

**Schedule 13**

**Compensation on Termination**

## Schedule 13

### Compensation on Termination

#### Section 1: Definitions relevant to Schedule 13

##### 1 Definitions

In each section of this Schedule 13 the following expressions (in addition to those specified in Schedule 1 (Definitions, Interpretations and Construction)) shall, save where the context or the express provisions of this Contract otherwise requires or admits, have the following meanings:

**Adjusted Estimated Fair Value of the Contract** means the Estimated Fair Value of the Contract, less an amount equal to the aggregate of:

- (a) where relevant, any Post Termination Service Amount paid to the Contractor (if a positive number);
- (b) the Tender Costs; and
- (c) amounts that the Authority is entitled to set off or deduct under clause 26.13 (Set off),

plus an amount equal to the aggregate of:

- (i) all credit balances on any bank accounts held by or on behalf of the Service Provider on the date that the Estimated Fair Value of the Contract is calculated;
- (ii) any insurance proceeds and other amounts owing to the Service Provider (and which the Service Provider is entitled to retain), to the extent not included in (i); and
- (iii) the Post Termination Service Amount (if a negative number),

to the extent that:

- (A) (i), (ii) and (iii) have not been directly taken into account in calculating the Estimated Fair Value of the Contract; and
- (B) the Authority has received such amounts in accordance with the Contract

**Base Case Equity IRR** means [♦] per cent ([♦]%)

**Compensation Date** means either:

- (a) if paragraph 2 of Section 3 (Compensation following Service Provider Default) of this Schedule 13 applies, the earlier of:

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- (i) the date that the New Contract is entered into; and
  - (ii) the date on which the Authority pays the Adjusted Highest Compliant Tender Price to the Service Provider; or
- (b) if paragraph 3 of Section 3 (Compensation following Service Provider Default) of this Schedule 13 applies, the date that the Adjusted Estimated Fair Value of the Contract has been agreed or determined

**Compliant Tender** means any tender submitted by a Compliant Tenderer that meets the Qualification Criteria notified under paragraph 2.1(c) of Section 3 (Compensation following Service Provider Default) of this Schedule 13

**Compliant Tenderer** means a tenderer who is a Suitable Substitute Service Provider

**Credit Agreement** means a credit agreement of even date herewith made between the Service Provider and the Senior Lenders

**Deduction** means the Adjustments other than the Adjustments made pursuant to Performance Standard 1 set out in Part 2 of the Payment Mechanism

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

- (a) if this Contract is terminated prior to the completion of any of the Milestones, then the remaining dates for the completion of the Milestones shall be extended by a period to allow a New Service Provider to achieve completion of any of the remaining Milestones (as the case may be);
- (b) any Milestone Default Termination Points and/or Service Default Termination Points accrued pursuant to the provisions of the Payment Mechanism and/or any formal warning notices and/or Final Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled; and
- (c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date

**Estimated Fair Value of the Contract** means the amount determined in accordance with paragraph 3 of Section 3 (Compensation following Service Provider Default) of this Schedule 13 that a third party would pay to the Authority as the market value of the Deemed New Contract

**Fair Value** means the amount at which an asset or liability could be exchanged in an arm's length transaction between informed and willing parties, other than in a forced sale or liquidation

**Force Majeure Termination Sum** means the sum calculated in accordance with paragraph 1.2 of Section 5 (Compensation following a Force Majeure Event or Uninsurability) of this Schedule 13 as the same may be adjusted in accordance with

## Street Lighting Procurement Pack – Model Documentation

paragraphs 1.4 to 1.6 (inclusive) of Section 5 (Compensation following a Force Majeure Event or Uninsurability) of this Schedule 13

**Highest Compliant Tender Price** means the price offered by the Compliant Tenderer (if any) with the highest tender price and, if no Compliant Tenders are received, zero

