

**Schedule 21**

**Insurance Matters**

## Schedule 21

### Insurance Matters

#### Part 1 - Required Insurances<sup>1</sup>

##### 1 Third Party Liability Insurance

Insured parties:

- (a) the Authority;
- (b) the Service Provider;
- (c) the Senior Lenders;
- (d) Sub-Contractors, Secondary Contractors and suppliers of any tier.

1.1 Interest: To indemnify the Insured in respect of all sums that they may become legally liable to pay (including claimant's costs and expenses) as damages in respect of accidental:

- (a) death, bodily injury, illness or disease contracted by any person;
- (b) loss or damage to property;
- (c) interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause,

happening during the period of insurance and arising out of or in connection with the Project and the provision of the Service.

1.2 Limit of Indemnity: Not less than [♦] pounds [£♦] in respect of any one (1) occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution and products liability.

1.3 [Maximum Deductible: [♦] pounds [£♦] for each and every occurrence of property damage (escalated periodically as appropriate) (Personal injury claims will be paid in full).]

1.4 Territorial Limits: UK (and elsewhere in the world in respect of non manual visits).

1.5 Jurisdiction: UK (and elsewhere in the world in respect of non manual visits).

1.6 Period of Insurance: From the Service Commencement Date for the duration of the Contract and renewable on an annual basis unless agreed otherwise.

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<sup>1</sup> Insurance advisors should review on a project specific basis. If material damage and business interruption insurance is obtained, SOPC4 wording should be inserted in this Schedule.

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### 1.7 Cover Features & Extensions:

- (a) munitions of war;
- (b) cross liability clause;
- (c) contingent motor; and
- (d) legal defence costs.

### 1.8 Principal Exclusions:

- (a) liability for death, illness, disease or bodily injury sustained by employees of the insured;
- (b) liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles;
- (c) liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the insured;
- (d) liability in respect of loss or damage to property in the care, custody and control of the insured but this exclusion is not to apply to all property belonging to the Authority which is in the care, custody and control of another Insured Party;
- (e) liability arising out of technical or professional advice (given for a fee) other than in respect of death or bodily injury to persons or damage to third party property;
- (f) liability arising from the ownership, possession or use of any aircraft or marine vessel; and
- (g) Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.

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#### Part 2 - Endorsements

Unless the context otherwise requires defined terms set out in the following endorsements shall have the meaning set out in the Contract.

##### **Endorsement 1: Cancellation**

This policy shall not be cancelled or terminated before the original expiry date is to take effect except in respect of non-payment of premium.

The insurer shall by written notice advise the Authority:

- (a) at least thirty (30) days before any such cancellation or termination is to take effect;
- (b) at least thirty (30) days before any reduction in limits or coverage or any increase in deductibles is to take effect; and
- (c) of any act or omission or any event of which the insurer has knowledge and which might invalidate or render unenforceable in whole or in part this policy.

##### **Endorsement 2: Multiple Insured/Non-Vitiating Clause**

Each of the parties comprising the insured shall for the purpose of this policy be considered a separate co-insured entity, insured on a composite basis, with the words "the insured" applying to each as if they were separately and individually insured provided that the total liability of the insurers under each section of this policy to the insured collectively shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity or amount stated to be insured under that section or policy. Accordingly, the liability of the insurers under this policy to any one insured shall not be conditional upon the due observance and fulfillment by any other insured party of the terms and conditions of this policy or of any duties imposed upon that insured party relating thereto, and shall not be affected by any failure in such observance or fulfillment by any such other insured party.

It is understood and agreed that any payment or payments by insurers to any one or more of the insureds shall reduce, to the extent of that payment, insurers' liability to all such parties arising from any one event giving rise to a claim under this policy and (if applicable) in the aggregate.

Insurers shall be entitled to avoid liability to or (as may be appropriate) claim damages from any insured party in circumstances of fraud misrepresentation non-disclosure or material breach of warranty or condition of this policy (each referred to as a **Vitiating Act**) committed by that insured party save where such misrepresentation non-disclosure or breach of warranty or condition was committed innocently and in good faith.

