

without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to clause 67.4.3 in respect of such Claim.

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

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

67.4.8.2 the amount paid to the Beneficiary by the Indemnifier in respect of the Claim under the relevant indemnity,

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

67.4.9 Any person taking any of the steps contemplated by clauses 67.4.3 to 67.4.8 (inclusive) shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Contract.

## **PART N - INSURANCE**

### **68. INSURANCE**

#### **68.1 Required Insurances**

The Service Provider shall take out and maintain or procure the maintenance of:

68.1.1 the insurances set out in schedule 6 (*Insurance*); and

68.1.2 any other insurances as may be required by law.

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

68.3 The insurances referred to in clause 68.1.1 (the “**Required Insurances**”) shall:

68.3.1 subject to clause 68.4 below, name the Service Provider as co-insured with any other party maintaining the insurance;

68.3.2 provide for non-vitiation protection in respect of any claim made by the Authority as co-insured in accordance with Endorsement 2 in part 3 of schedule 6 (*Insurance*);

68.3.3 contain a clause waiving the insurers’ subrogation rights against the Authority, its employees and agents in accordance with Endorsement 2 in part 3 of schedule 6 (*Insurance*); and

68.3.4 provide for thirty (30) days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 in part 3 of schedule 6 (*Insurance*).

68.3.5 in respect of CAR Insurance being a Required Insurance that provides cover in respect of damage to any Project Network Parts, provide for payment of any CAR Proceeds in accordance with clause 68.11A.1 and 68.11A.2.

68.3.6 in respect of Property Damage Insurance being a Required Insurance that provides cover in respect of damage to any Project Facilities provide for payment of any Property Damage Proceeds in accordance with clause 68.11A.3.

68.4 The insurances referred to in clause 68.1.1 shall name the Authority as a co-insured for its separate interest to the extent required under Schedule 6 (*Insurance*).

**68.5 Information to be provided to the Authority by the Service Provider**

The Service Provider shall provide to the Authority:

- 68.5.1 copies on request of all insurance policies referred to in clause 68.1 (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority shall be entitled to inspect them during ordinary business hours; and
- 68.5.2 evidence that the premiums payable under all insurance policies have been paid and that the insurances are in full force and effect in accordance with the requirements of clauses 68.1 to clause 68.10 and schedule 6 (*Insurance*).
- 68.6 Renewal certificates in relation to the insurances referred to in clause 68.1.1 (*Required Insurances*) shall be obtained by the Service Provider as and when necessary and copies (certified in a manner acceptable to the Authority) shall be forwarded to the Authority as soon as possible but in any event on or before the renewal date.
- 68.7 If the Service Provider is in breach of clause 68.1 (*Required Insurances*), the Authority may pay any premiums required to keep such insurance in force or itself procure such insurance and may, in either case, recover such amounts from the Service Provider on written demand.
- 68.8 The Service Provider shall give the Authority notification within thirty (30) days after any claim in excess of [REDACTED] on any of the Required Insurances policies accompanied by full details of the incident giving rise to the claim.
- 68.9 Neither failure to comply nor full compliance with the insurance provisions of this Contract shall limit or relieve the Service Provider of its liabilities and obligations under this Contract.
- 68.10 The insurance premiums in respect of the Required Insurances and any other insurances required by Legislation shall be the

responsibility of the Service Provider in accordance with this Contract.

68.11 Not used.

68.11A.1 All insurance proceeds received under any CAR Insurance in respect of damage to any Project Network Part(s) ("**CAR Proceeds**") shall be applied to repair, reinstate and replace each part or parts of the Project Network Parts(s) in respect of which the proceeds were received.

68.11A.2 All CAR Proceeds in respect of a single event (or series of related events) in an amount in excess of [REDACTED] shall be paid into the Joint Insurance Account.

68.11A.3 All insurance proceeds received under any Property Damage Insurance ("**Property Damage Proceeds**") shall be applied to repair, reinstate and replace each part or parts of the Project Facilities in respect of which the proceeds were received.

68.11A.4 All Property Damage Proceeds in respect of a single event (or series of related events) in an amount in excess of [REDACTED] shall be paid into the Joint Insurance Account.

**68.11B.1 Reinstatement of Project Network Parts and Project Facilities where the cost of Reinstatement Works is equal to or below [REDACTED]**

Subject to clauses 12 (*Geotechnical and Geological Zones*) and 13 (*Latent Defects*), where damage to Project Network Parts or Project Facilities occurs as a result of a single event (or series of related events) (the "**Relevant Incident**") and where such damage requires repair, reinstatement or replacement (including all associated traffic management) (the "**Reinstatement Works**") of the Project Network Parts which are the subject of such Relevant Incident costing up to and including [REDACTED] the Service Provider shall be responsible for the cost of the Reinstatement Works and such Reinstatement Works shall be completed by the Service Provider and shall be carried out in accordance with Good Industry Practice.

**68.11B.2 Reinstatement of Project Network Parts and Project Facilities**  
where the cost of Reinstatement Works is above [REDACTED]

Where the cost of any required Reinstatement Works where damage occurs in excess of [REDACTED] the provisions of clause 68.12 shall apply to Reinstatement of uninsured Project Network Parts and the provisions of clause 68.12A shall apply to reinstatement under Required Insurances.

**68.12 Reinstatement of uninsured Project Network Parts**

68.12.1 Save as provided in clause 67.2 (*Limitation of Liability*), the Service Provider shall be liable for the cost of any Reinstatement Works up to [REDACTED] (the "Material Damage Limit") (provided that any damage in respect of which CAR Proceeds are recovered by the Service Provider shall not count towards the [REDACTED] and to which clause 68.12A (*Reinstatement under Required Insurances*) shall apply, such costs to exclude any costs (including traffic management costs) which the Service Provider is able to recover from a third party (including, but not limited to those costs listed in the Reinstatement Plan pursuant to clause 68.12.2.1(i)) and clause 68.12B (*Conduct of Third Party Claims*) shall apply in respect of recovery of such third party costs.

68.12.2 Subject to clauses 12 (*Geotechnical Failures*) and 13 (*Latent Defects*), where a Relevant Incident occurs and such damage is likely to require works or replacement costing in excess of [REDACTED] (provided that any damage in respect of which CAR Proceeds are received by the Service Provider shall not count towards the [REDACTED] and to which clause 68.12A (*Reinstatement under Required Insurances*) shall apply;

68.12.2.1 the Service Provider shall deliver as soon as practicable and in any event within twenty (20) Business Days after the Relevant Incident a plan (the "Reinstatement Plan") prepared by the Service Provider for the carrying out of works necessary to repair, reinstate or replace the Project Network Parts

which are the subject of the Relevant Incident (including all associated traffic management) (the "**Reinstatement Works**") in accordance with (a) to (i) below. The Reinstatement Plan shall set out:

- (a) if not the Service Provider or a Sub-Contractor, the identity of the person proposed to effect each element of the Reinstatement Works, which shall be subject to the prior written approval of the Authority;
- (b) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority, which approval shall not be unreasonably delayed;
- (c) the Reinstatement Works Direct Costs;
- (d) a summary of any civil law actions or claims for the recovery of any amounts against any third parties to be undertaken by the Service Provider or any Service Provider Party ("**Third Party Claims**"), including an estimate of the likely amounts to be claimed from third parties and the justification for such estimate, a summary of the anticipated costs to be expended in recovery of such amounts and the likelihood of recovery of such costs from any third the net amounts to be recovered (the "**Third Party Claims Estimate**");
- (e) an estimate of any amounts recoverable by the Service Provider under any Required Insurances;
- (f) details of the cause of the Relevant Incident, demonstrating (where applicable) to the satisfaction of the Authority (acting reasonably) that the Relevant Incident was not caused by or contributed to by any act

or omission of the Service Provider or any Service Provider Party, whether deliberate or negligent;

- (g) traffic management measures, including road closures, diversions, restricted access to roads and any closure or restrictions on pedestrian thoroughfares that the Service Provider has taken, or intends to take, as part of the rectification, together with an estimate of the cost of such measures;
- (h) any further measures that the Service Provider has taken, or intends to take in order to manage any immediate or potential health and safety risk to the public;
- (i) the extent to which the Authority (in the opinion of the Service Provider and based on the information available to the Service Provider at the relevant time) or the Service Provider will be entitled to recover the costs of rectification (including those costs listed in clauses 68.12.2.1(c) and (g) above) from any third party; and
- (j) where relevant, and to the extent not addressed in the Reinstatement Plan, the terms of any Insured Reinstatement Plan required as a result of the Relevant Incident, pursuant to clause 68.12A.1.2 (*Reinstatement under Required Insurances*);

and the Authority shall thereafter notify the Service Provider that either clause 68.12.2.2 or clause 68.12.2.3 shall apply.

68.12.2.2 Provided that the Authority is satisfied that the Reinstatement Plan will enable the Service Provider to comply with clause 68.12.6 within a reasonable timescale and is also satisfied with the Reinstatement Works Direct Costs and the Third Party Claims Estimate then where the Authority agrees to fund the cost of any Reinstatement Works in excess of the Material Damage Limit then:

- (a) the Reinstatement Plan will be adopted;
- (b) the Service Provider shall, as necessary, enter into contractual arrangements to effect the Reinstatement Works with any person (or persons) identified in the Reinstatement Plan approved by the Authority;
- (c) the Service Provider shall use all reasonable endeavours to pursue claims against those third parties notified to the Authority as part of the Third Party Claims Estimate for the recovery of the costs of the Reinstatement Works or where it would otherwise be reasonable for the Service Provider to pursue a claim, and to recover any sums due under any Required Insurances;
- (d) where the Reinstatement Plan incorporates the terms of any Insured Reinstatement Plan then clause 68.12A.1.2 (*Reinstatement under Required Insurances*) shall apply in respect of the Reinstatement Plan to the extent it applies to Insured Reinstatement Works;
- (e) the Authority agrees and undertakes that, subject to compliance by the Service Provider with its obligations under this clause, and provided that the Service Provider procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in clause 68.12.2.2(b), it shall not exercise any right which it might otherwise have to terminate this Contract by virtue of the Relevant Incident;
- (f) the Authority undertakes to use reasonable endeavours to assist the Service Provider in the carrying out of the Reinstatement Plan;
- (g) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in

accordance with clause 68.12.6, the Authority shall issue a statement to that effect; and

- (h) subject to the provisions of clause 67.2 (*Limitation of Liability*), the Service Provider shall be solely responsible for the payment of any deficiency of the Relevant Proceeds to fund the Reinstatement Works, provided that subject to compliance with clause 68.12.4, the Service Provider shall not be responsible in the case of any Relevant Incident for the cost of any Reinstatement Works in excess of the Material Damage Limit, such costs to exclude any costs (including traffic management costs) which the Service Provider is able to recover from a third party (including, but not limited to those costs listed in the Reinstatement Plan pursuant to clause 68.12.1.2(i) and clause 68.12B (*Conduct of Third Party Claims*)) shall apply in respect of recovery of such third party costs.

