipt of any notice from either Party under Clause 38.1, the Parties shall discuss and agree the issues referred to in Clause 38.1 and any ways in which the Contractor can mitigate the effect of the Qualifying Change in Law, including:
 - (A) providing evidence that the Contractor has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-contractors and its or their respective sub-contractors to minimise any increase in costs and maximise any reduction in costs;
 - (B) demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Contractor;
 - (C) giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the Shareholders or their Affiliates carry on business; and
 - (D) demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain Assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clauses 38.1.6 and/or 38.1.7.

Either Party may refer any Dispute regarding the Change in Law Notice to the Dispute Resolution Procedure.

- 38.2.2 Following agreement or determination of the Change in Law Notice, the Authority shall be deemed to have requested an Authority Service Variation, the purpose of which is to implement such Change in Law Notice.
- 38.2.3 If the Parties agree or it is determined under Clause 68 (Dispute Resolution Procedure) that the Contractor is required to incur additional Capital Expenditure due to a Qualifying Change in Law (excluding the Contractor's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change in Law under this Clause), then the Contractor shall use its reasonable

endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it and the Senior Lenders.

- 38.2.4 The Contractor's Share shall be solely for the account of the Contractor.
- 38.2.5 If the Contractor has used reasonable endeavours to obtain funding for Capital Expenditure referred to in Clause 38.2.3, but has been unable to do so within 40 Business Days of the date that the agreement or determination in Clause 38.2.3 occurred, then the Authority shall pay to the Contractor an amount equal to that Capital Expenditure on or before the date falling 20 Business Days after the Capital Expenditure has been incurred.
- 38.2.6 Any compensation payable under this Clause by means of an adjustment to or reduction in the Service Charge or pursuant to an Authority Service Variation deemed to be requested pursuant to Clause 38.2.2 shall be calculated in accordance with the Financial Model Adjustment Mechanism.

38.3 **Other Changes in Law**

The Contractor shall not be entitled to any payment from the Authority in respect of:

- 38.3.1 the Contractor's increased net costs or expenditure arising from a Change in Law which is not a Qualifying Change in Law;
- 38.3.2 the Contractor's Share; or
- 38.3.3 where a Qualifying Change in Law is also a General Change in Law any expenditure which falls to be treated as operating expenditure rather than capital expenditure in accordance with GAAP.

38.4 **Payment of Irrecoverable VAT**

The Authority shall pay to the Contractor from time to time as the same is incurred by the Contractor 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 20 Business Days of the delivery by the Contractor 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 38.4 "**Irrecoverable VAT**" means input VAT incurred by the Contractor 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 the Agreement (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Contractor is not entitled to repayment or credit from H.M Revenue and Customs in respect of such input VAT.

38.5 **No Double Recovery**

Neither Party shall be able to recover in respect of the same losses, costs, expenses, liabilities and/or claims pursuant to Clause 38 and Clauses 44 (Indemnity and Liability Limitation) and 45 (Environmental Liability).

38.6 **Effects of Changes in Law on Commercial Contracts.**

The Contractor shall not be entitled to any payment from the Authority in respect of the Contractor's increased costs or expenditure arising from any Change in Law which applies to any Commercial Contract.

PART IX – INTELLECTUAL PROPERTY RIGHTS, DATA AND CONFIDENTIALITY

39. INTELLECTUAL PROPERTY RIGHTS AND LICENSING

39.1 Authority Material

- 39.1.1 The Intellectual Property Rights in the Authority Material and other materials created by the Authority or its subcontractors (excluding the Contractor, the Sub-contractors and any of its or their respective sub-contractors) shall be owned by and shall remain vested in the Authority or its subcontractors.
- 39.1.2 The Authority grants to the Contractor a non-exclusive, royalty free licence to use all or any Authority Material during the Contract Term only for the purposes of performing the Contractor's obligations and exercising the Contractor's rights under this Agreement. Such licence shall permit the Contractor to grant sub-licences to any of its Sub-contractors (and any of its or their respective sub-contractors) only for the purposes of performing the Contractor's obligations and exercising the Contractor's rights under this Agreement and such sub-licence shall be on the same terms as the licence granted to the Contractor under this Agreement.
- 39.1.3 The Authority grants to the Contractor and to any of its Sub-Contractors (and any of its or their respective sub-contractors) the right to interface with the NOMAD System, the HALOGEN System, the COBS System and any other systems as may be agreed between the Parties (such agreement not to be unreasonably withheld or delayed) as may be reasonably required for the purposes of enabling the Contractor to fulfil its obligations under this Agreement.
- 39.1.4 The Contractor acknowledges and agrees that it (and its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors) shall comply with the Licence Restrictions for the duration of the licence granted to the Contractor in Clause 39.1.2 in respect of any software the subject of such licence.
- 39.1.5 Subject to Clause 39.11, the Contractor further acknowledges and agrees that in the event that it (and/or any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including its Sub-Contractors)) materially fails to comply with or materially breaches any of the Licence Restrictions in relation to any software comprised in any part of the Authority Material and, where such non-compliance or breach is capable of remedy, fails to remedy the same within 14 days (or such other period as the Parties agree in writing) of notice given by the Authority requiring its remedy, the Authority shall be entitled to revoke the licence to use such parts of the Authority Material.

39.2 Contractor Material

- 39.2.1 As between the Authority and the Contractor, the Intellectual Property Rights in the Contractor Material shall be owned by the Contractor, its Sub-contractors, Shareholders or Affiliates (as appropriate) and nothing in this Agreement shall transfer ownership of the Contractor Material from the Contractor (or any of its Sub-contractors, Shareholders or Affiliates as (appropriate)).
- 39.2.2 Subject to Clauses 39.2.3 and 39.2.4 the Contractor hereby grants to the Authority or, in relation to any Contractor Material not proprietary to the Contractor itself, shall procure the grant of a perpetual, non-exclusive, royalty free licence to use all and any Contractor Material only for the purposes of:

- (A) exercising the Authority's rights and performing its obligations under this Agreement;
- (B) exercising the Authority's statutory rights and powers and carrying out the Authority's statutory duties and functions, in so far as they concern the Project;
- (C) enabling the Authority to have full and proper use of the Services; and/or
- (D) enabling the Authority to provide for itself services which are in all material respects equivalent to the Services after the expiry or termination of this Agreement.

Such licence shall permit the Authority to grant sub-licences to any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider) only for the following purposes:

- (1) to enable the New Service Provider to continue to provide services which are in all material respects equivalent to the Services to the Authority after the expiry or termination of this Agreement;
- (2) to exercise the Authority's rights and to perform the Authority's obligations under this Agreement;
- (3) for any purpose specifically relating to the exercise of the Authority's statutory rights and powers and the carrying out of the Authority's statutory duties and functions, in so far as they concern the Project; and/or
- (4) to enable the Authority to have full and proper use of the Services,

and such sub-licence shall be on the same terms as the licence granted to the Authority under this Agreement and provided that such licence and sub-licence shall not include the right for the Authority or any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider) to commercially exploit the Contractor Material.

- 39.2.3 The Authority acknowledges and agrees that it (and its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider)) shall comply with the Licence Restrictions for the duration of the licence granted to the Authority in Clause 39.2.2 in respect of any software the subject of such licence.
- 39.2.4 Subject to Clause 39.11, the Authority further acknowledges and agrees that in the event that it (and/or any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider)) materially fails to comply with or materially breaches any of the Licence Restrictions in relation to any part of software (or any related Software Documentation) comprised in the Contractor Material and, where such non-compliance or breach is capable of remedy, fails to remedy the same within 14 days (or such other period as the Parties agree in writing) of notice by the Contractor requiring its remedy, the Contractor shall be entitled to revoke the licence to use such parts of the software (and/or related Software Documentation) comprised in the Contractor Material.

39.3 Third Party Material

39.3.1 Subject to Clause 39.3.2:

- (A) the Contractor shall procure that any licence procured by the Contractor or an Associated Company of the Contractor relating to Third Party Material which is not Commercially Available ("**Third Party Material Licence**"):
 - (1) subject to Clauses 39.3.1(A)(2) and 39.3.1(B), shall be perpetual;
 - (2) shall be capable of being terminated by the Authority or its nominee upon reasonable notice;
 - (3) shall contain a right to assign and transfer the Contractor's or, where appropriate, the Contractor's Associated Company's rights and obligations under such licence to the Authority pursuant to and on the dates referred to in Clauses 61.1.2 or 61.15 (together with the right for the Authority to sub-licence the Third Party Material to a New Service Provider) without the consent of the relevant counterparty;
 - (4) subject to Clause 39.3.4, shall contain an express provision stipulating that the terms of such licence will not change as a result of assignment and transfer referred to in Clause 39.3.1(A)(3) except with the written agreement of the Authority;
 - (5) shall permit the use of the Third Party Material for the purposes of:
 - (a) enabling the Authority or the New Service Provider to continue to provide services which are in all material respects equivalent to the Services to the Authority after the expiry or termination of this Agreement;
 - (b) exercising the Authority's rights and the performance of the Authority's obligations under this Agreement;
 - (c) exercising the Authority's statutory rights and powers and the carrying out of the Authority's statutory duties and obligations, in so far as they concern the Project; and/or
 - (d) enabling the Authority to have full and proper use of the Services; and
 - (6) shall be subject to the applicable Independent Parties' standard terms and conditions provided that the Authority has approved these standard terms and conditions in advance to the extent the same are not equivalent to the Licence Restrictions (such approval shall not be unreasonably withheld or delayed); and
- (B) the Authority acknowledges and agrees that where such a licence relates to any non-Commercially Available Third Party Software, such licence may be subject to restrictions equivalent to the Licence Restrictions, and may be revocable in the event of any material breach by the Authority or any New Service Provider of or non-compliance by the Authority or any New Service Provider with (i) such restrictions (to the extent such restrictions do not exceed the Licence Restrictions), or (ii) any other provisions of the applicable Independent Parties' standard terms and

conditions, if such terms and conditions have been approved by the Authority in advance in accordance with Clause 39.3.1(A)(6),

provided that such licence and sub-licence shall not include the right for the Authority or any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider) to commercially exploit the Third Party Material.

- 39.3.2 Where despite using reasonable endeavours, the Contractor is unable to comply with Clause 39.3.1, the Contractor shall ensure that the relevant Third Party Material or replacement Third Party Material which is equivalent in all material respects with such functionality, adaptability, quality and reliability and from a reputable supplier is Commercially Available at the earlier of the Termination Date or the Expiry Date.
- 39.3.3 Where despite using reasonable endeavours, the Contractor is unable to enter into an escrow agreement in respect of any Third Party Software as described in Clause 41.4 and circumstances occur prior to the expiry of two years after either the Term Date or the Termination Date, if earlier, which circumstances would have constituted a release event under the TP Project Escrow Agreement in respect of such Third Party Software (had such software been the subject of the TP Project Escrow Agreement), the Contractor shall ensure that:
- (A) replacement Third Party Software which is equivalent in all material respects with such functionality, adaptability, quality and reliability and from a reputable supplier is promptly made available to the Authority; or
 - (B) that the Contractor otherwise remedies the lack of access to Source Code in such circumstances in a manner which does not have a material adverse effect on the Services or the performance of the Contractor's obligations under this Agreement.
- 39.3.4 If the Contractor fails or is unable to comply with its obligations relating to Third Party Material as set out in Clauses 39.3.1 and 39.3.2, the Contractor shall indemnify the Authority and keep the Authority fully and effectively indemnified against all Claims and Losses incurred or suffered by the Authority as a result of such inability or failure.
- 39.3.5 The Parties shall use reasonable endeavours to provide that all licences referred to in Clause 39.3.1(A) and assigned to the Authority in accordance with Clause 39.3.1(A)(3) shall include express terms to state that:
- (A) nothing in such assignment shall be deemed to transfer to the Authority any liabilities or obligations of the Contractor or its Associated Company arising from any breach by the Contractor or its Associated Company of the applicable Third Party Material Licence prior to the date of such assignment;
 - (B) nothing in such assignment shall affect or prejudice any claim or demand whatsoever which the Contractor or its Associated Company may have against the Independent Party owner of the relevant Third Party Material prior to the date of such assignment or in respect of any act, omission or circumstance which occurs prior to the date of such assignment; and
 - (C) the applicable Independent Party and the Authority will release the Contractor and (if a party to the Third Party Material Licence) its Associated Company from any and all of the Contractor's and (if a party

to the Third Party Material Licence) its Associated Company's obligations under such Third Party Material Licence with effect from the date of such assignment,

but in the event that the applicable Independent Party owner refuses to include such provisions in any Third Party Material Licence:

- (1) the Contractor shall indemnify the Authority and keep the Authority fully and effectively indemnified against all Claims and Losses incurred or suffered by the Authority as a result of any breach or non-compliance with the terms of any Third Party Material Licence referred to in Clause 39.3.1(A) by the Contractor or (if a party to the Third Party Material Licence) its Associated Company prior to the date of such assignment to the Authority in accordance with Clause 39.3.1(A)(3); and
- (2) the Authority shall indemnify the Contractor and (if a party to the Third Party Material Licence) its Associated Company and keep the Contractor and its Associated Company (as appropriate) fully and effectively indemnified against all Claims and Losses incurred or suffered by the Contractor or its Associated Company (as appropriate) as a result of any breach or non-compliance with the terms of any Third Party Material Licence referred to in Clause 39.3.1(A) by the Authority from the date of such assignment to the Authority in accordance with Clause 39.3.1(A)(3).

39.4 IPR Register

- 39.4.1 The Contractor shall create and maintain a register setting out descriptions of all products, systems and software used or provided by or on behalf of the Contractor in the performance of its obligations under this Agreement indicating whether (and to what extent) each of the same is Contractor Material, Consultancy Material, Software Related Project Material, Document Related Project Material, Project Systems and Third Party Material (the "**IPR Register**"), provided that the IPR Register need not separately identify items of Third Party Material embedded in products, systems and software proprietary to a Sub-contractor or Independent Party. A draft version of the IPR Register as at the date of this Agreement is annexed to the Handback Plan.
- 39.4.2 The Parties shall discuss and use all reasonable endeavours to agree the categorisation of any Intellectual Property Rights used by the Contractor for the Project or to perform its obligations under this Agreement as Contractor Material, Consultancy Material, Project Material, Project Systems and/or Third Party Material. The Parties acknowledge and agree that the Intellectual Property Rights in the various parts of software, systems or documentation may fall within different categories of Intellectual Property Rights. By way of example, certain elements of the Predictive Asset Management System could be categorised as Contractor Material while other elements could be categorised as Third Party Material and/or Project Material. If, despite each of the Parties acting reasonably, the Parties cannot agree to the categorisation of any particular Intellectual Property Rights they shall refer to the Dispute Resolution Procedure.
- 39.4.3 Following any discussion and agreement between the Parties (or determination) regarding the appropriate categorisation of such Intellectual Property Rights the

Contractor shall maintain and keep the IPR Register up to date and shall permit the Authority to inspect the IPR Register as soon as reasonably practicable following reasonable notice from the Authority and provided that such inspection occurs during office hours. The Contractor may not remove any item from the IPR Register without the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed).

39.5 Consultancy Material, Project Systems and Project Data

- 39.5.1 The Contractor hereby assigns all present and future Intellectual Property Rights in any Consultancy Material, the Project Systems and any data created specifically for the purposes of the provision of the Services and inserted into the Project Systems by or on behalf of the Contractor ("**Project Data**") to the Authority or its nominee and shall procure that any Independent Party owner or creator of such Consultancy Material, Project Systems and Project Data waives its moral rights and future moral rights (if any) in respect of all such Project Systems, Consultancy Material and Project Data. Following assignment under this Clause 39.5.1, the Consultancy Material, Project Systems and Project Data shall be owned by and be the sole property of the Authority or its nominee and the Contractor shall not in any way question or dispute the ownership by the Authority or its nominee thereof. If the Contractor is unable to procure or fails to procure that any such Independent Party owner or creator to waive its moral rights and future moral rights (if any) in respect of the Project Systems, Consultancy Material and Project Data in accordance with this Clause 39.5.1, the Contractor shall indemnify the Authority and keep the Authority fully and effectively indemnified against all Claims and Losses incurred or suffered by the Authority as a result of such failure or inability.
- 39.5.2 The Contractor shall, if and when required by the Authority (whether during the Contract Term or afterwards) and at the Authority's expense, provide all reasonable assistance to the Authority in the event that the Authority or its nominee applies for letters patent or other protection in any part of the world for any invention, process or development which forms part of any Consultancy Material, the Project Systems or Project Data.
- 39.5.3 The Contractor shall, at the request of the Authority, promptly execute such documents and do such acts and things as the Authority may require formally to assign to the Authority or its nominee any Consultancy Material, Project Systems or Project Data or to confirm the Authority's or the nominee's title. The Contractor shall ensure that, in the case of any Consultancy Material, Project Systems or Project Data created on behalf of the Contractor by a Sub-contractor (or any of their respective sub-contractors) or Independent Party, it obtains from the relevant Sub-contractor (or sub-contractor) or Independent Party all necessary Intellectual Property Rights in order to assign such Consultancy Material, Project Systems and relevant data to the Authority in accordance with this Clause 39.5.
- 39.5.4 Licence for Consultancy Material, Project Systems and Project Data
 - (A) The Authority grants to the Contractor a non-exclusive, royalty free licence to use all or any Consultancy Material, Project Systems and Project Data during the Contract Term only for the purposes of the performing the Contractor's obligations and exercising the Contractor's rights under the Commercial Contracts and/or this Agreement. Such licence shall permit the Contractor to grant sub-licences to any of its Sub-contractors (or any of its or their respective sub-contractors) only for the

purposes of performing the Contractor's obligations and exercising the Contractor's rights under the Commercial Contracts and/or this Agreement and such sub-licences shall be on the same terms as the licence granted to the Contractor under this Agreement.

- (B) The Contractor acknowledges and agrees that it (and its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors) shall comply with the Licence Restrictions for the duration of the licence granted to the Contractor in Clause 39.5.4(A) in respect of any software the subject of such licence.
- (C) Subject to Clause 39.11, the Contractor further acknowledges and agrees that in the event that it (and/or any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including its Sub-contractors) materially fails to comply with or materially breaches any of the Licence Restrictions in relation to any software comprised in any part of the Consultancy Material, Project Systems and Project Data and, where such non-compliance or breach is capable of remedy, fails to remedy the same within 14 days (or such other period as the Parties agree in writing) of notice by the Authority requiring its remedy, the Authority shall be entitled to revoke the licence to use such parts of the Consultancy Material, Project Systems and Project Data granted in Clause 39.5.4(A).

39.5.5 Commercial Exploitation

The Authority further grants to the Contractor a non-exclusive, perpetual licence to commercially exploit:

- (A) all software identified in the IPR Register as forming part of the Project Systems;
- (B) with the Authority's prior written consent (which may be withheld at the Authority's complete discretion) the Consultancy Material;
- (C) the modifications, improvements, adaptations or enhancements made by the Authority (including any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (excluding any New Service Provider)) to the Project Systems during the Contract Term which have been notified to the Contractor pursuant to Clause 39.5.6; and
- (D) with the Authority's prior written consent (which may be withheld at the Authority's complete discretion) the Project Data,

and such licence shall permit the Contractor to grant sub-licences to any of its Sub-contractors (or any of its or their respective sub-contractors) to commercially exploit the Project Systems (and any modifications, improvements, adaptations or enhancements of the same), any Consultancy Material within the scope of Clause 39.5.5(B), and any Project Data within the scope of Clause 39.5.5(D) provided that in each case prior to any proposed commercial exploitation, the Contractor shall:

- (1) provide to the Authority in writing all relevant details of such proposed commercial exploitation including identifying the Third Parties and the parts of the Project Systems and/or the modifications, improvements, adaptations or enhancements of the

Project Systems and/or the Consultancy Material within the scope of Clause 39.5.5(B), and/or the parts of the Project Data within the scope of Clause 39.5.5(D) (as appropriate) involved in such commercial exploitation; and

- (2) agree a reasonable royalty fee to be paid to the Authority (such agreement not to be unreasonably withheld or delayed by either Party) and in the event that the Parties cannot agree such reasonable royalty fee, the Parties shall refer the matter to the Dispute Resolution Procedure.

39.5.6 In order to enable the Contractor to exercise its rights under Clause 39.5.5(C), the Authority acknowledges and agrees that in the event that it wishes to make or requires any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (excluding the Contractor and any New Service Provider) to make any modification, improvement, adaptation or enhancement to the Project Systems prior to the expiry of two years after either the Term Date or the Termination Date, if earlier, it shall notify the Contractor of any such modification, improvement, adaptation or enhancement.

39.5.7 The Contractor acknowledges that, for the purpose of section 2(1) of the Registered Designs Act 1949 as amended by the Copyright, Designs and Patents Act 1988, the Authority shall be treated as the original proprietor of a design, where the design is comprised in any Consultancy Material, Project Systems or Project Data.

39.5.8 The Contractor acknowledges that for the purpose of the Copyright and Rights and Databases Regulations 1997 (as from time to time amended, extended or re-enacted) the Authority shall be treated as the maker of any database where such database is comprised in any Consultancy Material, Project Systems or Project Data.

39.6 Project Material

39.6.1 Subject to Clauses 39.6.2 and 39.6.3 the Contractor grants to the Authority from the date such Project Material is created, a perpetual, non-exclusive, royalty free licence to use all or any Project Material only for the purposes of:

- (A) exercising the Authority's rights and performing its obligations under this Agreement;
- (B) exercising the Authority's statutory rights and powers and carrying out the Authority's statutory duties and functions, in so far as they concern the Project;
- (C) the Authority's Normal Business; and/or
- (D) enabling the Authority to provide for itself services which are in all material respects equivalent to the Services after the expiry or termination of this Agreement,

and the right to modify, alter and develop all or any of the Project Material only for the purposes of the Authority's Normal Business. Such licence shall permit the Authority to grant sub-licences to any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider) only for the following purposes:

- (1) to enable the New Service Provider to continue to provide services which are in all material respects equivalent to the Services to the Authority after the expiry or termination of this Agreement;
- (2) to exercise the Authority's rights and to perform the Authority's obligations under this Agreement;
- (3) for any purpose specifically relating to the exercise of the Authority's statutory rights and powers and the carrying out of the Authority's statutory duties and functions, in so far as they concern the Project; and/or
- (4) for the Authority's Normal Business,

and such sub-licence shall be on the same terms as the licence granted to the Authority under this Agreement provided that such licence and sub-licence shall not include the right for the Authority or any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider) commercially exploit the Project Material.

39.6.2 The Authority acknowledges and agrees that it (and its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider)) shall comply with the Licence Restrictions for the duration of the licence granted to the Authority in Clause 39.6.1 in respect of any software the subject of such licence.

39.6.3 Subject to Clause 39.11, the Authority further acknowledges and agrees that in the event that it (and/or any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider)) materially fails to comply with or materially breaches any of the Licence Restrictions in relation to any part of the software (or any related Software Documentation) comprised in the Project Material and, where such non-compliance or breach is capable of remedy, fails to remedy the same within 14 days (or such other period as the Parties agree in writing) of notice by the Contractor requiring its remedy, the Contractor shall be entitled to revoke the licence to use such parts of the software (and/or related Software Documentation) comprised in the Project Material. For the avoidance of doubt, the foregoing shall apply to software and related Software Documentation referred to in Clause 39.6.4(B).

39.6.4 Modifications to Project Material

- (A) The Parties acknowledge and agree that in the event that the Authority wishes to modify, alter and/or develop all or any of the Software Related Project Material prior to the expiry of two years after either the Term Date or the Termination Date, if earlier, the Authority shall be required to obtain the prior written consent of the Contractor prior to each modification, alteration and/or development of the Software Related Project Material (such consent not to be unreasonably withheld or delayed).
- (B) In the event that any modification, alteration and/or development of the Software Related Project Material is carried out on behalf of the Authority by the Contractor (or any of its Sub-contractors, Shareholders or Affiliates as (appropriate)), following the consent of the Contractor in

accordance with Clause 39.6.4(A), such modifications, alterations and/or developments shall belong to the Contractor. To the extent that ownership of such modifications, alteration and or development of the Software Related Project Material is owned by the Authority, the Authority hereby assigns to the Contractor all present and future Intellectual Property Rights in all and any such modifications, alterations and/or developments made by the Contractor (or any of its Sub-contractors, Shareholders or Affiliates as (appropriate)) to the Software Related Project Material prior to the expiry of two years after either the Term Date or the Termination Date, if earlier, provided that the Contractor shall pay a reasonable fee to the Authority as agreed between the Parties (such agreement shall not be unreasonably withheld or delayed by either Party) and in the event the Parties cannot agree such reasonable fee, the Parties shall refer the matter to the Dispute Resolution Procedure.

- (C) The Contractor hereby grants from the date of creation, a perpetual, non-exclusive, royalty free licence to the Authority to use all and any such modifications, alterations and/or developments made by or on behalf of the Contractor to the Software Related Project Material in accordance with Clause 39.6.4(B) for the purposes of:
- (1) exercising the Authority's rights and performing its obligations under this Agreement;
 - (2) exercising the Authority's statutory rights and powers and carrying out the Authority's statutory duties and functions, in so far as they concern the Project;
 - (3) for the Authority's Normal Business; and/or
 - (4) enabling the Authority to provide for itself services which are in all material respects equivalent to the Services after the expiry or termination of this Agreement.

Such licence shall permit the Authority to grant sub-licences to any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider) only for the following purposes:

- (a) to enable the New Service Provider to continue to provide services which are in all material respects equivalent to the Services to the Authority after the expiry or termination of this Agreement;
- (b) to exercise the Authority's rights and to perform the Authority's obligations under this Agreement;
- (c) for any purpose specifically relating to the exercise of the Authority's statutory rights and powers and the carrying out of the Authority's statutory duties and functions, in so far as they concern the Project; and/or
- (d) for the Authority's Normal Business,

and such sub-licence shall be on the same terms as the licence granted to the Authority under this Agreement, provided that such licence and sub-licence shall not include the right for the Authority or its directors, officers, representatives, agents, employees, servants, consultants,

contractors or sub-contractors (including any New Service Provider) to commercially exploit the modifications, alterations and/or developments of the Software Related Project Material.

- (D) In the event that any modification, alteration and/or development of the Software Related Project Material is carried out during the Contract Term by the Authority or any of its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider) following the consent of the Contractor in accordance with Clause 39.6.4(A), the Authority hereby grants from the date of creation of such modifications, alterations and/or developments to the Contractor a non-exclusive, royalty-free licence to use such modifications, alterations and/or developments to the Project Material during the Contract Term for the purposes of fulfilling its obligations under this Agreement and, subject to the prior written consent of the Authority (which consent shall not be unreasonably withheld or delayed), a perpetual, non-exclusive licence to commercially exploit all or any such modifications, alterations and developments (except where such modifications, alterations and developments have been made by a New Service Provider) provided that prior to any proposed commercial exploitation, the Contractor shall:

- (1) provide to the Authority in writing all relevant details of such proposed commercial exploitation including identifying the Third Parties and the modifications, improvements, adaptations or enhancements of the Project Material involved in such commercial exploitation; and
- (2) agree a reasonable royalty fee to be paid to the Authority (such agreement not to be unreasonably withheld or delayed by either Party) and in the event that the Parties cannot agree such reasonable royalty fee, the Parties shall refer the matter to the Dispute Resolution Procedure.