**Instalment Dates** shall have the meaning given to it in paragraph 4.2(a) of Section 7 (General) of this Schedule 13

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

**Liquid Market** means that there are sufficient willing parties (being at least two parties each of whom is capable of being a Suitable Substitute Service Provider) in the market for PFI contracts or similar contracts for the provision of services (in each case the same as or similar to this Contract) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Lenders specifically for the purposes of this Project and to which this Contract may be novated shall be discounted in assessing whether there are sufficient willing parties in the market for such purposes

**Losses** means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or at common law or in connection with judgments, proceedings, internal costs or demands

**Market Value Availability Deduction Amount** means for any Month or part of a Month, an amount equal to the Deduction that was made to the Unitary Charge under the Payment Mechanism in the Month immediately preceding the Termination Date, less an amount equal to any Deduction that was made for a failure of the Service Provider to meet the requirements of the Output Specification at the Termination Date but which has subsequently been remedied whether as a result of the Authority incurring Rectification Costs or otherwise

**Maximum Monthly Payment** means in respect of a Month, the Unitary Charge payable during that Month before any Deductions under the Payment Mechanism [plus an amount referred to as A9 in accordance with paragraph 2.5 of Part 1 of the Payment Mechanism for the relevant Month] but allowing for indexation under paragraph 2.6 of Part 1 of the Payment Mechanism

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

- (a) if this Contract is terminated prior to the date of completion of any of the Milestones, then any remaining dates for the completion of the Milestones shall be extended by a period to allow a New Provider to achieve completion of any of the remaining Milestones (as the case may be);
- (b) any Milestone Default Termination Points and/or Service Default Termination Points accrued pursuant to the provisions of the Payment Mechanism and/or

## Street Lighting Procurement Pack – Model Documentation

any formal warning notices and/or Final Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled;

- (c) the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date; and
- (d) any other amendments which do not adversely affect the Service Provider

**New Service Provider** means the person who has entered or who will enter into the New Contract with the Authority

**Notice Date** means the later of the Termination Date and (if applicable) the date that the Adjusted Estimated Fair Value of the Contract is agreed between the parties pursuant to paragraph 3 of Section 3 (Compensation following Service Provider Default) of this Schedule 13

**Outstanding Principal** means the principal amount outstanding at the Termination Date of each borrowing (other than any borrowing under any equity bridge facility under the Senior Credit Agreement)

**Post Termination Service Amount** means for the purposes of paragraph 2 of Section 3 (Compensation following Service Provider Default) of this Schedule 13, for the whole or any part of a Month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Monthly Payment which would have been payable in that Month under this Contract had this Contract not been terminated, less an amount equal to the aggregate of:

- (a) the Market Value Availability Deduction Amount for that Month;
- (b) the Rectification Costs incurred by the Authority in that Month; and
- (c) (where relevant), the amount by which the Post Termination Service Amount for the previous Month was less than zero

**Prohibited Act Termination Amount** shall bear the meaning ascribed to it in Section 4 (Compensation following a Prohibited Act) of this Schedule 13

**Rectification Costs** means for the purposes of any Termination Date that occurs during the Service Period, an amount equal to the reasonable and proper costs incurred by the Authority in a particular Month or part of a Month in ensuring that the Service is delivered

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

## Street Lighting Procurement Pack – Model Documentation

**Senior Credit Agreement** means [♦]<sup>1</sup> as at the date of this Contract or as amended with the prior written approval of the Authority pursuant to clause 1.14 (No Increase in Authority Liability)

**Senior Debt Rate** means the interest rate referred to in clause [♦] of the Credit Agreement or such other lower rate as the parties may, in their absolute discretion, agree

**Sub-Contractor Breakage Costs** means Losses that have been or will be reasonably and properly incurred by the Service Provider as a direct result of the termination of this Contract but only to the extent that:

- (a) the Losses are incurred in connection with the Project and in respect of the provision<sup>2</sup> of the Service including:
  - (i) any materials or goods ordered or Sub-Contracts placed into that cannot be cancelled without such Losses being incurred;
  - (ii) any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
  - (iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project; and
  - (iv) redundancy payments;
- (b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms [and [♦]]<sup>3</sup> and
- (c) the Service Provider and the Sub-Contractor has each used its reasonable endeavours to mitigate the Losses