68.12.2.3 If the Authority disagrees that the Reinstatement Plan will enable the Service Provider to comply with the requirements of this Contract (including the Output Specification) upon completion of the Reinstatement Plan, and/or within a reasonable timescale and/or is dissatisfied with the Reinstatement Works Direct Costs or the Third Party Claims Estimate, and/or is not satisfied (acting reasonably) that the Relevant Incident was not caused by or contributed to by the failure of the Service Provider or a Service Provider Party to provide the Services, it shall notify the Service Provider in writing and the Parties shall as soon as practicable thereafter meet to endeavour to agree an amended Reinstatement Plan and/or amended Reinstatement Works Direct Costs and/or Third Party Costs Estimate. If the Parties are unable to

reach an agreement either Party may refer the matter to the Dispute Resolution Procedure, and following the agreement or determination of a Reinstatement Plan, the Reinstatement Plan shall be adopted and the provisions of clause 68.12.1.2(b) to 68.12.1.2(j) shall apply.

68.12.3 Where a Relevant Incident and/or the carrying out of any Reinstatement Works affects the provision of the Services by the Service Provider, the Service Provider shall be entitled to an Excusing Cause from the date of the Relevant Incident until the completion of the Reinstatement Works or until the implementation of the De-Accrual or Change pursuant to clause 68.12.4.2, provided always that the Service Provider is complying with the provisions of this clause 68.12 in relation to the carrying out of the Reinstatement Works.

68.12.4 Where the Reinstatement Works Direct Costs in relation to a Relevant Incident agreed between the Parties pursuant to clause 68.12.2.2 or determined pursuant to clause 68.12.2.3 less any amounts recoverable pursuant to any Required Insurance (provided always that the Service Provider shall be solely responsible for the payment of any deductible due in accordance with the terms of such Required Insurances) (the “**Net Reinstatement Works Cost**”) exceeds the Material Damage Limit, the Service Provider shall not be responsible for funding the Reinstatement Works in excess of the Material Damage Limit, and as soon as reasonably practicable (and in any event no longer than ten (10) Business Days following the agreement or determination of the Reinstatement Plan) the Authority shall notify the Service Provider of its decision as to which of the following options shall apply:

68.12.4.1 the Authority shall fund the Net Reinstatement Works Costs which are in excess of the Material Damage Limit; or

68.12.4.2 the Service Provider is not required to carry out the Reinstatement Plan and the Authority shall use the procedure set out in Schedule 17 (*Change Protocol*) or, where applicable, the procedure set out in Schedule 18 (*Accruals and De-Accruals*) to

implement a Change (as applicable) to remove from the scope of the Project or to De-Accrue the Project Network Part(s) affected by the Relevant Incident,

and the Service Provider shall not implement the Reinstatement Plan until the Authority has notified the Service Provider of its decision pursuant to this clause.

68.12.5 Where the Authority has opted to fund the Net Reinstatement Works Costs in excess of the Material Damage Limit pursuant to clause 68.12.4.1, the following provisions shall apply:

68.12.5.1 the Service Provider shall carry out the Reinstatement Works in accordance with the Reinstatement Plan up to the Material Damage Limit and shall notify the Authority when the Service Provider has expended funds at the level of the Material Damage Limit;

68.12.5.2 in any Month following the notification pursuant to clause 68.12.5.1, the Service Provider shall include with the Draft Monthly Payment Report pursuant to clause 56.4 (*Draft Monthly Payment Report*) amounts equivalent to the amounts expended by the Service Provider in that Month in carrying out the Reinstatement Plan and shall provide with any such Draft Monthly Payment Report evidence of the amounts expended by the Service Provider and also evidence that such amounts have been paid by the Service Provider,

provided that the Authority's liability to pay pursuant to this clause 68.12.5 shall never exceed the difference between the Material Damage Limit and the Net Reinstatement Works Cost.

68.12.6 The Service Provider shall carry out the Reinstatement Works in accordance with the Reinstatement Plan and Good Industry Practice and to the extent relevant in accordance with the provisions of schedule 2 (*Output Specification*)

so that on completion of the work, the provisions of this Contract are complied with.

**68.12.A Reinstatement under Required Insurances**

68.12A.1 Subject to clause 68.12A.3, where damage to Project Network Parks occurs as a result of a single event (or a series of related events) and such damage is covered by any Required Insurance (the “**Relevant Insured Incident**”) and likely to require works or replacement costing in excess of [REDACTED]:

68.12A.1.1 the Service Provider shall deliver as soon as practicable and in any event within twenty (20) Business Days after the Relevant Incident a plan (the “**Insured Reinstatement Plan**”) prepared by the Service Provider for the carrying out of the works necessary (the “**Insured Reinstatement Works**”) to repair, reinstate or replace the Project Network Part; and Project Facilities which are the subject of the Relevant Claim or Relevant Insured Incident (including all associated traffic management) in accordance with clause 68.12A.2 below, save that where the Relevant Insured Incident is also a Relevant Incident pursuant to clause 68.12.1 (*Reinstatement of uninsured Project Network Parts*) the Service Provider shall incorporate the terms of the Insured Reinstatement Plan into the terms of the Reinstatement Plan produced pursuant to clause 68.12.2.1 (*Reinstatement of uninsured Project Network Parts*), and the terms of clause 68.12 (*Reinstatement of uninsured Project Network Parts*) shall apply to the approval of the Insured Reinstatement Plan as part of the overall Reinstatement Plan. The Insured Reinstatement Plan shall set out, to the extent not addressed in the Reinstatement Plan in respect of the Relevant Incident:

- (a) if not the Service Provider or a Sub-Contractor, the identity of the person proposed to effect each element of

the Insured Reinstatement Works, which shall be subject to the prior written approval of the Authority; and

- (b) the proposed terms and timetable upon which the Insured Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority, which approval shall not be unreasonably delayed;

68.12A.1.2 provided that the Authority is satisfied that the Insured Reinstatement Plan will enable the Service Provider to comply with clause 68.12A.2 within a reasonable timescale then:

- (a) the Insured Reinstatement Plan will be adopted;
- (b) the Service Provider shall, as necessary, enter into contractual arrangements to effect the Insured Reinstatement Works with any person (or persons) identified in the Insured Reinstatement Plan approved by the Authority;
- (c) prior to the earlier to occur of the Termination Date or Expiry Date, any amounts standing to the credit of the Joint Insurance Account (“**the Relevant Proceeds**”) (together with any interest accrued) may be withdrawn by the Service Provider from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in clause 68.12A.1.2(b) and to meet any other reasonable costs and expenses of the Service Provider for the sole purpose of funding the Insured Reinstatement Works and the Parties shall operate the signatory requirements of the Joint Insurance Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and Expiry Date, the Authority may withdraw amounts standing to the credit of the Joint Insurance Account for

the purposes of funding any Insured Reinstatement Works;

- (d) the Authority agrees and undertakes that, subject to compliance by the Service Provider with its obligations under clause 68.12A.2, and provided that the Service Provider procures that the Insured Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in clause 68.12A.1.2(b), it shall not exercise any right which it might otherwise have to terminate this Contract by virtue of the Relevant Incident;
- (e) the Authority undertakes to use reasonable endeavours to assist the Service Provider in the carrying out of the Insured Reinstatement Plan;
- (f) after the Insured Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with clause 68.12A.2 the Authority shall permit withdrawal by the Service Provider of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under clause 68.12A.1.2(c) in respect of the Relevant Incident; and
- (g) subject to the provisions of clause 67.2 (*Limitation of Liability*) the Service Provider shall be solely responsible for the payment of any deficiency of the Relevant Proceeds to fund the Insured Reinstatement Works.

68.12A.2 Where insurance proceeds are to be used, in accordance with this Contract, to repair, reinstate or replace any Project Network Part or Project Facility, the Service Provider shall carry out the work in accordance with the Insured Reinstatement Plan and Good Industry Practice and to the extent relevant in accordance with the provisions of schedule 2 (*Output Specification*) so that on completion of the work, the provisions of this Contract are complied with,

68.12A.3 If following a Relevant Insured Incident, the Authority exercises its right to invoke a Change, such that the relevant affected Project Network Part or parts thereof are removed from the Service Provider's responsibility under this Contract to the extent necessary to enable the Authority to undertake Insured Reinstatement Works the Service Provider shall, to the extent not satisfied out of Relevant Proceeds or required for any Insured Reinstatement Works already undertaken, pay to the Authority a sum equivalent to the full cost of the Insured Reinstatement Works,

68.12A.4 If following a Relevant Insured Incident, the Authority exercises its right to invoke a Change, such that the relevant affected Project Network Part or part thereof are removed from the Service Provider's responsibility under this Contract, other than to enable the Authority to undertake Insured Reinstatement Works, the Service Provider shall, to the extent not required for any Insured Reinstatement Works already undertaken, pay to the Authority the balance of any Relevant Proceeds and the Service Provider shall be entitled to withdraw such amount from the Joint Insurance Account for the purposes thereof.

#### **68.12B Conduct of Third Party Claims**

68.12B.1 To the extent that the Authority is obliged, or elects pursuant, to clause 68.12.3.1 (*Reinstatement of uninsured Project Network Parts*) to fund the cost of Reinstatement Works in excess of the limit set out in clause 68.12.1, (*Reinstatement of uninsured Project Network Parts*) this clause shall apply to the conduct by the Service Provider of claims made against a third party for the recovery of such costs ("**Insurance Recovery Claim**"). The Service Provider shall use reasonable endeavours to pursue any such Insurance Recovery Claim where such Insurance Recovery Claim was detailed in the Reinstatement Plan in accordance with clause 68.12.2.1(f) (*Reinstatement of uninsured Project Network Parts*) or where it would otherwise be reasonable for the Service Provider to pursue such Insurance Recovery Claim provided that,

subject to clause 68.12B.8, the Service Provider shall not be obliged to incur material additional expenditure (as defined in clause 68.12.1.) (*Reinstatement of uninsured Project Network Parts*) in pursuing such Insurance Recovery Claims.

