

Days, then, either party may terminate this Agreement on a specified date by giving at least 20 Business Days' written notice to the other party.

31.5 **Notice to Continue**

If the Operator gives notice to the Authority under clause 31.4 (*Unable to Agree*) that it wishes to terminate this Agreement, then the Authority has the option either to accept such notice or to respond in writing on or before the date falling 10 Business Days after the date of its receipt stating that it requires this Agreement to continue. If the Authority gives the Operator such notice (the "**Continuation Notice**"), then:

31.5.1 where there is:

31.5.1.1 a Surplus Annual Payment, the Operator shall pay the Authority the Monthly Payments as if the Services were being fully provided, less any Loss of Revenue from the day after the date on which this Agreement would have terminated under clause 31.4 (*Unable to Agree*) (to the extent that such Loss of Revenue arises as a direct result of the Force Majeure Event); or

31.5.1.2 a Deficit Annual Payment, the Authority shall pay to the Operator the Monthly Payments as if the Services were being fully provided, plus any Loss of Revenue from the day after the date on which this Agreement would have terminated under Clause 31.4 (*Unable to Agree*)(to the extent that such Loss of Revenue arises as a direct result of the Force Majeure Event); and

31.5.2 this Agreement will terminate upon expiry of a further written notice (of at least 20 Business Days) from the Authority to the Operator that it wishes this Agreement to terminate.

31.6 **Mitigation**

The parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Operator shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

31.7 **Cessation of Force Majeure Event**

The Affected Party shall notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

PART 6 – LIABILITY AND RISK MANAGEMENT

32. Indemnities, guarantees and contractual claims

32.1 Operator's Indemnity

32.1.1 The Operator shall, subject to clause 32.2 (*Operator not Responsible*), be responsible for, and shall release and indemnify the Authority on demand from and against:

32.1.1.1 all Direct Losses incurred as a result of Operator Damage to the Facilities and/or the Sites (other than any assets the repair, reinstatement and/or replacement of which are the responsibility of the Operator under clause 34.1 (*Reinstatement and change of requirement after Insured Event*)); and

32.1.1.2 all liability for Direct Losses arising from:

- (a) death or personal injury;
- (b) loss of or damage to property (including property belonging to the Authority or for which it is responsible) but excluding the land, buildings, plant, equipment and other assets which are the responsibility of the Operator to provide under this Agreement and which form part of the Facilities; and
- (c) third party actions, claims and/or demands other than those which are the subject of the indemnity in clause 32.1.2 (*Operator's Indemnity*),

which may arise out of, or in consequence of, the operation or maintenance of the Sites and/or Facilities or the performance or non-performance by the Operator of its obligations under this Agreement or the presence on the Authority's property of the Operator or an Operator Related Party or the presence on the land or buildings forming part of a Facility of any User.

32.1.2 The Operator shall, subject to clause 32.2 (*Operator not Responsible*), be responsible for, and shall release and indemnify the Authority or any Authority Related Party, on demand from and against all liability for Direct Losses and Indirect Losses arising from third party actions, claims or demands (as described in clause 32.1.1.2(b) (*Operator's Indemnity*)) brought against the Authority or any Authority Related Party for breach of statutory duty which may arise out of, or in consequence of a breach by the Operator of its obligations under this Agreement to the extent that there are no other remedies available to the Authority under this Agreement.

32.2 Operator not Responsible

The Operator shall not be responsible or be obliged to indemnify the Authority for:

32.2.1 any matter referred to in clause 32.1 (*Operator's Indemnity*) which arises as a direct result of the Operator acting on a written notice issued by the Authority (and for the purposes of this clause 32.2.1 (*Operator not Responsible*), clause 1.5 (*Precedence of Documentation*) shall not apply); or

32.2.2 any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Authority or any Authority Related Party (other than to the extent such negligence or wilful misconduct would not have occurred but for a breach by the Operator of its obligations under this Agreement) or by the breach of the Authority of its obligations under this Agreement.

32.3 **Limitation of Indemnity**

An indemnity by either party under any provision of this Agreement shall be without limitation to any indemnity by that party under any other provision of this Agreement.