**Subordinated Financing Agreements** means [♦] as at the date of this Contract or as amended with the prior written approval of the Authority

**Suitable Substitute Service Provider** means a person approved by the Authority (such approval not to be unreasonably withheld or delayed) as:

- (a) having the legal capacity, power and Authority to become a party to and perform the obligations of the Service Provider under this Contract; and
- (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to

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<sup>1</sup> Reference should be made here to the document under which the Senior Loan Facility is made available.

<sup>2</sup> DN: Not SOPC4 – to be discussed.

<sup>3</sup> See footnote 15 in SOPC4 guidance on caps for loss of profit for sub-contractors which should be limited to a fixed period.

## Street Lighting Procurement Pack – Model Documentation

enable it to perform the obligations of the Service Provider under this Contract

**Tender Costs** means the reasonable and proper costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Contract

**Tender Process** means the process by which the Authority requests tenders from any parties interested in entering into a New Contract, evaluates the responses from those interested parties and enters into a New Contract with a New Service Provider, in accordance with paragraph 2 of Section 3 (Compensation following Service Provider Default) of this Schedule 13

**Tender Process Monitor** means the third party appointed by the Service Provider pursuant to paragraph 2.1(e) of Section 3 (Compensation following Service Provider Default) of this Schedule 13

**Tendering Procedure** means the procedure set out in paragraph 3 of Section 3 (Compensation following Service Provider Default) of this Schedule 13

**Termination Date Discount Rate** means a discount rate expressed as  $((1 + \text{real base case project IRR} + \text{Gilt B} - \text{Gilt A}) * (1 + i) - 1)$  where:

**real base case project IRR** is the real pre-tax Project IRR as set out in the Base Case;

**i** is the agreed assumed forecast rate of increase in the [indexation formula] set out in this Contract for the remaining term of this Contract;

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

**Gilt B** is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Base Case on the Termination Date

## Schedule 13

### Compensation on Termination

#### Section 2: Compensation following Authority Default, Authority Voluntary Termination, Authority Termination on an Authority Break Point Date or Relevant Discharge Terms

##### 1 Calculation of Payment

1.1 On termination of this Contract pursuant to:

- (a) clause 3.1 (Unenforceability of Contract);
- (b) clause 42.1 (Authority Voluntary Termination);
- (c) clause 44 (Termination by the Service Provider),

the Authority shall pay the Service Provider, in accordance with this Section 2, the Authority Default Termination Sum.

1.2 On termination of this Contract pursuant to clause 42.9 (Authority Termination on an Authority Break Point Date), the Authority shall pay the Service Provider, in accordance with this Section 2, the Authority Default Termination Sum, save that in calculating such amount, the amount specified in paragraph 1.3(c), shall be substituted by:

- (a) [in the case of termination on the first Authority Break Point Date, £[◆]]; [or]
- (b) [in the case of termination on the second Authority Break Point Date, £[◆]].

1.3 Subject to paragraphs 1.4 to 1.6 (inclusive), the Authority Default Termination Sum shall be an amount equal to the aggregate of:

- (a) the Base Senior Debt Termination Amount;
- (b) redundancy payments for employees of the Service Provider that have been, or will be, reasonably incurred by the Service Provider as a direct result of termination of this Contract and any Sub-Contractor Breakage Costs; and
- (c) [an amount which when taken together with:
  - (A) dividends (or other distributions) paid by the Service Provider on its share capital on or before the Termination Date;
  - (B) interest paid and principal repaid by the Service Provider under the Subordinated Financing Agreements on or before the Termination Date,

taking account of the actual timing of all such payments, gives a real internal rate of return on the share capital subscribed and amounts advanced under the Subordinated Financing Agreements equal to the Base Case Equity IRR; or]

- (c) [the aggregate amount for which the share capital of the Service Provider and the amounts outstanding under the Subordinated Financing Agreements could have been sold on an open market basis based on the Relevant Assumptions; or]
- (c) [all amounts shown in the Base Case as payable by the Service Provider from the Termination Date, either in dividends or other distributions on the share capital of the Service Provider or as payments of interest or repayments of principal made by the Service Provider under the Subordinated Financing Agreements, each amount discounted back at the Base Case Equity IRR from the date on which it is shown to be payable in the Base Case to the Termination Date.]