68.12B.2 If either the Authority or the Service Provider serves or receives any notice, demand, letter or other document concerning any Insurance Recovery Claim such Party shall give notice in writing to the other party as soon as reasonably practicable and in any event within twenty (20) Business Days of service or receipt of such document, and shall supply a copy of the relevant document to the other Party.

68.12B.3 Subject to the provisions of this clause 68.12B, following the service of a notice by the Authority pursuant to clause 68.12B.2, where it appears that the Authority pursuant to clause 68.12B.2 is or may become entitled to recover any amount arising out of the Insurance Recovery Claim, the Service Provider shall (subject to clause 68.12B.5.1 and clause 68.12B.5) take conduct of any incidental negotiations and the Authority shall give the Service Provider all reasonable co-operation, access and assistance for the purposes of considering and pursuing such claim.

68.12B.4 With respect of an claim conducted by the Service Provider pursuant to clause 68.12B.3:

68.12B.4.1 the Service Provider shall keep the Authority fully informed and consult with it about material elements of the conduct of the claim;

68.12B.4.2 the Service Provider shall not bring the name of the Authority into disrepute; and

68.12B.4.3 the Service Provider shall not settle such claims without the prior consent of the Authority, such consent not to be unreasonably withheld or delayed.

68.12B.5 The Authority shall be free to settle or discontinue any claim on such terms as it may in its absolute discretion think fit and without prejudice to its right and remedies under this Contract if:

68.12B.5.1 the Service Provider is not entitled to take conduct of the claim in accordance with clause 68.12B.3; or

68.12B.5.2 the Authority notifies the Service Provider of its intention to take conduct of the relevant claim within twenty (20) Business days of the notice under clause 68.12B.2; or

68.12B.5.3 the Service Provider notifies the Authority that it does not intend to take conduct of claim; or

68.12B.5.4 the circumstances set out in clause 68.12B.8 (a) or (b) apply; or

68.12B.5.5 the Service Provider fails to comply in any material respect with the provisions of clause 68.12B.3 within twenty (20) Business Days of notice from the Authority of such failure.

68.12B.6 The Service Provider shall pay to the Authority all amounts recovered pursuant to any Insurance Recovery Claim up to the lesser (i) of the amount so recovered by the Service Provider and (ii) the amount that the Authority has funded the Service Provider in respect of the relevant Reinstatement Works pursuant to clause 68.12.2.2 (*Reinstatement of uninsured Project Network Parts*) and any additional costs incurred by the Authority in respect of such Insurance Recovery Claim, including all sums paid pursuant to the indemnity in

clause 68.12B.8. Any remaining amounts shall be for the sole account of the Service Provider.

68.12B.7 Where the Service Provider pays to the Authority amounts recovered pursuant to an Insurance Recovery Claim and the Authority subsequently recovers (whether by payment, discount, credit, saving relief or other benefit or otherwise) a sum which is directly referable to the same fact, matter, event or circumstances giving rise to the payment of such amount, the Authority shall forthwith repay to the Service Provider whichever is the lesser of;

68.12B.7.1 an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses reasonably and properly incurred by the Authority in recovering the same; and

68.12B.7.2 the amount paid to the Authority by the Service Provider in respect of the Insurance Recovery Claim, provided that there shall be no obligation on the Authority to pursue such recovery other than pursuant to clause 68.12.2.2 (*Reinstatement of uninsured Project Network Parts*) and that the Service Provider is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Service Provider exceeds any costs sustained by the Authority (including for this purpose indirect or consequential losses or claims for loss of profits which are otherwise excluded by this Contract from being recovered from the Service Provider, and any sums paid pursuant to the indemnity in clause 68.12B.8).

68.12B.8 The Service Provider shall notify the Authority in circumstances where the Service Provider reasonably believes that continuing to pursue an Insurance

Recovery Claim (beyond the notice period set out in this clause 68.12B.8) pursuant to this clause 68.12B (Conduct of Third Party Claims) would lead to the Service Provider incurring material additional expenditure (as defined in clause 68.12.1. (Reinstatement of uninsured Project Network Parts) in pursuing such Insurance Recovery Claim, and upon such notification the Authority shall notify the Service Provider within fifteen (15) Business Days (provided that the Service Provider shall remain responsible for continuing to pursue such Insurance Recovery Claim for the duration of the fifteen (15) Business Days) that:

- (a) the Authority will take over the conduct of such Insurance Recovery Claim, in which case the Service Provider shall provide the Authority with all reasonable co-operation, access and assistance for the purposes of considering and pursuing such claim, without incurring material additional expenditure (as defined in clause 68.12.1 (*Reinstatement of uninsured Project Network Parts*)) in respect of such Insurance Recovery Claim, and the Service Provider shall have no further obligation to pursue such Insurance Recovery Claim pursuant to this clause 68.12B (*Conduct of Third Party Claims*); or
- (b) the Service Provider shall continue to pursue such Insurance Recovery Claim pursuant to this clause 68.12B (Conduct of Third Party Claims) subject to the Authority indemnifying the Service Provider in a form acceptable to the Service Provider, acting reasonably, against all costs or expenses incurred by the Service Provider in pursuing such Insurance Recovery Claim in excess of [REDACTED], save that the Authority may cap such indemnity at a level determined by the Authority, provided that any costs or

expenses incurred by the Service Provider in excess of such cap shall be deemed to be material expenditure for the purposes of this clause 68.12B (*Conduct of Third Party Claims*) and the Service Provider shall have no further obligation to pursue such Insurance Recovery Claim pursuant to this clause 68.12B (*Conduct of Third Party Claims*),

and, subject to clause 68.12B.8(a) and clause 68.12B.8 (b), the Service Provider will have no further obligation to pursue such Insurance Recovery Claim.

### **68.13 Uninsurable Risks**

If a risk usually covered by a Required Insurance or statutory insurances under this Contract becomes Uninsurable then:

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

68.13.2 if both Parties agree, or it is determined in accordance with the Dispute Resolution Procedure that the risk is Uninsurable and that:

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

68.13.2.2 the Service Provider has demonstrated to the Authority that the Service Provider and a prudent board of directors of a company operating the same or substantially similar PFI businesses in the United Kingdom to that operated by the Service Provider would in similar circumstances (in the absence of the type of relief envisaged by this clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the

likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

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

68.14 If the requirements of clause 68.13 (*Uninsurable Risks*) are satisfied, but the Parties cannot agree as to how to manage or share the risk, then:

68.14.1 in respect of third party liability insurance only (being construction third party liability insurance as described in paragraph 3 of Part 1 of schedule 6 (*Insurance*) and third party public and product liability insurance as described in paragraph 3 of Part 2 of schedule 6 (*Insurance*)) ("**Third Party Liability Insurance**") the Authority shall (at the Authority's option) either pay to the Service Provider an amount equal to the amount calculated in accordance with clause 80.4 (*Compensation following a Force Majeure Event or Uninsurability*) and this Contract will terminate, or elect to allow this Contract to continue and clause 68.14.2 shall thereafter apply in respect of such risk; and

68.14.2 in respect of CAR Insurance, Property Damage Insurance, Third Party Liability Insurance (if the Authority elects to allow this Contract to continue in accordance with clause 68.14.1), delay in start-up insurance (as described in paragraph 2 of part 1 of schedule 6 (*Insurance*) but not loss of profits, business interruption insurance (as described in paragraph 2 of Part 2 of schedule 6 (*Insurance*) but not loss of profits or statutory insurances, this Contract shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to the Service Provider an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Contract will continue, or an amount equal to the amount calculated in accordance with clause 80.4 (*Compensation following a Force Majeure Event*

*or Uninsurability*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon this Contract will terminate; and

68.14.3 where pursuant to clauses 68.14.1 and/or 68.14.2 this Contract continues then the Annual Unitary Charge shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by the Service Provider in respect of the relevant risk in the year prior to it becoming Uninsurable (Indexed from the date that the risk becomes Uninsurable). Where the risk is Uninsurable for part of a year only the reduction in the Annual Unitary Charge shall be pro rated to the number of months for which the risk is Uninsurable; and

68.14.4 where pursuant to clauses 68.14.1 and/or 68.14.2 this Contract continues the Service Provider shall approach the insurance market at least every four months to establish whether the risk remains Uninsurable. As soon as the Service Provider is aware that the risk is no longer Uninsurable, the Service Provider shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Contract; and

68.14.5 in respect of any period between the Authority receiving notification in accordance with Clause 68.13.1 that a TPL Risk has become Uninsurable and the Authority's notification to the Service Provider in accordance with Clause 68.14 in respect of such risk then, provided it is ultimately agreed or determined that the requirements of Clause 68.13.2 are satisfied in respect of the Uninsurable TPL Risk and subject to Clause 68.14.6 below, Clause 68.14.2 shall apply in respect of occurrences of the Uninsurable TPL Risk during such period unless the parties otherwise agree how to manage the risk during this period; and

68.14.6 Clause 68.14.5 shall only apply provided the Service Provider does not unreasonably materially delay (a) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of Clause 68.13.2 are satisfied in respect of the Uninsurable TPL Risk and/or (b) meeting with the Authority to discuss the means by which the risk should be managed.

68.15 If, pursuant to clause 68.14.2, the Authority elects in writing to make payment to the Service Provider (such that this Contract will terminate) (the "**Relevant Payment**"), the Service Provider shall have the option (exercisable within twenty (20) Business Days of the date of such election by the Authority (the "**Option Period**")) to pay to the Authority on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the relevant risk not become Uninsurable, in which case this Contract will continue (and the Relevant Payment will not be made by the Authority), and the Service Provider's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

68.16 Nothing in this clause 68 (*Insurance*) shall oblige the Service Provider to take out insurances in respect of a risk which is Uninsurable save where the predominant cause of the risk being Uninsurable is any act(s) or omission(s) of the Service Provider or a Service Provider Party.

**68.17 Unavailability of terms and conditions**

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

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

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

(other than, in each case, by reason of one or more actions of the Service Provider and/or any sub-contractors of the Service Provider) then clause 68.18 (*Waiver*) shall apply.