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For the avoidance of doubt it is however agreed that a Vitiating Act committed by one insured party shall not prejudice the right to indemnity of any other insured who has an insurable interest and who has not committed the Vitiating Act.

Insurers hereby agree to waive all rights of subrogation and/or recourse which they may have or acquire against any insured party (together with their employees and agents) except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstances insurers may enforce such rights against the insured responsible for the Vitiating Act notwithstanding the continuing or former status of the vitiating party as an insured.

Notwithstanding any other provision of this policy or any other document or any act and/or omission by any insured party insurers agree that:

- (a) no party other than the Authority has any authority to make any warranty, disclosure or representation in connection with this policy on behalf of the Authority;
- (b) where any warranty, disclosure or representation is required from the Authority in connection with this policy insurers will contact the Authority in writing (in accordance with Endorsement 3 to the Contract) and set out expressly the warranty, disclosure and/or representation required within a reasonable period of time from the Authority (regarding itself); and
- (c) save as set out in a request from insurers to the Authority in accordance with paragraph (b) above, the Authority shall have no duty to disclose any fact or matter to insurers in connection with this policy save to the extent that for the Authority not to disclose a fact or matter would constitute fraudulent misrepresentation and/or fraudulent non-disclosure.

### Endorsement 3: Communications

All notices or other communications under or in connection with this policy shall be given to each insured (and the Authority) in writing or by facsimile. Any such notice will be deemed to be given as follows:

- (a) if in writing, when delivered;
- (b) if by facsimile, when transmitted but only if, immediately after transmission, the sender's facsimile machine records a successful transmission has occurred.

The address and facsimile number of the Authority for all notices under or in connection with this policy are those notified from time to time by the Authority for this purpose to the Service Provider at the relevant time. The initial address and facsimile number of the Authority are as follows:

The Authority:

Address: [◆]

Facsimile No: [◆]

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Attention: The Chief Executive from time to time of the Authority

It is further agreed that a notice of claim given by the Authority or any other insured shall in the absence of any manifest error be accepted by the insurer as a valid notification of a claim on behalf of all insureds.

## **Endorsement 4<sup>2</sup>**

Not Used.

## **Endorsement 5: Primary Insurance**

It is expressly understood and agreed that this policy provides primary cover for the insured parties and that in the event of loss destruction damage or liability covered by this policy which is covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurers will indemnify the insured parties as if such other policy or policies of insurance were not in force and the insurers waive their rights of recourse if any against the insurers of such other policy or policies of insurance.

## **Endorsement 6: Ringfencing**

The level of any indemnity available to an insured party under this policy in relation to any claim(s) concerning the Project shall not be affected and/or reduced by any claim(s) unrelated to the Project.

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<sup>2</sup> This Endorsement was only relevant to material damage insurance. See footnote 1.

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#### Part 3 - Broker's Letter of Undertaking

To: The Authority

Dear Sirs

#### **Contract dated [◆] entered into between [◆] Limited (the Service Provider) and [◆] (the Authority) (the Contract)**

- 1 We refer to the Contract. Unless the context otherwise requires, terms defined in the Contract shall have the same meaning in this letter.
- 2 We act as insurance broker to the Service Provider in respect of the Required Insurances and in that capacity we confirm that the Required Insurances which are required to be procured pursuant to clause 32 (Insurance) and Schedule 21 (Insurance Matters) of the Contract:
  - (a) where appropriate, name you and such other persons as are required to be named pursuant to the Contract for their respective interests;
  - (b) are, in our reasonable opinion as insurance brokers, as at today's date, in full force and effect in respect of all the matters specified in the Contract;
  - (c) all premiums due to date in respect of the Required Insurances are paid and the Required Insurances are, to the best of our knowledge and belief, placed with insurers which, as at the time of placement, are reputable and financially sound we do not, however, make any representations regarding such insurers' current or future solvency or ability to pay claims; and
  - (d) the endorsements set out in Part 2 to Schedule 21 (Insurance Matters) of the Contract are in full force and effect in respect of the Required Insurances.
- 3 We further confirm that the attached cover notes confirm this position.
- 4 Pursuant to instructions received from the Service Provider and in consideration of your approving our appointment [or continuing appointment] as brokers in connection with the Required Insurances, we hereby undertake in respect of the interests of the Authority (and all other parties which should be insured under any of the Required Insurances) in relation to the Required Insurances:
  - (a) **Notification Obligations:**
    - (i) to notify you at least thirty (30) days prior to the expiry of any of the Required Insurances if we have not received instructions from the Service Provider to negotiate renewal and in the event of our receiving instructions to renew, to advise you promptly of the details thereof; and

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- (ii) to notify you at least ninety (90) days prior to ceasing to act as brokers to the Service Provider unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as practicable.