32.4 **Notification of Claims**

Where either party (the "**Indemnified Party**") wishes to make a claim under this Agreement against the other (the "**Indemnifying Party**") in relation to a claim made against it by a third party (a "**Third Party Claim**"), the Indemnified Party shall give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

32.5 **Conduct of Claims**

Subject to the rights of the insurers under the Operator Insurances, the Indemnifying Party may at its own expense and with the assistance and co-operation of the Indemnified Party have conduct of the Third Party Claim including its settlement and the Indemnified Party shall not, unless the Indemnifying Party has failed to resolve the Third Party Claim within a reasonable period, take any action to settle or prosecute the Third Party Claim.

32.6 **Costs of Claims**

The Indemnifying Party shall, if it wishes to have conduct of any Third Party Claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the Third Party Claim by the Indemnifying Party.

32.7 **Mitigation**

The Indemnified Party shall at all times take all reasonable steps to minimise and mitigate any loss for which the Indemnified Party is entitled to bring a claim against the Indemnifying Party pursuant to this Agreement.

32.8 **Sub-Contractor Losses**

Where:

32.8.1 a Sub-Contractor is entitled to claim any compensation and/or relief from the Operator under the Sub-Contracts; and

32.8.2 the Operator subsequently makes a claim against the Authority under this Agreement in relation to such compensation and/or relief,

the Authority waives any right to defend the Operator's claim on the ground that the Operator is only required to pay compensation or grant relief to the Sub-Contractor under the Sub-Contracts to the extent that the same is recoverable from the Authority.

33. **Operator insurances**

33.1 **Requirement to Maintain**

33.1.1 Subject to Clause 33.1.2, the Operator shall in relation to each Existing Facility during the Contract Period and in relation to each Additional Facility during the Contract Period commencing from the Additional Facilities Service Commencement Date, take out and maintain or procure the maintenance of the Operator Insurances.

33.1.2 The Parties recognise that there is a unique risk of flooding (the "**Flooding Risk**") at the Facilities and that the Operator may not be able to take out and maintain the Operator Insurances fully in accordance with Schedule 12. To the extent that the Operator is unable to take out the Operator Insurances fully in accordance with Schedule 12, on reasonable commercial terms, as a result of the Flooding Risk:

33.1.2.1 the Authority shall allow the Operator to take out such insurances as it can obtain on reasonable commercial terms (as approved by the Council acting reasonably); and

33.1.2.2 in the event there is a loss that would have been covered by the Operator Insurances had they been taken out fully in accordance with Schedule 12, the Operator shall be entitled to treat such loss as a Compensation Event.

33.2 **Obligation on parties**

33.2.1 Neither party to this Agreement 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 an additional insured person.

33.2.2 The Operator shall where it is obliged to effect Operator Insurances under this clause 33 (*Operator insurances*) not bring any claim or action against the Authority (or any Authority Related Party) in respect of any loss or damage in circumstances where the Operator is able to recover such loss or damage under such insurance (or where it would have been able to recover such loss had it been complying with its obligations under this Agreement).

33.3 **Nature of Insurances**

The Required Insurances shall:

- 33.3.1 name the Authority as co-insured with any other party maintaining the insurance as required by part 1 of schedule 12 (*Insurances*);
- 33.3.2 provide for non-vitiating protection in respect of any claim made by the Authority as co-insured in accordance with Endorsement 2 in part 2 of schedule 12 (*Insurances*);
- 33.3.3 contain a clause waiving the insurers' subrogation rights against the Authority, its employees and agents in accordance with Endorsement 2 in part 2 of schedule 12 (*Insurances*);
- 33.3.4 where the Authority is a co-insured provide for 20 Business Days' prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 in part 2 of schedule 12 (*Insurances*); and
- 33.3.5 in respect of the Operator Insurances provide for payment of any proceeds received by the Operator to be applied in accordance with clause 34 (*Reinstatement and change of requirement after Insured Event*).

33.4 Evidence of Policies

The Operator shall provide to the Authority:

- 33.4.1 copies on request of all insurance policies referred to in clause 33.1 (*Requirement to Maintain*) (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
- 33.4.2 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 this clause 33 (*Operator insurances*) and schedule 12.