**68.18 Waiver**

If it is agreed or determined that clause 68.17 (*Unavailability of terms and conditions*) applies then the Authority shall waive the Service Provider's obligations in clauses 68.1 (*Required Insurances*) to 68.10 (and/or schedule 6 (*Insurance*)) in respect of that particular Insurance Term and the Service Provider shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Contract as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in clause 68.17 (*Unavailability of terms and conditions*) continue to apply to such Insurance Term.

#### **68.19 Availability of Alternative Insurance**

To the extent that the Parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and/or condition of insurance is available to the Service Provider in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address the Service Provider's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, the Service Provider shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Contract, the costs of such insurance shall be subject to the premium costs sharing mechanism set out at clause 68.24 (*Insurance Review Procedure*).

68.20 Not used.

68.21 Not used.

#### **68.22 Provision of Information**

The Service Provider shall notify the Authority as soon as reasonably practicable and in any event within five (5) Business Days of becoming aware that clause 68.17.2 and/or clause 68.17.3 are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). The Service Provider shall provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the Parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.

### 68.23 Insurance Market

In the event that clause 68.17.2 and/or clause 68.17.3 apply in respect of an Insurance Term, (irrespective of the reasons for the same) the Service Provider shall approach the insurance market at least every four months to establish whether clause 68.17.2 and/or clause 68.17.3 remain applicable to the Insurance Term. As soon as the Service Provider is aware that clause 68.17.2 and/or clause 68.17.3 has ceased to apply to the Insurance Term, the Service Provider shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Contract.

### 68.24 Insurance Review Procedure

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

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

68.24.2.1 a full breakdown of the Actual Relevant Insurance Cost;

68.24.2.2 a full breakdown of the Base Relevant Insurance Cost;

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

- (a) the sum(s) insured and/or the limit of indemnity (i.e. rateable factor) for each of the Relevant Insurances;
- (b) the premium rate for each of the Relevant Insurances;
- (c) the net premium paid (or to be paid) for each of the Relevant Insurances (excluding both insurance premium tax and brokers fees and commissions);

- (d) the deductible(s) for each Relevant Insurance; and
  - (e) details of any claims (paid or reserved) (including incident date, type and quantum) in excess of [REDACTED] [REDACTED] being the amount stated in clause 68.8;
- 68.24.2.4 an assessment and quantification of each Project Insurance Change together with the reasons therefore;
  - 68.24.2.5 full details of any Portfolio Cost Saving;
  - 68.24.2.6 any other reasons that the Service Provider believes may have caused a change (by way of increase or decrease relative to the Base Relevant Insurance Costs) in the Actual Relevant Insurance Cost;
  - 68.24.2.7 the opinion of the Service Provider's insurance broker as to the reasons why the Actual Relevant Insurance Cost has varied from the Base Relevant Insurance Cost, specifying the impact of each of the factors and quantifying the amount attributable to each factor specified above;
  - 68.24.2.8 the calculation of the Insurance Cost Differential and any Exceptional Cost or Exceptional Saving arising from this calculation;
  - 68.24.2.9 evidence satisfactory to the Authority (acting reasonably) of any changes to circumstances generally prevailing in the Relevant Insurance Market that are claimed to account for the Insurance Cost Differential; and
  - 68.24.2.10 details of movements in the CBS private capital non marine index plus, if available from other appropriate sources, details of changes in insurance cost across the PFI market as a whole;

68.24.2.11 the Service Provider shall procure that the Service Provider's insurance broker, no later than the date which is ten (10) Business Days after the Insurance Review Date, delivers to the Authority, at the same time as it delivers to the Service Provider, at least two (2) copies of the Joint Insurance Cost Report. At the same time the Service Provider should send a copy of the Insurance Summary Sheet to HM Treasury private finance unit or its nominee. Following receipt of the Joint Insurance Cost Report, the Authority shall notify the Service Provider within fifteen (15) Business Days whether or not it accepts the Joint Insurance Cost Report including full details of any disagreement. If the Authority does not provide such notification and/or details of any disagreement to the Service Provider within fifteen (15) Business Days, the Authority shall be deemed to have accepted the Joint Insurance Cost Report. If the Authority disagrees with any item in the Joint Insurance Cost Report, the Parties shall use their respective reasonable endeavours acting in good faith to agree the contents of the Joint Insurance Cost Report. If the Parties fail to agree the contents of the Joint Insurance Cost Report within thirty five (35) Business Days from the date it was delivered to the Authority, the matter shall be resolved pursuant to the Dispute Resolution Procedure provided always that references in clause 83.2 (*Adjudication*) to an expert shall be construed as references to an independent insurance expert agreed by the Parties or, in the absence of agreement appointed by the President for the time being of the Chartered Institute of Arbitrators.

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

**68.24.4 Sharing of Exceptional Cost and Exceptional Saving**

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

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

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

**68.24.5 Insurance Cost Index**

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

**68.25 Indexation of Insurance Figures**

The levels of cover, deductibles and excesses referred to in this clause 68 (*Insurance*) and schedule 6 (*Insurance*) shall be Indexed and the definition of Required Insurances shall be deemed to include reference to such indexation from time to time. However, if the Service Provider can demonstrate that the insurance market will only provide cover or accept deductibles or excesses relating to the Required Insurances at figures other than the Indexed figure then at the Service Provider election:

68.25.1 the minimum amount which the limit of indemnity in respect of the insurance specified in paragraph 3.2 of each of Part 1 and Part 2 of Schedule 6 (*Insurance*) is required to exceed shall be Indexed, provided such amount shall only be increased on each renewal date if the amount as Indexed becomes equal to or exceeds the next whole multiple of [REDACTED];

68.25.2 the maximum excesses/deductibles for each of the Required Insurances shall be Indexed, provided that such maximum excesses/deductibles shall only be increased on each renewal date if the excesses/deductibles as Indexed become equal to or exceed the next whole multiple of [REDACTED];

68.25.3 but the expression Required Insurances shall, for the purposes of clause 68.13 (*Uninsurable Risks*) be deemed nevertheless, to refer to fully Indexed levels of cover, excess and deductibles.

#### **68.26 Insurance Broker's Letter of Undertaking**

On or before the Service Commencement Date and during the Term the Service Provider shall procure that any broker appointed by the Service Provider to arrange the insurances referred to in this clause 68 (*Insurance*) (such appointment to be approved by the Authority such approval not to be unreasonably withheld) shall provide to the Authority a letter of undertaking substantially in the form set out in part 4 of schedule 6 (*Insurance*) and signed by such broker.

### **69. ADMINISTRATION OF HIGHWAYS CLAIMS**

The Parties shall comply with and implement the provisions of schedule 26 (*Administration of Highways Claims*).

## **PART O - EMPLOYEES AND EMPLOYMENT MATTERS**

### **70. TUPE AND EMPLOYMENT MATTERS**

## 70.1 Relevant Transfers

The Authority and the Service Provider agree that the following events:

- 70.1.1 the Service Commencement Date; and
- 70.1.2 where the identity of a provider (including the Authority) of any service which constitutes or which will constitute any part of the Service is changed whether in anticipation of changes pursuant to this Contract or not,

shall constitute a Relevant Transfer and that the contracts of employment of any Relevant Employees shall have effect (subject to Regulation 4(7) of TUPE) thereafter as if originally made between those employees and the new provider except insofar as such contracts relate to those parts of an occupational pension scheme relating to the old age, invalidity and survivors' benefits. On the occasion of a Relevant Transfer (save on expiry or termination of this Contract) the Service Provider shall procure that the former and the new sub-contractor shall both comply with their obligations under TUPE.

## 70.2 TUPE Compliance

The Authority shall comply with its obligations under TUPE in respect of each Relevant Transfer pursuant to this Contract and the Service Provider shall comply, and shall procure that each relevant sub-contractor shall comply with its obligations (including, without limitation, the obligation under Regulation 13(4) of TUPE) in respect of each Relevant Transfer pursuant to this Contract. Each of the Authority and the Service Provider shall indemnify the other against any Direct Losses sustained as a result of any breach of this clause 70.2 (*TUPE Compliance*) by the party in default, save that there shall be no obligation on the Authority to indemnify the Service Provider for any breach by the Authority of its obligations under Regulation 13 of TUPE, or any award of compensation under Regulation 15 where such failure arises from the failure of the Service Provider or any sub-contractor of the Service Provider to comply with its or their duties under Regulation 13 of TUPE.

## 70.3 Offer of Employment

If TUPE does not apply to any person who is an Authority Existing Employee, the Service Provider shall offer to, or shall procure the offer by the relevant sub-contractor to, each and every such employee a new contract of employment commencing on the

Service Commencement Date under which the terms and conditions (including full continuity of employment) shall not differ from those enjoyed immediately prior to the Service Commencement Date (except insofar as such terms and conditions relate to old age, invalidity and survivors' benefits under an occupational pension scheme) and the offer shall be in writing, shall be open to acceptance for a period of not less than ten (10) Business Days and shall be made:

70.3.1 if it is believed that TUPE will not apply to a person, not less than ten (10) Business Days before the Service Commencement Date; or

70.3.2 if it is believed that TUPE applies to a person but it is subsequently decided that TUPE does not so apply, as soon as is practicable and in any event no later than ten (10) Business Days after that decision is known to the Service Provider.

#### 70.4 Acceptance/Refusal of Offer

Where any such offer as referred to in clause 70.3 (*Offer of Employment*):

70.4.1 is accepted the Authority shall indemnify and keep indemnified in full the Service Provider on the same terms and conditions as those set out in clause 70.18 (*Authority Indemnities*) as if there had been a Relevant Transfer in respect of each and every Authority Existing Employee who has accepted any such offer and the provisions of clauses 70.7 (*Employment Costs*) to 70.14 (*Open Book Requirement*) (inclusive) shall apply in the event of any resulting increase or decrease in the Remuneration Costs and Reorganisation Costs;

70.4.2 is not accepted, the Service Provider shall act and shall procure that each relevant Sub-Contractor shall act, in all respects, as if TUPE had applied to each and every Authority Existing Employee who has accepted any such offer and shall comply with clause 71 (*Pensions*) in respect of each and every such employee who was immediately before the Service Commencement Date an Authority Existing Employee. For the avoidance of doubt, where any such offer as referred to in clause 70.3 (*Offer of Employment*) is not accepted and TUPE does not apply, the Authority Existing Employee shall remain an employee of the Authority.