(b) **Advisory Obligations:**

- (i) to notify you forthwith of any default in the payment of any premium for any of the Required Insurances;
- (ii) to notify you if any insurer cancels or gives notification of cancellation of any of the Required Insurances, at least ninety (90) days before such cancellation is to take effect or as soon as reasonably practicable in the event that notification of cancellation takes place less than ninety (90) days before it is to take effect;
- (iii) to notify you of any act or omission, breach or default of which we have knowledge which may either invalidate or render unenforceable in whole or in part any of the Required Insurances or which may otherwise impact on the extent of cover provided under the Required Insurances; and
- (iv) to advise the Service Provider of its duties of disclosure to insurers and to specifically advise upon:
  - (A) the facts, circumstances and beliefs that should generally be disclosed to insurers; and
  - (B) the obligation not to misrepresent any facts, matters or beliefs to insurers.

(c) **Disclosure Obligations:**

- (i) to disclose to insurers all information made available to us from any source and any fact, change of circumstances or occurrence made known to us from any source which is material to the risks insured against under the Required Insurances and which properly should be disclosed to insurers as soon as practicable after we become aware of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise; and
- (ii) to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of the Service Provider or the Authority and not to disclose such information, without the prior written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Required Insurances in discharge of our obligation set out at clause 4(c)(i) of this letter. Our obligations of confidentiality shall not conflict with our duties owed to

the Service Provider and shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

(d) **Administrative Obligations:**

- (i) to hold copies of all documents relating to or evidencing the Required Insurances, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Required Insurances, payment of premiums and presentation and receipt of claims;
- (ii) to supply to the Authority and/or its insurance advisers (or the Authority's or its insurance advisers' authorised representatives) forthwith on request copies of the documents set out in clause 4(d)(i) of this letter, and to the extent available, to make available to such persons promptly upon the Authority's request the originals of such documents;
- (iii) to administer the payment of premiums due pursuant to the Required Insurances such that, in so far as we hold appropriate funds, all such premiums shall be paid to insurers in accordance with the terms of the Required Insurances;
- (iv) to administer the payment of claims from insurers in respect of the Insurances (the **Insurance Claims**) including:
  - (A) negotiating settlement of Insurance Claims presented in respect of the Required Insurances;
  - (B) collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Required Insurances; and
  - (C) insofar as it is relevant and practicable, liaising with and reporting to each Authority throughout the settlement, payment and administration of such Insurance Claims;
- (v) to advise the Authority promptly upon receipt of notice of any material changes which we are instructed to make in the terms of the Required Insurances and which, if effected, would result in any material reduction in limits or coverage or in any increase in deductibles, exclusions or exceptions;
- (vi) to advise the Authority in advance of any change to the terms of, or any lapse, non-renewal and/or cancellation of any policy maintained in respect of the Required Insurances; and
- (vii) to use our best endeavours to have endorsed on each and every policy evidencing the Required Insurances (when the same is issued)

endorsements substantially in the form set out in Part 2 of Schedule 21 (Insurance Matters) of the Contract.

(e) **Insurance Cost Reporting Procedures:**

- (i) to prepare following request, at the expense of the Service Provider, a Joint Insurance Cost Report on behalf of both the Service Provider and the Authority in accordance with the Insurance Review Procedure set out in Part 4 of Schedule 21 (Insurance Matters) of the Contract. We shall ensure that the information in the Joint Insurance Cost Report is fairly represented, based on the information available to us.

(f) **Notification Details:**

- (i) Our obligations at clause 4(a) of this letter to notify or inform you shall be discharged by providing the requisite information in hard copy to:

Authority: [◆]

Address: [◆]

- (ii) We shall supply further letters in this form on renewal of each of the Required Insurances and at other times as requested by the Authority and shall supply copies of such letters to those parties identified to us by the Authority for such purposes.