1.4 If the aggregate of the amounts referred to in paragraphs 1.3(a) and 1.3(c) is less than the Revised Senior Debt Termination Amount, then the Authority Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.3(b) provided always that:

- (a) the amount referred to in paragraph 1.3(b) shall only be paid to the extent that the Service Provider has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and
- (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub Contract in circumstances where there is an event of default under such Sub Contract which would entitle the Service Provider to terminate such Sub-Contract.

1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Service Provider has wilfully, or through gross negligence, failed to comply with its obligations under clause 10.5(d)(i) of the Senior Lender's Direct Agreement then, in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

1.6 If the Service Provider has wilfully or through gross negligence failed to comply with its obligations under clause 9.4(d) of the Senior Lender's Direct Agreement and there has been an overstatement of the cash balances by the

Service Provider as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this paragraph 1, then the Authority Default Termination Sum, shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

## **2 Payment**

2.1 The Authority shall pay to the Service Provider the Authority Default Termination Sum on Termination Date.

## **3 Full Satisfaction**

3.1 The provisions of paragraph 3 of Section 7 (General) of this Schedule 13 shall apply to the payment of the Authority Default Termination Sum.

## **4 Transfer of Assets**

The Authority shall have the option to require the Service Provider to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority in accordance with clause 46.6 (Transfer of Assets).

## Schedule 13

### Compensation on Termination

#### Section 3: Compensation following Service Provider Default

##### 1 Retendering Election

1.1 If the Authority terminates this Contract pursuant to clauses 42.3 or 42.6 (Termination by the Authority) following the occurrence of a Service Provider Default, (subject to paragraph 1.2), the Authority shall be entitled either to:

- (a) retender the provision of the Project in accordance with paragraph 2; or
- (b) require an expert determination in accordance with paragraph 3.

1.2 The Authority shall be entitled to retender the provision of the Project in accordance with paragraph 2 if:

- (a) the Authority notifies the Service Provider on or before the date falling twenty (20) Business Days after the Termination Date that it intends to retender; and
- (b) there is a Liquid Market; and either:
  - (i) the Senior Lenders have not exercised their rights to step-in under clause 6 of the Senior Lender's Direct Agreement; or
  - (ii) the Service Provider or Senior Lenders have not procured the transfer of the Service Provider's rights and liabilities under this Contract to a Suitable Substitute Service Provider and have failed to use all reasonable efforts to do so,

but otherwise the Authority shall not be entitled to re-tender the provision of the Service and paragraph 3 shall apply.

##### 2 Retendering Procedure

2.1 If the Authority elects to retender the provision of the Project pursuant to paragraph 1.1(a), then the following provisions shall apply:

- (a) the objective of the retendering procedure shall be to establish and pay to the Service Provider the Highest Compliant Tender Price as a result of the Tender Process;
- (b) the Authority shall (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable;