Such licence shall permit the Contractor to grant sub-licences to any of its Sub-contractors to use and/or commercially exploit all or any such modifications, alterations and developments and such sub-licence shall be on the same terms as the licence granted to the Contractor under this Agreement.

- 39.6.5 For the avoidance of doubt the Parties acknowledge and agree that where the Authority has any right to make any changes, modifications, improvements, adaptations, alterations, developments or enhancements to any of the Project Data, Project Systems, Consultancy Material, Third Party Material, Contractor Material and/or Project Material under this Clause 39, during the Contract Term (and including any 2 year handback period referred to in Clause 61.1.1(A) it shall only make such changes, modifications, improvements, adaptations, alterations, developments or enhancements to copies of the Project Data, Project Systems, Consultancy Material, Third Party Material, Contractor Material and/or Project Material (to the extent that it is entitled to make copies of any and all of the same) and, unless otherwise agreed between the Parties in writing or in accordance with another procedure under or developed pursuant to this Agreement which provides for such change, not to any of the actual Project Data, Project Systems, Consultancy Material, Third Party Material, Contractor Material and/or Project Material used by the Contractor to perform its obligations or to exercise its rights

under this Agreement or in connection with the Project. For the avoidance of doubt, the foregoing and the other provisions of this Clause 39 shall be without prejudice to the operation of Clauses 35, 36 and 37 in so far as those Clauses apply in relation to modifications to the Project Data, Project Systems, Consultancy Material, Third Party Material, Authority Material, Authority Data, Contractor Material and/or Project Material.

- 39.6.6 The Authority acknowledges and agrees that it (and its directors, officers, representatives, agents, employees, servants, consultants, contractors or sub-contractors (including any New Service Provider)) shall comply with the Licence Restrictions for the duration of the licences granted to the Authority in Clause 39.6.4 in respect of any software the subject of such licence.

39.7 Intellectual Property Rights Indemnity

- 39.7.1 Subject to Clause 39.7.7, the Contractor shall indemnify the Authority and keep the Authority fully and effectively indemnified against all Claims and Losses of whatsoever nature to the extent arising out of or in connection with any claim that the use or possession of any of the Contractor Material, the Project Material, the Project Systems or any Consultancy Material (as a whole or in part) or other information, data or materials provided by the Contractor to the Authority within the terms of this Agreement infringe the Intellectual Property Rights of any Independent Party. In relation to Third Party Material, the Contractor shall indemnify the Authority against all Claims and Losses arising out of or in connection with any claim that the use of the Third Party Material infringes the Intellectual Property Rights of any Independent Party on the same terms (if any) as any relevant Independent Party owner or supplier of such Third Party Material indemnifies the Contractor (or its Sub-contractors, Shareholders or Affiliates as the case may be).

- 39.7.2 Subject to Clause 39.7.7 the Authority shall indemnify the Contractor and keep the Contractor fully and effectively indemnified against all Claims and Losses of whatsoever nature to the extent arising out of or in connection with any claim that the use or possession of any of the Authority Material (as a whole or in part) or other information, data or materials provided by the Authority to the Contractor within the terms of this Agreement infringe the Intellectual Property Rights of any Independent Party.

39.7.3 Notice

- (A) If the indemnified Party receives any notice, demand, letter or other document concerning any Claim from which it appears that the indemnified Party is or may become entitled to indemnification under this Clause 39.7, the indemnified Party shall give notice in writing to the indemnifier as soon as reasonably practicable.
- (B) On the giving of a notice pursuant to Clause 39.7.3(A), the indemnifier shall, subject to providing the indemnified Party with an indemnity in respect of all Claims or Losses arising out of its handling of the Claim, be entitled to and shall resist the Claim in the name of the indemnified Party and shall have the sole conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations at the indemnifier's expense and the indemnified Party shall give the indemnifier all reasonable co-operation, access and assistance for the purpose of considering and resisting such Claim.

- (C) In relation to any Claim subject to Clause 39.7.3(B):
- (1) the indemnifier shall keep the indemnified Party fully informed and consult with it about the progress and conduct of the Claim; and
 - (2) to the extent that the indemnified Party is not entitled to be indemnified by the indemnifier for all of the liability arising out of the act or omission which is the subject of the Claim, the indemnifier shall take no action which shall increase the amount of the payment to be made by the indemnified Party in respect of that part of the Claim which is not covered by the indemnity from the indemnified Party.

39.7.4 The indemnified Party shall be free to pay or settle any Claim referred to in this Clause 39.7 on such terms as it may in its absolute discretion think fit and without prejudice to its rights and remedies under this Agreement if:

- (A) within (subject as specified below) 30 Business Days of the notice from the indemnified Party under Clause 39.7.3(A) the indemnifier fails to notify the indemnified Party of its intention to dispute the Claim provided that if the indemnifier fails to notify the indemnified Party within 21 Business Days of its intention to dispute the Claim the indemnified Party will notify the indemnifier of such failure to notify and shall permit the indemnifier to notify the indemnified Party of its intention to dispute the Claim within a further 9 Business Days of such notice; or
- (B) the indemnifier fails to comply in any material respect with the provisions of Clause 39.7.3,

provided that the indemnified Party shall act reasonably in conducting the Claim having regard to the indemnifier's financial position.

39.7.5 The indemnified Party shall be free at any time to give notice to the indemnifier that it is taking over the conduct of any defence, dispute, compromise or appeal of any Claim notified pursuant to Clause 39.7.3 or of any incidental negotiations. Upon receipt of such notice, the indemnifier shall promptly take all steps necessary to transfer the conduct of such Claim to the indemnified Party and shall provide the indemnified Party all reasonable co-operation, access and assistance for the purpose of considering and resisting such Claim. If the indemnified Party gives any notice pursuant to this Clause 39.7.5, the indemnifier shall be released from its indemnity given pursuant to Clause 39.7.3(B) in respect of the handling of such Claim.

39.7.6 If the indemnified Party's use of, or possession of the material referred to in Clauses 39.7.1 or 39.7.2 (as the case may be) is held by any court to constitute an infringement of an Independent Party's Intellectual Property Rights, or the indemnified Party is prohibited by an order of court from using such material (as a whole or in part), or if the indemnifying Party is advised by counsel of its choice that such use or possession is likely to constitute such an infringement, then the indemnifying Party shall promptly and at its own expense and at the indemnifying Party's sole option either:

- (A) procure for the indemnified Party the right to continue using and possessing the relevant material in their entirety; or

- (B) promptly remove, modify or replace the infringing item to avoid the infringement.

The actions in Clause 39.7.6(A) or 39.7.6(B) shall be at the indemnifying Party's expense.

39.7.7 Neither Party shall be liable or obliged to indemnify the other Party pursuant to this Clause 39.7 for any Claim or Loss which:

- (A) is caused by any act or omission by the other, unless such act or omission is in accordance with this Agreement;
- (B) arises as a result of the use of any of the Authority Material, Contractor Material, the Project Material, the Project Systems, or any Consultancy Material (as a whole or in part) or other information data or materials provided by the indemnified Party to the indemnifier in combination with any equipment or programs or data not supplied or approved by the indemnifier or its Sub-contractors, Shareholders or Affiliates) (such approval not to be unreasonably withheld or delayed). For the purposes of this Clause any equipment or programs in use by the Authority prior to the date of execution of this Agreement shall be deemed to be approved by the Authority for the purposes of this Clause 39.7.7(B);
- (C) arises as a result of a modification or enhancement which was carried out by someone other than the indemnifier, its Sub-contractors, Shareholders or Affiliates or someone authorised by the indemnifier or its Sub-contractors, Shareholders or Affiliates; or
- (D) arises as a result of the indemnified Party not using the latest release of the Authority Material, Contractor Material, the Project Material, the Project Systems or any Consultancy Material (as a whole or in part) or other information, data or materials provided by the indemnifier to the indemnified Party within the terms of this Agreement.

39.8 Access to Intellectual Property Rights

Upon request by the Authority (whether during or after the term of this Agreement), the Contractor shall provide to the Authority any Contractor Material, Authority Material, Project Systems, Consultancy Material, Third Party Material or Project Material to which the Authority is entitled in accordance with the terms of this Agreement as soon as reasonably practicable (and in any event, no more than 5 Business Days after the request) where such material is within the possession or control of the Contractor, its Sub-contractors, Shareholders or Affiliates. This Clause 39.8 shall survive for the two year period immediately following the earlier of the Termination Date or the Expiry Date.

39.9 Security of Authority Data

39.9.1 The Contractor shall not delete or remove any copyright notices contained within or relating to the Authority Data. The Contractor and the Authority shall each take reasonable precautions (having regard to the nature of their respective obligations under this Agreement) to preserve the integrity of the Authority Data and to prevent any corruption, destruction or loss of the Authority Data.

39.9.2 Without prejudice to Clause 39.9.1, the Contractor shall obtain accredited certification to British Standard ISO 17799 and shall implement and maintain such security procedures as are necessary to prevent the unauthorised access, disclosure, destruction, damage, loss or alteration of the Authority Data and reduce the risk of breaches of security occurring which might adversely affect the

Contractor's ability to perform the Services and shall comply with Section 5.10 (Manage Network) of Schedule 1.2 (Statement of Requirements: Processes).

- 39.9.3 The Contractor shall be responsible for rectifying any loss, corruption or destruction of the Authority Data at its own expense except where such loss, corruption or destruction both (i) is caused by the negligence of the Authority or any of the Authority's Contractors or a breach by the Authority or any of the Authority's Contractors of the terms of this Agreement and (ii) could not have been avoided by compliance by the Contractor with the Contractor's obligations under Clauses 39.9.1 and 39.9.2.

39.10 Additional rights and obligations

- 39.10.1 Each of the Parties shall obtain from the relevant Sub-contractor (in the case of the Contractor) or sub-contractor or Independent Party all necessary Intellectual Property Rights and/or approvals, consents, licences, authorisations and provisions in order to grant the rights, licences and/or assignments to the other Party set out in this Clause 39.

- 39.10.2 The Parties acknowledge and agree that they shall comply with the terms of this Clause 39 and with the terms of any and all licences that are granted to each of them under this Clause 39 and both Parties shall procure that their respective directors, officers, representatives, agents, employees, servants, consultants, contractors and/or sub-contractors shall comply with the terms of this Clause 39 and with the terms of any and all sub-licences that are granted to each and any of them in accordance with the terms of this Clause 39.

- 39.10.3 The Parties acknowledge and agree that they shall be obliged to notify the other as promptly as possible in the event that they are or become aware or suspect that there may be or have been:

- (A) a breach of any of the terms of this Clause 39;
- (B) a breach of any of the licences granted under this Clause 39; and/or
- (C) a breach or potential breach of any of their respective Intellectual Property Rights, and/or the Intellectual Property Rights of any Third Party which are licensed hereunder or pursuant to this Agreement, where such infringement may adversely affect the performance of the Parties' respective obligations under this Agreement.

- 39.10.4 If either Party breaches or fails to comply with any of the terms of the licences granted to it in accordance with this Clause 39, the Party in breach shall indemnify the other and keep the other fully and effectively indemnified against all Claims and Losses incurred or suffered by the indemnified Party as a result of such breach or non-compliance.

39.11 Limitation on each Party's rights to revoke a licence

Each Party ("**Revoking Party**") acknowledges and agrees that it shall only be entitled to exercise any right to revoke any licences granted to the other Party in relation to the Authority Material, the Contractor Material, the Project Material, the Project Systems, the Project Data and any Consultancy Material pursuant to this Clause 39:

- 39.11.1 if such Authority Material, Contractor Material, Project Material, Project Systems, Project Data and any Consultancy Material (as the case may be) is licensed to the Revoking Party by a third party (including but not limited for the purposes of this

Clause 39.11, by any Independent Party, Sub-contractor, Shareholder, Affiliate or other sub-contractor) ("**Head Licence**") and

39.11.2 to the extent that such third party revokes the Head Licence or the Revoking Party's right to grant such licence to the other Party in accordance with the terms of this Clause 39, under the Head Licence.

39.12 **Audit**

Each Party (and in respect of the Contractor, any of its Sub-contractors, Shareholders, Affiliates or providers of the Third Party Material) shall at their own cost, be entitled upon giving the other not less than 5 Business Days prior written notice, to audit or appoint an independent firm of auditors to audit the other's compliance with the provisions of this Clause 39, provided that:

39.12.1 save where such Party reasonably believes the other Party to be in breach of this Clause 39, neither Party shall be entitled to audit the other or appoint an auditor more than 3 times in any calendar year for the duration of this Agreement;

39.12.2 each Party shall provide reasonable assistance and access to information as necessary for the purposes of the audit during business hours and the auditing Party and any auditor shall use their reasonable endeavours to minimise any disruption to the audited Party's business; and

39.12.3 any independent auditor shall be required to enter into a confidentiality agreement with the audited Party as reasonably requested by the audited Party and such access by the auditor shall be subject to obligations of confidentiality or obligations in relation to any data protection legislation at least as onerous as those confidentiality obligations and obligations in relation to any data protection legislation that are imposed upon the Parties under this Agreement.

40. **DATA PROTECTION**

40.1 **Authority Personal Data**

The Authority shall be and remain the owner and data controller (as defined in the Data Protection Laws) of all Authority Personal Data at all times.

40.2 **Contractor Measures**

The Contractor and any Sub-contractor shall only hold and process Authority Personal Data after having taken appropriate technical and organisational measures to guard against unauthorised or unlawful processing of Authority Personal Data and against accidental loss or destruction of, or damage to, the Authority Personal Data.

40.3 **Use of Authority Personal Data**

40.3.1 The Contractor and any Sub-contractor shall only undertake processing of Authority Personal Data reasonably required in connection with the Services and shall not transfer any Authority Personal Data to any country or territory outside the EEA.

40.3.2 Save to the extent specified in Clause 40.3.1, the Contractor shall, in all cases, process the Authority Personal Data only as authorised by, and on instructions from, the Authority. The Authority Personal Data may not be transferred in any manner to any person not authorised in writing by the Authority. If the Authority Personal Data is transferred to a person authorised in writing by the Authority, the Contractor shall ensure that the person may only use the Authority Personal Data in connection with the performance of the Contractor's obligations under

this Agreement and not for that person's own benefit or the benefit of a Third Party.

40.4 Contractor Security

The Contractor shall ensure that the measures undertaken pursuant to Clause 40.3 (Use of Authority Personal Data) above (which includes taking steps to ensure the reliability of staff having access to the Authority Personal Data) provide a level of security appropriate to the harm that might result from any unauthorised or unlawful processing or accidental loss, destruction or damage to the Authority Personal Data and also to the nature of the Authority Personal Data being protected.

40.5 Disclosure to Third Parties

The Contractor shall not disclose Authority Personal Data to any Third Parties other than:

40.5.1 to employees and Sub-contractors to whom such disclosure is reasonably necessary in order for the Contractor to carry out the Services; or

40.5.2 to the extent required under a court order,

provided that disclosure under Clause 40.5.1 is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this Clause 40 and that the Contractor shall give notice in writing to the Authority of any disclosure of Authority Personal Data it or a Sub-contractor is required to make under Clause 40.5.2 immediately it is aware of such a requirement.

40.6 Supply of security measures

The Authority may, at reasonable intervals, request a written description of the technical and organisational methods employed by the Contractor and any Sub-contractor pursuant to Clause 40.4. Within 20 Business Days of such a request, the Contractor 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 Authority Personal Data, those measures are compliant with the DPA.

40.7 Data Protection Laws

The Contractor shall not do anything to breach the Data Protection Laws.

40.8 Contractor Personal Data

The Contractor shall be and remain the owner and data controller (as defined in the Data Protection Laws) of all Contractor Personal Data at all times.

41. SOURCE CODE AND ESCROW

41.1 Project Systems, Software Related Project Material, and Consultancy Material

41.1.1 The Contractor shall deliver to the Authority a complete copy of the Source Code of the Project Systems, the Software Related Project Material and all and any software comprised in the Consultancy Material promptly following the creation thereof, and shall update such Source Codes as held by the Authority:

(A) following the introduction of any material change in, addition to or development of the Project Systems, Software Related Project Material or Consultancy Material; and

(B) where there has been any change in, addition to or development of the Project Systems, Software Related Project Material or Consultancy Material, in any event no less than once every 6 months,

in order to ensure that the Authority holds a complete and up to date copy of the Source Codes of the Project Systems, the Software Related Project Material, and all and any software comprised in the Consultancy Material from time to time.

41.1.2 For the avoidance of doubt, and subject to the terms of the relevant licences of Source Code by the Authority referred to in Clause 41.7, the Contractor shall be entitled to retain copies of the Source Code of the Project Systems, all and any software in the Consultancy Material, and any modifications, alterations and/or developments of Software Related Project Material carried out by the Authority and others under Clause 39.6.4 (D) for the duration of the relevant licence only. During the period from the Effective Date until the expiry of 2 years after either the Term Date or the Termination Date, if earlier, the Authority shall deliver to the Contractor the latest Source Code of any modifications, alterations and/or developments of Software Related Project Material (or, where such Source Code is in the possession of a third party, shall use reasonable endeavours so to deliver it):

- (A) following the first creation of such modification, alteration and/or development, where the same is put into live operation by the Authority in any system supported by the Contractor; or
- (B) in all other cases following the Contractor's request therefor, any such request to identify the specific Source Code required in reasonable detail and not to be made more frequently than once every twelve months,

in each case to the extent such Source Code is reasonably needed by the Contractor to fulfil its obligations under this Agreement or is otherwise licensed or assigned to the Contractor under this Agreement.

41.2 **Project Escrow Agreement for Contractor Material**

41.2.1 The Parties shall enter into with the Escrow Agent an escrow agreement (the "**CM Project Escrow Agreement**") substantially in the form (subject to any reasonable amendments required by the Escrow Agent) set out in Schedule 21 Part A relating to any software comprised in the Contractor Material which belongs to the Contractor or its Associated Companies from time to time. The Parties shall enter into the CM Project Escrow Agreement within 30 days of the Effective Date.

41.2.2 The Contractor shall procure that, within 30 days of the Effective Date, each of the Contractor's Sub-contractors which owns any Contractor Material shall enter into with the Authority and the Escrow Agent an escrow agreement (an "**SC Project Escrow Agreement**") substantially in the form (subject to any reasonable amendments required by the Escrow Agent) set out in Schedule 21 Part B relating to any software comprised in such Contractor Material from time to time.

41.3 **Deposit in Escrow**

The Contractor shall procure that an up to date version of the Source Code of any software comprised in the Contractor Material from time to time is deposited in escrow in accordance with the terms of the CM Project Escrow Agreement or an SC Project Escrow Agreement, as appropriate, as soon as possible after the Contractor grants a licence to the Authority in respect of that software under this Agreement. The Contractor shall procure that an up to date version of all such Source Code is so deposited every six months thereafter until the earlier of the Expiry Date or Termination Date as the case may be.

41.4 **Escrow Agreement for Third Party Software**

The Contractor (or, at the Contractor's election, the Contractor's Associated Company which is the head licensee of the relevant software) shall use reasonable endeavours to enter into an escrow agreement with the Independent Party owner or licensor of any Third Party Software used by the Contractor in the provision of the Services, if such Third Party Software is not Commercially Available. Subject to Clause 61.5 (Right to Assign), such escrow agreement will be substantially in the form (subject to any reasonable amendments required by the Escrow Agent) set out in Schedule 21, Part C (the "**TP Project Escrow Agreement**"). The Contractor shall use its reasonable endeavours to ensure that the Source Code deposited under any such escrow agreement from time to time is a complete copy of the Source Code of the corresponding Third Party Software as then used by the Contractor.

41.5 **Audit of Source Code**

The Contractor shall permit the Authority upon reasonable notice during business hours from time to time to audit, whether by itself or through the Escrow Agent or another independent third party (save where the Contractor can reasonably demonstrate that such third party has a conflict of interest with the business of the Contractor or its Affiliates), the Source Code either delivered to the Authority pursuant to Clause 41.1 or placed in escrow pursuant to Clause 41.3 in order to establish whether such Source Code is a complete and up to date copy of the Source Code of the corresponding software. The Contractor shall provide such information and assistance as is reasonably requested by the Authority or the Authority's representative in relation to any such audit. Any such audit shall be performed at the Authority's own expense (save that the Contractor shall not make any charge in relation thereto), provided always that the Contractor shall refund to the Authority on the Authority's demand the reasonable cost of any such audit where such audit discloses a material deficiency in the Source Code delivered to the Authority or placed in escrow. The audit shall be limited to one audit in any calendar year, save where the Authority reasonably believes the Contractor to be in breach of its obligations under Clause 41.1 and 41.3. Any independent auditor (other than the Escrow Agent) shall be required to enter into a confidentiality agreement in a form reasonably requested by the Contractor.

41.6 **Licence of Source Code**

41.6.1 Where the Source Code of any software licensed to the Authority pursuant to Clause 39 is to be delivered to the Authority or released to the Authority from escrow in accordance with this Agreement or the terms of the applicable escrow agreement, the licence granted to the Authority in respect of such software under Clause 39 shall include the right to copy, modify and adapt such Source Code in conjunction with the use of such software for the purposes for which such use is permitted.

41.6.2 Without prejudice to the rights granted to the Authority in Clause 39.2 and Clause 39.3 in relation to material other than Source Code, where the Source Code of any Contractor Material or Third Party Material is released to the Authority from escrow other than by reason of the relevant owner's (as such term is defined in the applicable escrow agreement) becoming insolvent, ceasing to trade or permanently ceasing to provide support for the corresponding software, the Authority's licence to use such Source Code shall expire 2 years following either the Term Date or the Termination Date (if earlier).

41.6.3 For the avoidance of doubt, the Authority's licence to the Contractor of (i) Project Systems and all and any software in Consultancy Material, and (ii) modifications,

alterations and/or developments of Software Related Project Material carried out by the Authority and others under Clause 39.6.4(D) shall include a licence of the corresponding Source Code and shall include the right to copy, modify and adapt such Source Code in conjunction with the use of such software for the purposes and for the period for which such use is permitted, provided always that any licence granted by the Authority to the Contractor commercially to exploit any software comprised in any Consultancy Material shall only include such a Source Code licence to the extent agreed in writing by the Authority.

42. CONFIDENTIALITY

42.1 Disclosure and Use of Confidential Information

The Parties shall keep confidential all matters relating to this Agreement, the Project Documents and the Ancillary Documents and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any matter relating to the Agreement.

42.2 Exceptions for both Parties

Clause 42.1 shall not apply to:

- 42.2.1 any disclosure of information that is reasonably required by persons engaged in the performance of its obligations under this Agreement;
- 42.2.2 any matter which a party can demonstrate is already generally available and in the public domain otherwise than as a result of a breach of this Clause 42;
- 42.2.3 any disclosure to enable a determination to be made under Clause 68 (Dispute Resolution Procedure);
- 42.2.4 any disclosure which is required by any law (including any order of a court of competent jurisdiction), any Parliamentary obligation or the rules of any stock exchange or governmental or regulatory authority having the force of law;
- 42.2.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 42.2.6 any provision of information 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 Contractor to enable it to carry out its obligations under this Agreement, to that person but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 42.2.7 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 any proposed new contractor, its advisers and lenders, should the Authority decide to retender the Agreement or relet the Project;
- 42.2.8 any registration or recording of the Necessary Consents and property registration required;
- 42.2.9 any disclosure of information by the Authority to any other department, office or agency of the Government;
- 42.2.10 any disclosure by the Authority of any document related to this Agreement to which it is a party and which the Contractor (acting reasonably) has agreed with the Authority contains no commercially sensitive information; and

42.2.11 any disclosure for the purpose of:

- (A) the examination and certification of the Authority's or the Contractor's accounts; or
- (B) any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority has used its resources.

42.3 Confidentiality Undertaking

Where disclosure is permitted under Clause 42.2, other than under Clauses 42.2.4, 42.2.6, 42.2.8, 42.2.10 and 42.2.11, the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

42.4 National Audit Act

For the purposes of the National Audit Act 1983, the Contractor shall procure that the Comptroller and Auditor General may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Contractor and any Sub-contractor and may require the Contractor and any Sub-contractor to produce such oral or written explanation as he considers necessary. For the avoidance of doubt it is hereby declared that the carrying out of an examination under section 6(3)(d) of the National Audit Act 1983 in relation to the Contractor is not a function exercisable under this Agreement.

42.5 Use to be for purposes of the Agreement

The Contractor shall not make use of this Agreement or any information issued or provided by or on behalf of the Authority in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the Authority.

42.6 Freedom of Information Act

42.6.1 The Contractor shall note and facilitate the Authority's compliance with the Freedom of Information Act 2000.

42.6.2 If the Authority is required to provide information which is confidential (in accordance with Clause 42.1) to a person as a result of a request made to it under the Freedom of Information Act 2000, the Authority shall adhere to the requirements thereof in disclosing information relating to this Agreement and the Contractor.

42.6.3 If the Authority receives any requests for information under the Freedom of Information Act 2000 in respect of the Project, the Authority shall be obliged to consult the Contractor, where reasonably practicable to do so, prior to disclosing any information relating to the Project to the person who requested such information.

42.6.4 If the Authority is required to provide information to a person as a result of a request made to it under the Freedom of Information Act 2000 and such information is in the possession of any of the Contractor or the Contractor Parties but not the Authority, the Contractor shall provide such information to the Authority as soon as reasonably practicable.

42.7 National Audit Office

The Parties acknowledge and agree that the National Audit Office has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.

42.8 Duration and Post Termination

- 42.8.1 The obligations in this Clause 42 (Confidentiality) shall continue for a period of five years after the date of expiry or termination of this Agreement.
- 42.8.2 Subject to Clause 42.8.3, on expiry or termination of this Agreement each Party shall return, or procure the return of (or if authorised in writing to do so by the other party, destroy, or procure the destruction of) any information which is confidential (in accordance with Clause 42.1) belonging to the other Party.
- 42.8.3 Notwithstanding Clause 42.8.2, on expiry or termination of this Agreement, the Authority may continue to use the information which is confidential (in accordance with Clause 42.1) to the extent required for the continuance or the re tendering of the Services, or services similar to the Services.

42.9 Public Relations and Publicity

- 42.9.1 The Contractor shall not and shall procure that the Sub-contractors shall not and its and their directors, officers, representatives, agents, employees, servants, consultants, and advisers shall not communicate with representatives of the press, television, radio or communications media on any matter concerning this Agreement or the Project without the prior written consent of the Authority.
- 42.9.2 Save where required by the Contractor, its Sub-contractors or its or their respective sub-contractors (but not, for the avoidance of doubt, other Third Parties) for the carrying out of the Services, no facilities to photograph or film in or upon the Project Road Network or any other premises owned or occupied by the Authority shall be given or permitted by the Contractor unless the Authority has given its prior written consent.