33.5 Renewal Certificates

Renewal certificates in relation to any of the Operator Insurances shall be obtained by the Operator as and when necessary and copies (certified in a manner acceptable to the Authority acting reasonably) shall be forwarded by the Operator to the Authority as soon as possible but in any event on or before the renewal date.

33.6 Breach

If the Operator is in breach of clause 33.1 (*Requirement to Maintain*), 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 Operator on written demand.

33.7 Notification of Claims

- 33.7.1 The Operator shall give the Authority notification within 10 Business Days after any claim in excess of [REDACTED] (index-linked) on any of the Operator Insurances or which, but for the application of the applicable

insurance policy excess, would be made on any of the Operator Insurances and (if required by the Authority) give full details of the incident giving rise to the claim.

33.7.2 Without prejudice to clause 33.7.1, the Operator shall consult with the Authority prior to making any claim below [REDACTED] (index-linked) on the Buildings Insurance that exceeds the relevant excess by more than fifteen (15) per cent and the parties shall both act reasonably in determining the most cost effective means of handling the claim. For the avoidance of doubt the Operator shall remain responsible for the excess and, when discussing the most cost effective means of handling the claim, the Parties shall only debate the sharing of any costs in excess of the relevant threshold and the potential impact on obtaining Buildings Insurance in future years.

33.8 Limit of Liability

Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Operator of its other liabilities and obligations under this Agreement.

33.9 Premia

33.9.1 Save where expressly set out in this Agreement, the insurance premia for the Operator Insurances and the amount of any loss that would otherwise be recoverable under any of the Operator Insurances but for the applicable uninsured deductible and limit of indemnity in respect of such insurance shall at all times be the responsibility of the Operator.

33.9.2 The Authority shall, save where clause 35 applies, pay to the Operator, on a pass-through basis, the full cost of the annual premium for Buildings Insurance in relation to the Facilities within thirty (30) days of receipt of an invoice from the Operator.

33.10 Authority Approval

The Operator Insurances shall be effected with insurers approved by the Authority, such approval not to be unreasonably withheld or delayed.

34. Reinstatement and change of requirement after Insured Event

34.1 The Operator shall be responsible for repairing, reinstating and/or replacing all damage to the assets which are (or are required to be) insured under any policy referred to in paragraph 3 of part 1 of schedule 12. All insurance proceeds received under the Operator Insurances shall be applied to repair, reinstate and replace each part or parts of the assets in respect of which such proceeds were received.

34.2 The Operator shall set up and at all times maintain an account in the joint names of the Authority and the Operator. All insurance proceeds paid under any Operator Insurances in respect of a single event (or a series of related events) in an amount in

excess of [REDACTED] (indexed) shall be paid into the Joint Insurance Account.

34.3 **Obligations**

Where a claim is made or proceeds of insurance are received or are receivable under any Operator Insurances in respect of a single event (or a series of related events) in an amount in excess of [REDACTED] (indexed):

34.3.1 the Operator shall deliver to the Authority as soon as practicable, and in any event within 20 Business Days after the making of the claim, a plan prepared by the Operator for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace (the "**Reinstatement Outline**") the part or parts of the Facility which is or are the subject of the relevant claim or claims. The Reinstatement Outline shall set out:

34.3.1.1 the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Authority (such approval not to be unreasonably withheld or delayed); and

34.3.1.2 the proposed terms (including price) and timetable upon which the Reinstatement Works are to be effected (including the date that the affected Facility will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority (such approval not to be unreasonably withheld or delayed) and details of any insurance proceeds available from the Operator Insurances;

34.3.2 the Authority shall within 10 Business Days of receipt of the Reinstatement Outline notify the Operator in writing that:

34.3.2.1 it is satisfied that the Reinstatement Outline will enable the Operator to comply with its obligations to carry out the Reinstatement Works within a reasonable timetable, and that the identity of any person (set out in the Reinstatement Outline) that may be appointed to effect the Reinstatement Works is approved;

34.3.2.2 the identity of any person (set out in the Reinstatement Outline) that may be appointed to effect the Reinstatement Works is not approved together with its reasons for such non-approval in sufficient detail so as to enable the Operator to understand the nature and extent of such non-approval and to assess whether the Authority's approval under clause 34.3.1.1 (Obligations) has been unreasonably withheld;