Yours faithfully

for and on behalf of  
[Service Provider's Broker]

## Schedule 21

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#### Part 4 - Insurance Premium Risk Sharing

##### 1 Definitions

1.1 In each part of this Part 4 of Schedule 21, the following expressions (in addition to those specified in Schedule 1 (Definitions, Interpretation and Construction)) shall, save where the context or the express provisions of this Contract otherwise requires or admits, have the following meanings:

**Actual Reduction** has the meaning given to it in paragraph (b)(i) of the definition of Base Relevant Insurance Reduction

**Actual Relevant Insurance Cost** means the aggregate of the [annual] insurance premiums reasonably incurred by the Service Provider to maintain the Relevant Insurance during the Insurance Review Period but excluding insurance premium tax and all broker's fees and commissions

**Base Cost** means [♦] pounds (£♦) being the amount as agreed at the Bid Date and set out in the Base Case Financial Model which represents the insurance costs (which excludes amounts in respect of insurance premium tax and all brokers' fees and commissions) which are proposed to be incurred to maintain the Relevant Insurance in each year following the Service Commencement Date, expressed in real terms as at the Bid Date

**Base Relevant Insurance Cost** means, the aggregate of the Base Costs which were (at Bid Date) projected to be incurred to maintain the Relevant Insurance during the Insurance Review Period indexed by actual RPI from the Bid Date up to the dates on which the Relevant Insurance was placed or renewed either immediately before or during the Insurance Review Period (as applicable in respect of the year in question) less any Base Relevant Insurance Reduction

**Base Relevant Insurance Reduction** the reduction to be made to the Base Relevant Insurance Cost in respect of a risk which has become Uninsurable or a term or condition which is no longer available and shall be an amount that is either:

- (a) the amount by which the Base Relevant Insurance Cost would have been a lesser amount had such a risk been Uninsurable or such a term or condition been unavailable at the Bid Date (which amount, for the avoidance of doubt, can be zero (£0)); or
- (b) if it is impossible to determine an amount pursuant to paragraph (a), an amount that is reasonable to be deducted from the Base Relevant Insurance Cost having due regard to:

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- (i) the amount by which the Actual Relevant Insurance Cost is less than it would have been as a result of the risk becoming Uninsurable, or the term or condition becoming unavailable (the **Actual Reduction**);
- (ii) the size of the Actual Reduction as a percentage of the Actual Relevant Insurance Cost immediately prior to the risk becoming Uninsurable, or the term or condition becoming unavailable; and
- (iii) the effects of RPI since the Bid Date

**Bid Date** means [◆]<sup>3</sup>

**Exceptional Cost** means, for an Insurance Review Period, the extent to which there is an Insurance Cost Increase which exceeds in amount thirty per cent (30%) of the Base Relevant Insurance Cost for that Insurance Review Period

**Exceptional Saving** means, for an Insurance Review Period, the extent to which there is an Insurance Cost Decrease which exceeds in amount thirty per cent (30%) of the Base Relevant Insurance Cost for that Insurance Review Period

**First Insurance Review Date** means the first Business Day following the first anniversary of the Relevant Insurance Inception Date

**Insurance Cost Decrease** means the Insurance Cost Differential if the value thereof is less than zero, multiplied by minus one

**Insurance Cost Differential** shall, subject to the Insurance Review Procedure, be determined as follows:

**Insurance Cost Differential = (ARIC - BRIC) \_ (±PIC)**

where:

**ARIC** is the Actual Relevant Insurance Cost

**BRIC** is the Base Relevant Insurance Cost

**PIC** is any Project Insurance Change

**Insurance Cost Increase** means the Insurance Cost Differential if the value thereof is greater than zero

**Insurance Cost Index** means any index introduced by the United Kingdom Government or the Office of National Statistics after the date of this Contract

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<sup>3</sup> This is the date on which the Service Provider has fixed its price prior to appointment as Preferred Bidder.

and which is anticipated to be published annually to provide an independent and objective measure of changes in prevailing market insurance costs