42.10 Damages not an adequate remedy

Without prejudice to any other rights or remedies that the Parties may have, the Parties acknowledge and agree that damages alone would not be an adequate remedy for any breach by them of this Clause 42 (Confidentiality) and that the remedies of injunction and specific performance as well as any other equitable relief for any threatened or actual breach of Clause 42 (Confidentiality) by any Party would be more appropriate remedies.

PART X – LIABILITY AND INSURANCE

43. WARRANTIES AND DISCLAIMERS

43.1 Warranties

The Contractor warrants and undertakes that:

- 43.1.1 as at the Effective Date, it is duly incorporated under the laws of England and Wales and the Contractor has the corporate power to own its assets and to carry on its business as it is now being conducted;
- 43.1.2 as at the Effective Date, it has the power to enter into and to exercise its rights and perform its obligations under this Agreement, the Project Documents and the Ancillary Documents;
- 43.1.3 as at the Effective Date, all necessary action to authorise the execution of and the performance of its obligations under this Agreement, the Project Documents and Ancillary Documents has been taken or, in the case of any Project Document or Ancillary Document executed after the Effective Date, will be taken before such execution;
- 43.1.4 as at the Effective Date, the obligations expressed to be assumed by the Contractor under this Agreement, the Project Documents and the Ancillary Documents are (or, in the case of any Project Document or Ancillary Document executed after the Effective Date, will be), legal, valid, binding and (except as may be limited by any relevant bankruptcy, insolvency examination or similar laws affecting creditors' rights generally, the principles of equity or equitable remedies, limitation of claims or defences of set off) enforceable to the extent permitted by Law;
- 43.1.5 as at the Effective Date, the execution, delivery and performance by the Contractor of this Agreement, the Project Documents and the Ancillary Documents do not and will not contravene:
 - (A) any existing Law, treaty or regulation, either in force or enacted but not yet in force, binding on the Contractor;
 - (B) the Memorandum or Articles of Association of the Contractor;
 - (C) any order or decree of any Court or arbitrator; or
 - (D) any obligation which is binding upon the Contractor or upon any of its assets or revenues;
- 43.1.6 as at the Effective Date, no claim is presently being assessed and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of the knowledge of the Contractor, pending or threatened against it or any of the Assets which is reasonably likely to have a material adverse effect on the ability of the Contractor to perform its obligations under this Agreement, any Project Document or any Ancillary Document;
- 43.1.7 as at the Effective Date, the Contractor 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 Contractor to perform its obligations under this Agreement, any Project Document or any Ancillary Document;
- 43.1.8 as at the Effective Date, no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Contractor, threatened) for the Contractor's winding up or dissolution or for the appointment of a receiver,

administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its or their assets or revenues;

- 43.1.9 as at the Effective Date, no Contractor Default has occurred which is continuing nor has any event or circumstance occurred or arisen which, with the giving of notice, lapse of time, determination of materiality or satisfaction of any other condition may become a Contractor Default;
- 43.1.10 the copies of the Ancillary Documents which the Contractor has delivered or, when executed, will deliver, to the Authority are as at the Effective Date 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 of the Ancillary Documents which would materially affect the interpretation or application of any of the Ancillary Documents;
- 43.1.11 the Contractor is not aware of any material facts or circumstances which as at the Effective Date have not been disclosed to the Authority and which would, if disclosed, be likely to have a material adverse affect on a reasonable public sector entity's decision whether or not to contract with the Contractor;
- 43.1.12 as at the Effective Date, the share capital of the Contractor will be beneficially owned as shown in Schedule 15 (Contractor's Details and Share Capital); and
- 43.1.13 as at the Effective Date, all information, representations and other matters of fact, whether oral or in writing, supplied by or on behalf of the Contractor to the Authority, its agents, employees or advisers in connection with the Contractor's response to the invitation to tender for the Services or in the course of subsequent negotiations leading to the entering into of this Agreement, the Project Documents and any Ancillary Documents to which the Authority is a party, are (save to the extent that they have been superseded or overridden by further information supplied by the Contractor or by subsequent events or circumstances) true, complete and accurate in all material respects.

43.2 **Disclaimers**

- 43.2.1 The Authority has made available prior to the Execution Date and might make available during the term of this Agreement to the Contractor, its Senior Lenders, directors, officers, representatives, agents, employees, servants, consultants and Sub-contractors (and its or their respective sub-contractors) and advisers various materials, information, documents and data (the "**Disclosed Data**") including the tender invitation documentation relating (amongst other things) to its activities, assets, land, buildings, contractual arrangements, records, reports and forecasts and other matters which are or may be relevant to the Project and the obligations undertaken by the Contractor under this Agreement, the Project Documents and any Ancillary Documents to which the Authority is a party. The Disclosed Data includes all such materials, information, documents and data which were provided to or made available to the Contractor, its Senior Lenders, directors, officers, representatives, agents, employees, servants, consultants and Sub-contractors (and its or their respective sub-contractors) and advisers in connection with pre qualification, the invitation to negotiate and/or the invitation to submit a best and final offer in respect of the Project.
- 43.2.2 Subject to Clause 11.1.3 neither the Authority nor any of its officers, representatives, agents, employees, servants, consultants, contractors, sub-contractors or advisers shall be liable to the Contractor (whether in contract, tort or otherwise howsoever and whether or not arising out of any negligence on the

part of the Authority or any of its officers, representatives, agents, employees, consultants, contractors, sub-contractors or advisers) in respect of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy of any kind whatsoever in the Disclosed Data.

43.2.3 Subject to Clause 11.1.3 the Authority gives no warranty or undertaking in respect of the Disclosed Data and the Authority does not warrant or undertake that the Disclosed Data represents all of the information relevant or material to the Project or the Services in its possession or power (either during the tender for the Project or at the execution of this Agreement, any Project Document or any Ancillary Document to which the Authority is a party). Neither the Authority nor any of its officers, representatives, agents, employees, consultants, contractors, sub-contractors or advisers shall be liable to the Contractor in respect of any failure to disclose or make available (whether before or after the execution of this Agreement, any Project Document or any Ancillary Document to which the Authority is a party) to the Contractor any information, documents or data or to keep the Disclosed Data up to date or to inform the Contractor (whether before or after execution of this Agreement, any Project Document or any Ancillary Document to which the Authority is a party) of any inaccuracy, error, omission, unfitness for purpose, defects or inadequacy in the Disclosed Data.

43.2.4 Save for any liability in respect of the warranty given by the Authority under Clause 11.1.3 the Contractor acknowledges and confirms that:

- (A) it has conducted its own analysis and review of the Disclosed Data and, before execution of this Agreement, any Project Document or Ancillary Document, has satisfied, or will satisfy itself, as to the accuracy and completeness of all such Disclosed Data upon which it places reliance;
- (B) it shall not be entitled to make any claim against the Authority or any Authority Party whether in damages or for extensions of time or additional payments under this Agreement, any Project Document or any Ancillary Document to which the Authority is a party, on the grounds of misunderstanding or misapprehension in respect of the Disclosed Data or the matters referred to in Clause 43.2.4(A) or on the grounds that incorrect or insufficient information relating thereto was given to it by any person, whether or not in the employ of the Authority, nor shall the Contractor be relieved from any risks or obligations imposed on or undertaken by it under this Agreement, any Project Document or any Ancillary Document to which the Authority is a party on any such ground.

44. INDEMNITY AND LIABILITY LIMITATION

44.1 Contractor's Indemnities

Subject to Clause 44.2 (Exceptions), the Contractor shall indemnify and keep indemnified the Authority, its officers, employees, agents and contractors from and against all Claims and Losses (including legal expenses on an indemnity basis) which may arise out of, or in consequence of, the design, construction, operation or maintenance of the Assets or the performance or non performance by the Contractor of its obligations under this Agreement or the exercise by the Contractor of its right of access to the Project Road Network, Third Party Land or HA Premises or the presence on the Project Road Network or HA Premises of the Contractor, a Sub-contractor, its or their respective sub-contractors, Contractor Employees or agents in respect of:

- 44.1.1 death or personal injury;

- 44.1.2 loss of or damage to property (including property belonging to the Authority or for which it is responsible) other than the Assets but including the Legacy Assets during the period from the Step 1a milestone event until the commencement of the Relevant Service Period which is applicable to such Legacy Assets;
- 44.1.3 a breach by the Authority of its statutory duties where such breach is caused directly or indirectly by any act or omission of the Contractor;
- 44.1.4 the Commercial Contracts (other than any loss of the Authority's revenue share thereunder);
- 44.1.5 any TP Claim or Loss save to the extent that such loss or claim falls within Clauses 44.1.1 to 44.1.4;
- 44.1.6 subject to Clause 44.3, the loss, corruption or destruction of data provided by the Authority to the Contractor for use in the provision of the Services;
- 44.1.7 the loss, corruption or destruction of data, created by or on behalf of the Contractor or for which the Contractor is responsible throughout the term of this Agreement, which upon handback of the Services pursuant to the Handback Plan, shall be necessary to provide the Authority (and/or the New Service Provider, as the case may be) with the capability to provide the Services (or services which are similar to the Services) to the standard required by the Statement of Requirements for two years following the Expiry Date or Termination Date, as the case may be; and
- 44.1.8 any negligent or wilful (i) inaccuracy, (ii) error or (iii) omission in any advice provided by the Contractor to the Authority in the performance of its obligations pursuant to the Consultancy Service.

44.2 **Exceptions**

- 44.2.1 The Contractor shall not be liable or be obliged to indemnify the Authority for:
 - (A) any Claim or Loss to the extent caused by the negligence or wilful misconduct of the Authority, its employees, agents or contractors other than the Contractor (in the course of such employee's employment and such agent's service) or by the breach by the Authority of its obligations under this Agreement;
 - (B) Claims made or Losses incurred under Clauses 44.1.6, 44.1.7 or 44.1.8 that the Contractor is (i) not obliged to insure pursuant to Clause 47 (Insurance) or (ii) obliged only to insure to an agreed limit and that limit has been exceeded, to the extent that in aggregate they exceed:
 - (1) in respect of Clause 44.1.6, £2,000,000 (adjusted for RPI);
 - (2) in respect of Clause 44.1.7, £2,000,000 (adjusted for RPI); and
 - (3) in respect of Clause 44.1.8, £2,000,000 (adjusted for RPI),
 together, in the case of (ii) with the applicable deductible; or
 - (C) any Claim or Loss which arises as a direct result of the Contractor acting on the written instructions of the Authority provided that such instructions fall outside the scope of the exercise by the Authority of its rights under this Agreement or the performance by the Contractor of its obligations under this Agreement.
- 44.2.2 The Contractor shall have no liability to the Authority under Clauses 44.1.2, 44.1.4, 44.1.6 or 44.1.7 in respect of any consequential, indirect, or (in relation to

Claims in negligence) pure economic loss or any actual or expected loss of profit, loss of revenue, loss of goodwill or loss of opportunity.

44.2.3 In relation to any Claim or Loss under Clause 44.1.3 which arises in contract, the Contractor shall have no liability to the Authority in respect of any consequential loss, indirect loss or any actual or expected loss of profit, loss of revenue, loss of goodwill or loss of opportunity to the extent that the aggregate of the Claims made or Losses incurred exceeds the aggregate of:

- (A) £1,000,000; and
- (B) the amount by which any Claim or Loss has been increased by reason of the Contractor's failure to use its best endeavours to mitigate such Claim or Loss.

44.2.4 In relation to any Claim or Loss under Clause 44.1.5 which:

(A)

- (1) arises in contract; and
- (2) has been caused by the negligence of the Contractor, any Sub-contractor or any of their respective sub-contractors or a breach by the Contractor of its obligations under this Agreement,

subject to Clause 44.2.5, the Contractor shall only be liable to the Authority in respect of any consequential loss, indirect loss or any actual or expected loss of profit, loss of revenue, loss of goodwill or loss of opportunity to the extent that the Loss or Claim was reasonably foreseeable on the basis that the Contractor had been given a reasonable opportunity to review relevant sections of contracts entered into between the Authority and any third parties.

(B)

- (1) arises in contract; and
- (2) has not been caused by the negligence of the Contractor, any Sub-contractor or any of their respective sub-contractors or a breach by the Contractor of its obligations under this Agreement,

the Contractor shall have no liability to the Authority in respect of any consequential loss, indirect loss or any actual or expected loss of profit, loss of revenue, loss of goodwill or loss of opportunity save to the extent by which such loss has been increased by reason of the Contractor's failure to use reasonable endeavours to mitigate the loss.

44.2.5 Where Clause 44.2.4(A) applies, the Contractor's aggregate liability shall not exceed the sum of:

- (A) the lesser of (a) fifty per cent of the value of any Claim or Loss and (b) £1,500,000; and
- (B) the amount by which any Claim or Loss has been increased by reason of the Contractor's failure to use best endeavours to mitigate such Claim or Loss.

44.2.6 For the purposes of this Clause 44.2 (Exceptions) "liability" means any liability, whether under statute or in tort (including but not limited to negligence), contract or otherwise, and "liable" shall be construed accordingly.

44.3 Data

- 44.3.1 The Parties agree and acknowledge that the data referred to in Clause 44.1.6 shall not include any data transmitted by the Authority via the Transmission Network which relates to the Authority's activities.
- 44.3.2 The Contractor shall not be liable to indemnify the Authority under Clauses 44.1.6 or 44.1.7 to the extent that any Loss or Claim results from the Authority's failure to take reasonable precautions to (i) copy data or (ii) back up data or (iii) implement virus protection measures.

44.4 Conduct of Claims

If the Authority receives any notice, demand, letter or other document concerning any Claim from which it appears that the Authority is or may become entitled to indemnification under this Agreement, the Authority shall give notice in writing to the Contractor as soon as reasonably practicable.

44.5 Contractor Handling of Claims

Subject to Clauses 44.6 (Contractor's Obligations), 44.7 (Settlement by the Authority) and 44.8 (Authority Handling of Claims) on the giving of a notice pursuant to Clause 44.4 (Conduct of Claims) the Contractor shall, subject to providing the Authority with an indemnity in respect of all Claims or Losses arising out of its handling of the Claim, be entitled to and shall resist the Claim in the name of the Authority and shall have the conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations at the Contractor's expense and the Authority shall give the Contractor all reasonable co operation, access and assistance for the purpose of considering and resisting such Claim.

44.6 Contractor's Obligations

In relation to any Claim subject to Clause 44.5 (Contractor Handling of Claims):

- 44.6.1 the Contractor shall keep the Authority fully informed and consult with it about the progress and conduct of the Claim;
- 44.6.2 the Contractor shall not pay or settle such Claim without the prior written consent of the Authority, such consent not to be unreasonably withheld or delayed; and
- 44.6.3 to the extent that the Authority is not entitled to be indemnified by the Contractor for all of the liability arising out of the act or omission which is the subject of the Claim, the Contractor shall take no action which shall increase the amount of the payment to be made by the Authority in respect of that part of the Claim which is not covered by the indemnity from the Contractor.

44.7 Settlement by the Authority

The Authority shall be free to pay or settle any Claim on such terms as it may, subject to obtaining any consents which are required under the relevant insurance policies, in its absolute discretion think fit and without prejudice to its rights and remedies under this Agreement if:

- 44.7.1 within 28 days of the notice from the Authority under Clause 44.4 (Conduct of Claims) the Contractor fails to notify the Authority of its intention to dispute the Claim; or
- 44.7.2 the Contractor fails to comply in any material respect with the provisions of Clause 44.6 (Contractor's Obligations),

provided that the Authority shall act reasonably in conducting the Claim having regard to the Contractor's financial position.

44.8 Authority Handling of Claims

Subject to any requirement to the contrary in any insurance policy, the Authority shall be free at any time to give notice to the Contractor that it is taking over the conduct of any defence, dispute, compromise or appeal of any Claim notified pursuant to Clause 44.4 (Conduct of Claims) or of any incidental negotiations. Upon receipt of such notice, the Contractor shall promptly take all steps necessary to transfer the conduct of such Claim to the Authority and shall provide to the Authority all reasonable co operation, access and assistance for the purpose of considering and resisting such Claim. If the Authority gives any notice pursuant to this Clause 44.8 (Authority Handling of Claims), the Contractor shall be released from its indemnity given pursuant to Clause 44.5 (Contractor Handling of Claims) in respect of the handling of such Claim.

44.9 Authority's Limit of Liability

44.9.1 The Authority, its officers, representatives, agents, employees, consultants, contractors and sub-contractors shall have:

- (A) no liability whatsoever to the Contractor relating to or arising from any representation or implied warranty, condition or other term under any Law other than an express representation, warranty, condition or term in this Agreement, any of the Project Documents or any Ancillary Documents to which the Authority is a party;
- (B) without prejudice to Clause 44.9.1(A), no liability to the Contractor in respect of:
 - (1) any consequential, indirect, or (in relation to Claims in negligence) pure economic loss or any actual or expected loss of profit, loss of revenue, loss of goodwill or loss of opportunity subject to the compensation payable in accordance with Clauses 31 (Compensation Events), 44.11.2, 45.3.1, 49.2 (Compensation on Voluntary Termination), 53.2 (Compensation on Termination for Breach of the Refinancing Provisions), 55 (Compensation on Termination for Authority Default), 56 (Compensation on Termination for Contractor Default), 57 (Compensation on Termination for Force Majeure) or 58 (Compensation on Termination for Corrupt Gifts and Fraud); or
 - (2) any loss arising out of any liability of the Contractor to any other person for any consequential, indirect or (in relation to claims in negligence) pure economic loss or any actual or expected loss of profit, loss of revenue, loss of goodwill or loss of opportunity subject to the compensation payable in accordance with Clauses 31 (Compensation Events), 44.11.2, 45.3.1, 49.2 (Compensation on Voluntary Termination), 53.2 (Compensation on Termination for Breach of the Refinancing Provisions), 55 (Compensation on Termination for Authority Default), 56 (Compensation on Termination for Contractor Default), 57 (Compensation on Termination for Force Majeure) or 58 (Compensation on Termination for Corrupt Gifts and Fraud).

44.9.2 Subject to Clauses 44.9.1 and 54.2 (Rights and Obligations), the aggregate liability of the Authority, its officers, representatives, agents, employees,

consultants, contractors and sub-contractors to the Contractor arising out of or in connection with the termination of this Agreement whether under this Agreement, contract, tort, restitution or otherwise shall in no circumstances exceed the amounts of compensation payable in accordance with Clauses 49.2 (Compensation on Voluntary Termination), 53.2 (Compensation on Termination for Breach of the Refinancing Provisions), 55 (Compensation on Termination for Authority Default), 56 (Compensation on Termination for Contractor Default), 57 (Compensation on Termination for Force Majeure) or 58 (Compensation on Termination for Corrupt Gifts and Fraud), as applicable.

- 44.9.3 The Contractor shall only be entitled to be indemnified by the Authority pursuant to any of the Authority's obligations to indemnify the Contractor under this Agreement in respect of any Loss to the extent that an amount in respect of such Loss is not recoverable by the Contractor under any of the Relevant Insurances set out in Parts 1 and 2 of Schedule 23 (Insurance).

44.10 Liability for Authority's Contractors

- 44.10.1 The Authority shall use all reasonable endeavours to procure that each Authority's Contractor effects and maintains in force professional liability insurance and public liability insurance in an amount and for such period which is commensurate with the liability being assumed by such Authority's Contractor.

- 44.10.2 Subject to Clause 44.10.2(E), the Authority shall be liable to the Contractor for all Claims and Losses suffered or incurred by the Contractor as a result of the acts or omissions of the Authority's Contractors and the Contractor shall be entitled to bring a claim in the name of the Authority against each Authority's Contractor in respect of any loss or damage caused to the Contractor by the Authority's Contractors, provided that:

- (A) the Contractor fully indemnifies the Authority against all Claims and Losses in connection with the making of any such claim;
- (B) the Contractor gives such security in advance in respect of such indemnity as the Authority may deem reasonably appropriate;
- (C) the conduct of any such claim and of any incidental negotiations shall be at the Contractor's expense; and
- (D) the Contractor keeps the Authority fully informed about the conduct of any such claim; and
- (E) the Contractor's entitlement in respect of any matter to which this Clause 44.10.2 applies shall be limited to the amount recovered by the Authority from the relevant Authority's Contractor in respect of the Claims and Losses referred to in Clause 44.10.2. This Clause 44.10.2(E) shall not limit or otherwise prejudice any right or entitlement of the Contractor arising other than pursuant to Clause 44.10.2.

- 44.10.3 The Authority shall give to the Contractor all reasonable co operation, access and assistance in considering and/or making any Claims under Clause 44.10.2 and this shall include:

- (A) subject to Clause 44.10.4, providing the Contractor with copies of all relevant contracts between the Authority and the Authority's Contractors whether appointed before or after the Execution Date; and

- (B) paying to the Contractor any proceeds received by the Authority from or on behalf of any of the Authority's Contractors in respect of any such Claims.

44.10.4 Nothing in Clause 44.10.3(A) shall oblige the Authority to:

- (A) provide to the Contractor any information which is not in the Authority's possession; and
- (B) disclose to the Contractor any information which:
 - (1) in the reasonable opinion of the Authority is commercially sensitive and/or confidential; or
 - (2) if disclosed, would result in the Authority being held liable for breaching any of its obligations or prejudicing any of its rights pursuant to the contract to which the information relates.

44.10.5 The Authority agrees that it shall draw the content of this Clause 44.10 (Liability for Authority's Contractors) to the attention of each Authority's Contractor who is appointed after the Execution Date.

44.10.6 The Authority shall use its reasonable endeavours to procure that:

- (A) without prejudice to the Authority's ability to contract on normal commercial terms, the terms on which each Authority's Contractor who is appointed after the Execution Date shall not expressly prevent or limit the Contractor's rights of recovery under Clause 44.10.2; and
- (B) a provision substantially in the form of the following is included in the terms of appointment of each Authority's Contractor: "The Authority's Contractor shall not contend that the Authority has suffered or incurred or will suffer or incur no damage, loss, cost or expense or that its liability to the Authority should be in anyway reduced or extinguished by reason of any provision in the Project Agreement to the effect that the entitlement of the Contractor in respect of any matter shall be limited by reference to the amount of the Authority's entitlement or recovery against or from the Authority's Contractor".

44.11 Authority Indemnity

44.11.1 Subject to Clause 44.10, the Authority shall not be liable or obliged to indemnify the Contractor for any loss or damage caused by the Authority's Contractors to the Contractor.

44.11.2 Subject to Clauses 44.11.1 and 44.11.3, the Authority shall indemnify and keep indemnified the Contractor from and against all Claims and Losses (including legal expenses on an indemnity basis) which may arise out of, or in consequence of the negligence or wilful default of the Authority or of its officers, employees and agents in respect of:

- (A) death or personal injury; and
- (B) loss of or damage to property other than the Assets; and
- (C) any TP Claim or Loss arising in tort (and not contract) save to the extent that such loss or claim falls within Clauses 44.11.2(A) or (B).

- 44.11.3 The Authority shall not be responsible or be obliged to indemnify the Contractor:
- (A) if any Claim or Loss under Clauses 44.11.2(A) or 44.11.2(B) arises as a direct result of the Authority acting on the instructions of the Contractor; or
 - (B) for any Claim or Loss to the extent caused by the negligence or wilful misconduct of the Contractor, its employees, agents or sub-contractors or by any breach by the Contractor of its obligations under this Agreement; or
 - (C) to the extent that the Claim or Loss is insured or should have been insured in accordance with this Agreement.

44.12 No double recovery

Neither Party shall be able to recover in respect of the same losses, costs, expenses, liabilities and/or claims pursuant to this Clause 44 and Clauses 38 (Changes in Law) and 45 (Environmental Liability). Any payments to be made under this Agreement shall be calculated without double counting.

44.13 General

44.13.1 Each sub clause of this Clause 44 (Indemnity and Liability Limitation) shall:

- (A) be construed as a separate and severable contract term pursuant to Clause 73 (Severability), and if one or more of these terms is held to be invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, it may be severed and such invalidity, unenforceability and legality of the remaining provisions of this Clause 44 (Indemnity and Liability Limitation) or this Agreement; and
- (B) survive the termination of this Agreement.

44.13.2 Nothing in this Clause 44 (Indemnity and Liability Limitation) shall be construed as excluding or limiting the liability of either Party or any of their respective officers, representatives, agents, employees, consultants, contractors and sub-contractors to the other for death or personal injury resulting from the negligence of such persons.

44.13.3 Save as otherwise expressly provided in this Agreement, this Clause 44 (Indemnity and Liability Limitation) insofar as it excludes or limits liability shall override any other provision in this Agreement.

44.13.4 Any indemnity by either Party under any provision of this Agreement shall be without limitation to any indemnity by that Party under any other provision of this Agreement.

45. ENVIRONMENTAL LIABILITY

45.1 Contractor Indemnity

45.1.1 Subject to Clause 45.1.2, the Contractor shall reimburse to the Authority, the Authority's officers, employees, agents and contractors the amount of all Environmental Losses arising in connection with any act, omission or default, on the part of the Contractor, any Sub-contractor (or any of its or their respective sub-contractors) and/or any Contractor Employee, including but not limited to any breach of the Contractor's obligations under this Agreement save to the extent that:

- (A) the Environmental Loss is attributable to Existing Contamination or Pollution; and
- (B) the Environmental Loss is not caused, exacerbated, increased or otherwise contributed to by any such act omission or default of the Contractor, any Contractor Employee or any Sub-contractor (or any of its or their respective sub-contractors).

45.1.2 To the extent that:

- (A) the amount recoverable by the Authority in respect of any Claim or Loss pursuant to Clause 44 (Indemnity and Liability Limitation) is limited; and
- (B) any claim for reimbursement under Clause 45.1.1 relates to a Claim or Loss of the same nature as a Claim or Loss referred to in Clause 45.1.2(A) (a "**Clause 45 Claim or Loss**"),

the amount recoverable by the Authority from the Contractor in respect of the Clause 45 Claim or Loss shall be limited in the manner described in Clause 44 (Indemnity and Liability Limitation).

45.2 **Compliance with Environmental Law**

45.2.1 The Contractor shall at all times, comply or procure compliance with Environmental Law and take all reasonable steps to ensure prevention of:

- (A) harm to the Environment (including any areas not occupied by the Contractor in the performance of the Services where such might foreseeably be affected by circumstances arising in connection with the performance of the Services, or the Environmental Condition at on in or under the areas which the Contractor occupies); and
- (B) action by any Competent Authority or any claim against it or the Authority under Environmental Law where such claim arises out of or in connection with the Project or the performance of the Services,

and without prejudice to the generality of the foregoing, in particular, the Contractor shall:

- (1) follow all applicable Authority Guidelines and Procedures; and
- (2) immediately notify the Authority if it becomes aware of the presence of any Hazardous Substances either on or in the vicinity of the Project Road Network.