#### 70.5 Emoluments and Outgoings – Authorities Responsibilities

The Authority shall be responsible for or shall procure that any other employer of a Relevant Employee is responsible for all remuneration, benefits, entitlements and outgoings in respect of the Relevant Employees/Transferring Employees, including without limitation all wages, holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions, pension contributions and otherwise, up to the Service Commencement Date.

#### 70.6 Emoluments and Outgoings – Service Provider Responsibilities

The Service Provider shall be responsible for, or shall procure that any relevant sub-contractor is responsible for, all remuneration, benefits, entitlements and outgoings in respect of the Relevant Employees and any other person who is, or will be, employed or engaged by the Service Provider or any sub-contractor in connection with the provision of any part of the Services, including, without limitation, all wages, holiday pay, bonuses, commission, payment of PAYE, national insurance contributions, pension contributions and otherwise, from and including the Service Commencement Date until the Expiry Date or Termination Date.

#### 70.7 Employment Costs

The Authority has supplied to the Service Provider the information, as at the date of this Contract, which is contained in the First Employee List regarding the identity, number, age, sex, length of service, job title, grade and terms and conditions of employment of and other matters affecting each of those employees of the Authority who it is expected, if they remain in the employment of the Authority until immediately before the Service Commencement Date, would be Relevant Employees but the Authority gives no warranty as to the accuracy or completeness of this information.

#### 70.8 Update of the First Employee List

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

("Final Employee List"). The Authority gives, and shall give, no warranty as to the accuracy or completeness of any information contained in any update of the First Employee List or in the Final Employee List.

#### 70.9 Employee Liability Information

Without prejudice to clause 70.7 (*Employment Costs*), clause 70.8 (*Update of the First Employee List*) and 70.17 (*Union Recognition*), the Authority shall (or shall procure if it has the contractual or legal powers to do so and shall otherwise use all reasonable endeavours) to procure that every relevant sub-contractor of the Authority shall:

- 70.9.1 provide the Employee Liability Information to the Service Provider at such time or times as are required by TUPE; and
- 70.9.2 update the Employee Liability Information to take account of any changes as required by TUPE, and the Authority shall give no warranty as to the accuracy or completeness of the Employee Liability Information supplied by the Authority or any of its relevant sub-contractors.

#### 70.10 Workforce Information

The Service Provider has provided to the Authority the Workforce Information (in relation to the Relevant Employees, to the extent the Service Provider is able to provide such information based on the First Employee List) on which the element of the Annual Unitary Charge relating to staff costs as shown in the O&M tab of the Base Case is based and which shows, in respect of the Service, the following information:

- 70.10.1 the workforce which the Service Provider proposes to establish to provide the Service ("**Proposed Workforce**") classified by reference to grade, job description, hours worked, shift patterns, pay scales, rates of pay, terms and conditions and pension arrangements;
- 70.10.2 the monthly costs of employing the Relevant Employees who are expected to be engaged in the provision of the Service. These costs ("**Remuneration Costs**") have been calculated on the basis of (amongst other things) the information contained in the First Employee List; and
- 70.10.3 the costs, including any lump sum payments for the purposes of any reorganisation which may be required to establish the Proposed Workforce or a

workforce which is as close as reasonably practicable to the Proposed Workforce (including but not limited to costs associated with dismissal by reason of redundancy or capability and costs of recruitment). These costs ("**Reorganisation Costs**") have been calculated by the Service Provider and the relevant sub-contractors on the basis of (amongst other things) the information contained in the First Employee List.

#### 70.11 Adjustment of Remuneration/Reorganisation Costs

If at any time (including, for the avoidance of doubt, after the submission of the Final Employee List) the Remuneration Costs and/or the Reorganisation Costs require to be adjusted on account of and to the extent of any differences between the information contained in the First Employee List and that contained in the Final Employee List, or on account of and to the extent of any inaccuracies in, or omissions from, the information contained in the First Employee List or the Final Employee List then (subject to clause 70.12 (*Obligation to discuss/mitigate*), clause 70.13 (*Calculation of Adjustment*) and clause 70.14 (*Open Book Requirement*)) there shall be a corresponding adjustment to the Annual Unitary Charge to compensate for any such difference.

#### 70.12 Obligation to discuss/mitigate

If the circumstances described in clause 70.11 (*Adjustment of Remuneration/Reorganisation Costs*) arise:

70.12.1 in circumstances where there are more Relevant Employees than shown on the Final Employee List, then the parties shall discuss the implications for the provision of the Service; and

70.12.2 the Service Provider and the relevant sub-contractor shall take all reasonable steps to mitigate any additional costs and any adjustment to the Annual Unitary Charge shall be calculated as if they had done so.

#### 70.13 Calculation of Adjustment

In calculating any adjustment to be made to the Annual Unitary Charge pursuant to clause 70.11 (*Adjustment of Remuneration/Reorganisation Costs*):

- 70.13.1 no account shall be taken of a decrease in the Remuneration Costs or Reorganisation Costs to the extent that it arises from a reduction in the number of Relevant Employees (or their whole time equivalent) such that there are, immediately after the Service Commencement Date, fewer suitably qualified persons available than are required in order to establish the Proposed Workforce and to the extent that the Service Provider has employed replacement staff on equivalent remuneration and has used all reasonable endeavours to mitigate all expenses in recruiting and employing such replacement staff;
- 70.13.2 to avoid double counting, no account shall be taken of any change to the Remuneration Costs or the Reorganisation Costs to the extent that the Service Provider has been, or will be, compensated as a result of any indexation of the Annual Unitary Charge under this Contract;
- 70.13.3 to avoid doubt any changes in costs which fall to be dealt with under clause 70.11 (*Adjustment of Remuneration/Reorganisation Costs*) and which arise from a Change in Law shall be dealt with in accordance with the provisions of clause 70.11 (*Adjustment of Remuneration/Reorganisation Costs*) and shall not be taken into account for the purposes of clause 53 (*Change in Law*);
- 70.13.4 no adjustments under clause 70.11 (*Adjustment of Remuneration/Reorganisation Costs*) shall be made in respect of overpayments made by the Service Provider or a relevant subcontractor to Relevant Employees which arise from reliance on the Final Employee List to the extent that the Service Provider or a relevant sub-contractor is able to correct overpayments in respect of continuing employment having taken reasonable steps to do so;
- 70.13.5 if there are underpayments by the Service Provider or a relevant subcontractor to Relevant Employees, whether claimed or established as unlawful deductions from wages or as a breach of contract, which arise from reliance on the Final Employee List, there shall be an immediate increase to the Annual Unitary Charge in respect of all such liabilities of the Service Provider or relevant sub-contractor for all such underpayments which are retrospective (save that any such liabilities which relate to the period prior to the Service

Commencement Date shall be dealt with in accordance with clauses 70.6 (*Emoluments and Outgoings – Service Provider Responsibilities*) or clauses 70.18.1 to 70.18.3 (inclusive)) and an appropriate increase in respect of such liabilities of the Service Provider which represent ongoing costs;

70.13.6 in order to prevent duplication, no adjustment shall be made under this clause 70.13 if any indemnity given by the Authority under any other provision of this Contract would apply; and

70.13.7 no adjustments under clause 70.11 (*Adjustment of Remuneration/Reorganisation Costs*) shall be made to the extent that any payment is made to the Service Provider or a relevant sub-contractor under Regulation 12 of TUPE.

#### 70.14 Open Book Requirement

Either party may propose an adjustment to the Annual Unitary Charge pursuant to clause 70.11 (*Adjustment of Remuneration/Reorganisation Costs*) by giving not less than ten (10) Business Days notice to the other. Each party will provide, or procure the provision, to the other, on an open book basis, access to any information or data which the other party reasonably requires for the purpose of calculating or confirming the calculation of any adjustment pursuant to clause 70.11 (*Adjustment of Remuneration/Reorganisation Costs*).

#### 70.15 Co-operation

In relation to all matters described in clause 70.11 (*Adjustment of Remuneration/Reorganisation Costs*) and clause 70.12 (*Obligation to discuss/mitigate*), the Service Provider and the Authority shall, and the Service Provider shall procure that the relevant sub-contractor shall, co-operate with the other or others and take all reasonable steps to mitigate any costs and expenses and any adverse effect on industrial or employee relations.

#### 70.16 Smooth Transfer

The Authority shall and the Service Provider shall and shall procure that each and every relevant sub-contractor shall take all reasonable steps, including cooperation with reasonable requests for information including information from any Future Service Provider to ensure that each and every Relevant Transfer pursuant to this

Contract takes place smoothly with the least possible disruption to the services of the Authority (including the Services) and to the employees who transfer.

#### 70.17 Union Recognition

It is agreed that:

70.17.1 the Authority shall, and shall procure if it has the contractual or legal powers to do so and shall otherwise use all reasonable endeavours to procure, that every relevant sub-contractor of the Authority shall supply to the Service Provider, no later than five (5) Business Days prior to the Service Commencement Date, true copies of its union recognition agreement(s). The Service Provider shall, and shall procure that each and every relevant sub-contractor shall, in accordance with TUPE, recognise the trade unions representing Relevant Employees (as relevant to each relevant sub-contractor) after the transfer to the same extent as they were recognised by the Authority or the relevant subcontractor before the Service Commencement Date; and

70.17.2 the Service Provider shall procure that, on each occasion on which the identity of a relevant sub-contractor changes pursuant to this Contract, in the event that there is a Relevant Transfer, the new sub-contractor shall, in accordance with TUPE, recognise the trade unions representing the employees whose contracts of employment transfer to the new sub-contractor to the same extent as they were recognised before the change of identity of the relevant sub-contractor in respect of the provision of the Services.

