

the District Auditor and the Audit Commission may examine such documents as he or it may reasonably require which are owned, held or otherwise within the control of the Operator and any Sub-Contractor and may require the Operator and any Sub-Contractor to produce such oral or written explanations as he or it considers necessary.

26.10 Exploitation of Information

The Operator shall not make use of this Agreement or any information issued or provided by or on behalf of the Authority in connection with this Agreement otherwise than for the purposes of this Agreement, except with the written consent of the Authority.

26.11 Information about Users and Authority Related Parties

Without prejudice to clause 55 (*Data protection*) and clause 56 (*Confidentiality*), where the Operator, in carrying out its obligations under this Agreement, is provided with information relating to Users and Authority Related Parties, the Operator shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Operator has sought the prior written consent of that User or Authority Related Party and has obtained the prior written consent of the Authority.

26.12 Disclosure by Audit Commission

26.12.1 The parties acknowledge that the Audit Commission has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.

26.12.2 The provisions of this clause 26 (*Audit*) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

PART 5 – SUPERVENING EVENTS

27. Change control procedure

The provisions of schedule 21 shall have effect in respect of Changes except as otherwise expressly provided in this Agreement.

28. Change in law

28.1 The Operator shall take all steps necessary to ensure that the Services are performed in accordance with the terms of this Agreement following any Change in Law.

28.2 Qualifying Change in Law

If a Qualifying Change in Law occurs or is shortly to occur, then either party may write to the other to express an opinion on its likely effects, giving details of its opinion of:

28.2.1 any necessary change to the Services;

28.2.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;

- 28.2.3 whether relief from compliance with obligations is required, including the obligation of the Operator to meet the Services Specification and/or the Service Delivery Proposals during the implementation of any relevant Qualifying Change in Law;
- 28.2.4 any Change in Revenue that will result from the relevant Qualifying Change in Law;
- 28.2.5 any estimated Change in Costs that directly result from the Qualifying Change in Law; and
- 28.2.6 any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law,

in each case giving in full detail the procedure for implementing the change in the Services. Responsibility for the costs of implementation (and any resulting variation to the Annual Payment) shall be dealt with in accordance with clauses 28.3 (*Parties to Discuss*) to 28.6 (*Adjustment to Annual Payment*).

28.3 **Parties to Discuss**

As soon as practicable after receipt of any notice from either party under clause 28.2 (*Qualifying Change in Law*), the parties shall discuss and agree the issues referred to in clause 28.2 (*Qualifying Change in Law*) and any ways in which the Operator can mitigate the effect of the Qualifying Change in Law, including:

- 28.3.1 providing evidence that the Operator has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-Contractors to minimise any increase in costs or decrease in Revenue and maximise any reduction in costs or increase in Revenue;
- 28.3.2 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Operator;
- 28.3.3 giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses, including similar businesses in which the shareholders or their Affiliates carry on business; and
- 28.3.4 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under clauses 28.2.5 (*Qualifying Change in Law*) and/or 28.2.5 (*Qualifying Change in Law*);

28.4 **Change Agreed**

Where it is agreed or determined that the Qualifying Change in Law has resulted or will result in:

28.4.1 a Change in Costs (other than to the extent such Change in Costs is attributable to additional Capital Expenditure being incurred by the Operator); and/or

28.4.2 a Change in Revenue (with any Loss in Revenue being calculated in accordance with schedule 20 (Loss of Revenue),

the Annual Payment shall be adjusted to reflect such agreed or determined Change in Costs and/or Change in Revenue (as the case may be).

28.5 **Financing**

If the parties agree or it is determined under the Dispute Resolution Procedure that the Operator is required to incur additional Capital Expenditure due to a Qualifying Change in Law, then the Operator shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it. If the Operator has used reasonable endeavours to obtain funding for such Capital Expenditure, but has been unable to do so either at all or has been unable to obtain the full financing required for such Capital Expenditure within 120 Business Days of the date that agreement or determination pursuant to clause 28.4 (Change Agreed) occurred, then the Authority shall pay to the Operator, in instalments to be paid on the value of works carried out on a monthly basis, an amount equal to that part of the Capital Expenditure in relation to which the Operator was unable to obtain funding, with the Operator being responsible for the remaining amount. The Operator shall provide the Operator with evidence of financing applications to reputable institutions and any rejection letters received. Payments under this clause 28.5 (Financing) shall, subject to clause 36.5 (Disputed Amounts), be made within 20 Business Days of the Authority's receipt of the Operator's invoice therefor.