45.3 **Reimbursement and Liability Limitation**

45.3.1 Subject to the provisions of this Clause 45, the Authority shall:

- (A) reimburse to the Contractor the amount of all Environmental Losses suffered or incurred by the Contractor as a result of any Existing Contamination or Pollution Claim together with any costs incurred by the Contractor in using reasonable endeavours to mitigate Environmental Losses; and
- (B) reimburse to the Contractor and any Contractor Party (as the case may be) the amount of any Asbestos Event Losses suffered or incurred by the Contractor or any Contractor Party (as the case may be).

45.3.2 The Contractor shall not be entitled to the reimbursement pursuant to Clause 45.3.1(A):

- (A) to the extent that the Environmental Loss has been caused, exacerbated, increased or otherwise contributed to by the Contractor Employee, any Sub-contractor (or any of its or their respective sub-contractors) or any third party, unless at or following the direction of the Authority;
- (B) to the extent that any Existing Contamination or Pollution Claim arises or is caused, exacerbated, increased or otherwise contributed to by any voluntary investigation or intrusive works undertaken by the Contractor or any agent of the Contractor, Contractor Employee or Sub-contractor (or any of its respective sub-contractors) following the Contractor becoming aware of such Existing Contamination or Pollution unless at or following the direction of the Authority;
- (C) where the Existing Contamination or Pollution Claim arises as a result of or in connection with:
 - (1) a matter in respect of which the Contractor is insured or otherwise compensated (to the extent that the amount of such compensation is equal to or in excess of the amount for which the Authority is liable to reimburse the Contractor pursuant to Clause 45.3.1(A));
 - (2) any disclosure of information by the Contractor, Contractor Employee or Sub-contractor (or any of its respective sub-contractors) or agent of the Contractor to any Competent Authority or third party save where required by Law or with the prior written consent of the Authority; or
 - (3) any redevelopment, building operations or change of use other than in accordance with this Agreement;
- (D) to the extent that appropriate and timely efforts to pursue claims and recover against any third parties (including insurers, landlords and tenants) who may have some liability to the Contractor or any Contractor Employee or Sub-contractor (or any of its or their respective sub-contractors) or agent of the Contractor in respect of the matter in question have not been made (keeping the Authority informed on a timely basis of all such efforts); or
- (E) to the extent that the Contractor fails to use reasonable endeavours to mitigate the Environmental Loss.

45.3.3 The Contractor or any Contractor Party (as the case may be) shall not be entitled to the reimbursement pursuant to 45.3.1(B):

- (A) to the extent that the Asbestos Event Loss has been caused, exacerbated, increased or otherwise contributed to by:
 - (1) the negligence or default of the Contractor or any Contractor Party;
 - (2) a breach by the Contractor of any of its obligations under this Agreement; or
 - (3) the Contractor's failure to use reasonable endeavours to mitigate the effects of the Asbestos Event;

- (B) to the extent that the Asbestos Event Loss is recoverable by the Contractor or any Contractor Party from the Licensed Asbestos Removal Contractor; or
 - (C) to the extent that the Asbestos Event Loss is insured or should have been insured in accordance with this Agreement.
- 45.3.4 Where the Contractor becomes aware that either the Authority or the Contractor is, or is likely to, incur an Environmental Loss or an Asbestos Event Loss it shall:
 - (A) provide full particulars of the same and the circumstances giving rise to the same to the Authority; and
 - (B) consult with the Authority with a view to taking steps which will minimise the extent of any Environmental Loss or any Asbestos Event Loss (as the case may be). Any steps which are agreed pursuant to this Clause 45.3.4(B) shall be undertaken by the Contractor at the expense of the Authority.
- 45.3.5 The Contractor shall procure that none of the Sub-contractors recovers or seeks to recover any Environmental Losses or Asbestos Event Loss directly from the Authority and shall use reasonable endeavours to procure that no Contractor Employee recovers or seeks to recover any Environmental Losses or Asbestos Event Loss directly from the Authority.
- 45.4 **Remediation Works**
 - 45.4.1 Where the Authority agrees that Remediation Works are to be undertaken by the Contractor, the Contractor shall afford the Authority and its advisers reasonable prior notice and, except where expressly prohibited by any Regulatory Authority, opportunity:
 - (A) to attend site visits or meetings and review all relevant correspondence for the purpose of making representations to the Contractor, any Third Party or any Contractor Party concerning any Remediation Works; and/or
 - (B) to comment in advance on any instructions, scope of work, specifications, proposals, statements, reports or other material documents or correspondence concerning any Remediation Works; and/or
 - (C) to attend and inspect the carrying out of any Remediation Works; and/or
 - (D) to take samples, measurements, photographs and records in relation to the subject matter of any Remediation Works.
 - 45.4.2 The costs of any Remediation Works in respect of which the Contractor seeks reimbursement pursuant to Clause 45.3.1(A) shall be determined on the basis of three quotes obtained from three reputable and independent contractors nominated by the Authority and the Authority shall determine which contractor is used and no costs shall be payable by the Authority in relation to any such Remediation Works until they have been carried out and properly invoiced.
- 45.5 **Asbestos**
 - 45.5.1 Subject to Clause 45.5.2, where performance of the Services imposes a duty upon the Contractor to maintain and repair the Premises (as defined in the Health and Safety at Work Act 1974) or any part of the Premises, the Contractor shall be the Duty holder (as defined in the Control of Asbestos at Work Regulations 2002 ("CAWR")) for the purposes of section 4 of the CAWR and shall thereby undertake to implement update and review, and comply with, at the Contractor's

expense, the asbestos assessment (as defined in the CAWR) and plan (as defined in the CAWR) and the IAN and carry out the necessary actions identified in the asbestos assessment and plan and in the IAN in accordance with the CAWR in relation to any such Premises or any part of such Premises provided always that the provisions of the CAWR shall, in the event of a conflict with those of the IAN, take precedence over those of the IAN.

- 45.5.2 Clause 45.5.2 shall be without prejudice to the Authority's rights to audit and monitor the Contractor's compliance with its duties as Duty holder and the Contractor shall give all reasonable assistance (such assistance to be at the expense of the Contractor) to the Authority and the Authority Parties for these purposes. The Authority shall use its reasonable endeavours to procure that, in the carrying out of any such audit, disruption to the provision of the Services is minimised and, subject to Paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not be entitled to make any deductions or award any Service Credits under Clause 30 (Service Credit Regime) in the period during which the audit is carried out and/or arising out of any resulting impact on the performance of the Services.
- 45.5.3 The rights of the Authority referred to in Clause 45.5.2 shall be exercised by the Authority acting reasonably and as often as it considers it necessary (acting reasonably) throughout the term of this Agreement.
- 45.5.4 In performing its duties as Duty holder pursuant to Clause 45.5.1, the Contractor agrees and undertakes to comply with and include in its asbestos assessment and plan any health and safety measures notified to the Contractor by the Authority pursuant to the CAWR.
- 45.5.5 If the Contractor notifies to the Authority any asbestos which is present in the Premises, the Authority shall, as soon as reasonably practicable thereafter, appoint an independent asbestos surveyor (the "**Asbestos Surveyor**") from an organisation accredited to ISO17025 who shall determine whether such asbestos shall be:
- (A) removed; or
 - (B) not removed but contained and managed,
- in either case in order to safeguard the health and safety of:
- (1) the Contractor and its Sub-contractors (and any of their respective sub-contractors), employees or agents on the Premises in the course of the performance of the Contractor's obligations under this Agreement;
 - (2) the Authority and the Authority Parties; and
 - (3) any Third Party lawfully present on the Premises.
- 45.5.6 Where Clause 45.5.5(A) applies:
- (A) the removal of asbestos (the "**Asbestos Removal Works**") shall be carried out by an independent, reputable firm of licensed contractors (the "**Licensed Asbestos Removal Contractor**") which has the appropriate technical skills and knowledge of the Assets, the Services and the Project. The firm to act as the Licensed Asbestos Removal Contractor shall be selected by the Contractor (acting reasonably) and engaged on terms approved by the Contractor (acting reasonably);

- (B) by a date no later than 15 Business Days prior to the proposed commencement of any Asbestos Removal Works, the Contractor shall prepare and provide to the Authority for approval a report setting out the proposed Asbestos Removal Works together with a quotation from the Licensed Asbestos Removal Contractor as to the cost of carrying out the Asbestos Removal Works;
- (C) the Contractor shall use all reasonable endeavours to procure the safe removal by the Licensed Asbestos Removal Contractor of any asbestos identified by the Asbestos Surveyor as requiring removal pursuant to Clause 45.5.5 in order to safeguard the health and safety of:
 - (1) the Contractor and its Sub-contractors (and any of their respective sub-contractors), employees or agents on the Premises in the course of the performance of the Contractor's obligations under this Agreement;
 - (2) the Authority Parties; and
 - (3) any Third Party lawfully present on the Premises;
- (D) the Contractor shall use all reasonable endeavours (and shall use all reasonable endeavours to procure that the Licensed Asbestos Removal Contractor uses all reasonable endeavours) to minimise any disruption caused to the provision of the Services during the period in which the Asbestos Removal Works are being carried out by the Licensed Asbestos Removal Contractor;
- (E) subject to the Authority (acting reasonably) approving the report and the quotation referred to in Clause 45.5.6(B):
 - (1) the Contractor shall pay to the Licensed Asbestos Removal Contractor an amount equal to the reasonable costs (the "**Asbestos Removal Costs**") incurred by the Licensed Asbestos Removal Contractor in carrying out any Asbestos Removal Works within 20 Business Days following receipt of the Licensed Asbestos Removal Contractor's invoice following the completion of the Asbestos Removal Works; and
 - (2) the Authority shall reimburse the Contractor for the Asbestos Removal Costs and such Asbestos Removal Costs shall be payable within 25 Business Days of receipt of the Licensed Asbestos Removal Contractor's invoice from the Contractor; and
- (F) subject to the Contractor complying with Clause 45.5.6(D) and subject to Paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not be entitled to make any deductions or award any Service Credits under Clause 30 (Service Credit Regime) in the period during which the Asbestos Removal Works are being carried out to the extent that such deductions are levied or Service Credits awarded as a consequence of the Contractor being prevented from performing its obligations in relation to the provision of the Services by the carrying out of the Asbestos Removal Works.

45.5.7 Where Clause 45.5.5(B) applies:

- (A) the Contractor shall contain and manage any asbestos identified by the Asbestos Surveyor as requiring such containing and managing pursuant to Clause 45.5.5 in order to safeguard the health and safety of:
 - (1) the Contractor and its Sub-contractors (and any of their respective sub-contractors), employees or agents;
 - (2) the Authority Parties; and
 - (3) any Third Party lawfully present on the Premises; and
- (B) the Authority shall reimburse the Contractor for the extra costs incurred by the Contractor in containing and managing such asbestos and such costs shall be payable by the Authority within 25 Business Days of receipt of the invoice in respect of such costs from the Contractor.

45.5.8 If:

- (A) the Contractor is, as a result of any Asbestos Removal Works or the presence on the Premises of asbestos (together an "**Asbestos Event**"), impeded in its ability to carry out its obligations under this Agreement or suffers any Loss; and
- (B) the Contractor has used and continues to use all reasonable endeavours to mitigate the effects of the Asbestos Event,

the Contractor shall be entitled to relief in accordance with Clause 45.5.9.

45.5.9 The relief to which the Contractor shall be entitled pursuant to Clause 45.5.8 shall be as follows:

- (A) During the period up to the Base Service Charge Date, the Contractor shall be entitled to the payment of amounts equivalent to (and paid at the same time as) the Base Service Charge which would have been paid by the Authority to the Contractor if the Asbestos Event had not occurred.
- (B) During the period up to the Base Service Charge Date, the Longstop Date shall be postponed by such period as its reasonable taking account of the likely effect of the Asbestos Event.
- (C) At any time, the Authority shall not be entitled to terminate this Agreement pursuant to Clause 51 (Termination for Contractor Default) by reason of the occurrence of the Asbestos Event.
- (D) At any time, subject to paragraph 6.3 of Part 2 of Schedule 27 (Service Credit Regime), the Authority shall not, for the period from the commencement of the Asbestos Event until the remedy of the Asbestos Event, be entitled to make deduction or award Service Credits under Clause 30 (Service Credit Regime) which would not have been deducted or awarded if the Asbestos Event had not occurred.

45.6 **Claims and Entitlements**

45.6.1 In the event of a dispute between the Parties either Party may refer the matter to be dealt with in accordance with Clause 68 (Dispute Resolution Procedure).

45.6.2 The provisions of Clauses 44.4 (Conduct of Claims) to 44.8 (Authority Handling of Claims) inclusive shall apply to the obligation to reimburse pursuant to Clause 45.1.1 provided that:

- (A) in Clause 44.4 reference to "indemnification" shall be read as "reimbursement";
 - (B) in Clause 44.6.3 reference to "indemnified" shall be read as "reimbursed"; and
 - (C) in Clause 44.6.3 reference to "indemnity" shall be read as "reimbursement obligation".
- 45.6.3 The provisions of Clauses 44.4 (Conduct of Claims) to 44.8 (Authority Handling of Claims) inclusive shall apply to the obligation to reimburse pursuant to Clause 45.3.1 provided that:
- (A) in such clauses references to the Authority shall be read as references to the Contractor and references to the Contractor shall be read as references to the Authority;
 - (B) in Clause 44.4 reference to "indemnification" shall be read as "reimbursement";
 - (C) in Clause 44.6.3 reference to "indemnified" shall be read as "reimbursed"; and
 - (D) in Clause 44.6.3 reference to "indemnity" shall be read as "reimbursement obligation".
- 45.6.4 Neither Party shall be able to recover in respect of the same losses, costs, expenses, liabilities and/or claims pursuant to this Clause 45 and Clauses 38 (Changes in Law) and 44 (Indemnity and Liability Limitation).

46. FORCE MAJEURE

46.1 Relief from Liability

No Party shall be entitled to bring a claim for a breach of obligations under this Agreement by the other Party or (subject to Clause 46.5 (Right to Terminate)) terminate this Agreement 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 its obligations by that Force Majeure Event.

46.2 Entitlements

Nothing in Clause 46.1 (Relief from Liability) above shall affect any entitlement to make deductions or any deductions made or any entitlement to award any Service Credits or any Service Credits awarded under Clause 30 (Service Credit Regime) in respect of any part(s) of the Project Road Network affected by the Force Majeure Event in the period during which the Force Majeure Event is subsisting.

46.3 Notice

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.

46.4 Remedy

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 arrangements to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this Agreement.

46.5 Right to Terminate

If no such terms are agreed on or before the date falling 95 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 Agreement for a period of more than 95 Business Days, then, subject to Clause 46.6 (Compensation), either Party may terminate this Agreement by giving 20 Business Days written notice to the other Party.

46.6 Compensation

If the Agreement is terminated under Clause 46.5 (Right to Terminate) above or 46.7 (Right to Continue Agreement) below, compensation shall be payable by the Authority in accordance with Clause 57 (Compensation on Termination for Force Majeure).

46.7 Right to Continue Agreement

If the Contractor gives notice to the Authority under Clause 46.5 (Right to Terminate) above that it wishes to terminate this Agreement, the Authority has the option either to accept such notice or to respond in writing on or before the date falling 10 Business Days after the date of its receipt stating that it requires this Agreement to continue. If the Authority gives the Contractor such notice, then

46.7.1 the Authority shall pay to the Contractor the Service Charge from the day after the date on which the Agreement would have terminated under Clause 46.5 (Right to Terminate) as if the Services were being fully provided; and

46.7.2 the Agreement will not terminate until expiry of written notice (of at least 20 Business Days) from the Authority to the Contractor that it wishes the Agreement to terminate.

46.8 Mitigation

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 Contractor 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.

46.9 Resumed Performance

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 Agreement. Following such notification, this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

47. INSURANCE

47.1 Insurance Cover

Subject to the provisions of this Clause 47 (Insurance), the Contractor shall procure that, from the Effective Date:

47.1.1 the insurances identified in Part 1 and Part 2 of Schedule 23 (Insurance) are taken out and maintained as set out therein;

47.1.2 without prejudice to Clause 47.1.1, the Contractor effects and maintains in full force those insurances which it is required to effect under any applicable Law;

47.1.3 the insurances set out in Part 1 of Schedule 23 (Insurance):

- (A) are placed with reputable insurers of good standing;
- (B) are effected against the risks and liabilities and maintained to at least the amounts specified in the relevant Part of Schedule 23 (Insurance) (as varied from time to time in accordance with this Clause 47 (Insurance));
- (C) include only such provisions for self insurance, whether by deductible or otherwise, as are not in excess of the levels referred to in the relevant Part of Schedule 23 (Insurance) (as varied from time to time in accordance with this Clause 47 (Insurance));
- (D) include the extensions specified in the relevant Part of Schedule 23 (Insurance) (as varied from time to time in accordance with this Clause 47 (Insurance));
- (E) without prejudice to Clause 47.1.3(F), are increased from time to time to such amounts as is reasonable to cover inflation;
- (F) without prejudice to Clause 47.1.3(B), are otherwise increased from time to time to such amounts as would be effected by a reasonable and prudent person carrying out the Services who does not self insure (except by means of minimum deductibles which are at a level which is consistent with the relevant deductibles set out in Part 1 of Schedule 23 (Insurance)) and having regard to all the circumstances;
- (G) provide for payment of any proceeds to be made by insurers in accordance with Clauses 47.17 (Joint Insurance Account) and 47.18 (Reinstatement); and
- (H) contain the endorsement wording in the same form or substantially in the form as the endorsement wording set out in Part 3 of Schedule 23 (Insurance).

47.2 **Payment**

The Contractor shall promptly make payment or procure its Sub-contractors to make payment of all premiums under each of the insurance policies set out in Part 1 of Schedule 23 (Insurance).

47.3 **Insurance Required under Law**

Without prejudice to Clauses 47.1.1 and 47.1.2, the Contractor shall procure that its Sub-contractors shall (and shall use all reasonable endeavours to procure that the Sub-contractors' respective sub-contractors shall) effect and maintain in full force and effect those insurances which its Sub-contractors or their respective sub-contractors (as the case may be) are required to effect by Law at the relevant time.

47.4 **Broker's Letter of Undertaking**

- 47.4.1 On the Effective Date the Contractor shall deliver to the Authority a broker's letter of undertaking signed by the insurance brokers to the Contractor in the agreed form as set out in Part 4 of Schedule 23 (Broker's Letter of Undertaking).
- 47.4.2 The Contractor shall procure that any broker(s) appointed during the currency of this Agreement shall owe the Authority the obligations and give the warranties which are substantially similar to those set out in Part 4 of Schedule 23 (Broker's Letter of Undertaking) and in this Clause 47 (Insurance) and shall enter into an agreement which is substantially similar to that set out in Part 4 of Schedule 23 (Broker's Letter of Undertaking).

47.5 **Insurance Changes**

- 47.5.1 Subject to Clause 47.5.7, if the Authority wishes, from time to time, the Contractor to take out additional insurances, or cease to maintain any insurance required under Part 1 of Schedule 23 (Insurance) or effect any amendment to any aspect of such insurance (including adding or removing the Authority as an insured person under any such insurance), the Authority shall be entitled to serve a notice (an "**Initial Insurance Change Notice**") containing a request to that effect on the Contractor.
- 47.5.2 Within 20 Business Days of delivery of the Initial Insurance Change Notice, the Contractor and the Authority shall:
- (A) discuss the terms applicable to any additional insurances and the terms of any amendment to any aspect of an insurance requested in the Initial Insurance Change Notice;
 - (B) agree any increase or decrease in premium or the amount of any additional premiums payable that would result from implementing the Authority's request in the Initial Insurance Change Notice; and
 - (C) agree whether the additional insurances can be placed with reputable insurers of good standing on reasonable terms.
- 47.5.3 If, within 30 Business Days of delivery of the Initial Insurance Change Notice, the Parties fail to agree any of the matters to be discussed and agreed under Clause 47.5.2(A), 47.5.2(B) and 47.5.2(C), either Party may refer the matter to the Dispute Resolution Procedure.
- 47.5.4 Within 10 Business Days of agreement or determination of the matters referred to in Clause 47.5.2, the Authority shall be entitled to serve a notice (an "**Implementation Notice**") on the Contractor confirming that it wishes the request contained in the Initial Insurance Change Notice (as amended by the agreed or determined matters referred to in Clause 47.5.2) to be implemented and the Contractor shall implement such request as soon as practicable. For the avoidance of doubt, the Contractor shall not implement any such request other than on receipt of an Implementation Notice.
- 47.5.5 With effect from the implementation of the Implementation Notice, any increase or decrease in premium or any additional premium referred to in Clause 47.5.2 agreed or determined shall result in an appropriate adjustment to the Service Charge payable under Schedule 30 (Payment Mechanism).
- 47.5.6 If, within 10 Business Days of agreement or determination of the matters referred to in Clause 47.5.2, the Authority does not serve an Implementation Notice, the Contractor shall take no further action in respect of the Initial Insurance Change Notice.
- 47.5.7 Subject to Clause 47.5.8, the Authority shall not serve an Initial Insurance Change Notice requesting that the Contractor either ceases to maintain any insurance or reduces the level of insurance in each case required to be maintained from time to time by the Contractor under this Clause 47 (Insurance) without the prior written consent of:
- (A) the Contractor (such consent not to be unreasonably withheld); and
 - (B) (while the Senior Debt is outstanding) the Senior Lenders.

The Authority shall, however, be entitled to serve an Initial Insurance Change Notice requesting that the Authority ceases to be an insured person under any such insurance without the prior written consent of the Senior Lenders.

- 47.5.8 The Contractor shall consent under Clause 47.5.7(A) where the Contractor demonstrates that it would not, following implementation of the Implementation Notice, be in a worse position in respect of the risk assumed by it in relation to the risks insured against under this Clause 47 (Insurance) than before the implementation of such Implementation Notice.

47.6 Insured Parties

The insured parties under the insurances required to be taken out in accordance with Part 1 of Schedule 23 (Insurance) shall be as set out in that Part of Schedule 23 (Insurance) such that each Party is co insured for its respective rights and interests to the extent specified in that Part of Schedule 23 (Insurance).

47.7 Requirements of Policies

- 47.7.1 The Contractor shall ensure that each policy taken out pursuant to Part 1 of Schedule 23 (Insurance) shall, insofar as is consistent with the endorsement wording set out in Part 3 of Schedule 23 (Insurance) (which shall take precedence over the terms of this Clause 47.7):

- (A) provide that the insurers waive any rights of subrogation arising in connection only with activities relating to this Project which they may have or acquire against the Authority, its agents and employees and which do not arise as a result of fraud, misrepresentation, deliberate non disclosure or deliberate breach of any policy condition; and
- (B) provide for non vitiation protection (other than where vitiation arises as a result of fraud, misrepresentation, deliberate non disclosure or deliberate breach of any policy condition) in respect of any claim made by the Authority as co insured other than where such vitiation has been caused by the Authority.

- 47.7.2 The Contractor shall ensure that each policy taken out pursuant to paragraphs 4, 5 and 6 of Part 1 of Schedule 23 (Insurance) shall, insofar as is consistent with the endorsement wording set out in Part 3 of Schedule 23 (Insurance) (which shall take precedence over the terms of this Clause 47.7), provide that the insurers shall promptly advise the Authority in writing of any circumstances regarding the cancellation of any insurance or non renewal of the insurance which ought to have been renewed or any material change to any policy whereby the scope or limits of cover are materially reduced, and in particular shall advise the Authority:

- (A) at least 30 Business Days (or such lesser period, if any, as may be specified from time to time by insurers in the case of war risks and similar perils) before any cancellation is to take effect if the insurer cancels or gives notice of such cancellation of the insurance for any reason including non payment of premium;
- (B) promptly of any default on the payment of any premium for any of the insurances;
- (C) at least 30 Business Days prior to the expiry of the insurances if the insurer has not received renewal instructions from the Contractor and/or any jointly insured parties or the agents of any such party, and if the

insurers receive instructions to renew, to advise the Authority promptly of the details thereof; and

- (D) of any act or omission or of any event of which the insurer has actual knowledge and which might invalidate or render the insurance unenforceable in whole or in part.

47.8 Liaison

The Contractor shall consult with the Authority in relation to any reasonable request made by the Authority in connection with any insurance which the Contractor is obliged to maintain under this Agreement, such consultation to take place as soon as practicable and in any event within 10 Business Days of the Authority making its request.

47.9 Renewal

47.9.1 Before the expiry of any insurance effected pursuant to this Clause 47 (Insurance), the Contractor shall, where such insurance is required to be maintained hereunder, review the same in accordance with the procedure set out in Clause 47.10 (Procedure for Determining Insurances) below.

47.9.2 Following the renewal of any such insurance, the Contractor shall procure a renewal certificate in relation to the same and a copy thereof (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.

47.10 Procedure for Determining Insurances

47.10.1 Not less than 30 Business Days prior to the date by which:

- (A) any insurance policy is required either by Part 1 of Schedule 23 (Insurance) to this Agreement or by the relevant policy to be effected or renewed; and/or
- (B) the Contractor wishes to make any amendment or modification to any such insurance policy; and/or
- (C) the Contractor wishes to cancel or not renew any such insurance policy,

the Contractor shall deliver to the Authority a written notice in respect of the proposed amendment or scope of cover of such insurance policy ("**Proposed Scope**") and the proposed terms ("**Proposed Terms**") or the proposed cancellation or non renewal ("**Proposed Cancellation**"). The notice shall either:

- (D) confirm that the Proposed Scope and Proposed Terms and/or Proposed Cancellation comply with the requirements of Clauses 47.1 (Insurance Cover) and 47.7 (Requirements of Policies); or
- (E) if the Proposed Scope, Proposed Terms or Proposed Cancellation do not comply with the requirements of Clauses 47.1 (Insurance Cover) or 47.7 (Requirements of Policies), state in what respect the Proposed Scope, Proposed Terms or Proposed Cancellation differ from those requirements and whether the Contractor considers that insurance policies in compliance with the requirements of Clauses 47.1 (Insurance Cover) and 47.7 (Requirements of Policies) cannot be obtained due to the particular risk becoming Uninsurable in which case the procedure set out in Clause 47.12 (Uninsurable Risks) shall apply.

47.10.2 The Authority shall, within 15 Business Days of receipt of any notice under Clause 47.10.1 in respect of Proposed Scope, Proposed Terms or Proposed

Cancellation which do not comply with Clauses 47.1 (Insurance Cover) or 47.7 (Requirement of Policies), advise the Contractor whether or not it approves the Proposed Scope, Proposed Terms or Proposed Cancellation in whole or in part.

- 47.10.3 If the Authority does not approve the Proposed Scope, Proposed Terms or Proposed Cancellation then the Parties shall negotiate in good faith and in consultation with their respective insurance advisers for a further period of 5 Business Days with a view to agreeing the scope and terms of the policy or the cancellation/non renewal matter, provided that in the absence of agreement the Authority shall be entitled to withhold its approval in its sole discretion and in that event, subject to Clause 47.12 (Uninsurable Risks), the Contractor shall immediately obtain the insurances which comply with the Authority's requirements pursuant to the provisions of Clauses 47.1 (Insurance Cover) and 47.7 (Requirements of Policies).