#### 70.18 Authority Indemnities

It is agreed that:

70.18.1 the Authority shall indemnify, and keep indemnified in full the Service Provider (for itself and for the benefit of each relevant sub-contractor) against all Direct Losses incurred by the Service Provider or any relevant sub-contractor in connection with or as a result of:

70.18.1.1 a breach by the Authority of its obligations under clause 70.5 (*Emoluments and Outgoings – Authorities Responsibilities*);

70.18.1.2 (subject to clause 70.19 (*Service Provider Indemnities*)) any claim or demand by any Transferring Employee arising out of the employment of any Transferring Employee provided that this arises from any act, fault or omission of the Authority in relation to any Transferring Employee prior to the date of the Relevant Transfer (save where such act, fault or omission arises as a result of the Service Provider's or any relevant sub-contractor's failure to comply with Regulation 13 of TUPE);

70.18.2 where any liability in relation to any Transferring Employee, in respect of his or her employment by the Authority or its termination which transfers in whole or part in accordance with TUPE and/or the Directive arises partly as a result of any act or omission occurring on, or before, the Service Commencement Date and partly as a result of any act or omission occurring after the Service Commencement Date the Authority shall indemnify and keep indemnified in full the Service Provider or the relevant sub-contractor against only such part of the Direct Losses sustained by the Service Provider or any relevant subcontractor in consequence of the liability as is reasonably attributable to the act or omission occurring before the Service Commencement Date;

70.18.3 the indemnities contained in clause 70.18.1 shall apply as if references in this clause 70.18 to any Transferring Employee also included a reference to any Relevant Employee and references to any act, fault or omission of the Authority also included a reference to the relevant third party employer of the Relevant Employee prior to the Service Commencement Date to the extent that the Authority recovers any sum in respect of the subject matter of those indemnities from such third party employer under any indemnity or other legal entitlement it has against such third party employer. The Authority shall use all reasonable endeavours to recover any such sums under any such entitlement as is mentioned in this clause 70.18.3; and

70.18.4 clause 67.4 (*Conduct of proceedings for matters covered by Service Provider's and Authority's indemnities*) shall apply where any claim is made in respect of the indemnities given under this clause 70.18.

## 70.19 Service Provider Indemnities

It is agreed that:

70.19.1 the Service Provider shall indemnify, and keep indemnified, in full the Authority and at the Authority's request each and every service provider who shall provide any service equivalent to any part of the Services after expiry or earlier termination of this Contract ("**Future Service Provider**") against:

70.19.1.1 all Direct Losses incurred by the Authority or any Future Service Provider in connection with, or as a result of, any claim or demand against the Authority or any Future Service Provider by any person who is or has been employed or engaged by the Service Provider or any relevant sub-contractor in connection with the provision of any part of the Services where such claim arises as a result of any act, fault or omission of the Service Provider and/or any relevant sub-contractor after the Service Commencement Date;

70.19.1.2 all Direct Losses incurred by the Authority or any Future Service Provider in connection with or as a result of a breach by the Service Provider of its obligations under clause 70.6; and

70.19.1.3 all Direct Losses incurred by the Authority or any Future Service Provider in connection with, or as a result of, any claim by any trade union or staff association or employee representative (whether or not recognised by the Service Provider and/or the relevant sub-contractor in respect of all or any of the Relevant Employees) arising from, or connected with, any failure by the Service Provider and/or any relevant sub-contractor to comply with any legal obligation to such trade union, staff association or other employee representative whether under Regulations 13 or 14 of TUPE or any award of

compensation under Regulation 15 of TUPE, under the Directive or otherwise and, whether any such claim arises or has its origin before or after the date of the Service Commencement Date;

70.19.2 the Service Provider shall indemnify and keep indemnified in full the Authority, against all Direct Losses incurred by the Authority in connection with or as a result of:

70.19.2.1 the change of identity of employer occurring by virtue of TUPE to the Service Provider or the relevant sub-contractor being significant and detrimental to any of the Relevant Employees or to any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment as terminated under Regulation 4(9) of TUPE) on or before the Service Commencement Date as a result of the change in employer and whether such claim arises before or after the Service Commencement Date;

70.19.2.2 any proposed or actual change by the Service Provider or any relevant sub-contractor to the Relevant Employees' working conditions, terms or conditions or any proposed measures of the Service Provider or the relevant sub-contractor which are to any of the Relevant Employees' material detriment or to the material detriment of any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment as terminated under Regulation 4(9) of TUPE) on or before the Service Commencement Date as a result of any such proposed changes or measures and whether such claim before or after the Service Commencement Date; and

70.19.2.3 any claim arising out of any misrepresentation or mis-statement whether negligent or otherwise made by the Service Provider or a relevant sub-contractor to the Relevant Employees or their representatives whether before on or after the Service Commencement Date and whether liability for any such claim arises before on or after the Service Commencement Date,

70.19.3 for the avoidance of doubt, the indemnities in this clause 70.19 shall not apply in respect of any sum for which the Authority is to indemnify the Service Provider or a relevant sub-contractor pursuant to clause 70.18.2 or as a result of any adjustment to the Annual Unitary Charge in accordance with clause 70.11 or to the extent that the claim arises from a wrongful act or omission of the Authority; and

70.19.4 clause 67.4 (*Conduct of proceedings for matters covered by Service Provider's and Authority's indemnities*) shall apply where any claim is made in respect of the indemnities given under this clause 70.19.

#### 70.20 Provision of Details and Indemnity

The Service Provider shall immediately upon request by the Authority provide to the Authority details of any measures which the Service Provider or any relevant sub-contractor envisages it, or they, will take in relation to any employees who are, or who will be, the subject of a Relevant Transfer, and if there are no measures, confirmation of that fact, and shall indemnify the Authority against all Direct Losses resulting from any failure by the Service Provider to comply with this obligation.

#### 70.21 Compliance with Principles of Good Employment Practice

The Service Provider shall and shall procure that any Sub-Contractors shall in relation to the employment of all employees wholly or mainly engaged in the Services, have regard to any applicable Principles of Good Employment Practice.

#### 70.22 Retendering

The Service Provider shall (and shall procure that any relevant sub-contractor shall) within the period of twelve (12) months immediately preceding the Expiry Date or

following the service of a Termination Notice or as a consequence of the Authority notifying the Service Provider of its intention to retender this Contract:

- 70.22.1 on receiving a request from the Authority provide in respect of any person engaged or employed by the Service Provider or any relevant sub-contractor in the provision of the Service ("**Assigned Employees**") full and accurate details regarding the identity, number, age, sex, length of service, job title, grade and terms and conditions of employment of and other matters affecting each of those Assigned Employees who it is expected, if they remain in the employment of the Service Provider or of a relevant sub-contractor (as the case may be) until immediately before the Termination Date, would be Returning Employees ("**Retendering Information**");
- 70.22.2 provide the Retendering Information promptly and at no cost to the Authority;
- 70.22.3 notify the Authority forthwith in writing of any material changes to the Retendering Information promptly as and when such changes arise;
- 70.22.4 be precluded from making any material increase or decrease in the numbers of Assigned Employees;
- 70.22.5 be precluded from making any increase in the remuneration or other change in the terms and conditions of the Assigned Employees other than in the ordinary course of business and with the Authority's prior written consent; and
- 70.22.6 be precluded from transferring any of the Assigned Employees to another part of its business or moving other employees from elsewhere in its or their business who have not previously been employed or engaged in providing the Services to provide the Services save with the Authority's prior written consent.

#### 70.23 Warranty of Employee Liability Information

Without prejudice to clause 70.22 and clause 70.24 the Service Provider shall provide, and shall procure that any relevant sub-contractor shall provide, the Employee Liability Information to the Authority at such time or times as are required by TUPE, and shall warrant at the time of providing such Employee Liability Information, that

such information will be updated to take account of any changes to such information as is required by TUPE.

#### 70.24 Indemnity of Retendering Information

The Service Provider shall keep indemnified in full the Authority and at the Authority's request any Future Service Provider against all Direct Losses arising from any claim by any party as a result of the Service Provider or any relevant subcontractor failing to provide or promptly to provide the Authority and/or any Future Service Provider where requested by the Authority with any Retendering Information and/or Employee Liability Information or to provide full Retendering Information and/or Employee Liability Information or as a result of any material inaccuracy in or omission from the Retendering Information and/or Employee Liability Information save to the extent that any inaccuracy or omission was a result of any breach of contract (including in relation to information provided by the Authority in the Final Employee List), neglect or other default on the part of the Authority.

#### 70.25 Termination of Agreement

On the expiry or earlier termination of this Contract the Authority and the Service Provider agree that it is their intention that TUPE shall apply in respect of the provision thereafter of any service equivalent to any part of the Service but the position shall be determined in accordance with Legislation at the Expiry Date or Termination Date (as the case may be) and this clause 70.25 is without prejudice to such determination.

#### 70.26 Transfer of Employment on Expiry/Termination

For the purposes of this clause 70.26 Returning Employees shall mean those employees wholly or mainly engaged in the provision of the Service as the case may be as immediately before the Expiry Date or Termination Date whose employment transfers to the Authority or a Future Service Provider pursuant to TUPE. Upon expiry or termination of this Contract for whatever reason (such date being termed the "**Return Date**"), the provisions of this clause 70.26 shall apply:

- 70.26.1 the Service Provider shall, or shall procure, that all wages, salaries and other benefits of the Returning Employees and other employees or former employees of the Service Provider or the relevant subcontractors (who had been engaged

in the provision of any part of the Services) and all PAYE tax deductions, pension contributions and national insurance contributions relating thereto in respect of the employment of the Returning Employees and such other employees or former employees of the Service Provider or the relevant subcontractors up to the Return Date are satisfied;

70.26.2 without prejudice to clause 70.26.1, the Service Provider shall:

70.26.2.1 remain (and procure that the relevant sub-contractors shall remain) (as relevant) responsible for all the Service Provider's or relevant sub-contractor's employees (other than the Returning Employees) on or after the Expiry Date or Termination Date and shall indemnify the Authority and any Future Service Provider against all Direct Losses incurred by the Authority or any Future Service Provider resulting from any claim whatsoever whether arising before on or after the Return Date by or on behalf of any of the Service Provider's or the relevant sub-contractor's employees who do not constitute the Returning Employees;

70.26.2.2 in respect of those employees who constitute Returning Employees the Service Provider shall indemnify the Authority and any Future Service Provider against all Direct Losses incurred by the Authority or any Future Service Provider resulting from any claim whatsoever by or on behalf of any of the Returning Employees in respect of the period on or before the Return Date (whether any such claim, attributable to the period up to and on the Return Date, arises before, on or after the Return Date) including but not limited to any failure by the Service Provider or the relevant sub-contractor to comply with its or their obligations under Regulations 13 and 14 of TUPE and any award of compensation under Regulation 15 of TUPE and/or

Article 6 of the Directive as if such legislation applied, even if it does not in fact apply save to the extent that any such failure to comply arises as a result of an act or omission of the Authority or any Future Service Provider;

70.26.2.3 the Authority shall be entitled to assign the benefit of the indemnity in this clause 70.26 to any Future Service Provider.