34.3.2.3 the Authority does not approve the Reinstatement Outline together with its reasons for such non-approval, in sufficient details so as to enable the Operator to understand the nature and extent of such non-approval and to assess whether the Authority's approval

under clause 34.3.1.1 (Obligations) has been unreasonably withheld; or

- 34.3.2.4 if the Authority does not make one (1) of the said responses within the period specified in clause 56.2.2 (Permitted Disclosure) it shall be deemed to have approved the Reinstatement Outline, save where the Authority has reasonably requested any further information from the Operator, in which case the time limit outlined in clause 34.3.2 (Obligations) will be deemed to commence upon receipt of such information by the Authority;
- 34.3.3 if the Authority gives notice of non-approval in accordance with clause 34.3.2.2 or 34.3.2.3, the Operator may amend and re-submit the Reinstatement Outline (the "**Amended Reinstatement Outline**") to the Authority for its reconsideration and the Authority shall give its approval or non-approval within five Business Days of the submission of the Amended Reinstatement Outline to the Authority. If the Authority does not approve the Amended Reinstatement Outline, it shall provide reasons for such non-approval in sufficient detail so as to enable the Operator to understand the nature and extent of such non-approval and to assess whether the Authority's approval has been unreasonably withheld. In the event that the Amended Reinstatement Outline or a person proposed to carry out the Reinstatement Works pursuant to the Amended Reinstatement Outline is not approved by the Authority in accordance with this clause 34.3.3 the Operator may submit the Amended Reinstatement Outline to the Dispute Resolution Procedure in order for it to be determined whether the Authority's approval under this clause 34.3.3 (*Obligations*) was unreasonably withheld.
- 34.3.4 The Reinstatement Outline or the Amended Reinstatement Outline (as the case may be) as approved by the Authority pursuant to this clause 34 (*Reinstatement and change of requirement after Insured Event*) or as determined pursuant to the Dispute Resolution Procedure shall become the reinstatement plan (the "**Reinstatement Plan**").
- 34.3.5 The Operator shall effect the Reinstatement Works in accordance with the Reinstatement Plan, and
- 34.3.5.1 shall enter into contractual arrangements to effect the Reinstatement Works with the person(s) identified in the Reinstatement Plan;
- 34.3.5.2 prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Joint Insurance Account (the "**Relevant Proceeds**") (together with any interest accrued) may be withdrawn by the Operator from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements entered into to effect the Reinstatement Works and to meet any

other reasonable costs and expenses of the Operator for the sole purposes of funding the Reinstatement Works and the parties shall operate the signatory requirements of the Joint Insurance Account to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Works;

- 34.3.5.3 the Authority agrees and undertakes that, subject to compliance by the Operator with its obligations under this clause 34 (*Reinstatement and change of requirement after Insured Event*), and provided that the Operator procures that the Reinstatement Works are carried out and completed in accordance with this clause 34.3 it shall not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;
- 34.3.5.4 the Authority undertakes to use reasonable endeavours to assist the Operator in the carrying out of the Reinstatement Plan;
- 34.3.5.5 after the Reinstatement Plan has been implemented to the Authority's satisfaction (acting reasonably) and in accordance with this clause 34.3 the Operator shall submit to the Authority an invoice for the Reinstatement Works for the sum approved by the Authority in the Reinstatement Plan, less the sums standing to the credit of the Joint Insurance Account which the Operator shall be entitled to draw down together with any interest accrued. In the event of any damage to the Facility or the Site which damage is covered or would be covered by the Operator Insurances, the Operator shall carry out or procure the carrying out of reinstatement works to repair or replace property or assets so damaged.

35. **Risks that become uninsurable**

35.1 **Uninsurable Risks**

Nothing in clause 33 (*Operator insurances*) or this clause 35 (*Risks that become uninsurable*) shall oblige the Operator to take out insurance in respect of a risk which is Uninsurable save where the predominant cause of the risk being Uninsurable is an act or omission of the Operator or an Operator Related Party.