47.11 Disclosure

- 47.11.1 Each Party shall ensure that the following matters are disclosed to the insurers providing any insurance required pursuant to this Clause 47 (Insurance):
- (A) all information which such Party, acting in accordance with Good Industry Practice and in good faith, reasonably considers to be material to the relevant insurance and/or acting in accordance with the advice of its insurance advisers believes that the relevant insurers require, including details of any material change in the methods or procedures used in the performance of the Services and/or the Commercial Contracts and any of the Authority's activities; and/or
 - (B) all information which such insurers specifically request be disclosed.
- 47.11.2 Each Party shall put in place appropriate internal reporting procedures for the purposes of satisfying its obligations under Clause 47.11.1.
- 47.11.3 On request by a Party, the other Party shall supply the first Party with copies of any information supplied to insurers pursuant to this Clause 47.11 (Disclosure).
- 47.11.4 Where a Party is aware of any information which it would not reasonably expect to be known by the other Party but, if the same were known to such other Party, the first Party would expect the other Party to disclose to the insurers pursuant to Clause 47.11.1, the first Party shall, promptly upon becoming aware of the relevant information, provide details of the same to the other Party.

47.12 Uninsurable Risks

- 47.12.1 If a particular risk required to be insured under Part 1 of Schedule 23 (Insurance) becomes Uninsurable (not including, for the avoidance of doubt, insurances for non vitiation protection as required by Clause 47.11.1(B)) then:
- (A) the Contractor shall notify the Authority within 15 Business Days of the risk becoming Uninsurable; and
 - (B) if both Parties agree, or it is determined in accordance with Clause 68 (Dispute Resolution Procedure) that the risk is Uninsurable and that:
 - (1) the risk being Uninsurable is not caused by the actions of the Contractor or a Sub-contractor, and
 - (2) in respect of this Clause 47.12.1, the Contractor has demonstrated to the Authority that the Contractor 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 Contractor would in similar circumstances (in the absence of the type of relief envisaged by this Clause 47.12) 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 (including considering the issue of self insurance by either Party).

47.12.2 If the requirements of Clause 47.12.1 are satisfied, but the Parties cannot agree as to how to manage the risk, then:

- (A) in respect of third party liability insurance (as referred to in paragraphs 3 and 6 of Part 1 of Schedule 23 (Insurance)) only the Authority shall (at the Authority's option) either pay to the Contractor an amount equal to the amount set out in Clause 57 (Compensation on Termination for Force Majeure) and this Agreement will terminate, or elect to allow this Agreement to continue and Clause 47.12.2(B) shall thereafter apply in respect of such risk; and
- (B) in respect of the risks required to be insured under Part 1 of Schedule 23 (Insurance) this Agreement 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 Contractor an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Agreement will continue, or an amount equal to the amount set out in Clause 57 (Compensation on Termination for Force Majeure) plus (in relation to third party liability insurance only (as referred to in paragraphs 3 and 6 of Part 1 of Schedule 23 (Insurance))) the amount of insurance proceeds that would have been payable to the Contractor whereupon this Agreement will terminate.

47.12.3 In the event that a risk becomes Uninsurable the Contractor shall use reasonable endeavours to recover any insurance premiums paid in respect of such risk and shall promptly pay the amount so recovered to the Authority.

47.13 Copies

47.13.1 The Contractor shall:

- (A) in respect of the insurances set out in Part 1 of Schedule 23 (Insurance) provide the Authority with a copy of each insurance policy; and
- (B) in the case of all other insurances required pursuant to this Clause 47 (Insurance), a letter from the Contractor's insurance broker or (as appropriate) a letter from the insurance broker to the relevant Sub-contractor certifying receipt of premiums (which the Authority hereby acknowledges shall be sufficient proof that such premiums have been paid),

on request, and shall keep (or procure that its insurance broker keeps) the original copy of each policy required pursuant to this Clause 47 (Insurance) in a secure place.

47.13.2 During ordinary business hours, in respect of the insurances set out in Part 1 of Schedule 23 (Insurance), the Authority shall be entitled to inspect:

- (A) the original policies of insurance taken out and maintained, together with any other related documentation reasonably requested by the Authority; and
- (B) such evidence as the Authority may require that the premiums payable under the insurance policies have been paid and, by a cover note in a form satisfactory to the Authority, that the insurances are in full force and effect in accordance with the requirements of this Clause 47 (Insurance) and Schedule 23 (Insurance).

47.14 **Authority's Right to Insure**

47.14.1 If the Contractor fails to:

- (A) provide a notice where required in accordance with Clause 47.10.1;
- (B) obtain or maintain any insurance required under this Clause 47 (Insurance); or
- (C) comply with the provisions of any insurance policy, including any provision relating to the payment of premiums,

the Authority may provide the Contractor with notice in writing advising the Contractor of such failure and requiring (where rectification is possible) rectification of such default.

47.14.2 If after the expiry of 5 Business Days following the date of the Authority's notice, the Contractor has failed to rectify such default (or immediately on providing the notice, if rectification is not possible) the Authority shall, without prejudice to any of its other rights under this Agreement, have the right but not the obligation to procure the insurances that are due to be taken out or renewed pursuant to this Clause 47 (Insurance), or to rectify the default by paying any premiums required to keep the insurances in force.

47.14.3 The Authority shall be entitled to exercise its rights under this Clause 47.14 without providing notice where the Authority considers that unless such rights are exercised there will be a break in the cover of any insurance.

47.14.4 Any sum paid and any expense reasonably incurred by the Authority in accordance with this Clause 47.14 (Authority's Right to Insure) shall immediately become due and payable to the Authority by the Contractor.

47.15 **Undertakings and Indemnities**

47.15.1 No Party to this Agreement shall take or fail to take any reasonable action or (insofar as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) whereby any of the insurances maintained pursuant to this Clause 47 (Insurance) may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

47.15.2 The Contractor shall indemnify the Authority against any Claim or Loss incurred by the Authority to the extent that such Claims or Losses arise:

- (A) by reason of any insurance effected by the Contractor pursuant to this Clause 47 (Insurance) being vitiated or invalidated or payment under the same being reduced or withheld, in any such case, as a result of any act, omission, negligence or wilful default on the part of the Contractor, its Sub-contractors or any of its or their respective sub-contractors, agents or Contractor Employees; or
- (B) subject to Clause 47.12 (Uninsurable Risks), by reason of the failure by the Contractor to obtain any insurance required to be effected by it under the provisions of this Clause 47 (Insurance).

47.15.3 The Authority shall indemnify the Contractor against any Claim or Loss incurred by the Contractor to the extent that such Claims or Losses arise by reason of any insurance effected by the Contractor pursuant to this Clause 47 (Insurance) being vitiated or invalidated or payment under the same being reduced or withheld, in any such case, as a result of any act, omission, negligence or wilful default on the part of the Authority, its contractors, employees or agents.

47.16 Notification of Claims

47.16.1 The Contractor shall notify the Authority of any circumstances which may give rise to any claim with an estimated value in excess of £100,000 (adjusted for RPI) or which relates to death or serious personal injury to any person, with respect to any of the insurance policies referred to in paragraphs 1, 3, 4 and 6 of Part 1 of Schedule 23 (Insurance), promptly upon becoming aware of the same and shall keep the Authority fully informed of any subsequent developments.

47.16.2 If any insurer disputes any claim made under any of the insurances referred to in paragraphs 1, 3, 4 and 6 of Part 1 of Schedule 23 (Insurance), the Contractor shall liaise with the Authority and take such steps as the Authority may reasonably require to preserve or pursue the claim.

47.17 Joint Insurance Account

47.17.1 By the Effective Date the Parties shall open and maintain the Joint Insurance Account.

47.17.2 Subject to Clause 61.1.2(D), upon expiry or termination of this Agreement (as applicable) and following full discharge of all losses to which the sums held in the Joint Insurance Account relate, the Parties shall close the Joint Insurance Account and any excess funds shall be paid to the Authority.

47.18 Reinstatement

47.18.1 Subject to Clause 47.19 (No Reinstatement), all insurance proceeds received under any policy referred to in paragraphs 1 and 4 of Part 1 of Schedule 23 (Insurance) (the "**Physical Damage Policies**") shall be applied to repair, reinstate and replace each part or parts of the Insured Assets in respect of which the proceeds were received.

47.18.2 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 £500,000 (adjusted for RPI) shall be paid into the Joint Insurance Account. For the avoidance of doubt, the insurance proceeds paid under any third party liability

policy referred to in paragraphs 3 or 6 of Part 1 of Schedule 23 (Insurance) shall not be paid into the Joint Insurance Account.

- 47.18.3 Subject to Clause 47.19 (No Reinstatement), where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the "**Relevant Incident**") in an amount in excess of £500,000 (adjusted for RPI):
- (A) the Contractor shall deliver as soon as practicable and in any event within 20 Business Days after the making of the claim a plan prepared by the Contractor for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace (the "**Reinstatement Plan**") the Insured Assets which are the subject of the relevant claim or claims in accordance with Clause 47.18.4 below. The Reinstatement Plan shall set out:
 - (1) the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Authority; and
 - (2) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date on which any affected Service will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority;
 - (B) provided that the Authority is satisfied that the Reinstatement Plan will enable the Contractor to comply with Clause 47.18.4 below within a reasonable timescale:
 - (1) the Reinstatement Plan will be adopted. The Authority shall notify the Contractor within 15 Business Days of receipt of the Reinstatement Plan whether or not it will be adopted;
 - (2) the Contractor shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the approved Reinstatement Plan approved by the Authority;
 - (3) 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 Contractor 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 47.18.3(B)(2) above, and to meet any other reasonable costs and expenses of the Contractor for the sole purposes of funding the Reinstatement Works. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Works;
 - (4) the Authority agrees and undertakes that, subject to compliance by the Contractor with its obligations under this Clause 47.18, and provided that the Contractor procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 47.18.3(B)(2), it

shall not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;

- (5) the Authority undertakes to use reasonable endeavours to assist the Contractor in the carrying out of the Reinstatement Plan; and
- (6) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with Clause 47.18.4 below the Authority shall permit withdrawal by the Contractor of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under Clause 47.18.3(B)(3) above, in respect of the Relevant Incident, together with any interest accrued.

47.18.4 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate, or replace any Insured Assets, the Contractor shall carry out the work in accordance with the Statement of Requirements so that on completion of the work, the provisions of this Agreement are complied with.

47.19 No Reinstatement

47.19.1 The Authority shall notify the Contractor in writing if, within 20 Business Days of damage or destruction occurring to any Insured Assets, the Authority decides, at its option, that it does not require the Contractor to reinstate the relevant Insured Assets in which case the Authority shall be deemed to have requested an Authority Service Variation and to have served an Authority Notice of Service Variation pursuant to Clause 36.3 (Authority Notice of Service Variation) and the provisions of Clause 36.4 (Authority Service Variation Objection Notice) to 36.13 (Implementation of Authority Service Variation) shall apply. In such circumstances the Authority Service Variation shall be to remove the Insured Assets to the extent damaged or destroyed from the scope of the Project.

47.19.2 If the Contractor demonstrates that it is not reasonably practicable on engineering, construction or other technical grounds for the relevant Insured Assets to be reinstated, the Authority shall notify the Contractor that it does not require the Contractor to reinstate the relevant Insured Assets in which case the Authority shall be deemed to have requested an Authority Service Variation pursuant to Clause 36.3 (Authority Notice of Service Variation) and the provisions of Clause 36.4 (Authority Service Variation Objection Notice) to 36.13 (Implementation of Authority Service Variation) shall apply. In such circumstances the Authority Service Variation shall be to remove the Insured Assets to the extent damaged or destroyed from the scope of the Project. If the Authority does not accept that the relevant Insured Assets cannot be reinstated, either Party may refer the matter to the Dispute Resolution Procedure.

47.19.3 Any insurance proceeds paid in the circumstances described in Clauses 47.19.1 or 47.19.2 which relate to the damage or destruction of any asset shall be paid to the Authority.

47.20 No Relief

Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Contractor in respect of its liabilities and obligations under this Agreement.

47.21 Review of Insurance Costs

47.21.1 In relation to the Relevant Insurances referred to in Part 1 of Schedule 23 (Insurance) (the "**Part 1 Relevant Insurances**") it is agreed that at the Execution Date the amount provided for insurance costs for each year of the Project in the Financial Model (the "**Base Price**") is as specified below.

Year	Base Price
Effective Date to 1st anniversary of the Effective Date	£2,451,603
1st anniversary of the Effective Date to 2nd anniversary of the Effective Date	£568,508
2nd anniversary of the Effective Date to 3rd anniversary of the Effective Date	£568,508
3rd anniversary of the Effective Date to 4th anniversary of the Effective Date	£568,508
4th anniversary of the Effective Date to 5th anniversary of the Effective Date	£568,508
5th anniversary of the Effective Date to 6th anniversary of the Effective Date	£568,508
6th anniversary of the Effective Date to 7th anniversary of the Effective Date	£568,508
7th anniversary of the Effective Date to 8th anniversary of the Effective Date	£568,508
8th anniversary of the Effective Date to 9th anniversary of the Effective Date	£568,508
9th anniversary of the Effective Date to 10th anniversary of the Effective Date	£568,508
10th anniversary of the Effective Date to the end of the Initial Service Period	£284,254

47.21.2 The Contractor shall no later than the date which is 30 Business Days prior to the relevant Insurance Costs Review Date, deliver to the Authority a Renewal Quotation for such Part 1 Relevant Insurances from not less than three reputable insurers of good standing in the worldwide insurance market unless there are fewer than three reputable insurers of good standing willing and able to quote, in which case the Contractor shall approach those who are willing and able to quote and shall advise the Authority of those Renewal Quotations.

47.21.3 Following notification to the Authority under this Clause 47.21 the Authority and the Contractor shall endeavour to agree which of the Renewal Quotations shall be accepted by the Contractor. If they shall fail to reach such agreement 15 Business Days prior to the Insurance Costs Review Date, the lowest of the Renewal Quotations obtained by the Contractor under Clause 47.21.2 shall be accepted by the Contractor unless either Party considers (or it is determined pursuant to Clause 68 (Dispute Resolution Procedure) that the provider of the lowest of the Renewal Quotations is not an acceptable insurer or the Parties agree or it is determined pursuant to Clause 68 (Dispute Resolution Procedure) that the cover is materially inferior.

47.21.4 In the event that the accepted or determined Renewal Quotation referred to in Clause 47.21.3 is lower than the Base Price (adjusted for RPI) for the relevant

year or part year (the amount of such difference being the "**Insurance Saving**"), the Authority shall be entitled to 85% of the Insurance Saving and the Contractor shall be entitled to 15% of the Insurance Saving and the Contractor shall, within 20 Business Days of such acceptance or determination, make an appropriate payment to the Authority or, if the Parties so agree, the Financial Model shall be updated to reflect such acceptance or determination and the appropriate elements of the Service Charge (adjusted for RPI) shall be reduced accordingly.

- 47.21.5 In the event that the accepted or determined Renewal Quotation referred to in Clause 47.21.3 exceeds the Base Price (adjusted for RPI) for the relevant year or part year, the Authority shall, within 20 Business Days of such acceptance or determination, make an appropriate payment to the Contractor of an amount calculated by reference to the following table or, if the Parties so agree, the Financial Model shall be updated to reflect the increase from the Base Price by an amount calculated by reference to the following table and the appropriate elements of the Service Charge shall be increased accordingly.

Percentage amount by which the Renewal Quotation exceeds the Base Price (adjusted for RPI):		Contractor Share (%)	Authority Share (%)
Increase	0 – 10	100	0
	10 – 300	15	85
	300 and above	0	100

- 47.21.6 If the Renewal Quotation at any time exceeds the Base Price (adjusted for RPI) for the relevant year or part year but is less than 10% more than the Base Price (adjusted for RPI) for the relevant year or part year (the amount by which the Renewal Quotation is less than 10% more than the Base Price (adjusted for RPI) for the relevant year or part year being the "**Insurance Shortfall**"), the Contractor shall promptly pay the Insurance Shortfall to the Authority. The Contractor shall use reasonable endeavours to minimise the level of any Renewal Quotation.
- 47.21.7 The Authority shall only be liable under Clause 47.21.5 to the extent that any increases in the actual cost of Part 1 Relevant Insurances are not caused by any act or omission by the Contractor or any sub-contractor (or its or their respective sub-contractors), Contractor Employees or agents.
- 47.21.8 In the event that the percentage by which the Renewal Quotation exceeds the Base Price (adjusted for RPI) is greater than 300%, the parties shall meet to discuss the means by which the increase could be mitigated, which shall include, without limitation, the extent to which the scope of the Part 1 Relevant Insurances can be changed.

PART XI – TERMINATION

48. TYPES OF TERMINATION

- 48.1 This Agreement shall terminate either on the Expiry Date or as a result of:
- 48.1.1 voluntary and non default termination by the Authority in accordance with Clause 49 (Voluntary and Non Default Termination);
 - 48.1.2 early termination caused by default by the Authority in accordance with Clause 50 (Termination for Authority Default);
 - 48.1.3 early termination caused by default by the Contractor in accordance with Clause 51 (Termination for Contractor Default);
 - 48.1.4 termination for long term force majeure in accordance with Clause 46 (Force Majeure);
 - 48.1.5 termination for corrupt gifts or fraud in accordance with Clause 52 (Termination for Corrupt Gifts and Fraud); or
 - 48.1.6 termination for breach of the refinancing provisions in accordance with Clause 53 (Termination for Breach of the Refinancing Provisions).

49. VOLUNTARY AND NON DEFAULT TERMINATION

49.1 Voluntary Termination by the Authority

- 49.1.1 The Authority may terminate this Agreement at any time on or before its Expiry Date by complying with its obligations under Clauses 49.1.2 to 49.1.3.
- 49.1.2 If the Authority wishes to terminate this Agreement under this Clause 49, it must give written notice to the Contractor stating:
 - (A) that the Authority is terminating this Agreement under this Clause 49.1 (Voluntary Termination by the Authority); and
 - (B) that this Agreement will terminate on the date falling 20 Business Days after the date of receipt of the notice.
- 49.1.3 This Agreement will terminate on the date falling 20 Business Days after the date of receipt by the Contractor of the written notice referred to in Clause 49.1.2 above.

49.2 Compensation on Voluntary Termination

On termination under Clause 49.1.3 above the Authority shall pay the Contractor an amount equal to the amount payable under Clause 55 (Compensation on Termination for Authority Default) in accordance with Clause 59 (Calculation and Payment of Termination Payments).

50. TERMINATION FOR AUTHORITY DEFAULT

50.1 Authority Default

The following events shall be an Authority Default:

- 50.1.1 an expropriation, sequestration or requisition of a material part of the Authority Default Assets and/or shares of the Contractor or HoldCo by the Authority or other Relevant Authority; or
- 50.1.2 a failure by the Authority to make payment of any amount of money exceeding £1 million (adjusted for RPI) that is due and payable by the Authority to the

Contractor under this Agreement within 30 days of service of a formal written demand by the Contractor, where that amount fell due and payable 1 or more months prior to the date of service of the written demand; or

50.1.3 a breach by the Authority of its obligations under this Agreement which substantially frustrates or renders it impossible for the Contractor to perform its obligations under this Agreement for a continuous period of 2 months; or

50.1.4 a breach by the Authority of Clause 63 (Assignment) occurs.

50.2 Termination on Authority Default

50.2.1 If an Authority Default has occurred and the Contractor wishes to terminate this Agreement, it must serve a termination notice on the Authority within 35 Business Days of becoming aware of the Authority Default.

50.2.2 The termination notice must specify the type of Authority Default which has occurred entitling the Contractor to terminate.

50.2.3 The Agreement will terminate on the day falling 22 Business Days after the date the Authority receives the termination notice, unless the Authority rectifies the Authority Default within 20 Business Days of receipt of the termination notice.

50.3 Compensation

On termination of this Agreement under Clause 50.2 (Termination on Authority Default), the Authority shall pay the Contractor the amount payable under Clause 55 (Compensation on Termination for Authority Default) calculated in accordance with Clause 59 (Calculation and Payment of Termination Payments).

51. TERMINATION FOR CONTRACTOR DEFAULT

51.1 Contractor Default

Each of the following events shall be a Contractor Default:

51.1.1 a breach by the Contractor of any of its obligations under this Agreement which materially and adversely affects the performance of the Services;

51.1.2 a court makes an order that the Contractor be wound up or a resolution for a voluntary winding up of the Contractor is passed;

51.1.3 any receiver or manager in respect of the Contractor is appointed or possession is taken by or on behalf of any creditor of any property that is a subject of a charge;

51.1.4 any voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 or the Companies Act 1985;

51.1.5 an administration order is made;

51.1.6 a breach of Clauses 24.2.1 or 24.3.1 occurs;

51.1.7 a breach by the Contractor of its obligations in Clause 63.2 (Assignment by the Contractor) occurs;

51.1.8 a breach of Clause 64.1 (No Change) occurs;

51.1.9 the abandonment of the Project by the Contractor;

51.1.10 a failure to achieve the Build Completion Date by the Longstop Date;

51.1.11 the accumulation of, in respect of:

(A) Availability Service Credits:

- (1) 100 or more Service Credits in any period of 3 consecutive Contract Months;
- (2) 200 or more Service Credits in any period of 12 consecutive Contract Months; or
- (3) 300 or more Service Credits in any period of 3 consecutive years,
- (B) Service Credits in respect of Notice Periods:
 - (1) 300 or more Service Credits in any period of 3 consecutive Contract Months;
 - (2) 600 or more Service Credits in any period of 12 consecutive Contract Months; or
 - (3) 900 or more Service Credits in any period of 3 consecutive years,
- (C) Service Credits in respect of Non Compliance:
 - (1) 300 or more Service Credits in any period of 3 consecutive Contract Months;
 - (2) 600 or more Service Credits in any period of 12 consecutive Contract Months; or
 - (3) 1000 or more Service Credits in any period of 3 consecutive years,

provided that:

 - (a) in calculating the number of Service Credits for each period in Clause 51.1.11(A) to (C) (inclusive), any Service Credits awarded three years or more prior to commencement of the relevant period shall be disregarded from such calculation; and
 - (b) notwithstanding the provisions of Clauses 32.2.3 and 46.2 (Entitlements), Service Credits attributable to any Relief Event or any Force Majeure Event shall be disregarded for the purpose of this Clause 51.1.11; or

51.1.12 a breach by the Contractor of its obligation to take out and maintain all Part 1 Relevant Insurances pursuant to Clause 47 (Insurance).

51.2 Termination or Rectification

51.2.1 If a Contractor Default has occurred and the Authority wishes to terminate this Agreement, it must serve a termination notice on the Contractor.

51.2.2 The termination notice must specify:

- (A) the type and nature of Contractor Default that has occurred, giving reasonable details; and
- (B) subject to Clause 51.2.6, that this Agreement will terminate on the day falling 40 Business Days after the date the Contractor receives the termination notice, unless the Contractor puts forward an acceptable rectification programme (the "**Rectification Programme**") within 20 Business Days (and implements such Rectification Programme in accordance with its terms and rectifies the Contractor Default in accordance with the Rectification Programme) or rectifies the Contractor

Default within 40 Business Days or the provisions of the Lenders' Direct Agreement apply to prevent termination.

- 51.2.3 If the Contractor either rectifies the Contractor Default within the time period specified in the termination notice, or implements the Rectification Programme, if applicable, in accordance with its terms, the termination notice will be deemed to be revoked and this Agreement will continue.
- 51.2.4 If the Contractor fails to rectify the Contractor Default within the time period specified in the termination notice (or in accordance with any accepted Rectification Programme), this Agreement will, subject to the terms of the Lenders' Direct Agreement, terminate on the date falling 40 Business Days after the date of receipt of the termination notice.
- 51.2.5 If the Contractor fails to implement any Rectification Programme in accordance with its terms, this Agreement will, subject to the terms of the Lenders' Direct Agreement, terminate on the date falling 40 Business Days after the date of notification to the Contractor.
- 51.2.6 Where an event of Contractor Default occurs under Clauses 51.1.2 to 51.1.5, 51.1.9, 51.1.10 or 51.1.11, the Authority shall specify this in the termination notice and this Agreement shall (subject to the terms of the Lenders' Direct Agreement) terminate on the date falling 40 Business Days after the date of receipt by the Contractor of the termination notice.

51.3 **Rectification Programme**

- 51.3.1 The Rectification Programme shall specify in detail how the Contractor Default is proposed to be remedied and the latest date by which the Contractor anticipates that the Contractor Default will be remedied.
- 51.3.2 Where the Contractor proposes a Rectification Programme in accordance with Clause 51.2.2(B), the Authority shall have 20 Business Days within which to notify the Contractor whether the Authority accepts the proposed Rectification Programme (such acceptance not to be unreasonably withheld). Failure of the Authority to provide such notification shall constitute deemed acceptance by the Authority. Where the Authority notifies the Contractor that it does not accept the Rectification Programme, the Parties shall endeavour within the following 5 Business Days to agree any necessary amendments to the Rectification Programme. In the absence of agreement within such 5 Business Day period, the question of whether or not the Authority's withholding of acceptance is reasonable may be referred by either Party to the Dispute Resolution Procedure.
- 51.3.3 If:
 - (A) the Contractor Default is not remedied:
 - (1) before the expiry of the period referred to in Clause 51.2.2(B); or
 - (2) in accordance with a Rectification Programme which is accepted by the Authority or is rejected by the Authority and the Dispute Resolution Procedure determines that the rejection is not reasonable; or
 - (B) the Rectification Programme proposed by the Contractor is rejected by the Authority and the Dispute Resolution Procedure determines that such rejection is reasonable,

this Agreement shall (subject to the terms of the Lenders' Direct Agreement) terminate on the expiry of the period (being not less than 45 Business Days) specified in a written notice from the Authority to the Contractor after receipt of which the Contractor shall make any necessary amendments to update the Handback Plan previously prepared in accordance with Clause 60.1.3.

51.4 Compensation

On termination of this Agreement under Clause 51 (Termination for Contractor Default), the Authority shall pay the Contractor the amount payable under Clause 56 (Compensation on Termination for Contractor Default) calculated in accordance with Clause 59 (Calculation and Payment of Termination Payments).

52. TERMINATION FOR CORRUPT GIFTS AND FRAUD

52.1 Contractor Warranty and Undertaking

The Contractor warrants that in entering into this Agreement it has not committed any Prohibited Act.

52.2 Termination for Corrupt Gifts and Fraud

52.2.1 If the Contractor 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 52.2.2 to 52.2.7 below.

52.2.2 If a Prohibited Act is committed by the Contractor or by an employee not acting independently of the Contractor, the Authority may terminate this Agreement by giving notice to the Contractor.