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- (c) the Authority shall notify the Service Provider of the qualification criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process but shall act reasonably in setting such requirements and terms;
- (d) the Service Provider authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under clause 36 (Confidentiality) that is reasonably required as part of the Tender Process;
- (e) the Service Provider may, at its own cost, appoint a person (the **Tender Process Monitor**) to monitor the Tender Process for the purposes of monitoring and reporting to the Service Provider and the Senior Lenders on the Authority's compliance with the Tender Process and making representations to the Authority. The Tender Process Monitor shall not disclose any confidential information to the Service Provider or any other person (and shall provide an undertaking to the Authority to such effect as a condition of its appointment) but shall be entitled to advise the Service Provider as to whether it considers that the Authority has acted in accordance with the Tender Process, and correctly determined the Adjusted Highest Compliant Tender Price;
- (f) the Tender Process Monitor shall enter into a confidentiality agreement with the Authority in a form acceptable to the Authority (acting reasonably) and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of the tender documentation and bids and shall be required to make written representations to the Authority regarding compliance with the Tender Process. All representations shall be made by the Tender Process Monitor in a timely manner as the Tender Process proceeds. The Authority shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the Service Provider in the event that the Service Provider refers a dispute relating to the Adjusted Highest Compliant Tender Price to the Dispute Resolution Procedure;
- (g) for all or any part of a Month, falling within the period from the Termination Date to the Compensation Date, the Authority shall pay to the Service Provider:
  - (i) the Post Termination Service Amount for that Month, on or before the date falling ten (10) Business Days after the end of the Month; and
  - (ii) the Post Termination Service Amount for the Month ending on the Compensation Date, on or before the date falling twenty (20) Business Days after the Compensation Date;

## Street Lighting Procurement Pack – Model Documentation

- (h) if any Post Termination Service Amount is less than zero then it shall be carried forward and shall be set off against any future positive Post Termination Service Amounts. If any such Post Termination Service Amount has not been set off on or before the Compensation Date then it shall be taken into account in the calculation of the Adjusted Highest Compliant Tender Price;
- (i) not used;<sup>4</sup>
- (j) as soon as practicable after tenders have been received, the Authority shall (acting reasonably) determine the Compliant Tenders and shall notify the Service Provider of the Adjusted Highest Compliant Tender Price;
- (k) if the Service Provider refers a dispute relating to the Adjusted Highest Compliant Tender Price to the Dispute Resolution Procedure, the Authority shall be entitled to enter into a New Contract. The Authority shall pay to the Service Provider the Adjusted Highest Compliant Tender Price on or before the date falling twenty (20) Business Days after it has been determined in accordance with the Dispute Resolution Procedure and the Authority shall pay interest to the Service Provider at the Senior Debt Rate on any amount of Adjusted Highest Compliant Tender Price which had been withheld, from the date specified in paragraph 2.1(l) until the date specified in this paragraph 2.1(k). For the avoidance of doubt, where there is an agreed amount and a disputed amount in respect of the Adjusted Highest Compliant Tender Price, the Authority shall (where it is agreed that the Adjusted Highest Compliant Tender Price is a positive number) pay to the Service Provider the agreed amount no later than the date specified in paragraph 2.1(l), with the disputed amount being dealt within accordance with paragraph 2.1(k);
- (l) subject to paragraphs 2.1(k), 2.1(k) and 2.1(o), the Authority shall pay to the Service Provider an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the date of the New Contract;
- (m) the discharge by the Authority of its payment obligation in paragraph 2.1(j) shall be in full and final settlement of all the Service Provider's claims and rights against the Authority for breaches and/or termination of this Contract and the Project Documents whether under contract, tort, restitution or otherwise, save for any liability of the Authority which arose prior to the Termination Date that has not already been taken into account in the Adjusted Highest Compliant Tender Price;

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<sup>4</sup> This is the provision requiring bidders to bid on basis that they will receive benefit of material damage insurance claims which will not be relevant to street lighting projects.