35.2 **Risks Become Uninsurable**

If a risk usually covered by property damage, third party liability, business interruption (but excluding loss of profits) or statutory insurances, in each case required under this Agreement, becomes Uninsurable then:

35.2.1 the Operator shall notify the Authority of the risk becoming Uninsurable within five Business Days of becoming aware of the same and in any event at least five Business Days before expiry or cancellation of any existing insurance in respect of that risk; and

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

35.2.2.1 the risk being Uninsurable is not caused by the actions, breaches, omissions or defaults of the Operator or a Sub-Contractor; and

35.2.2.2 the Operator has demonstrated to the Authority that the Operator and a prudent board of directors of a company operating the same or substantially similar businesses in the United Kingdom to that operated by the Operator would in similar circumstances (in the absence of the type of relief envisaged by this clause 35 (*Risks that become uninsurable*)) 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,

then 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).

35.3 Consequences

35.3.1 If the requirements of clause 35.2 (*Risks Become Uninsurable*) are satisfied, but the parties cannot agree as to how to manage or share the risk, then:

35.3.1.1 in respect of such third party liability insurance only, the Authority shall (at the Authority's option) either pay to the Operator an amount equal to the amount set out in clause 47 (*Compensation on termination for force majeure*) and this Agreement will terminate or elect to allow this Agreement to continue and clause 35.3.1.2 (*Consequences*) shall thereafter apply in respect of such risk;

35.3.1.2 in respect of such property damage insurance or third party liability insurance (if the Authority elects to allow the Agreement to continue in accordance with clause 35.3.1.1 (*Consequences*)) business interruption (but not loss of profits) or statutory insurances this Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to the Operator an amount equal to insurance proceeds that would have

been payable had the relevant insurance continued to be available and this Agreement will continue, or an amount equal to the amount calculated in accordance with clause 47 (*Compensation on termination for force majeure*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon this Agreement will terminate; and

35.3.1.3 where pursuant to clauses 35.3.1.1 (*Consequences*) and/or 35.3.1.2 (*Consequences*) this Agreement continues then, in respect of all Insurance other than Buildings Insurance, either:

35.3.1.4 the Annual Payment shall (where there is a Surplus Annual Payment) be increased in each Contract 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 Operator in respect of the relevant risk in the Contract Year prior to it becoming Uninsurable (index-linked from the first day of the Contract Year in which such risk became Uninsurable) from the date that the risk became Uninsurable; or

(a) the Annual Payment shall (where there is a Deficit Annual Payment) be reduced in each Contract 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 Operator in respect of the relevant risk in the Contract Year prior to it becoming Uninsurable (index-linked from the first day of the Contract Year in which such risk became Uninsurable) from the date that the risk became Uninsurable. In the event that such premium exceeds the relevant Annual Payment, the excess shall be a debt due to the Authority by the Operator;

(b) where the risk is Uninsurable for part of a Contract Year only the increase in the Annual Payment shall be pro-rated to the number of months for which the risk was Uninsurable; and

35.3.1.5 where pursuant to clauses 35.3.1.1 (*Consequences*) and/or 35.3.1.2 (*Consequences*) this Agreement continues the Operator shall approach the insurance market at least every four months to establish whether the risk remains Uninsurable. As soon as the Operator is aware that the risk is no longer Uninsurable, the Operator shall take out and maintain and procure the taking out and maintenance of insurance (to be inceptioned as soon as reasonably practicable) for such risk in accordance with this Agreement.

35.3.2 If, pursuant to clause 35.3.1.2 (*Consequences*), the Authority elects to make payment to the Operator (such that the Agreement will terminate) (the "**Relevant Payment**") the Operator shall have the option (exercisable within 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 risk not become Uninsurable, in which case this Agreement will continue (and the Relevant Payment will not be made by the Authority), and the Operator'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.

35.4 **Increase in Insured Amounts**

The limit of indemnity and the maximum deductibles for each of the Operator Insurances shall be index-linked, provided such limits of indemnity and maximum deductibles shall only be increased on each renewal date such that the limit that is index-linked becomes equal to or exceeds the next whole insurable amount or deductible (as the case may be) available in the insurance market.

35.5 **Unavailability of Terms or Conditions**

35.5.1 If, upon the renewal of any insurance which the Operator is required to maintain or to procure the maintenance of pursuant to this Agreement:

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

35.5.1.2 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 Operators in the United Kingdom,

(other than, in each case, by reason of one or more actions or omissions of the Operator and/or any Sub-Contractors) then clause 35.5 (*Unavailability of Terms or Conditions*) shall apply.