52.2.3 If the Prohibited Act is committed by an employee of the Contractor acting independently of the Contractor, then the Authority may give notice to the Contractor of termination and this Agreement will terminate unless within 20 Business Days of receipt of such notice the Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Services by another person.

52.2.4 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 Contractor of termination and this Agreement will terminate unless within 20 Business Days of receipt of such notice the Contractor terminates the relevant sub-contract and procures the performance of such part of the Services by another person.

52.2.5 If the Prohibited Act is committed by an employee of a Sub-contractor acting independently of that Sub-contractor, the Authority may give notice to the Contractor of termination and this Agreement will terminate unless within 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.

52.2.6 If the Prohibited Act is committed by a person not falling within Clauses 52.2.2 to 52.2.5 above, then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within 20 Business Days of receipt of such notice, the Contractor procures the termination of such person's employment and of the appointment of their employer (where not employed by

the Contractor or any Sub-contractor) and (if necessary) procures the performance of such part of the Services by another person.

52.2.7 Any notice of termination under this Clause 52 (Termination for Corrupt Gifts and Fraud) shall specify:

- (A) the nature of the Prohibited Act;
- (B) the identity of the person whom the Authority believes has committed the Prohibited Act; and
- (C) the date on which this Agreement will terminate, in accordance with the applicable provision of this Clause 52 (Termination for Corrupt Gifts and Fraud).

52.2.8 In this Clause 52.2 (Termination for Corrupt Gifts and Fraud), "**acting independently**" shall mean where a person does not act under the authority of or with the knowledge of a director of the Contractor or a Sub-contractor (as applicable) and "**not acting independently**" shall be construed accordingly.

52.3 **Compensation**

On termination of this Agreement under Clause 52.2 (Termination for Corrupt Gifts and Fraud), the Authority shall pay the Contractor the amount payable under Clause 58 (Compensation on Termination for Corrupt Gifts and Fraud) calculated in accordance with Clause 59 (Calculation and Payment of Termination Payments).

53. **TERMINATION FOR BREACH OF THE REFINANCING PROVISIONS**

53.1 **Breach of the Refinancing Provisions**

53.1.1 If the Contractor wilfully breaches Clause 34 (Refinancing), then the Authority may terminate this Agreement at any time on or before its Expiry Date by complying with its obligations under Clauses 53.1.2 to 53.1.3 below.

53.1.2 If the Authority wishes to terminate this Agreement under this Clause 53.1 (Breach of the Refinancing Provisions), it must give notice to the Contractor stating:

- (A) that the Authority is terminating this Agreement under this Clause 53 (Termination for Breach of the Refinancing Provisions); and
- (B) that this Agreement will terminate on the date falling 20 Business Days after the date of receipt of the notice.

53.1.3 This Agreement will terminate on the date falling 20 Business Days after the date of receipt of the notice referred to in Clause 53.1.2 above.

53.2 **Compensation on Termination for Breach of the Refinancing Provisions**

On termination under Clause 53.1.3 above, the Authority shall pay the Contractor an amount equal to the amount payable under Clause 58 (Compensation on Termination for Corrupt Gifts and Fraud) in accordance with Clause 59 (Calculation and Payment of Termination Payments).

54. **SURVIVAL OF RIGHTS AND OBLIGATIONS**

54.1 **Survival of Provisions**

Clauses 1, 4, 6, 26 to 30 (inclusive), 39 to 42 (inclusive), 44, 45, 47.17.2, 49.2, 50.3, 51.4, 52.3, 53.2, 54 to 62 (inclusive), 65 to 68 (inclusive), 70, 71, 73, 76, 78 and 79 and such

other provisions as are expressed to survive termination of this Agreement (the "**Surviving Clauses**") shall survive termination or expiry of this Agreement.

54.2 Rights and Obligations

Save as expressly provided in this Agreement, any Project Document or any Ancillary Document to which the Authority is a party, upon expiry or termination of this Agreement (for whatever cause):

54.2.1 any accrued rights or obligations to which either the Authority or the Contractor may be entitled or be subject to before such date shall remain in full force and effect; and

54.2.2 termination of this Agreement shall not affect or prejudice any right to damages or other remedy which the terminating Party may have in respect of the event giving rise to the termination or any right to damages or other remedy which either Party may have in respect of any breach of this Agreement which existed at or before the Termination Date.

54.3 Ceasing of Rights and Obligations

Save as provided for in Clause 54.1 (Survival of Provisions) and 54.2 (Rights and Obligations), all rights and obligations of the Authority and the Contractor under this Agreement shall cease and be of no further force and effect upon expiry or termination of this Agreement.

55. COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT

55.1 Calculation of Compensation

On termination of this Agreement under Clause 50 (Termination for Authority Default) the Authority shall pay the Contractor the "**Authority Default Termination Sum**" in accordance with Clause 59 (Calculation and Payment of Termination Payments). Subject to Clauses 55.2.1 to 55.2.3 below the Authority Default Termination Sum shall be an amount equal to the aggregate of:

55.1.1 the Base Senior Debt Termination Amount;

55.1.2 redundancy payments for Contractor Employees that have been or will be reasonably incurred by the Contractor as a direct result of termination of this Agreement and any Sub-contractor Breakage Costs; and

55.1.3 the aggregate amount for which the share capital of the Contractor and the amounts outstanding under the Subordinated Financing Agreements could have been sold on an open market basis based on the Relevant Assumptions;

55.1.4 Commercial Contract Breakage Costs not exceeding £5 million; and

55.1.5 all credit balances in the Retention Fund Account (save for the Projected Leased Assets Amount if applicable on the Termination Date and save for any amounts required to perform the Remedial Handback Works or to effect any of the recommendations of the System Capability Report which the Authority shall be entitled to retain),

less (provided and to the extent that it does not reduce the compensation payable below the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount, as the case may be)

55.1.6 the cost of removing any Assets which have not been removed by the Contractor in accordance with a Non-Service Instance Asset Removal Notice and/or an

Aerial Infrastructure Removal Notice served by the Authority on the Contractor pursuant to Clauses 15.4 (Removal of Non Service Instance Assets) and 15.5 (Removal of Aerial Infrastructure or Aerial Electronics) prior to any termination notice; and

55.1.7 the aggregate of any amounts under Clause 62.6.3 and 62.6.4.

55.2 Effect of APBs

55.2.1 If the aggregate of the amounts referred to in Clauses 55.1.1 and 55.1.3 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 55.1.2 and provided always that:

- (A) the amount referred to in Clause 55.1.2 shall only be paid to the extent that the Contractor 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
- (B) 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 Contractor to terminate such Sub-contract.

55.2.2 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under clause 11(d)(iv)(a) of the Lenders' 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.

55.2.3 If the Contractor has wilfully or through gross negligence failed to comply with its obligations under clause 11(d)(iv)(b) of the Lenders' Direct Agreement and there has been an overstatement of the cash balances by the Contractor 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 55, 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.

55.3 Compensation less than Zero

Subject to Clause 59.1.2, if the compensation payable by the Authority pursuant to Clauses 55.1 and 55.2 is less than zero then the amount by which the compensation is less than zero shall be deemed to be zero.

56. COMPENSATION ON TERMINATION FOR CONTRACTOR DEFAULT

On termination of this Agreement pursuant to Clause 51 (Termination for Contractor Default) the Authority shall pay to the Contractor, in accordance with Clause 59

(Calculation and Payment of Termination Payments), compensation calculated in accordance with this Clause 56 (Compensation on Termination for Contractor Default).

56.1 Procedure

Upon termination of this Agreement pursuant to Clause 51 (Termination for Contractor Default) the Authority shall require the level of compensation to be agreed or determined in accordance with the procedure for no retendering set out in Clause 56.2 (the "**No Retendering Procedure**").

56.2 No Retendering Procedure

Upon the No Retendering Procedure being followed by the Authority the following shall apply:

56.2.1 in agreeing or determining the Estimated Fair Value of the Agreement the Parties shall be obliged to follow the principles set out below:

- (A) 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 Agreement;
- (B) the total of all future payments of the Service Charge (without deductions) forecast to be made shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate;
- (C) 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 56.2.1(B), 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 to the standard required; and
 - (3) any rectification costs required to deliver the Services (as applicable) to the standard required (including any costs forecast to be incurred by the Authority to complete any installation work, 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 Service Charge referred to in Clause 56.2.1(B) above;

56.2.2 if the Parties cannot agree on the Adjusted Estimated Fair Value of the Agreement on or before the date falling 30 Business Days after termination of this Agreement pursuant to Clause 51 (Termination for Contractor Default), then the Adjusted Estimated Fair Value of the Agreement shall be determined in accordance with Clause 68 (Dispute Resolution Procedure);

56.2.3 the Authority shall pay to the Contractor an amount equal to the Adjusted Estimated Fair Value of the Agreement together with the Termination Adjustment as referred to in Clause 56.3 on the date falling 40 Business Days after the date on which the Adjusted Estimated Fair Value of the Agreement has been agreed or determined in accordance with this Clause 56.2 (No Retendering Procedure);

- 56.2.4 the discharge by the Authority of its obligation in Clause 56.2.3 is in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Agreement, Project Documents or any Ancillary Documents to which the Authority is a party 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 been taken into account in determining the Adjusted Estimated Fair Value of the Agreement; and
- 56.2.5 to the extent that the Adjusted Estimated Fair Value of the Agreement is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Agreement shall be due and payable by the Contractor to the Authority on the Compensation Date.

56.3 Termination Adjustment

- 56.3.1 The sum payable by the Authority to the Contractor pursuant to Clause 56.2 (No Retendering Procedure) (if any) shall, where the Termination Adjustment is a positive sum, be increased by the Termination Adjustment and, where the Termination Adjustment is a negative sum, be reduced by the Termination Adjustment.
- 56.3.2 The sum payable by the Contractor to the Authority pursuant to Clause 56.2 (if any) shall, where the Termination Adjustment is a negative sum be increased by the Termination Adjustment and, where the Termination Adjustment is a positive sum, be reduced by the Termination Adjustment.

57. COMPENSATION ON TERMINATION FOR FORCE MAJEURE

57.1 Calculation of Compensation

- 57.1.1 On termination of this Agreement under Clause 46 (Force Majeure), the Authority shall pay to the Contractor the "**Force Majeure Termination Sum**" in accordance with Clause 59 (Calculation and Payment of Termination Payments). Subject to Clauses 57.1.2 to 57.1.4 below the Force Majeure Termination Sum shall be the amount equal to the aggregate of:
- (A) the Base Senior Debt Termination Amount;
 - (B) the Junior Debt less an amount equal to the aggregate of payments of interest and principal made by the Contractor under the Subordinated Financing Agreements;
 - (C) all amounts paid to the Contractor by way of subscription for shares in the capital of the Contractor less dividends and other distributions paid to the Shareholders of the Contractor (save to the extent deducted under (B) above);
 - (D) redundancy payments for Contractor Employees that have been or will be reasonably incurred by the Contractor as a direct result of termination of this Agreement and any Sub-contractor Breakage Costs; and
 - (E) all credit balances in the Retention Fund Account (save for the Projected Leased Assets Amount if applicable on the Termination Date and save for any amounts required to perform the Remedial Handback Works or to effect any of the recommendations of the System Capability Report which the Authority shall be entitled to retain),

less (provided and to the extent that it does not reduce the compensation payable below the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount, as the case may be)

- (F) the cost of removing any Assets which have not been removed by the Contractor in accordance with a Non Service Instance Asset Removal Notice and/or an Aerial Infrastructure Removal Notice served by the Authority on the Contractor pursuant to Clauses 15.4 (Removal of Non Service Instance Assets) and 15.5 (Removal of Aerial Infrastructure or Aerial Electronics) prior to any termination notice; and
- (G) the aggregate of any amounts under Clause 62.6.3 and 62.6.4.

If the amounts referred to in Clauses 57.1.1(B) and/or (C) are less than zero, then, for the purposes of the calculation in Clause 57.1 (Calculation on Compensation) they shall be deemed to be zero.

57.1.2 If the aggregate of the amounts referred to in Clauses 57.1.1 (A), (B) and (C) 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 57.1.1(D) provided always that:

- (A) the amounts referred to in Clause 57.1.1 (D) shall only be paid to the extent that the Contractor 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
- (B) 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 Contractor to terminate such Sub-contract.

57.1.3 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under clause 11 (d)(iv)(a) of the Lenders' 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.

57.1.4 If the Contractor has wilfully or through gross negligence failed to comply with its obligations under clause 11 (d)(iv)(b) of the Lenders' Direct Agreement and there has been an overstatement of the cash balances by the Contractor 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 57.1 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.

57.1.5 Such amount shall be determined and paid in accordance with Clause 59 (Calculation and Payment of Termination Payments).

57.2 Compensation less than Zero

Subject to Clause 59.1.2, if the compensation payable by the Authority pursuant to Clause 57.1 (Calculation of Compensation) is less than zero then the amount by which the compensation is less than zero shall be deemed to be zero.

58. COMPENSATION ON TERMINATION FOR CORRUPT GIFTS AND FRAUD

58.1 Calculation of Compensation

On termination of this Agreement in accordance with Clause 52 (Termination for Corrupt Gifts and Fraud), then the Authority shall pay to the Contractor, an amount equal to:

58.1.1 the Revised Senior Debt Termination Amount; and

58.1.2 all credit balances in the Retention Fund Account (save for the Projected Leased Assets Amount if applicable on the Termination Date and save for any amounts required to perform the Remedial Handback Works or to effect any of the recommendations of the System Capability Report which the Authority shall be entitled to retain),

less (provided and to the extent that it does not reduce the compensation payable below the Revised Senior Debt Termination Amount)

58.1.3 the cost of removing any Assets which have not been removed by the Contractor in accordance with a Non Service Instance Asset Removal Notice and/or an Aerial Infrastructure Removal Notice served by the Authority on the Contractor pursuant to Clauses 15.4 (Removal of Non Service Instance Assets) and 15.5 (Removal of Aerial Infrastructure or Aerial Electronics) prior to any termination notice; and

58.1.4 the aggregate of any amounts under Clause 62.6.3 and 62.6.4.

58.2 Such amount shall be determined and paid in accordance with Clause 59 (Calculation and Payment of Termination Payments).

58.3 Compensation less than Zero

Subject to Clause 59.1 (Set Off), if the compensation payable by the Authority pursuant to Clause 58.1 (Calculation of Compensation) is less than zero then the amount by which the compensation is less than zero shall be deemed to be zero.

59. CALCULATION AND PAYMENT OF TERMINATION PAYMENTS

59.1 Set Off

59.1.1 Subject to Clause 59.1.2, all payments to be made by the Authority to the Contractor pursuant to Clauses 49.2 (Compensation on Voluntary Termination), 53.2 (Compensation on Termination for Breach of the Refinancing Provisions), 55 (Compensation on Termination for Authority Default), 56 (Compensation on Termination for Contractor Default), 57 (Compensation on Termination for Force Majeure) or 58 (Compensation on Termination for Corrupt Gifts and Fraud) (any such sum referred to in this paragraph as the "**Termination Payment**") shall be made without any set off or deduction save as expressly provided in this Agreement and save also in respect of sums payable by the Contractor to the Authority under this Agreement prior to the Termination Date.

59.1.2 Except where expressly stated otherwise, the Authority is not entitled to set off any amount against any payment of termination compensation to be made by the Authority to the Contractor pursuant to Clauses 49.2 (Compensation on

Voluntary Termination), 53.2 (Compensation on Termination for Breach of the Refinancing Provisions), 55 (Compensation on Termination for Authority Default), 57 (Compensation on Termination for Force Majeure) or 58 (Compensation on Termination for Corrupt Gifts and Fraud), 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.

59.2 Grossing up

59.2.1 If any amount of compensation payable by the Authority under Clauses 49.2 (Compensation on Voluntary Termination), 53.2 (Compensation on Termination of Breach of the Refinancing Provisions), 55 (Compensation on Termination for Authority Default), 57 (Compensation on Termination for Force Majeure), 58 (Compensation on Termination for Corrupt Gifts and Fraud) is subject to Tax payable to a Relevant Authority in the United Kingdom, then the Authority shall pay to the Contractor such additional amount as will put the Contractor 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 Contractor to reduce the Tax to which the payment is subject.

59.2.2 The Contractor shall, to the extent reasonably necessary, keep the Authority informed of all material aspects of negotiations with HM Revenue and Customs relating to any liability for Taxation in respect of any Termination Payment. The Contractor shall not agree, accept or compromise any claim or issue or dispute relating to such liability without the prior written consent of the Authority which shall not be unreasonably withheld (and notification of such consent or withholding of consent (as the case may be) shall be given within 10 Business Days of the Contractor's request for consent by the Authority unless the Contractor requests that the Authority respond within a shorter period of time in circumstances where the Contractor's ability to agree, accept or compromise the dispute would otherwise be prejudiced). The Authority may, if it considers in good faith that such action is justified having regard to the likely costs and benefits and upon indemnifying the Contractor in respect of all and any reasonable costs and expenses properly incurred, including penalties and interest relating to Tax, direct the Contractor to resist, appeal, defend or otherwise dispute any assessment relating to its liability for Taxation in respect of the Termination Payment. However, if the Contractor obtains professional advice from a person with relevant expertise that any resistance, appeal, defence or other mode of dispute is not likely to result in any diminution of the liability of Taxation, the Contractor need not continue such resistance, appeal, defence or other mode of dispute.

59.2.3 The increased amount which is payable under Clause 59.2.1 shall be determined upon the following assumptions and bases:

- (A) the Project comprises the sole trade and business of the Contractor;
- (B) the assets and equipment held, owned, hired, leased or otherwise used by the Contractor for the purposes of the Project comprise the sole assets and equipment of the Contractor;

(C) that full account shall be taken of any unrelieved trading losses or other reliefs of the Contractor arising from the Project which can be set off against Taxation in respect of the Termination Payment; and

(D)

(1) losses or other amounts arising from the Project which have been surrendered by the Contractor by way of group relief or consortium relief shall be assumed for these purposes not to have been surrendered and to remain available as carried forward trading losses or other reliefs to the extent that they would be so available had they not been so surrendered; and

(2) losses or other amounts eligible for surrender to the Contractor by way of group relief or consortium relief shall not be regarded as available to the Contractor to reduce Tax chargeable in respect of the Termination Payment.

59.2.4 Subject to the remainder of this Clause 59.2 the additional payment under Clause 59.2.1 shall be made on the later of:

(A) 5 Business Days before the Contractor's liability for Taxation in respect of the Termination Payment is due and payable; and

(B) 5 Business Days after the amount of the Contractor's liability for Taxation in respect of the Termination Payment is finally and conclusively determined. For this purpose, the amount of the Contractor's liability for Taxation shall be deemed to be finally and conclusively determined when, in respect of such amount, an agreement under Section 54 of the Taxes Management Act 1970 is made, or a decision of a court or tribunal is given or any binding agreement or determination is made from which either no appeal lies or in respect of which no appeal is made within the prescribed time limit.

If and to the extent that such liability is reduced by a claim, loss or relief which does not arise from the Project, Taxation shall be deemed for the purposes of this Clause 59 to be due and payable in respect of the Termination Payments and, for the purposes of this Clause 59.2.4, shall be deemed to be due and payable on the date when it would have been due and payable in the absence of such claim, loss or relief and to the same extent as if such claim, loss or relief had not been available.

59.2.5 If any payment under this Clause 59.2 (Grossing Up) is consideration for a taxable supply for VAT purposes, the person making such payment shall in addition to the payment, pay an amount in respect of VAT on such payment on delivery by the recipient of such payment of a valid VAT invoice.

59.2.6 The Authority shall be entitled in its absolute discretion to make all or any part of any payment payable under this Clause 59.2 direct to H.M. Revenue and Customs.

59.3 **Payment of Termination Payments**

59.3.1 The Authority shall pay any Termination Sum together with interest on any Base Senior Debt Termination Sum or Revised Senior Debt Termination Sum element of the Termination Sum at the Senior Debt Rate for the period from and including the Termination Date to and including the date on which such payment is made.

59.3.2 Subject to Clause 59.3.3, the amount payable by the Authority pursuant to Clause 59.3.1 shall be payable 20 Business Days after each of the following events has occurred:

- (A) the Contractor having given to the Authority an invoice for the relevant Termination Sum and provided, to the reasonable satisfaction of the Authority, sufficient supporting evidence to justify the amount of the relevant Termination Sum together with a breakdown of the elements of such Termination Sum; and
- (B) the amount of such Termination Sum having either been agreed between the Parties or determined pursuant to the Dispute Resolution Procedure,

provided that the Authority shall only be entitled to dispute an invoice if it contains a manifest error.

59.3.3 The Authority shall pay any part of the Termination Sum as is agreed within 20 Business Days of the receipt of an invoice in respect of the same.

59.3.4 If the Authority fails to make any payment in respect of the Termination Sum in accordance with Clause 59.3.2 or Clause 59.3.3, interest shall be payable on such sum in accordance with Clause 29.4 and not, in respect of any Base Senior Debt Termination Sum or Revised Senior Debt Termination Sum element of the Termination Sum, at the Senior Debt Rate.

59.4 **Sole Remedy**

Any payment of compensation shall be in full satisfaction of any claim which can be made against the Authority by the Contractor in relation to termination of this Agreement, any Project Document or any Ancillary Document to which the Authority is a party. The compensation payable under Clauses 49.2 (Compensation on Voluntary Termination), 55 (Compensation on Termination for Authority Default), 56 (Compensation on Termination for Contractor Default), 57 (Compensation on Termination for Force Majeure) or 58 (Compensation on Termination for Corrupt Gifts and Fraud) shall be the sole remedy of the Contractor against the Authority on termination of this Agreement.

60. **CO OPERATION ON EXPIRY OR TERMINATION**

60.1 **Handback Procedure**

60.1.1 Subject to the exercise by the Authority of its rights contained in this Agreement, any of the Project Documents or any Ancillary Documents to which the Authority is a party to perform or procure the performance by a Third Party of any of the obligations of the Contractor, the Parties shall continue to perform their obligations under this Agreement notwithstanding the giving of any termination notice until the termination of this Agreement becomes effective in accordance with its terms.

60.1.2 Prior to the Interim Service Start Date the Contractor shall prepare and agree with the Authority the Handback Plan detailing how, on the expiry or early termination of this Agreement:

- (A) a gradual transition of the Services from the Contractor to the New Service Provider or the Authority (as the case may be) will be effected; and
- (B) the Contractor is going to comply with its obligations under Clause 61 (Handback of a Working System).

The Parties shall review and the Contractor shall update the Handback Plan at least once every 12 months.

- 60.1.3 By a date no later than 12 months prior to the Expiry Date or, in the event of the early termination of this Agreement, as soon as is practicable, where relevant, having regard to the effect of the Lender's Direct Agreement, the Authority shall provide to the Contractor as much information as is reasonably practicable regarding the Authority's proposed arrangements for the provision of the Services (or services similar to the Services) by the New Service Provider or the Authority (as the case may be) (the "**Anticipated Arrangements**"). The Authority shall update such information periodically where there are changes to the proposed arrangements. By a date no later than 8 months prior to the Expiry Date or, in the event of the early termination of this Agreement, within 5 Business Days of the Authority providing the Anticipated Arrangements to the Contractor, the Contractor shall prepare and provide to the Authority for approval an up to date version of the Handback Plan which is capable of achieving a smooth handback and continued running of the Services during the Handback Period, including the gradual transition of the Services in a manner consistent with the information provided by the Authority. In the case of expiry, the Handback Plan shall incorporate any recommendations of the Independent Surveyors in accordance with Clause 62.4.3.
- 60.1.4 The Contractor shall co operate, and shall procure that the Sub-contractors (and any of its or their respective sub-contractors) co operate, fully with the Authority and any New Service Provider in ensuring the smooth handback and continued running of the Services during the Handback Period in accordance with the Handback Plan.
- 60.1.5 On the Expiry Date or the Termination Date (as the case may be) or such later date notified to the Contractor by the Authority any rights of access of the Contractor to the Project Road Network or any premises owned or occupied by the Authority shall automatically cease to the extent that such rights of access were granted in relation to the exercise of rights and the performance of obligations pursuant to this Agreement. The Authority will extend the Contractor's rights of access beyond the Expiry Date or Termination Date (as the case may be) to the extent reasonably necessary for the performance of its residual obligations under the Handback Plan to complete tasks in progress at such date.

60.2 Assistance required by the Authority

The Contractor shall until the earlier of:

60.2.1 the expiry of twenty four months after the end of the Handback Period; or

60.2.2 the expiry of six months' written notice given by the Authority to the Contractor,

provide (and shall procure that its Sub-contractors (and any of its or their respective sub-contractors) provide) to the Authority and/or the New Service Provider such reasonable advice and assistance as the Authority may reasonably require. The Authority shall pay the Contractor's fair and reasonable costs for providing or procuring the provision of such advice and assistance in respect of the period commencing after the Expiry Date or the Termination Date (as the case may be).

60.3 Removal of Aerial Infrastructure and Aerial Electronics

The Authority shall be entitled, not less than 6 months prior to the Expiry Date or within 3 weeks of any termination notice, to give notice to the Contractor of any Aerial Infrastructure and Aerial Electronics on the Project Road Network which it requires the Contractor to remove (or to procure the removal of), the cost of such removal to be borne by the Authority and calculated in accordance with Schedule 30 (Payment Mechanism). The Contractor shall return any Aerial Electronics removed pursuant to this Clause 60.3 (Removal of Aerial Infrastructure and Aerial Electronics) to their legal owner.

60.4 Standard for Removal

The Contractor shall remove to the standard specified in Section 6.7 (Remove Service) of Schedule 1.2 (Statement of Requirements: Processes) all Aerial Infrastructure listed in the notice given by the Authority pursuant to Clause 60.3 (Removal of Aerial Infrastructure and Aerial Electronics) as soon as reasonably practicable after the Expiry Date or Termination Date (whichever is the earlier) and in any event no later than 3 months after the Expiry Date or the Termination Date (whichever is the earlier).