- (n) subject to paragraphs 2.1(o) and 2.1(r), if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to the Service Provider on or before the date falling two (2) years after the Termination Date then the following provisions of this paragraph 2.1 shall not apply to that termination and the provisions of paragraph 3 shall apply instead;
- (o) if the Adjusted Highest Compliant Tender Price is zero or a negative number then the Authority shall have no obligation to make any payment to the Service Provider and with effect from the time that the Authority gives notice of that event to the Service Provider, the Authority shall be released from all liability to the Service Provider for breaches and/or termination of this Contract and any Project Document whether under contract, tort, restitution or otherwise save for any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price;
- (p) if the Adjusted Highest Compliant Tender Price is less than zero then an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by the Service Provider to the Authority on the date of the New Contract;
- (q) the Authority may elect at any time prior to the receipt of a Compliant Tender to follow the no retendering procedure under paragraph 3 by notifying the Service Provider that this election has been made; and
- (r) if the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify the Service Provider of this decision and pay to the Service Provider an amount equal to the Adjusted Highest Compliant Tender Price within twenty (20) Business Days of such notification.

### **3 No Retendering Procedure**

#### 3.1 If either:

- (a) the Authority is not entitled to retender the provision of the Service under paragraph 1;
- (b) the Authority elects to require an expert determination in accordance with this paragraph 3;
- (c) [the Adjusted Highest Compliant Tender Price is not paid in accordance with the provisions of paragraph 2.1(n);

- (d) the Authority elects the no retendering procedure pursuant to paragraph 2.1(q),]

then the procedure set out in paragraph 3.2 shall apply.

### 3.2 No Retendering Procedure

If paragraph 3.1 applies then:

- (a) subject to paragraph 3.2(b), the Service Provider shall not be entitled to receive any Post Termination Service Amount;
- (b) if the Authority elects to require an expert determination in accordance with this paragraph 3.2 after it has elected to follow the procedure under paragraph 2.1, then the Authority shall continue to pay to the Service Provider each Post Termination Service Amount until the Compensation Date, in accordance with paragraph 2.1;
- (c) in agreeing or determining the Estimated Fair Value of the Contract the parties shall be obliged to follow the principles set out below:
  - (i) all forecast amounts should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Contract;
  - (ii) the total of all future payments of the Unitary Charge (without Deductions) forecast to be made shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate;
  - (iii) the total of all costs forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Termination Date Discount Rate and deducted from the payment calculated pursuant to paragraph 3.2(c)(ii), such costs to include without double counting:
    - (A) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;
    - (B) the costs of the service forecast to be incurred by the Authority in providing the Project to the standard required; and
    - (C) any rectification costs required to deliver the Project to the standard required (including any costs forecast to be incurred by the Authority to complete the Core Investment Programme Service or development work

and additional operating costs required to restore operating services standards),

in each case such costs to be forecast at a level that will deliver the full Unitary Charge referred to in paragraph 3.2(c)(ii);

- (d) if the parties cannot agree on the Adjusted Estimated Fair Value of the Contract on or before the date falling twenty (20) Business Days after the date on which the Authority elected to require an expert determination in accordance with this paragraph 3.2, then the Adjusted Estimated Fair Value of the Contract shall be determined in accordance with the Dispute Resolution Procedure;
- (e) the Authority shall pay to the Service Provider an amount equal to the Adjusted Estimated Fair Value of the Contract on the date falling forty (40) Business Days after the date on which the Adjusted Estimated Fair Value of the Contract has been agreed or determined in accordance with this paragraph 3.2;
- (f) the discharge by the Authority of its obligation in paragraph 3.1(e) is in full and final settlement of all the Service Provider's claims and rights against the Authority for breaches and/or termination of this Contract or any Project Document whether in contract, tort, restitution or otherwise save for any liability that arose prior to the Termination Date (but not from the termination itself) that has not been taken into account in determining the Adjusted Estimated Fair Value of the Contract;
- (g) to the extent that the Adjusted Estimated Fair Value of the Contract is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Contract shall be due and payable by the Service Provider to the Authority on the Compensation Date.

#### **4 Transfer of Assets**

The Authority shall have the option to require the Service Provider to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority in accordance with clause 46.6 (Transfer of Assets).

## Schedule 13

### Compensation on Termination

#### Section 4: Compensation following a Prohibited Act

##### **1 Calculation of Payment**

On termination of the Contract in accordance with clause 43 (Termination for Corrupt Gifts and Fraud), then the Authority shall pay the Service Provider an amount equal to the Revised Senior Debt Termination Amount.