28.6 **Adjustment to Annual Payment**

Any compensation payable under this clause 28 (*Change in law*) by means of an adjustment to or reduction in the Annual Payment shall be determined and made in accordance with clause 37 (*Financial adjustments*).

28.7 **Payment of Irrecoverable VAT**

The Authority shall pay to the Operator from time to time as the same is incurred by the Operator sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change in Law that is unforeseeable as at the Commencement Date. Subject to clause 36.5 (*Disputed Amounts*), any such payment shall be made within 20 Business Days of the delivery by the Operator to the Authority of the Operator's invoice therefor, accompanied by written details of the amount involved and details as to the grounds for and computation of the amount claimed. For the purposes of this clause 28.7 (*Payment of Irrecoverable VAT*), "**Irrecoverable VAT**" means input VAT incurred by the Operator on any supply which is made to it which is used or to be used exclusively in performing the Services or any of the obligations or provisions under this Agreement (together with input VAT incurred as part of its overhead in relation to such

activities) to the extent that the Operator is not entitled to repayment, set-off or credit from HM Revenue & Customs in respect of such input VAT.

29. Compensation events

29.1 Effect of a Compensation Event

If, for any Facility, as a direct result of the occurrence of a Compensation Event the Operator:

29.1.1 is or will be unable to comply with its obligations under this Agreement; and/or

29.1.2 has incurred or will incur costs and/or has lost or will lose Revenue,

then the Operator is entitled to apply for relief from its obligations and/or to claim compensation under this Agreement.

29.2 Procedure for Relief and Compensation

Subject to clause 33.5 (*Renewal Certificates*), to obtain relief and/or claim compensation the Operator must:

29.2.1 as soon as practicable, and in any event within 20 Business Days after it became aware that the Compensation Event has caused or is likely to cause breach of an obligation under this Agreement and/or the Operator to incur costs or lose Revenue, give to the Authority a notice of its claim for payment of compensation and/or relief from its obligations under this Agreement;

29.2.2 within 10 Business Days of receipt by the Authority of the notice referred to in clause 29.2.1 (*Procedure for Relief and Compensation*), give full details of the Compensation Event and the relief from its obligations under this Agreement and/or any estimated Change in Costs and/or any estimated Change in Revenue claimed; and

29.2.3 demonstrate to the reasonable satisfaction of the Authority that:

29.2.3.1 the Compensation Event was the direct cause of:

(a) the estimated Change in Costs; and/or

(b) the estimated Change in Revenue; and/or

(c) breach of the Operator's obligations under this Agreement; and

29.2.3.2 the estimated Change in Costs, estimated Change in Revenue and/or relief from the obligations under this Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Operator acting in accordance with Good Industry Practice.

29.3 Giving of Relief and Compensation

In the event that the Operator has complied with its obligations under clause 29.2 (*Procedure for Relief and Compensation*), then:

29.3.1 in the case of an additional cost being incurred or Change in Revenue, the Authority shall compensate the Operator for the estimated Change in Costs as adjusted to reflect the actual Change in Costs reasonably incurred and/or, without double counting, for any Change in Revenue (to the extent it could not reasonably have been mitigated) in accordance with clause 29.6 (*Method of Calculating Compensation*) by an adjustment to the Annual Payment in accordance with clause 37 (*Financial adjustments*); and/or

29.3.2 the Authority shall give the Operator such relief from its obligations under this Agreement as is reasonable for such a Compensation Event.

29.4 Late Provision of Notice or Information

In the event that information is provided after the dates referred to in clause 29.2.1 (*Procedure for Relief and Compensation*), then the Operator shall not be entitled to any compensation or relief from its obligations under this Agreement in respect of the period for which the relevant information is delayed.