60.5 Handback of Employees

The following provisions shall apply in the event that any of the Services (or part or parts of any such Services) are to be transferred to the Authority or a New Service Provider during the Handback Period or on the Termination Date or the Expiry Date, as the case may be:

- 60.5.1 it is acknowledged by the Authority and the Contractor that the transfer of any or all of the Services or relevant part thereof to the Authority and/or a New Service Provider during the Handback Period or on the Termination Date or the Expiry Date, as the case may be, will constitute a "relevant transfer" for the purposes of TUPE. In accordance with, and pursuant to the terms of TUPE, the Handback Employees employed in the Services or relevant part thereof to be transferred will be entitled to become employees of the Authority and/or a New Service Provider (as the case may be) with effect from 00:01 hours on the date of the relevant transfer (the "**Relevant Transfer Date**");
- 60.5.2 if (other than by virtue of Regulation 5(4A) of TUPE) the contract of employment of any of the relevant Handback Employees is found or alleged not to have effect after the Relevant Transfer Date as if originally made with the Authority and/or a New Service Provider (as the case may be) the Authority agrees that in consultation with the Contractor, it shall (or, if applicable, shall use its reasonable endeavours to procure that the New Service Provider shall) make to that relevant Handback Employee an offer in writing to employ him under a new contract of employment to take effect on the Relevant Transfer Date, such offer to be on terms no less favourable than the provisions of the relevant Handback Employee's contract of employment immediately before the Relevant Transfer Date;
- 60.5.3 the Authority shall comply, or shall use its reasonable endeavours to procure that the New Service Provider shall comply, with Regulation 10(3) of TUPE so that the Contractor is provided with such information as is necessary to discharge the information and consultation obligations under TUPE of the Contractor and any Sub-contractor (and any of its or their sub-contractors). The Authority shall indemnify the Contractor (for itself and any Sub-contractor (and any of its or their sub-contractors)) against all Claims and Losses in respect of any failure on its or the New Service Provider's part to provide information under this Clause 60.5.3;

60.5.4 the Contractor shall or shall use its best endeavours to procure that any Sub-contractor (or any of its or their respective sub-contractors) shall, within 10 Business Days following the Relevant Transfer Date:

- (A) deliver to the Authority or the New Service Provider (as the case may be) the PAYE certificates relating to each of the Handback Employees duly completed up to the Relevant Transfer Date; and
- (B) account to the Authority or the New Service Provider (as the case may be) with the cash equivalent calculated by reference to each of the relevant Handback Employees' terms and conditions of any accrued holiday entitlement and/or accrued contractual bonus or other similar entitlement in respect of each of the relevant Handback Employees up to the Relevant Transfer Date;

60.5.5 upon receiving a written request, the Contractor shall provide or shall use its best endeavours to procure that any Sub-contractor (or any of its or their respective sub-contractors) shall provide to the Authority or, if the Authority so directs, to any potential New Service Provider, in good time before the Relevant Transfer Date, written information so far as is permitted by Law relating to all the Contractor Employees (such information shall include details in respect of the matters set out in Schedule 22) and the Authority shall accept and shall use its reasonable endeavours to procure that any potential New Service Provider accepts that information; and

60.5.6 notwithstanding Clause 60.5.5, the Contractor shall following the Relevant Transfer Date, provide to the Authority and/or the New Service Provider (as the case may be) such information or documents as the Authority and/or a New Service Provider may reasonably require relating to the terms and conditions, pensions, benefits or any other matter concerning the employment of the relevant Handback Employees with the Contractor or any Sub-contractor (and its or their respective sub-contractors) in the performance of the Services (or relevant part thereof) prior to the Relevant Transfer Date; and

60.5.7 except with the prior written consent of the Authority, or in good faith in the normal course of business or as required by Law, the Contractor shall not vary the terms and conditions of employment of any Contractor Employee (and shall use its best endeavours to procure that any of its Sub-contractors (and its or their respective sub-contractors) shall not vary the terms and conditions of employment of any Contractor Employee) after the Authority has served notice to terminate this Agreement, or 6 months prior to the Expiry Date (whichever is the earlier).

60.6 Contractor Indemnity

Notwithstanding the provisions of Clause 23 (Employees), in the event of Clause 60.5 (Handback of Employees) applying, the Contractor shall indemnify the Authority and/or the New Service Provider against:

- 60.6.1 any Claim by any of the Handback Employees in relation to his employment with the Contractor or any Sub-contractor (and any of its or their respective sub-contractors), or the termination of that employment prior to the Relevant Transfer Date;
- 60.6.2 any Claim brought by any employee or former employee (other than the Handback Employees) arising from his employment with the Contractor or any Sub-contractor (or any of its or their respective sub-contractors) in the

performance of the Services, or the termination of that employment (howsoever arising) including any claim arising from the transfer to the Authority and/or the New Service Provider of the contract of employment of any such employee;

60.6.3 any Claim by any trade union or staff association recognised by the Contractor or any Sub-contractor (and any of its or their respective sub-contractors) in respect of all or any of the relevant Handback Employees, arising from the Contractor's failure to comply with any legal obligation owed to such trade union or staff association, or as a result of the Contractor's failure, or the failure of any Sub-contractor (and any of its or their respective sub-contractors), to comply with any consultation provision of any collective agreement with any trade union or staff association; and

60.6.4 any Claim brought by or on behalf of a relevant Handback Employee in respect of any failure by the Contractor to comply with any legal obligation to supply information to and/or consult with a representative of that Handback Employee,

and the Contractor shall indemnify the Authority and/or the New Service Provider against all Losses arising out of or in connection with such Claims.

60.7 **Authority Indemnity**

Notwithstanding the provisions of Clause 23 (Employees), in the event of Clause 60.5 (Handback of Employees) applying, the Authority shall indemnify the Contractor for itself and on behalf of any Sub-contractor (and any of its or their respective sub-contractors) against:

60.7.1 any Claim by any of the Handback Employees in relation to his employment with the Authority or the New Service Provider, or the termination of that employment on or after the Relevant Transfer Date;

60.7.2 any Claim by a Handback Employee arising from any actual or alleged significant change to his detriment pursuant to Regulation 5(5) of TUPE; and

60.7.3 any Claim brought by or on behalf of a relevant Handback Employee in respect of any failure by the Authority or the New Service Provider to comply with any legal obligation to supply information to and/or consult with a representative of that Handback Employee or to provide information for the purposes of consultation with a representative of that Handback Employee,

and the Authority shall indemnify the Contractor and/or its Sub-contractor (and its or their respective sub-contractors) against all Losses arising out of or in connection with such Claims.

61. **HANDBACK OF A WORKING SYSTEM**

61.1 **Handback of a Working System**

61.1.1

(A) Subject to Clause 3.2.2, on handback of the services pursuant to the Handback Plan, the Contractor shall, in accordance with Clause 61.1.2, ensure that the Authority (and/or the New Service Provider, as the case may be) has the capability to provide the Services (or services which are similar to the Services) to the standard required by this Agreement for two years following the Expiry Date or Termination Date, as the case may be.

- (B) Subject to the Authority's obligations to pay the Contractor's fair and reasonable costs pursuant to Clause 60.2 (Assistance Required by the Authority), the Contractor shall bear its own costs of complying with Clause 61.1.1(A) save that, subject to the Contractor complying with Clause 61.1.1(A), the Authority shall be responsible for bearing its legal costs associated with the handback of Services to the Authority in accordance with Clause 61.1.1(A) and Clause 61.3 (Contractor Steps).
- 61.1.2 The Contractor shall where the option described in Clause 3.2.1 has not been exercised ensure that such capability referred to in Clause 61.1.1(A) is available following the handback of each element of the Services pursuant to the Handback Plan following the Term Date or (if earlier) the Termination Date by:
- (A) permitting the use of the relevant Handback Contractor Owned Assets by the Authority or, if so directed by the Authority, the New Service Provider, in accordance with Clause 61.4 (Right to Use Contractor Owned Assets);
 - (B) unless otherwise directed by the Authority, promptly transferring, or procuring that the Contractor's Associated Company transfers, to the Authority or, if so directed by the Authority, the New Service Provider the benefit and burden of all licences of Third Party Material held by the Contractor or any Associated Company of the Contractor which contain a right to assign and transfer the Contractor's or its Associated Company's rights and obligations thereunder, whether pursuant to Clause 39.3.1(A)(3) or otherwise;
 - (C) save (i) as provided in Clause 61.1.2(B) in respect of Third Party Material Licences and (ii) in respect of any and all licences of Commercially Available Third Party Material, to the extent so directed by the Authority promptly transferring (or, where appropriate, procuring that the Contractor's Associated Company transfers) to the Authority or, if so directed by the Authority, to the New Service Provider, the benefit and the burden (to the extent of the Contractor's (or its Associated Company's) right to assign but without prejudice to Clause 61.5) of any relevant and existing:
 - (1) sub-contract;
 - (2) maintenance agreement;
 - (3) support agreement;
 - (4) easement;
 - (5) guarantee, condition or warranty in respect of New Assets which may have been given to the Contractor by the supplier or manufacturer of such New Asset or which is implied by law in favour of the Contractor;
 - (6) licence agreement, including any licence to the Contractor or its Associated Company of any Contractor Material or Project Material but excluding any licence granted or to be granted by or on behalf of the Authority pursuant to this Agreement;
 - (7) escrow agreement;

- (8) Agreement for Leased Assets in respect of the Handback Leased Assets; and/or
- (9) any other agreements (including for the avoidance of doubt any agreements with companies providing Utilities),

insofar as it relates to:

- (a) the Services other than those carried out under Clause 61.1.2(F);
 - (b) any of the Legacy Assets or New Assets which are used in the provision of the relevant Services immediately prior to the handback of the relevant Services pursuant to the Handback Plan; and
 - (c) any of the Handback Contractor Owned Assets or Handback Leased Assets which are reasonably required to ensure that the Contractor fulfils its obligations under this Clause 61.1;
- (D) promptly transferring to the Authority or, if so directed by the Authority, the New Service Provider, all of the Contractor's rights, title and interest in and any proceeds paid or payable under the insurance policies effected pursuant to Clause 47 (Insurance) which relate to the reinstatement of the relevant Insured Assets, and which have not yet been applied in such reinstatement;
- (E) promptly delivering up to the Authority or, if so directed by the Authority, the New Service Provider, any relevant records or copies of records which are reasonably required to support such capability including, but not limited to, any details of disaster recovery arrangements; and
- (F) in addition to the Contractor's other obligations under Schedule 1.2 (Statement of Requirements: Processes), providing software support in respect of all software supplied by or on behalf of the Contractor to the Authority or otherwise used in connection with the performance of the Contractor's obligations under this Agreement in accordance with the requirements of Paragraph 8.8.43 of Schedule 1.2 (Statement of Requirements: Processes) until the expiry of two years after the Term Date or (if earlier) the Termination Date, or as otherwise agreed between the Parties in writing.

61.2 Commercially Available Material

In the event that the Authority does not exercise the option set out in Clause 3.2.1 the Contractor shall at the Contractor's own expense procure for the Authority or, at the Authority's direction, for a New Service Provider, a licence of:

- 61.2.1 all Commercially Available Third Party Material used by or on behalf of the Contractor in the performance of the Services immediately prior to the Term Date or (if earlier) the Termination Date, as appropriate; and
- 61.2.2 any Commercially Available Third Party Material to replace non-Commercially Available Third Party Material pursuant to Clause 39.3.2,

such licence to be effective for a period of at least two years from the Term Date or (if earlier) the Termination Date, as appropriate, and to permit the use of such Third Party Material to the extent and in the manner reasonably necessary for the continued performance of the Services (or services equivalent to the Services) for such two year period.

61.3 Contractor Steps

The Contractor shall take all necessary steps as soon as reasonably practicable to ensure that the Authority (or the New Service Provider, as the case may be) has the capability referred to in Clause 61.1.1, including entering into any necessary agreements and executing any necessary documents.

61.4 Right to Use Contractor Owned Assets

In the event that the Authority does not exercise the option set out in Clause 3.2.1 then:

- 61.4.1 subject to Clause 61.14, from the handback of each element of the Services pursuant to the Handback Plan until the second anniversary of the Term Date or (if earlier) the Termination Date, as the case may be, the Contractor permits the Authority and/or the New Service Provider (and any of its or their respective contractors, sub-contractors and employees) to use the relevant Handback Contractor Owned Assets for the purposes of providing those Services or services similar to those Services;
- 61.4.2 subject to Clause 61.14 (Interface with Licences), from the handback of each element of the Services pursuant to the Handback Plan, until the second anniversary of the Term Date or (if earlier) the Termination Date, as the case may be, the Contractor shall make available to the Authority, as licensee, access to any Handback Contractor Owned Assets as shall be reasonably required by the Authority in order to use the Handback Contractor Owned Assets referred to in Clause 61.4.1;
- 61.4.3 the Contractor shall use reasonable endeavours to extend to the Authority and/or the New Service Provider (and any of its or their respective contractors and sub-contractors) the benefit of any guarantee, condition or warranty from which the Contractor may benefit in respect of the Handback Contractor Owned Assets from any supplier or manufacturer of such Handback Contractor Owned Assets or which is implied by law in favour of the Contractor;
- 61.4.4 the Authority shall be entitled to bring a claim in the name of the Contractor against any supplier or manufacturer for breach of any guarantee, condition or warranty referred to in Clause 61.4.3, provided that:
 - (A) the Authority fully indemnifies the Contractor against all Claims and Losses in connection with the making of any claim thereunder;
 - (B) the conduct of any such claim and of any incidental negotiations shall be at the Authority's expense; and
 - (C) the Authority keeps the Contractor fully informed about the conduct of any such claim;
- 61.4.5 subject to Clause 61.14 (Interface with Licences), the Authority shall not use, or permit the use of, the Handback Contractor Owned Assets for any purpose for which they are not designed or for any unlawful purpose or for any purpose other than provision of the Services or services similar to the Services;
- 61.4.6 save to the extent set out in Clause 61.4.2, the permission granted by the Contractor to the Authority in accordance with Clause 61.4.2 is not intended to and shall not confer upon the Authority any right or interest in the form of a lease or any other proprietary interest;
- 61.4.7 the Authority shall bear the risk of the loss of or damage to any physical Handback Contractor Owned Assets which are subject to the permission granted

pursuant to Clause 61.4.1. Save to the extent that such Claims or Losses are caused or exacerbated by the breach, default or negligence of the Contractor or any Contractor Party, the Authority shall indemnify and keep indemnified the Contractor against all Claims and Losses which may be suffered or incurred by the Contractor as a result of any act, neglect, defaults or omission arising out of the Authority's use of Handback Contractor Owned Assets;

61.4.8 the Authority shall ensure the maintenance, repair and service of any physical Handback Contractor Owned Assets which are subject to the permission or licence granted pursuant to Clause 61.4.1 in accordance with the recommendations of any supplier and/or manufacturer of such Contractor Owned Assets;

61.4.9 the Authority shall (and shall where relevant procure that the New Service Provider shall) obtain and keep in full force and effect all permissions, licences and other authorisations (other than licences of Intellectual Property Rights) which may at any time be required in connection with the possession or use of the Handback Contractor Owned Assets which are subject to the permission or licence granted pursuant to Clause 61.4.1. The Authority shall (and shall where relevant procure that the New Service Provider shall) comply with all requirements of Law relating to the possession or use of the Handback Contractor Owned Assets; and

61.4.10 subject to Clause 61.14 (Interface with Licences), the Authority shall (and shall where relevant procure that the New Service Provider will) promptly pay all taxes and all other charges and expenses of whatever nature payable by the Contractor or the Authority in respect of the Handback Contractor Owned Assets which are subject to the permission or licence granted pursuant to Clauses 61.4.1 or 61.4.2 or their use.

61.5 **Right to Assign**

Save as otherwise provided in Clause 39.3.2, the Contractor shall ensure that, where it enters into any document of a type which may fall within Clause 61.1.2(C), the relevant document contains a right to assign and transfer the Contractor's rights and obligations to the Authority or a New Service Provider (as the case may be) without the consent of the relevant counterparty. The Contractor shall also ensure that where it enters into any document of a type that may fall within Clause 61.1.2(C)(2) to (9) such document:

61.5.1 subject to Clause 61.5.2, remains in force after transfer to the Authority (or the New Service Provider, as the case may be) and thereafter for two years following the Term Date or (if earlier) the Termination Date (as the case may be) in accordance with this Clause 61 (Handback of a Working System);

61.5.2 is capable of being terminated by the Authority or its nominee upon reasonable notice; and

61.5.3 contains an express provision stipulating that the terms of the relevant document will not change as a result of assignment and transfer except with the written agreement of the counterparty and the Authority (or the New Service Provider, as the case may be).

61.6 **Commercial Contracts**

61.6.1 The Contractor shall ensure that all Commercial Contracts terminate upon expiry or termination of this Agreement.

- 61.6.2 The Authority shall have no obligation to ensure, nor liability for, the continued performance of any Commercial Contracts and the Contractor shall indemnify the Authority against all Claims and/or Losses arising out of, or in connection with, the Commercial Contracts.

61.7 Condition of Project Road Network

The Contractor shall upon handback of each element of the Services pursuant to the Handback Plan leave in an orderly condition the relevant part of the Project Road Network and any other premises owned or occupied by the Authority and used by the Contractor in connection with the provision of the relevant Services or the performance of the relevant Commercial Contracts.

61.8 Continuation of Escrow and delivery of materials

- 61.8.1 The Contractor shall ensure that the Source Code relating to any Contractor Material comprised in software to be used by or on behalf of the Authority following the Term Date or (if earlier) the Termination Date shall remain in escrow under the CM Project Escrow Agreement or SC Project Escrow Agreement, as appropriate (subject to any release event under the applicable escrow agreement) until the expiry of two years after such date (or, if earlier, the date on which such software ceases to be supported by or on behalf of the Contractor).
- 61.8.2 The Contractor shall, not less than 4 weeks before the handback of each element of the Services pursuant to the Handback Plan and/or the Term Date or (if earlier) the Termination Date, at no additional cost to the Authority, update or procure the update of the Source Codes required to be delivered to the Authority or deposited in escrow under the CM Project Escrow Agreement or any SC Project Escrow Agreement pursuant to Clause 41 (Source Code and Escrow) in order to incorporate all additions, amendments, modifications and enhancements to the corresponding software since the date of the most recent delivery of such Source Code to the Authority or deposit thereof with the Escrow Agent.
- 61.8.3 Promptly following the Term Date or (if earlier) the Termination Date, the Contractor shall, at the request of the Authority, ensure that each escrow agreement the Contractor or its Associated Company has entered into under Clause 41.4 (Escrow Agreement for Third Party Software) with an Independent Party owner or licensor of any Third Party Material is assigned or transferred to the Authority or the New Service Provider as the case may be.
- 61.8.4 Promptly following the Expiry Date or Termination Date the Contractor shall deliver up to the Authority or, if so directed by the Authority, the New Service Provider, any Authority Material, Project Systems and Consultancy Material in its possession and provide to the Authority a copy of any Contractor Material, Project Material and Third Party Material in its possession (i) to the extent that the use of such Contractor Material, Project Material and Third Party Material has been licensed to the Authority under Clause 39 (or in the case of Third Party Material, including where such licence has been assigned to the Authority) and (ii) excluding in each case any Source Code, except where such Source Code has been released to the Authority pursuant to this Agreement on the terms of the applicable escrow agreement (but for the avoidance of doubt the Contractor shall be entitled to retain (i) copies of Authority Material, Project Systems and Consultancy Material to the extent the Contractor is licensed to use the same following the Expiry Date or Termination Date, and copies of any Third Party

Material the licence of which has not been assigned to the Authority, and (ii) originals and copies of Contractor Material and Project Material). For the avoidance of doubt the Parties agree that Clause 39 shall not grant any right to use the Source Code of any Contractor Material, Project Material or Third Party Material except to the extent specified in Clause 41.6.

61.9 Leased Assets

- 61.9.1 On the transfer of each Agreement for Leased Assets pursuant to Clause 61.1.2(C), the Authority shall be entitled in accordance with Clauses 61.11 (Calculation of the Projected Leased Assets Amount upon Termination) and 61.12 (Calculation of the Projected Leased Assets Amount upon Expiry) to be paid by the Contractor the amount equal to the value of the rental payments, licence fees, royalty payments or other periodic or continuing payments ("**Rental Payments**") that will be payable by the Authority for the Handback Leased Assets under that Agreement for Leased Assets, in respect of the period between the date of transfer and the second anniversary of the Term Date or (if earlier) the Termination Date (as the case may be).
- 61.9.2 Subject to Clauses 61.11 (Calculation of the Projected Leased Assets Amount upon Termination) and 61.12 (Calculation of the Projected Leased Assets Amount upon Expiry), every 12 months the Contractor shall deliver to the Authority a report identifying the Leased Assets, the length of the remaining term of the rental period and the current monthly Rental Payments for each such Leased Asset (the "**Annual Leased Assets Report**").
- 61.9.3 If the Authority (acting reasonably) believes that supporting evidence is required to verify any Annual Leased Assets Report or requires clarification on the contents of any Annual Leased Assets Report delivered under this Clause 61.9 (Leased Assets), the Contractor shall, at the Contractor's expense, provide such supporting evidence and clarification as soon as reasonably practicable.

61.10 Final Leased Assets Report

- 61.10.1 Where required by Clause 61.11 (Calculation of the Projected Leased Assets Amount upon Termination) or 61.12 (Calculation of the Projected Leased Assets Amount upon Expiry), the Contractor shall deliver to the Authority a report identifying:
 - (A) the Handback Leased Assets;
 - (B) the length of the remaining term of each relevant Agreement for Leased Assets;
 - (C) the current monthly Rental Payments under each relevant Agreement for Leased Assets; and
 - (D) the aggregate future Rental Payments for the Handback Leased Assets taken together in respect of the period between the date on which each Agreement for Leased Assets will transfer to the Authority and/or the New Service Provider pursuant to Clause 61.1.2(B) and the Handback Plan and the second anniversary of the Term Date or (if earlier) the Termination Date (as the case may be) whether or not already paid by the Contractor in advance (the "**Future Rental Payments**"),
 (the "**Final Leased Assets Report**").

- 61.10.2 If the Authority (acting reasonably) believes that supporting evidence is required to verify any Final Leased Assets Report or requires clarification on the contents of any Final Leased Assets Report, the Contractor shall, at the Contractor's expense, provide such supporting evidence and clarification as soon as reasonably practicable.

61.11 Calculation of the Projected Leased Assets Amount upon Termination

- 61.11.1 Within 10 Business Days of a termination notice for any reason, the Contractor shall prepare and provide to the Authority for approval a Final Leased Assets Report setting out the information required pursuant to Clause 61.10 (Final Leased Assets Report). If any Rental Payments for Handback Leased Assets have been paid in advance by the Contractor beyond the date on which the relevant Agreement for Leased Assets will transfer to the Authority and/or the New Service Provider, the Contractor shall provide to the Authority evidence of such advance payments.
- 61.11.2 The Authority shall determine the Projected Leased Assets Amount as soon as reasonably practicable from the Final Leased Assets Report by deducting from the Future Rental Payments identified in the Final Leased Assets Report the aggregate of any amounts paid in advance beyond the date on which the relevant Agreement for Leased Assets will transfer to the Authority and/or the New Service Provider as evidenced by the Contractor pursuant to Clause 61.11.1 and shall inform the Contractor of the Projected Leased Assets Amount as soon as such amount is determined.
- 61.11.3 The Projected Leased Assets Amount shall be recovered by the Authority from the Contractor by deducting it from any compensation payable in accordance with Clauses 49.2 (Compensation on Voluntary Termination), 53.2 (Compensation on Termination for Breach of the Refinancing Provisions), 55 (Compensation on Termination for Authority Default), 56 (Compensation on Termination for Contractor Default), 57 (Compensation on Termination for Force Majeure) or 58 (Compensation on Termination for Corrupt Gifts and Fraud), as applicable, save to the extent that, in the cases of Clauses 49.2, 53.2, 55, 57 or 58, such deduction would reduce the amount of compensation payable below the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be).

61.12 Calculation of the Projected Leased Assets Amount upon Expiry

- 61.12.1 From the date which is 14 months prior to the Term Date (or such earlier time as the Authority may specify upon reasonable notice) the Contractor shall prepare and provide to the Authority for approval a Final Leased Assets Report setting out the information required pursuant to Clause 61.10 (Final Leased Assets Report). If any Rental Payments for Handback Leased Assets have been paid in advance by the Contractor beyond the date on which the relevant Agreement for Leased Assets will transfer to the Authority and/or the New Service Provider, the Contractor shall provide to the Authority evidence of such advance payments.
- 61.12.2 The Authority shall determine the Projected Leased Assets Amount as soon as reasonably practicable from the Final Leased Assets Report by deducting from the Future Rental Payments identified in the Leased Assets Report the aggregate of any amounts paid in advance beyond the date on which the relevant Agreement for Leased Assets will transfer to the Authority and/or the New Service Provider as evidenced by the Contractor pursuant to Clause 61.12.1 and shall inform the

Contractor of the Projected Leased Assets Amount as soon as such amount is determined.

61.12.3 The Authority shall be entitled to retain the Projected Leased Assets Amount in accordance with Clause 62.3 (Retention Fund).

61.13 Objection by the Contractor

Within 10 Business Days of receiving notification of the Projected Leased Assets Amount the Contractor shall either confirm in writing to the Authority that it agrees with the Projected Leased Assets Amount or notify the Authority in reasonable detail of the grounds on which it objects to the Projected Leased Assets Amount (a "**Projected Leased Assets Amount Objection Notice**"). If the Authority disagrees with the objections raised by the Contractor, it shall notify the Contractor within 5 Business Days of receiving a Projected Leased Assets Amount Objection Notice and either Party may refer the matter to the Dispute Resolution Procedure.

61.14 Interface with Licences

61.14.1 The provisions of this Clause 61 shall be without prejudice to the extent or duration of and/or (where relevant) the royalty-free status of any licence of Intellectual Property Rights granted to the Authority under or pursuant to Clause 39.

61.14.2 The licences granted by the Authority to the Contractor under Clause 39 shall include the period during which the Contractor is required to perform obligations following the Expiry Date or the Termination Date under this Clause 61, for the purposes of performing those obligations only and subject always to the relevant provisions of Clause 39.

61.15 Transfer Licences and Support Agreements at the end of the Secondary Service Period

The Contractor shall following the Expiry Date or Termination Date, to the extent that the Contractor has not already done so pursuant to Clause 61.1.2:

61.15.1 unless otherwise directed by the Authority, promptly transfer, or procure that the Contractor's Associated Company transfers, to the Authority or, if so directed by the Authority, the New Service Provider the benefit and burden of all licences of Third Party Material held by the Contractor or any Associated Company of the Contractor which contain a right to assign and transfer the Contractor's or its Associated Company's rights and obligations thereunder, whether pursuant to Clause 39.3.1(A)(3) or otherwise; and

61.15.2 save as provided in Clause 61.15.1 in respect of licences of Third Party Material and in respect of any and all Commercially Available Third Party Material, to the extent so directed by the Authority promptly transfer (or, where appropriate, procure that the Contractor's Associated Company transfers) to the Authority or, if so directed by the Authority, to the New Service Provider, the benefit and the burden of any relevant and existing agreement of the kind described in Clauses 61.1.2(C) (2), (3), (6) and (7).

62. EXIT SURVEY

62.1 Survey

62.1.1 During the period commencing 18 months prior to the Term Date and ending 12 months prior to the Term Date, the Authority shall have the right to procure that a survey (an "**Exit Survey**") is carried out to assess whether the Contractor has

complied with its obligations set out in Clause 14 (Maintenance and Renewal), whether the Contractor will be capable of complying with its obligations under Clause 61 (Handback of a Working System) (or, in the event that the Authority serves a notice under Clause 3.2.1, whether the Contractor would have been capable of doing so) and whether a Cable Renewal Shortfall is likely to arise in accordance with Clause 14.5. In undertaking the Exit Survey, the Independent Surveyor shall assess asset condition using the criteria set out in the PAMS, the Planned Maintenance Schedule, Schedule 1 (Statement of Requirements) and the Cost Model.