35.5.2 If it is agreed or determined that clause 35.5 (*Unavailability of Terms or Conditions*) applies then the Authority shall waive the Operator's obligations in clause 33 (*Operator insurances*) and/or schedule 12 in respect of that particular Insurance Term and the Operator shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in clause 35.5 (*Unavailability of Terms or Conditions*) continue to apply to such Insurance Term.

- 35.5.3 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 Operator 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 Operator'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 Operator shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Agreement whatsoever, the costs of such insurance shall be for the account of the Operator.
- 35.5.4 Where the Authority has exercised the waiver pursuant to clause 35.5.2 (*Unavailability of Terms or Conditions*), then for so long as the relevant circumstances described in clause 35.5 (*Unavailability of Terms or Conditions*) continue to apply to such Insurance Term other than in respect of any Insurance Term under the Buildings Insurance:
- 35.5.4.1 where there is as Surplus Annual Amount, the Monthly Payment shall be increased by the Adjusted Amount for the relevant Contract Year; or
- 35.5.4.2 where there is as Deficit Annual Amount, the Monthly Payment shall be decreased by the Adjusted Amount for the relevant Contract Year.
- 35.5.5 The Operator shall notify the Authority as soon as reasonably practicable and in any event within five days of becoming aware that clause 35.5.1.1 (*Unavailability of Terms or Conditions*) and/or 35.5.1.1 (*Unavailability of Terms or Conditions*) 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 Operator 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.
- 35.5.6 In the event that clause 35.5.1.1 (*Unavailability of Terms or Conditions*) and/or 35.5.1.1 (*Unavailability of Terms or Conditions*) apply in respect of an Insurance Term (irrespective of the reasons for the same) the Operator shall approach the insurance market at least every four months to establish whether clause 35.5.1.1 (*Unavailability of Terms or Conditions*) and/or 35.5.1.2 (*Unavailability of Terms or Conditions*) remain applicable to the Insurance Term. As soon as the Operator is aware that clause 35.5.1.1 and/or 35.5.1.2 (*Unavailability of Terms or Conditions*) has ceased to apply to the Insurance Term, the Operator shall take out and maintain or procure the taking out and maintenance of the insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this

Agreement and any amount of Annual Payment adjusted pursuant to clause 35.5.4 (Unavailability of Terms or Conditions) shall cease to apply.

PART 7 – PAYMENT AND SURPLUS SHARE

36. Payment

36.1 Payment of the Monthly Payment

36.1.1 Following the Commencement Date and as applicable:

36.1.1.1 where the Annual Payment is a Deficit Annual Payment, the Authority shall pay the Monthly Payment calculated in accordance with schedule 5 (Payment and Performance Monitoring System); or

36.1.1.2 where the Annual Payment is a Surplus Annual Payment, the Operator shall pay the Monthly Payment calculated in accordance with schedule 5 (*Payment and Performance Monitoring System*).

36.1.2 Where:

36.1.2.1 the the Annual Payment is a Deficit Annual Payment, in accordance with Schedule 5 (Payment and Performance Monitoring System), the Monthly Payment shall be reduced in each relevant Payment Period by Performance Adjustment Payments calculated in accordance with Schedule 5 (Payment and Performance Monitoring System)

36.1.2.2 the the Annual Payment is a Surplus Annual Payment, in accordance with schedule 5 (*Payment and Performance Monitoring System*), the Monthly Payment shall be increased in each relevant Payment Period by Performance Adjustment Payments calculated in accordance with schedule 5 (*Payment and Performance Monitoring System*).

36.2 Report and Invoice

On the first Business Day of each Payment Period the Operator shall submit to the Authority:

36.2.1 a report showing the Monthly Payment and any Performance Adjustment Payments for the previous Contract Month and, individually, each item taken into account in calculating such Monthly Payment and Performance Adjustment Payments pursuant to schedule 5 (*Payment and Performance Monitoring System*); and

36.2.2 a statement showing the Monthly Payment:

36.2.2.1 where the Annual Payment is a Surplus Annual Payment, payable by the Operator to the Authority, so as to permit the Authority to