29.5 Failure to Agree

If the parties cannot agree the extent of any compensation, relief from the Operator's obligations under this Agreement, or the Authority disagrees that a Compensation Event has occurred (or as to its consequences), or that the Operator is entitled to relief under this clause 29 (*Compensation events*), the parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

29.6 Method of Calculating Compensation

Any payment of compensation referred to in clause 29.3.1 (*Giving of Relief and Compensation*) shall be calculated in accordance with clause 37 (*Financial adjustments*) (and, in the case of Loss of Revenue, schedule 20 (Loss of Revenue)) and paid in accordance with clause 36 (*Payment*).

30. Relief events

30.1 Occurrence

If and to the extent that a Relief Event adversely affects the ability of the Operator to perform any of its obligations under this Agreement, then the Operator shall be entitled to apply for relief from any rights of the Authority arising under clause 40 (*Termination on Operator Default*) and from its affected obligations under this Agreement.

30.2 Relief

To obtain relief, the Operator must:

- 30.2.1 as soon as practicable, and in any event within 20 Business Days after it becomes aware that the Relief Event is likely to adversely affect the ability of the Operator to perform its obligations give to the Authority a notice of its claim for relief from its obligations under this Agreement, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;
- 30.2.2 within five Business Days of receipt by the Authority of the notice referred to in clause 30.2.1 (*Relief*), give full details of the relief claimed; and
- 30.2.3 demonstrate to the reasonable satisfaction of the Authority that:
 - 30.2.3.1 the Operator and its Sub-Contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;
 - 30.2.3.2 the Relief Event directly caused the need for relief from obligations;
 - 30.2.3.3 the relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or dealt with by the Operator acting in accordance with Good Industry Practice, without incurring material expenditure; and
 - 30.2.3.4 the Operator is using reasonable endeavours to perform its obligations under this Agreement.

30.3 **Consequences**

In the event that the Operator has complied with its obligations under clause 30.2 (*Relief*), then the Authority shall not be entitled to exercise its right to terminate this Agreement under clause 40 (*Termination on Operator Default*) and, subject to clause 30.4 (*Performance Adjustment Points and Performance Adjustment Payments*), shall give such other relief which the Authority deems to be reasonable.

30.4 **Performance Adjustment Points and Performance Adjustment Payments**

Where there is:

- 30.4.1 a Surplus Annual Payment, the Authority shall not be entitled to apply Performance Adjustment Points and/or Performance Adjustments under clause 36 (Payment) and schedule 5 (*Payment and Performance Monitoring System*) during the period in which the Relief Event is subsisting; or
- 30.4.2 a Deficit Annual Payment, nothing in clause 30.3 (*Consequences*) shall affect any entitlement to apply Performance Adjustment Points and/or Performance Adjustment Payments under clause 36 (Payment) and schedule 5 (*Payment and Performance Monitoring System*) during the period in which the Relief Event is subsisting provided that any such Performance Adjustment Points and Performance Adjustments shall be disregarded for the purposes of the Authority's right to terminate this Agreement for an Operator Default or

30.5 **Information**

In the event that information required by clause 30.2 (*Relief*) is provided after the dates referred to in that clause, then the Operator shall not be entitled to any relief during the period for which the information is delayed.

30.6 **Notice**

The Operator shall notify the Authority if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

30.7 **Disputes**

If the parties cannot agree the extent of the relief required, or the Authority disagrees that a Relief Event has occurred or that the Operator is entitled to relief from obligations under this Agreement, the parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

31. **Force majeure**

31.1 **Obligations**

No party shall be entitled to bring a claim for a breach of obligations under this Agreement by the other party or incur any liability to the other party for any losses or damages incurred by that other party to the extent that a Force Majeure Event occurs and the Affected Party is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt, the Authority shall not be entitled to terminate this Agreement for an Operator Default if such Operator Default arises from a Force Majeure Event.

31.2 **Notification for Force Majeure**

On the occurrence of a Force Majeure Event, the Affected Party shall notify the other party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

31.3 **Consultation**

As soon as practicable following such notification, the parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this Agreement.

31.4 **Unable to Agree**

If no such terms are agreed on or before the date falling 80 Business Days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Agreement for a period of more than 120 Business

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