- 62.1.2 The Exit Survey shall be carried out by an independent, reputable firm of experts (the "**Independent Surveyors**") which can fulfil the requirements specified in Clause 62.2 (Scope) and which has appropriate technical skills and knowledge of the Assets, the Services and the Project. The firm to act as the Independent Surveyors shall be selected by agreement between the Parties or, in the absence of agreement within 20 Business Days, determined in accordance with the Dispute Resolution Procedure.
- 62.1.3 The Authority shall give at least 20 Business Days notice to the Contractor before commencing the Exit Survey. The Authority shall consider in good faith any reasonable request by the Contractor for the Exit Survey to be carried out on different dates if such request is made at least 10 Business Days prior to the notified date and the Contractor (acting reasonably) is able to demonstrate that carrying out the Exit Survey on the notified dates would materially prejudice the Contractor's ability to provide the Services.
- 62.1.4 When carrying out the Exit Survey, the Authority shall procure that the Independent Surveyors use all reasonable endeavours to minimise any disruption to the provision of the Services or to the carrying out of the Commercial Contracts by the Contractor.
- 62.1.5 The Contractor shall provide (free of charge) any assistance reasonably requested by the Authority or the Independent Surveyors during the Exit Survey.
- 62.1.6 The Contractor shall as soon as reasonably practicable upon the reasonable request of the Independent Surveyors provide or procure access for any duly authorised representative of the Independent Surveyors to any information reasonably required for the purposes of preparing for or conducting the Exit Survey. The Contractor shall permit the Independent Surveyors to take copies of all such information.

62.2 **Scope**

The Independent Surveyors shall be instructed to:

- 62.2.1 review the most recent version of the Handback Plan to assess whether it would enable the Contractor to comply with its obligations under Clause 61 (Handback of a Working System);
- 62.2.2 review any sub-contracts, maintenance agreements, support agreements, easements, licence agreements, escrow agreements, Agreement(s) for Leased Assets or any other agreements relating to the Services or any of the Assets to assess whether such agreements would enable the Contractor to comply with its obligations under Clause 61 (Handback of a Working System);
- 62.2.3 review the Predictive Asset Management System, the Planned Maintenance Schedule and other records which the Contractor is required to maintain pursuant

to Clause 27.1 (Required Records) and survey a representative sample of the Assets, any Mandated Cable Renewals to assess whether the Contractor has complied with the Planned Maintenance Schedule and with its obligations set out in Clause 14 (Maintenance and Renewal);

- 62.2.4 prepare and deliver to the Parties a schedule of Remedial Handback Works;
- 62.2.5 prepare and deliver to the Parties a schedule of the Remedial Handback Works Amount for such Remedial Handback Works;
- 62.2.6 prepare and deliver a System Capability Report;
- 62.2.7 indicate the System Capability Report Amount;
- 62.2.8 survey and approve execution of the Remedial Handback Works;
- 62.2.9 approve any amendments made to the Handback Plan pursuant to the System Capability Report; and
- 62.2.10 monitor and approve the implementation of the actions required to be performed by the Contractor as set out in the System Capability Report, and the System Capability Report, the System Capability Report Amount and the schedules of Remedial Handback Works and of the Remedial Handback Works Amount prepared by the Independent Surveyors shall, in the absence of manifest error and, subject to the next sentence, be final and binding on the Parties. Where the Parties dispute an amount in excess of £100,000 (adjusted for RPI), either Party may refer the dispute to adjudication under the Dispute Resolution Procedure.

62.3 **Retention Fund**

- 62.3.1 From the date which is 12 months before the Term Date the Authority shall be entitled to deduct one twelfth of the System Capability Report Amount together with one twelfth of the Remedial Handback Works Amount from each payment of the Service Charge payable after that date and pay such amount into an interest bearing account in the joint names of the Authority and the Contractor (the "**Retention Fund Account**") until the Term Date or Termination Date (as the case may be) such that the aggregate of such deductions over the twelve month period totals the System Capability Report Amount plus the Remedial Handback Works Amount.
- 62.3.2 Subject to Clause 62.3.3, in addition to the amount deducted from each payment of the Service Charge pursuant to Clause 62.3.1, from the date which is 12 months before the Term Date until the date which is 6 months before the Term Date the Authority shall be entitled to deduct one sixth of the Projected Leased Assets Amount from each payment of the Service Charge payable between those dates and pay such amount into the Retention Fund Account such that the aggregate of such deductions over the 6 month period totals the Projected Leased Assets Amount.
- 62.3.3 If, pursuant to the Authority's instructions under Clause 61.12.1, the Contractor has prepared the Final Leased Assets Report before the date which is 14 months prior to the Term Date, the Authority shall be entitled to deduct the Projected Leased Assets Amount from the Service Charge payable after the date of the Final Leased Assets Report pro rated across the number of months remaining until the date which is 6 months prior to the Term Date such that the aggregate of the deductions over the period until the date which is 6 months prior to the Term Date equals the Projected Leased Assets Amount. The Authority shall pay such amounts into the Retention Fund Account.

- 62.3.4 The provisions of Clauses 62.3.1 to 62.3.3 inclusive shall not apply in the event that prior to the date which falls 12 months prior to the Term Date the Contractor provides the Authority with a performance bond in a form which is acceptable to the Authority (acting reasonably) and which provides the Authority with an amount of security reasonably equivalent to the amounts referred to in those clauses.

62.4 Remedial Handback Works and System Capability Report

- 62.4.1 The Contractor shall carry out the works specified in the schedule of Remedial Handback Works prepared in accordance with Clause 62.2 (Scope) to the Independent Surveyors' reasonable satisfaction and shall complete any such works not later than 6 months before the Term Date.
- 62.4.2 The costs incurred by the Contractor in carrying out such Remedial Handback Works shall be at its own expense.
- 62.4.3 The Contractor shall carry out the revisions to the Handback Plan and any other action required by the System Capability Report to the Independent Surveyors' reasonable satisfaction and shall complete the carrying out of such requirements not later than 8 months before the Term Date.
- 62.4.4 The costs incurred by the Contractor in carrying out the revisions and required actions pursuant to Clause 62.4.3 shall be at its own expense.
- 62.4.5 If and to the extent that the Contractor carries out:
- (A) such Remedial Handback Works as are specified in the schedule of Remedial Handback Works;
 - (B) the revisions to the Handback Plan as recommended by the System Capability Report; and
 - (C) any other action required by the System Capability Report,
- in accordance with this Clause 62.4 (Remedial Handback Works and System Compatibility Report) to the Independent Surveyors' reasonable satisfaction, the Authority shall reimburse the Contractor's costs of so doing by withdrawing amounts from the Retention Fund Account.
- 62.4.6 Subject to Clause 62.4.7, if and to the extent that the Contractor has failed to carry out:
- (A) such Remedial Handback Works as are specified in the schedule of Remedial Handback Works;
 - (B) the revisions to the Handback Plan as recommended by the System Capability Report; and
 - (C) any other action required by the System Capability Report,
- to the Independent Surveyors' reasonable satisfaction by the relevant date in Clause 62.4.1 or Clause 62.4.3 (as the case may be), the Authority shall, save to the extent the Contractor fulfils its obligations within such period as the Authority may agree (in its absolute discretion), be entitled to carry out itself, or procure the carrying out of, such Remedial Handback Works and/or the actions required by the System Capability Report at the Contractor's expense and shall make withdrawals from the Retention Fund Account to pay for such work.
- 62.4.7 The Contractor shall be entitled to and shall remedy, at its own cost, matters which are certified by the Independent Surveyor as snagging matters. The

Contractor shall be deemed not to have failed to carry out any of the matters referred to in Clause 62.4.6 by reason of such snagging matters provided that such matters are remedied within 20 Business Days of the relevant date in Clause 62.4.1 or Clause 62.4.3 (as the case may be).

62.5 Survey Costs

The Authority may, where the Exit Survey shows that the Contractor has not complied with its obligations under Clause 14 (Maintenance and Renewal), recover the cost of the Exit Survey from the Contractor by means of a withdrawal from the Retention Fund Account.

62.6 Retention Fund Account

62.6.1 In the event that there is a credit balance on the Retention Fund Account on the later of:

- (A) the Term Date; and
- (B) the completion of the Remedial Handback Works, the revisions to the Handback Plan and any other action required by the System Capability Report;

then such credit balance (less any amount attributable to the Projected Leased Assets Amount) shall be paid to the Contractor as soon as reasonably practicable after such time. In the event that there is a credit balance on the Retention Fund Account on the Termination Date then such credit balance shall be paid to the Authority as soon as reasonably practicable after the Termination Date.

62.6.2 In the event that the Contractor has provided the Authority with a performance bond pursuant to Clause 62.3.4, such bond shall be released and returned to the Contractor no later than the date on which any credit balance on the Retention Fund Account would have been returned under Clause 62.6.

62.6.3 In the event that the cost of carrying out the Remedial Handback Works in accordance with Clause 62.4.6 exceeds the credit balance on the Retention Fund Account, the difference between the cost of the Authority in carrying out the Remedial Handback Works, the revisions to the Handback Plan and any other action required by the System Capability Report and such credit balance (less any amount attributable to sums retained to date towards the Projected Leased Assets Amount) shall be recoverable by the Authority from the Contractor as a debt.

62.6.4 In the event that the actual Projected Leased Assets Amount incurred exceeds the aggregate of amounts in the Retention Fund Account attributable to the Projected Leased Assets Amounts, the difference shall be recoverable by the Authority from the Contractor as a debt.

PART XII - GENERAL PROVISIONS

63. ASSIGNMENT

63.1 Binding on Successors and Assigns

This Agreement shall be binding on and shall enure to the benefit of the Authority and the Contractor and their respective successors and permitted assigns.

63.2 Assignment by the Contractor

63.2.1 Subject to Clause 63.2.2, the Contractor shall not, without the prior written consent of the Authority, assign, novate, transfer, or otherwise dispose of this Agreement or any part thereof or any benefit or interest therein or thereunder.

63.2.2 The provisions of Clause 63.2.1 shall not apply to:

- (A) the grant of any security in a form previously approved by the Authority (which shall include the Initial Financing Agreements) for any loan made to or for the benefit of the Contractor under the Financing Agreements; or
- (B) Refinancing.

63.3 Assignment by the Authority

The rights and obligations of the Authority under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) other than in respect of the whole of the Agreement, to any public body other than any person (being a single entity) having the legal capacity, power and authority to become a party to and perform the obligations of the Authority under this Agreement being:

63.3.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975; or

63.3.2 any other public body whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Contractor) 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 this Agreement.

64. CHANGE OF CONTROL

64.1 No Change

64.1.1 The Contractor shall ensure that (other than by virtue of or as a result of the enforcement of the Shares Charge) there is no change in ownership of any interest in the Contractor without the prior written consent of the Authority prior to the Base Service Charge Date such consent not to be unreasonably withheld or delayed.

64.1.2 The conditions and restrictions in 64.1.1 shall not apply to a change in ownership of any interest in the Contractor (or any company of which the Contractor is a subsidiary) held by the Third Party Shareholder.

64.2 Change Permitted

After the Base Service Charge Date, there shall be no restriction on a change in ownership of any interest in the Contractor.

64.3 Notification of Transfer of Shares

Without prejudice to any requirement for consent under Clause 64.1 (No Change), following any transfer of shares of the Contractor, the Contractor shall notify the Authority of such change as soon as practicable and, in any event, within 20 Business Days and such notification shall include, inter alia, the amendment to the Contractor's ownership details as set out in Schedule 15 (Contractor's Details and Share Capital) and where there is a new Shareholder details of:

- 64.3.1 its name;
- 64.3.2 its registered address;
- 64.3.3 its business address;
- 64.3.4 any contact name;
- 64.3.5 a copy of its annual report and accounts for the 2 years prior to it becoming a Shareholder, and

any other information which the Authority may reasonably require.

65. NOTICES

65.1 Address

Except as otherwise stated, all notices or other communications required in connection with this Agreement shall be in writing in the English language and sent by hand, by first class prepaid post or by facsimile transmission to the relevant address or facsimile number set out below or to such other address or facsimile number as either Party may notify to the other in writing by not less than five Business Days' prior notice.

Authority

Address: Highways Agency
 Temple Quay House
 2 The Square
 Temple Quay
 Bristol
 BS1 6HA

Fax Number: 0117 372 8838

Attention: David Bradbrook (Team Leader, National Roads Telecommunications Team), David Raby (Project Leader, NRTS Project Team)

Contractor

Address: GeneSYS Telecommunications Limited
 Hanover House
 73/74 High Holborn
 London
 WC1V 6LR

Fax Number: 020 7419 5831

Attention: The Managing Director

65.2 **Effective Receipt**

Subject to Clause 65.3 (Timing):

- 65.2.1 a letter delivered by hand shall be deemed received when it is delivered to the addressee;
- 65.2.2 a letter sent by first class prepaid post shall be deemed received on the second Business Day after posting; and
- 65.2.3 a facsimile transmission shall be effective upon successful completion of transmission.

65.3 **Timing**

A notice or other communication received or deemed to be received on a day that is not a Business Day or after 5pm on any Business Day shall be deemed to be received on the following Business Day.

66. CONSENTS AND APPROVALS

66.1 **Contractor's Obligations**

Neither the giving of any approval, knowledge of the terms of any agreement or document (including, without limitation, this Agreement, the Project Documents and the Ancillary Documents) nor the review of any document nor any course of action by or on behalf of the Authority or the Authority Contract Manager shall exclude or limit any of the Contractor's obligations or liabilities under or in connection with this Agreement.

66.2 **Examination**

Without limitation to Clause 66.1 (Contractor's Obligations), no enquiry or examination or lack of enquiry or examination by the Authority into any matter nor any comment, rejection or approval expressed by such person in regard thereto, either with or without modifications, (nor any absence of the same) shall in any respect relieve or absolve the Contractor from any obligation or liability under or in connection with this Agreement.

66.3 **Inspections**

Without limitation to Clause 66.1 (Contractor's Obligations), notwithstanding any inspection by the Authority under this Agreement, the Project Documents or any Ancillary Documents to which the Authority is a party or the failure of the Authority to make any inspection under this Agreement, the Project Documents or any Ancillary Documents to which the Authority is a party, the Contractor's responsibility under this Agreement shall not be relieved or absolved or otherwise modified.

66.4 **Review**

Any approval may be opened up, reviewed or revised if errors or further relevant facts are revealed after the approval has been given provided that if an approval is opened up, reviewed or revised by one Party (the "**First Party**"), at a time when the other Party (the "**Other Party**") has already acted on such approval, the First Party shall indemnify the Other Party for any Loss and/or Claim (save, in the case of the Contractor being the Other Party, in respect of any Loss and/or Claim arising from or in relation to the Commercial Contracts) caused to the Other Party as a result of the approval being opened up, renewed or revised, unless the approval was originally given in reliance on any misrepresentation or false or incomplete information made or given by the Other Party.

67. TAXES

67.1 VAT

- 67.1.1 All amounts due under this Agreement are exclusive of VAT.
- 67.1.2 If any supply made or referred to in this Agreement is or becomes chargeable to VAT then the person receiving the supply (the "**Recipient**") shall in addition pay the person making the supply (the "**Supplier**") the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.
- 67.1.3 Where under this Agreement any amount is calculated by reference to any sum which has been 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.
- 67.1.4 Each Party shall provide to the other Party any information reasonably requested by the other Party in relation to the amount of VAT chargeable and payable in accordance with this Agreement.

67.2 Deductions from Payments

All sums payable by either Party to the other under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of Taxation, save as may be required by Law in which event the Party required to make the deduction or withholding shall (if so required) account to the relevant Taxation Authority for the appropriate amount and shall provide to the other Party within a reasonable period of time the appropriate certificate or other suitable evidence of that Party accounting to the relevant Taxation Authority which the other Party may require in order to obtain any repayment, credit or relief in respect of the withholding or deduction.

67.3 Indemnity Payments

If any payment by one Party under an indemnity in this Agreement is subject to income tax or corporation tax (or any Tax replacing them) in the hands of the other Party, that other Party may demand in writing to the Party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such Tax payable in respect of such additional amount, the other Party receives and retains a net sum equal to the amount it would otherwise have received had the payment not been subject to such Tax. The Party making the payment shall pay such additional amount within 25 Business Days of such demand.

68. DISPUTE RESOLUTION PROCEDURE

68.1 Introduction

- 68.1.1 Any dispute arising in relation to this Agreement shall be resolved in accordance with this Clause 68 (Dispute Resolution Procedure). The Parties shall first consult to come to an agreement on any disputed matter (a "**Dispute**").
- 68.1.2 The persons to whom Disputes shall, in the first instance, be referred by the Parties shall be the Authority Contract Manager and the Contractor Contract Manager who shall meet no later than 14 days after notification of a Dispute. The Authority Contract Manager and the Contractor Contract Manager shall attempt to resolve the Dispute by discussion and agreement in a manner satisfactory to both Parties.

- 68.1.3 If the Authority Contract Manager and the Contractor Contract Manager fail to agree, the matter may be referred by either Party to a meeting of the Contract Review Board. The Contract Review Board shall be authorised by the Parties to compromise the Dispute and shall upon meeting attempt further to resolve the Dispute by discussion and agreement in a manner satisfactory to both Parties. The Contract Review Board may agree to involve representatives of Related Persons in their discussions if they consider that this might assist in resolving the Dispute.
- 68.1.4 If any Dispute is not resolved by agreement within a maximum of 10 Business Days after it has been referred to the Contract Review Board under Clause 68.1.3, such Dispute shall be referred to the Authority's Divisional Director and the Managing Director of the Contractor for resolution.
- 68.1.5 If the Contractor and the Authority fail to resolve the dispute through consultation as referred to in Clause 68.1.1 to 68.1.4 within 10 Business Days of referral to the Authority's Divisional Director and the Managing Director of the Contractor under Clause 68.1.4, either Party may refer the matter to an Adjudicator selected in accordance with Clause 68.2 (Adjudication).
- 68.1.6 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 68 and shall give effect forthwith to every decision of the Adjudicator delivered under this Clause 68.
- 68.1.7 Where a Dispute relates to issues in dispute between the Contractor and the Principal Sub-contractor, the Principal Sub-contractor will have the right to make written submissions to the Adjudicator. The Adjudicator will not have jurisdiction to determine the Principal Sub-contract Dispute itself but his decision shall be binding on the Principal Sub-contractor inasmuch as it determines issues relating to the Principal Sub-contract Dispute.

68.2 Adjudication

- 68.2.1 The Adjudicator nominated to consider a Dispute referred to him shall be selected on a strictly rotational basis from a panel of experts appointed in accordance with the following:
 - (A) all the experts on the panel shall be wholly independent of the Contractor, the Authority, the Principal Sub-contractor and any of the major competitors of the Contractor or Principal Sub-contractor;
 - (B) the panel shall be comprised of 3 experts who shall be appointed jointly by the Contractor and the Authority. Such appointments shall take place within 20 Business Days of the date of this Agreement;
 - (C) if any member of the panel resigns during the term of the Agreement, a replacement expert shall be appointed by the Contractor and the Authority as soon as practicable; and
 - (D) if the Authority and the Contractor 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 20 Business Days of any application for such appointment by either Party.
- 68.2.2 Within 5 Business Days 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.

- 68.2.3 In any event, the Adjudicator shall provide to both Parties his written decision on the Dispute, within 20 Business Days of appointment (or such other period as the Parties may agree after the reference, or 30 Business Days from the date of reference if the Party which referred the Dispute agrees). The Adjudicator shall not state any reasons for his decision. Unless and until revised, cancelled or varied by the Courts, the Adjudicator's decision shall be binding on both Parties who shall forthwith give effect to the decision.
- 68.2.4 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.
- 68.2.5 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.
- 68.2.6 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 Agreement.
- 68.2.7 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 42 (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.
- 68.2.8 The Adjudicator shall not be 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 shall similarly be protected from liability.
- 68.2.9 If:
- (A) either Party is dissatisfied with or otherwise wishes to challenge the Adjudicator's decision; or
 - (B) both Parties agree,
- any Party contemplating or intending any action or application in any Court shall consider with its legal advisors what Court or list is most suitable for such action or application. Any action or application to the Court in respect of any Dispute which touches or concerns this Agreement shall be made in the first instance to the Commercial Court in London save where the Party making or contemplating making such application receives legal advice that an application to the Commercial Court is inappropriate in the particular circumstances in which case such application may be made to any other Court of competent jurisdiction in England and Wales. For the avoidance of doubt, the Court shall have full power to open up, review and revise any endorsement, decision (including any decision

of the Adjudicator), opinion, instruction, notice, statement of objection, finding, determination, requirement or certificate made under this Agreement and/or related to the Dispute.

- 68.2.10 Subject to Clause 68.2.9, nothing in this Dispute Resolution Procedure shall prevent either Party at any time seeking any interim or interlocutory relief from the Commercial Court.

68.3 Sub-contract issues

- 68.3.1 If any Dispute raises issues which relate to any dispute between the Contractor and the Principal Sub-contractor arising under the Principal Sub-contract or otherwise affects the relationship or rights of the Contractor and/or the Principal Sub-contractor under the Principal Sub-contract (a "**Principal Sub-contract Dispute**"), then the Contractor may include as part of its submission made to the Adjudicator submissions made by the Principal Sub-contractor and Clauses 68.3.2 to 68.3.6 shall apply.
- 68.3.2 The Adjudicator shall not have jurisdiction to determine the Principal Sub-contract Dispute but the decision of the Adjudicator shall, subject to Clause 68.2.9 be binding on the Contractor and the Principal Sub-contractor insofar as it determines the issues relating to the Principal Sub-contract Dispute.
- 68.3.3 Any submissions made by the Principal Sub-contractor shall:
- (A) be made within the time limits applicable to the delivery of submissions by the Contractor as part of the Contractor's submissions; and
 - (B) concern only those matters which relate to the dispute between the Authority and the Contractor under this Agreement.
- 68.3.4 Where the Principal Sub-contractor makes submission in any reference before the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one third by the Authority and two thirds by the Contractor.
- 68.3.5 The Authority shall have no liability to the Principal Sub-contractor arising out of or in connection with any decision of the Adjudicator in respect of the costs of Principal Sub-contractor in participating in the resolution of any Dispute.
- 68.3.6 The Contractor shall not allow Principal Sub-contractor access to any document relevant to the issues in dispute between the Authority and the Contractor save where:
- (A) the document is relevant also to the issues relating to the Sub-contract Dispute; and
 - (B) the Contractor has first delivered to the Authority a written undertaking from Principal Sub-contractor addressed to the Authority that it shall not use any such document otherwise than for the purpose of the Dispute Resolution Procedure and that it shall not disclose such documents or any information contained therein to any third party other than the Adjudicator or any professional adviser engaged by Principal Sub-contractor to advise in connection with the Dispute.

69. AGENCY

69.1 No Delegation

No provision of this Agreement shall be construed as a delegation by the Authority of any of its statutory authority to the Contractor.

69.2 No Agency

Save as otherwise provided in this Agreement, the Contractor shall not be or be deemed to be an agent of the Authority and the Contractor shall not hold itself out as having authority or power to bind the Authority in any way.

69.3 Independent Contractor

The Contractor shall at all times be an independent contractor and nothing in this Agreement shall be construed as creating any partnership between the Authority and the Contractor or any relationship of employer and employee between the Authority and the Contractor or any employee of the Contractor.

70. WHOLE AGREEMENT

Each Party to this Agreement confirms that this Agreement (including the Schedules), the Project Documents, any Ancillary Documents to which the Authority is a party and any side letters entered into between the Parties constitute the whole agreement and understanding of the Parties as to the subject matter hereof and there are no prior or contemporaneous agreements between the Parties with respect thereto and, for the avoidance of doubt, the tender invitation documentation is expressly excluded from this Agreement. Nothing in this Agreement shall affect the liability of a Party for fraud or fraudulent misrepresentation.

71. WAIVER

71.1 No term or provision of this Agreement shall be considered as waived by any Party to this Agreement unless a waiver is given in writing by that Party.

71.2 No waiver under Clause 71.1 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 Agreement unless (and then only to the extent) expressly stated in that waiver.

72. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or set of counterparts executed, in either case, by all the parties thereto shall constitute a full and original instrument for all purposes.

73. SEVERABILITY

If any condition, clause or provision of this Agreement is held to be illegal or unenforceable, it may be severed and the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

74. COSTS AND EXPENSES

Except where expressly stated otherwise, each Party to this Agreement shall be responsible for paying its own costs (including legal costs) and expenses incurred by it in connection with the negotiation, preparation and execution of this Agreement.

75. AMENDMENTS

No amendment to this Agreement, any Project Documents or any Ancillary Documents (other than the Financing Agreements) shall be binding unless agreed in writing and signed by duly authorised representatives of the Parties.

76. NO PRIVILEGE

With the exception of the rights of:

- 76.1 any Authority Party to enforce the terms contained in Clause 44.1 (Contractor's Indemnities) and Clause 45.1 (Contractor Indemnity);
- 76.2 any Contractor Party to enforce the terms contained in Clause 45.3.1(B);
- 76.3 the New Service Provider to enforce the terms contained in Clause 60.6 (Contractor Indemnity); and
- 76.4 any Appointed Representative and Suitable Substitute Contractor to enforce the terms contained in Clauses 11.1.1 and 11.1.2,

no provision of this Agreement is intended to or does confer upon any Third Party, any Contractor Party or any Authority Party any benefit, right or discretion enforceable at the option of that Third Party, Contractor Party or Authority Party against the Authority or the Contractor as the case may be or any liability whatsoever on any Third Party and no term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement.

77. FURTHER ASSURANCES

Each Party shall do all things reasonably necessary and execute all further documents reasonably necessary to give full effect to this Agreement.

78. GOVERNING LAW AND JURISDICTION

78.1 Law

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

78.2 Jurisdiction

Subject to the provisions of Clause 68 (Dispute Resolution Procedure), the Parties submit to the exclusive jurisdiction of the English Courts as regards any claim or matter arising in relation to this Agreement.

79. NO LOSS WAIVER

- 79.1 Subject to Clause 79.2, the Authority shall not be entitled to reduce or avoid to any extent any amount payable by it to the Contractor under this Agreement (including by way of indemnity) in reliance solely on the fact that the entitlement of a Sub-contractor is expressed to be conditional on the establishment of a corresponding entitlement of the Contractor under this Agreement.
- 79.2 Clause 79.1 is without prejudice to any other entitlement of the Authority howsoever arising so to reduce or avoid any amount payable pursuant to or liability under this Agreement.

IN WITNESS WHEREOF the Parties have executed this Agreement on the date first written above.

EXECUTED by **THE SECRETARY OF**)
STATE FOR TRANSPORT acting by:)

Name Redacted under Sec 40 of the FOIA Exemptions 'Personal Information'

EXECUTED by)
GENESYS TELECOMMUNICATIONS)
LIMITED acting by:)

Name Redacted under Sec 40 of the FOIA Exemptions 'Personal Information'

Director