#### 70.27 Offer of Employment on Expiry or Termination

It is agreed that:

70.27.1 if TUPE does not apply on the expiry or earlier termination of this Contract, the Authority shall ensure that each Future Service Provider (including the Authority) shall offer employment to the persons employed by the Service Provider or a relevant sub-contractor in the provision of the Services immediately before the Return Date;

70.27.2 if an offer of employment is made in accordance with clause 70.27.1, the employment shall be on the same terms and conditions (except for entitlement to membership of an occupational pension scheme, which shall be dealt with in accordance with clause 71 (*Pensions*)) as applied immediately before the expiry or earlier termination of this Contract including full continuity of employment, except that the Authority or Future Service Provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of clause 70.22;

70.27.3 where any such offer as referred to in clause 70.27.1 is accepted, the Service Provider shall indemnify and keep indemnified in full the Authority and/or any Future Service Provider on the same terms and conditions as those set out in clause 70.19 of this Contract as if there had been a Relevant Transfer in respect of each and every employee who has accepted any such offer and for the purposes of this clause 70 (*TUPE and Employment Matters*) each and every such employee shall be treated as if they were a Returning Employee;

70.27.4 for the avoidance of doubt, where any such offer as referred to in clause 70.27.1 is not accepted and TUPE does not apply, the employee shall remain an employee of the Service Provider or the relevant sub-contractor as appropriate.

#### 70.28 Sub-contractors

In the event that the Service Provider enters into any sub-contract in connection with this Contract, it shall impose obligations on its sub-contractors in the same terms as those imposed on it pursuant to clause 34 (*Service Provider's Personnel*), this clause 70 (*TUPE and Employment Matters*) and clause 71 (*Pensions*) and shall procure that the relevant sub-contractor complies with such terms. The Service Provider shall indemnify, and keep the Authority indemnified in full, against all Direct Losses, incurred by the Authority or any Future Service Provider as a result of, or in connection with, any failure on the part of the Service Provider to comply with this clause 70.28 and/or the relevant sub-contractor's failure to comply with such terms.

## 71. PENSIONS

### 71.1 Membership of the Pension Scheme

The Service Provider shall ensure that all Transferring Employees who were, or were eligible to be, members of the LGPS prior to the Relevant Transfer shall be offered membership or shall continue to be members of the LGPS or are afforded pension rights which are certified by the Government Actuary Department or by Fellow of the Institute of Actuaries or of the Institute of Actuaries employed by the Government Actuary Department as providing pension benefits which are broadly comparable to or better than the terms of the LGPS. The remaining provisions of this clause 71 (*Pensions*) shall apply in relation to Transferring Employees, but only for so long as they remain employed in connection with the Services (the "**Eligible Employees**").

### 71.2 Admission Agreement

Unless an alternative pension scheme is offered in accordance with clause 71.5 (*Alternative Pension Scheme*), on or before the Service Commencement Date, the Service Provider shall and/or shall procure that any relevant Sub-Contractor (as the case may be) shall enter into and comply with the conditions of the Admission Agreement and Admission Bond (if required under the Admission Agreement) with

the Authority (to which the Authority agrees) under the provisions of the Pensions Regulations so as to enable the Eligible Employees to continue in membership of the LGPS. In this regard:

- 71.2.1 the Service Provider agrees to indemnify the Authority from and against any direct Loss suffered by it which arises from any breach by the Service Provider and/or the relevant Sub-Contractor (as the case may be) of the terms of the Admission Agreement referred to in this clause 71.2;
- 71.2.2 subject to clause 71.2.4 and 71.3 (LGPS Funding), the Service Provider and/or the relevant Sub-Contractor (as the case may be) shall pay to the Administering Authority for the immediate credit of the LGPS such contributions and other payments as are due under the Pension Regulations for and in respect of each of the Eligible Employees or as a consequence of becoming a Transferee Admission Body and/or entering into an Admission Agreement; and
- 71.2.3 if any sum certified in writing by the Authority as being payable under the Pension Regulations or the Admission Agreement by the Service Provider and/or the relevant Sub-Contractor (as the case may be) to the Administering Authority or to the LGPS has not been paid by the date on which it becomes due under the Pension Regulations or the Admission Agreement the Authority shall be entitled to set off against any payments due to the Service Provider and/or the relevant Sub-Contractor (as the case may be) an amount equal to the sum due (including interest payable under the Pension Regulations) from the Service Provider and/or the relevant Sub-Contractor (as the case may be) to the Authority under this Contract and to pay the sum to the Administering Authority on behalf of the Service Provider and/or the relevant Sub-Contractor (as the case may be) or in the event of set-off not being available to pay the sum direct to the Administering Authority on behalf of the Service Provider and/or the relevant Sub-Contractor (as the case may be) for the credit of the LGPS and reclaim the same under clause 71.2.1.
- 71.2.4 Clause 71.3 shall apply in respect of the Service Provider's and any relevant Sub-contractor's participation in the LGPS.
- 71.2.5 The Admission Agreement, to be executed by the parties to it, shall be deemed to be a Project Document.

### 71.3 LGPS Funding

- 71.3.1 The Authority shall procure that the LGPS will be deemed to be fully funded in respect of the Eligible Employees as at the Relevant Transfer on an ongoing basis at the date of that Relevant Transfer, as determined by the Administering Authority's actuary on the basis of the assumptions used by the Administering Authority in the statutory valuation of the LGPS carried out as at 31 March 2010, but updating the financial assumptions to allow for market conditions as at the date of the Relevant Transfer).
- 71.3.2 subject to clause 71.3.5, the employer contribution rate payable to the Administering Authority or the LGPS in each month by the Service Provider and/or any relevant Sub-Contractor (as applicable) shall be subject to a maximum of twenty-one per cent (21%) of the aggregate pensionable pay (as defined in the Pension Regulations) in that month of the Eligible Employees who are active members of the LGPS at the relevant time (the "LGPS Contribution Rate").
- 71.3.3 subject to clause 71.3.5, where the employer contribution rate payable to the Administering Authority or the LGPS by the Service Provider and/or any relevant Sub-Contractor (as applicable), is more than the LGPS Contribution Rate (the amount of the contribution which exceeds the LGPS Contribution Rate being referred to as the "Excess Contribution"), the Authority shall pay to the Service Provider and/or any relevant Sub-Contractor (as applicable) an amount which is equal to the Excess Contribution. Any payment to be made under this clause 71.3.3 shall be calculated in accordance with clause 71.3.7;
- 71.3.4 subject to clause 71.3.5, where the employer contribution rate payable to the Administering Authority or to the LGPS by the Service Provider and/or relevant Sub-Contractor (as applicable) is less than the LGPS Contribution Rate, the Service Provider shall and/or shall procure that any relevant Sub-Contractor (as applicable) shall pay to the Authority an amount which is equal to the difference between the contribution actually paid by the Service Provider or relevant Sub-Contractor (as applicable), and the amount which would have been paid if contributions had been payable at the LGPS Contribution Rate. Any payment to be made under this clause 71.3.4 shall be calculated in accordance with clause 71.3.7;

71.3.5 where the Service Provider and/or any relevant Sub-Contractor:

- 71.3.5.1 grants or otherwise consents to an early retirement request in relation to an Eligible Employee (including where such Eligible Employee is a deferred member of the LGPS);
- 71.3.5.2 grants any augmentation of benefits in relation to an Eligible Employee under the Pension Regulations or otherwise takes any action or decision which has the effect of increasing the benefits payable to or in respect of any Eligible Employee under the LGPS, other than where the Service Provider and/or relevant Sub-Contractor is required to make such augmentation, or take such action or decision, to comply with its obligations under clause 71.13 (*Redundancy and Severance Terms and Discretionary Benefits*);
- 71.3.5.3 reduces or waives any contributions due from any Eligible Employee to the LGPS;
- 71.3.5.4 terminates the employment of an Eligible Employee by reason of redundancy or in the interests of efficiency (or otherwise allows an Eligible Employee to retire on those grounds) in circumstances where an immediate pension is payable under the LGPS;
- 71.3.5.5 waives any reduction to benefits under the LGPS in respect of an Eligible Employee;
- 71.3.5.6 grants any pay award to the Eligible Employees which, in aggregate, exceeds the greater of:
  - (a) the pay increases assumed by the actuary to the Isle of Wight Council Pension Fund in the most recent actuarial

valuation for the Isle of Wight Council Pension Fund as at the date on which the pay rises were given; and

- (b) the increases in rates of pay as agreed by the Joint Negotiating Committee for Local Authority Employees (or any replacement body); and
- (c) such higher amount as is agreed between the Service Provider or relevant Sub-Contractor (as applicable) and the Authority,

the Service Provider shall, and/or shall procure that the relevant Sub-Contractor shall, be responsible for funding any increase in liabilities in the LGPS relating to the Eligible Employees caused by any of the actions described in clauses 70.3.5.1 to 70.3.5.6 inclusive.