##### **2 Payment**

The Revised Senior Debt Termination Amount shall be paid in accordance with paragraph 4 of Section 7 (General) of this Schedule 13.

##### **3 Full Satisfaction**

The provisions of paragraph 3 of Section 7 (General) of this Schedule 13 shall apply to the payment of the Revised Senior Debt Termination Amount.

##### **4 Transfer of Assets**

The Authority shall have the option to require the Service Provider to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority in accordance with clause 46.6 (Transfer of Assets).

## Schedule 13

### Compensation on Termination

#### Section 5: Compensation following a Force Majeure Event or Uninsurability

##### 1 Calculation of Payment

- 1.1 On termination of this Contract pursuant to:
- (a) clause 32.4(b)(i) or 32.4(b)(ii) (Uninsurable Risks); or
  - (b) clause 45 (Termination following a Force Majeure Event) the Authority shall pay to the Service Provider the Force Majeure Termination Sum.
- 1.2 Subject to paragraphs 1.4 to 1.6 (inclusive), the Force Majeure Termination Sum shall be the amount equal to the aggregate of:
- (a) the Base Senior Debt Termination Amount;
  - (b) the Junior Debt less an amount equal to the aggregate of payments of interest made by the Service Provider under the Subordinated Financing Agreements;
  - (c) all amounts paid to the Service Provider by way of subscription for shares in the capital of the Service Provider less dividends and other distributions paid to the shareholders of the Service Provider (save to the extent deducted under paragraph 1.2(b)); and
  - (d) redundancy payments for employees of the Service Provider that have been or will be reasonably incurred by the Service Provider as a direct result of termination of the Contract and any Sub-Contractor Breakage Costs.
- 1.3 If the amounts referred to in paragraphs 1.2(b) and/or 1.2(c) are less than zero, then, for the purposes of the calculation of the Force Majeure Termination Sum they shall be deemed to be zero.
- 1.4 If the aggregate of the amounts referred to in paragraphs 1.2(a), 1.2(b) and 1.2(c) is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2(d) provided always that:
- (a) the amount referred to in paragraph 1.2(d) shall only be paid to the extent that the Service Provider has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and

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

1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Service Provider has wilfully, or through gross negligence, failed to comply with its obligations under clause 9.4(d) of the Senior Lender's Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.

1.6 If the Service Provider has wilfully or through gross negligence failed to comply with its obligations under clause 9.4(d) of the Senior Lender's Direct Agreement and there has been an overstatement of the cash balances by the Service Provider as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this paragraph 1.2, then the Force Majeure Termination Sum, shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.

## **2 Payment**

The Force Majeure Termination Sum shall be paid in accordance with paragraph 4 of Section 7 (General) of this Schedule 13.

## **3 Full Satisfaction**

The provisions of paragraph 3 of Section 7 (General) of this Schedule 13 shall apply to the payment of the Force Majeure Termination Sum.

## **4 Transfer of Assets**

The Authority shall have the option to require the Service Provider to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority in accordance with clause 46.6 (Transfer of Assets).

## Schedule 13

### Compensation on Termination

#### Section 6: Compensation following breach of the Refinancing Provisions

##### **1 Calculation of Compensation**

On termination of this Contract pursuant to clause 42.9 (Termination by the Authority for breach of the Refinancing Provisions), the Authority shall pay to the Service Provider an amount equal to the Revised Senior Debt Termination Amount.

##### **2 Payment**

Such amount shall be paid in accordance with paragraph 4 of Section 7 (General) of this Schedule 13.

##### **3 Full Satisfaction**

The provisions of paragraph 3 of Section 7 (General) of this Schedule 13 shall apply to the compensation payable under paragraph 1.1.

##### **4 Transfer of Assets**

The Authority shall have the option to require the Service Provider to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority in accordance with clause 46.6 (Transfer of Assets).