**Insurance Review Date** means the First Insurance Review Date and, thereafter, each date falling on the second anniversary of the previous Insurance Review Date, except where such date lies beyond the end of the Contract Period, in which case the Insurance Review Date shall be the last renewal date of the Relevant Insurance prior to the end of the Contract Period

**Insurance Review Procedure** means the procedure set out in paragraph 2 of this Part 4 of Schedule 21

**Insurance Review Period** means a two (2) year period from the Relevant Insurance Inception Date and each subsequent two (2) year period commencing on the second anniversary of the Relevant Insurance Inception Date except where the end of such period lies beyond the end of the Contract Period, in which case the Insurance Review Period shall be the period from the end of the penultimate Insurance Review Period to the last day of the Contract Period

**Insurance Summary Sheet** shall have the meaning given to it in paragraph 2.2(c) of this Part 4 of Schedule 21

**Joint Insurance Cost Report** shall have the meaning given to it in paragraph 2.2 of this Part 4 of Schedule 21

**Portfolio Cost Saving** means any insurance cost saving which arises from the Service Provider changing the placement of the Required Insurances from being on a standalone project-specific basis assumed at the date of this Contract and reflected in the Base Cost, to being on the basis of a policy (or policies) also covering risks on other projects or other matters which are outside the scope of the Project so as to benefit from portfolio savings. A Portfolio Cost Saving is defined to be a positive sum and cannot be less than zero

**Project Insurance Change** means any net increase or net decrease in the Actual Relevant Insurance Cost relative to the Base Relevant Insurance Cost, arising from:

- (a) the claims history or re-rating of the Service Provider or any Service Provider Party;
- (b) the effect of any change in deductible unless the following applies:
  - (i) such change is attributable to circumstances generally prevailing in the Relevant Insurance Market; and
  - (ii) the deductible, further to such change, is either greater than or equal to the maximum set out in Part 1 of Schedule 21;

- (c) any other issue or factor other than circumstances generally prevailing in the Relevant Insurance Market, except for any Portfolio Cost Saving.

For the purpose of determining the Insurance Cost Differential, in the event that there is a net increase, the Project Insurance Change shall have a positive value. In the event that there is a net decrease the Project Insurance Change shall have a negative value

**Relevant Insurance** means the Required Insurances and any other insurances as may be required by legislation

**Relevant Insurance Inception Date** means the date on which the Relevant Insurance is first providing active insurance cover to the Service Provider, being a date no earlier than the Service Commencement Date

**Relevant Insurance Market** means the insurance market which insures the majority of all PFI projects across all of the PFI sectors (as determined by the number of PFI projects). At the date of this Contract, the Relevant Insurance Market is in the United Kingdom

## 2 Insurance Review Procedure

- 2.1 This procedure shall be used to determine whether the Authority shall bear any increase or benefit from any decrease in Relevant Insurance costs.
- 2.2 The Service Provider's insurance broker shall prepare a report on behalf of both the Service Provider and the Authority (the **Joint Insurance Cost Report**). The Joint Insurance Cost 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:
- (a) a full breakdown of the Actual Relevant Insurance Cost;
  - (b) a full breakdown of the Base Relevant Insurance Cost;
  - (c) a spreadsheet (the **Insurance Summary Sheet**) detailing separately:
    - (i) the sum(s) insured/limit of indemnity (i.e. rateable factor) for each of the Relevant Insurances;
    - (ii) the premium rate for each of the Relevant Required Insurances;
    - (iii) the net premium paid (or to be paid) for each of the Relevant Insurances (i.e. excluding both insurance premium tax and brokers fees and commissions);
    - (iv) the deductible(s) for each Relevant Insurance;
  - (d) an assessment and quantification of each Project Insurance Change together with the reasons therefore;

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- (e) full details of any Portfolio Cost Saving;
- (f) 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;
- (g) 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;
- (h) the calculation of the Insurance Cost Differential and any Exceptional Cost or Exceptional Saving arising from this calculation;
- (i) 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
- (j) 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.

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

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

## 3 Sharing of Exceptional Cost and Exceptional Saving

- 3.1 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.
- 3.2 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.
- 3.3 If, 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.

## 4 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 index is in use.