71.3.6 for the purposes of clause 71.3.2, the LGPS Contribution Rate (and the contributions to be measured against this for the purposes of clauses 71.3.3 and 71.3.4) shall exclude any contributions or payments (or part of any contributions or payments) for which the Service Provider and/or any Sub-Contractor is liable in accordance with clause 71.3.5, but shall include any contributions or payments (or part of any contributions or payments) which the Service Provider and/or relevant Sub-Contractor may be required to pay which relate to discretionary benefits provided in accordance with clause 71.13 (*Redundancy and Severance Terms and Discretionary Benefits*)

71.3.7 for the purposes of this clause 71.3, any payment due from the Service Provider and/or Sub-Contractor to the Authority or from the Authority to the Service Provider and/or Sub-Contractor (as the case may be) shall be calculated by the Authority as at a date which is 12 months after the date of the Relevant Transfer and at 12 monthly intervals thereafter (each such date being a "Calculation Date"). Each such calculation shall be agreed with the Service Provider and/or Sub-Contractor (as applicable). The Authority and the Service Provider agree that, within 20 Business Days of the calculation being agreed, the Authority shall make any payment due from it to the Service Provider and/or relevant Sub-Contractor (as applicable) and/or the Service Provider shall, and/or shall procure that the relevant Sub-Contractor (as applicable) shall, make any payment due from it to the Authority (as the case may be). If

the amount of such payment is not agreed within one Month of the Calculation Date (or such longer period as may be agreed between the Service Provider and the Authority), the matter shall be determined in accordance with the Dispute Resolution Procedure, and for the purposes of this clause, the Dispute Resolution Procedure shall continue to apply after the Expiry Date or Termination Date (as applicable);

71.3.8 where any amount is payable to the Administering Authority or the LGPS by the Service Provider or any Sub-Contractor on, following or as a result of the termination of the Admission Agreement (for whatever reason), the Service Provider shall, and/or shall procure that the relevant Sub-Contractor (as applicable) shall, notify the Authority in writing of the amount payable within 10 Business Days of receiving a demand from the Administering Authority. The Authority agrees that it shall, within 10 Business Days of receiving such notice, pay to the Service Provider or relevant Sub-Contractor (as applicable) an amount equal to the amount payable to the Administering Authority and/or the LGPS. The Service Provider shall, or shall procure that any relevant Sub-Contractor (as applicable) shall, on receipt promptly pay such amount to the Administering Authority and/or the LGPS. The provisions of this clause 71.3.8 shall continue to apply after the Expiry Date or Termination Date (as applicable)

71.3.9 where the Service Provider and/or relevant Sub-Contractor has entered into more than one Admission Agreement, the provisions of this clause 71.3 shall apply in respect of each Admission Agreement.

#### 71.4 Obligation to maintain status

The Service Provider shall use its reasonable endeavours to retain its status as a Transferee Admission Body and in the event that the Service Provider should lose its status as a Transferee Admission Body, it shall use its reasonable endeavours to regain its status as a Transferee Admission Body (including taking all reasonable steps and (where reasonable) remedying all such matters as shall be notified to it by the Authority and/or the LGPS).

#### 71.5 Alternative Pension Scheme

Without prejudice to the Service Provider's obligations in clause 71.4 above, if the Service Provider ceases to or does not participate in the LGPS (for whatever reason) before the expiry of this Contract at a time when it employs Eligible Employees, the Service Provider shall set up an alternative pension scheme or schemes (the "**Pension Scheme**"). The Pension Scheme shall be:

- 71.5.1 established at least three (3) Months prior to the date of the Relevant Transfer (the "**Transfer Date**") or cessation of participation in the LGPS (the "**Cessation Date**") (whichever applies) and maintained (unless a replacement scheme is provided which also complies with this clause 71.5) at least until the earliest of the Expiry Date, the Termination Date or the date on which the Service Provider or relevant Sub-Contractor ceases to employ Eligible Employees;
- 71.5.2 reasonably acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed); and
- 71.5.3 approved by Revenue & Customs as a registered pension scheme under Chapter 2 of Part 4 of the Finance Act 2004 or under Schedule 36 of the Finance Act 2004 (or capable of such approval),
- 71.5.4 and the Service Provider shall offer the Eligible Employees membership of the Pension Scheme on and from the Transfer Date or the Cessation Date (as applicable) and the provisions of clauses 71.6 (*Indemnity in respect of Alternative Pension Scheme*) to 71.13 (inclusive) shall apply, but any references to the "Service Commencement Date" replaced by references to the Transfer Date or Cessation Date (as applicable).

#### 71.6 Indemnity in respect of Alternative Pension Scheme

The Service Provider shall indemnify the Authority from and against any Loss suffered by the Authority which may arise from the establishment and operation of the Pension Scheme.

#### 71.7 Benefits under Alternative Pension Scheme

The Pension Scheme shall provide such benefits for future service for each Eligible Employee as an actuary from the Government Actuary Department or a Fellow of the Institute of Actuaries employed by the Government Actuary Department certifies to

be of broadly comparable overall value as at the Transfer Date or Cessation Date (as applicable) to the benefits to which the Eligible Employee would have been or was entitled under the LGPS, had the Eligible Employee continued to be a member of the LGPS provided that the Pension Scheme shall not be obliged at any time to provide a greater level of benefits than would have applied to Eligible Employees had they remained in active membership of the LGPS.

For the avoidance of doubt, this means that the Authority and the Service Provider agree that, if the benefits provided under the LGPS are changed at any time on or after the Transfer Date or the Cessation Date the Service Provider (and/or any Sub-Contractor) shall be entitled to amend or consent to the amendment of the rules of the Pension Scheme so that corresponding or similar changes can be made in respect of the benefits provided for the Eligible Employees under the Pension Scheme.

#### 71.8 Government Actuary Department Certificate

The Service Provider shall ensure that the certificate from the Government Actuary Department for the Pension Scheme referred to in clause 71.7 (*Benefits under Alternative Pension Scheme*) shall be delivered to the Authority on or before the Transfer Date or the Cessation Date (whichever applies), or as soon as reasonably practicable thereafter.

#### 71.9 Provision of Information by Authority

The Authority shall provide the Service Provider with such information as it may reasonably require in relation to the LGPS to enable the Service Provider to submit a proposal to the Government Actuary Department to assess the comparability of the Pension Scheme. The Service Provider shall provide such documentation as is required by the Government Actuary Department to enable it to consider the question of comparability.

#### 71.10 Costs

All reasonable and necessary costs incurred in obtaining a certificate of broad comparability from the Government Actuary Department shall be borne by the Service Provider.

### 71.11 Bulk Transfer Payments

The Service Provider shall procure that the Pension Scheme shall be capable of receiving one or more bulk transfer payments for past service liabilities for and in respect of any or all of the Eligible Employees from the LGPS (the amount of such bulk transfer payment or payments to be determined by the Administering Authority's Actuary acting on guidance from the Government Actuary Department and agreed with the Service Provider) and the Service Provider undertakes to use its reasonable endeavours to ensure that the trustees of the Pension Scheme accept any such bulk transfer payments.

### 71.12 Transfer of Past Service Benefits

The Service Provider shall offer each Eligible Employee who joins the Pension Scheme the option of transferring his past service benefits in the LGPS to the Pension Scheme. Subject to:

- 71.12.1 the terms of the bulk transfer payment or payments being agreed between the Administering Authority's Actuary and the Service Provider as described in clause 71.11 (*Bulk Transfer Payments*) above; and
- 71.12.2 the Service Provider's actuary being satisfied that the amount of the bulk transfer payment or payments is sufficient to provide the benefits described in this clause 71.12,

such offer shall be of benefits in the Pension Scheme on a day for day credit basis in respect of pensionable service in the LGPS, which are broadly comparable in value to those applying for and in respect of him under the LGPS immediately before the Transfer Date or Cessation Date (as applicable). In consideration of the receipt of a bulk transfer payment or payments from the LGPS, calculated in accordance with clause 71.11 (*Bulk Transfer Payments*) and this clause 71.12 the Service Provider undertakes to use its reasonable endeavours to ensure that the trustees of the Pension Scheme provide the benefits described in this clause 71.12 in respect of such Eligible Employees who accept the Service Provider's offer.

### 71.13 Redundancy and Severance Terms and Discretionary Benefits

The following provisions shall apply:

- 71.13.1 the Service Provider shall procure that any relevant redundancy and severance terms in the LGPS shall be replicated in the Pension Scheme for the benefit of the Eligible Employees;
- 71.13.2 where the Service Provider has entered into an Admission Agreement, the Service Provider shall award benefits (where permitted) to the Eligible Employees under the Compensation Regulations and/or the LGPS in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority; and
- 71.13.3 where the award of benefits in clause 71.13.1 is not permitted under the Compensation Regulations and/or the LGPS or the Service Provider has not entered into an Admission Agreement, the Service Provider shall award benefits to the Eligible Employees which are identical to the benefits the Eligible Employees would have received under the Compensation Regulations and/or the LGPS in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority or shall compensate such Eligible Employees in a manner which is broadly comparable or equivalent in cash terms.

### 71.14 Undertakings from the Service Provider

The Service Provider undertakes to the Authority (for the benefit of the Authority itself and for the Authority as agent and trustee for the benefit of the Eligible Employees) that:

- 71.14.1 all information that the Authority or the Administering Authority or their respective professional advisors may reasonably request from the Service Provider or any relevant Sub-Contractor for the administration of the LGPS or concerning any other matters raised in this clause 71 (*Pensions*) shall be supplied to them as expeditiously as possible;
- 71.14.2 subject to clause 71.3 (LGPS Funding) it shall not, and shall procure that any relevant Sub-Contractor shall not without the consent of the Authority (which shall only be given subject to the payment by the Service Provider or the

relevant Sub-Contractor of such reasonable costs as the Authority or the Administering Authority may require) consent to instigate, encourage or assist any event which could impose on the Authority a cost in respect of any Eligible Employee greater than the cost which would have been payable in respect of that Eligible Employee had that consent, instigation, encouragement or assistance not been given, provided that this shall not apply to any:

71.14.2.1 pay rises granted by the Service Provider or Sub-Contractor;

71.14.2.2 early retirement on grounds of ill-health

71.14.2.3 early retirements or other terminations of employment on grounds of redundancy or business efficiency; or

71.14.2.4 promotions granted in the normal course of business.

71.14.3 until the Service Commencement Date, it shall not and shall procure that any relevant Sub-Contractor shall not issue any announcements (whether in writing or not) to the Eligible Employees concerning the matters stated in this clause 71 (*Pensions*) without the consent of the Authority and the Administering Authority (not to be unreasonably withheld or delayed);

71.14.4 subject to clause 71.6 it shall not, and shall procure that any relevant Sub-Contractor shall not, take or omit to take any action which would materially affect the benefits under the LGPS or under the Pension Scheme of any Eligible Employees who are or will be employed wholly or partially in connection with the Services without the prior written agreement of the Authority (not to be unreasonably withheld or delayed) provided that the Service Provider and/or such Sub-Contractor will be so entitled without the requirement of consent to give effect to any pre-existing contractual obligations to any Eligible Employees.

#### 71.15 Claims from Eligible Employees or Trade Unions

The Service Provider hereby indemnifies the Authority and/or any Future Service Provider and, in each case, their sub-contractors from and against all Loss suffered or incurred by it or them which arises from claims by the Eligible Employees of the

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

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

#### 71.16 Transfer of Employment of Eligible Employees

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

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

## **PART P - TERMINATION**

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

- 72.1 Authority's emergency step-in rights