## Schedule 13

### Compensation on Termination

#### Section 7: General

##### 1 Gross-Up of Termination Payments

If any amount of compensation payable by the Authority (whether payable as a lump sum or instalments) under Section 2 (Compensation following Authority Default, Authority Voluntary Termination, Authority Termination on an Authority Break Point Date or Relevant Discharge Terms), Section 4 (Compensation following a Prohibited Act), Section 5 (Compensation following a Force Majeure Event or Uninsurability) or Section 6 (Compensation following breach of the Refinancing Provisions) is subject to Tax payable to a Relevant Authority in the United Kingdom, then the Authority shall pay to the Service Provider such additional amount as will put the Contractor in the same after Tax position as it would have been in had the payment not been subject to Tax taking account of any relief, allowances deduction, setting off or credit in respect of Tax (whether available by choice or not) which may be available to the Service Provider to reduce Tax to which the payment is subject.

##### 2 Set Off on Termination

Clause 26.13 (Set off) shall apply in respect of set-off of any amount against any payment of termination compensation.

##### 3 Exclusivity of Remedy

Any and all sums irrevocably paid by the Authority to the Service Provider under this Contract shall be in full and final settlement of each party's rights and claims against the other for breaches and/or termination of this Contract or any Project Document whether under contract, tort, restitution or otherwise, but without prejudice to:

- (a) any antecedent liability of the Service Provider to the Authority which the Authority has been unable to set off pursuant to clause 26.13 (Set off);
- (b) any antecedent liability of either party to the other that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or agreeing the Authority Default Termination Sum, Adjusted Highest Compliant Tender Price, or Termination Sum as the case may be; and
- (c) any liabilities arising in respect of any breach by either party of their obligations under clause 41.2 (Continuing Obligations) which arises or continues after the Termination Date to the extent not taken into account in the calculation of any Termination Sum or other payment of compensation on termination pursuant to this Agreement.

## 4 Method of Payment

- 4.1 The Authority shall pay to the Service Provider the Termination Sum together with any interest on any Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount element of the Termination Sum at the Senior Debt Rate on or before the date falling forty (40) Business Days after the Notice Date provided that the Authority may elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in accordance with paragraph 4.2.
- 4.2 The Authority may (other than on an Authority Default) elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum:
- (a) in instalments as follows:
    - (i) where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is greater than or equal to the Outstanding Principal:
      - (A) in respect of that element of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) representing the Outstanding Principal (where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is greater than or equal to the Outstanding Principal) on the dates (the **Instalment Dates**) and in the amounts that the Service Provider would have been required to pay principal to the Senior Lenders under the terms of the Senior Credit Agreement had the Termination Date not occurred; and
      - (B) [in respect of the sum (if any) remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) in equal instalments on the Instalment Dates;]
    - (ii) where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is less than the Outstanding Principal, on the Instalment Dates pro rata to the amounts that the Service Provider would have been

required to pay as principal to the Senior Lenders on each Instalment Date under the terms of the [Senior Credit Agreement] had the Termination Date not occurred; or

(b) as the parties may otherwise agree.

4.3 From the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the Senior Debt Rate and be payable on the next occurring Instalment Date.

4.4 If the Authority has elected to pay in accordance with paragraph 4.2(a), it may (on twenty (20) Business Days prior written notice to the Service Provider) elect to pay any outstanding part of the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) together with any interest accrued pursuant to paragraph 4.3 in full on any Instalment Date.

### **5 Authority Default in Payment**

If the Authority:

(a) fails to make a payment to the Service Provider in accordance with paragraph 4; or

(b) breaches clause 48.3 (Assignment by the Authority),

the Service Provider may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum together with any accrued but unpaid interest to be immediately due and payable.

### **6 Outstanding Senior Debt**

6.1 The Authority shall be entitled to rely on the certificate of the Agent as conclusive as to the amount of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount outstanding at any relevant time.

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