

## ANNEX Guidance Note

### 1 STANDARD REQUIRED INSURANCE SCHEDULE

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#### Standard Required Insurance Schedule (Schedule [ ] Required Insurances)

This is Schedule [ ] comprising the Required Insurances referred to in the Contract for [ ] between:

[Authority/Trust]

-And-

[Contractor]

This Schedule [ ] comprises five Parts-

**PART 1:** Policies to be taken out by the Contractor and maintained during the [design and construction phase]

**PART 2:** Policies to be taken out by the Contractor and maintained during the Service Period

**PART 3:** Endorsements

**PART 4:** Broker's Letter of Undertaking

**PART 5:** Definitions

# PART 1

## Policies to be taken out by the Contractor and maintained during the [design and construction phase].

Common to each policy in Part 1 (unless stated otherwise):

### Insureds:-

Authority/Trust.

Contractor.

Construction Sub-Contractor.

[Operating Sub-Contractor].

Construction sub-contractors of any tier.

Senior Lenders.

Subordinated Lenders.

Consultants - for their site activities only.

each for their respective rights and interests in the Project.

## 1. CONTRACTORS' 'ALL RISKS' INSURANCE (CAR)

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### 1.1 Insured Property

The permanent and temporary works, materials [(including but not limited to equipment supplied by the Authority/Trust)]<sup>182</sup>, goods, plant and equipment for incorporation in the works (other than constructional plant, tools, accommodation and equipment belonging to or the responsibility of the Construction Sub-Contractor or the Construction Sub-Contractor's sub-contractors) and all other property used or for use in connection with works associated with the Project.

### 1.2 Coverage

"All risks" of physical loss or damage to the Insured Property unless otherwise excluded.

### 1.3 Sum Insured

At all times an amount not less than the full reinstatement or replacement value of the Insured Property, but not less than the value specified in the building contract plus provision to include extensions as appropriate<sup>183</sup>.

### 1.4 Maximum Deductible

£ [ ]

### 1.5 Territorial Limits

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<sup>182</sup> Include as appropriate as this is project specific.

<sup>183</sup> For certain projects where a total loss is inconceivable (e.g. road and rail) the sum insured could correspond to the Estimated Maximum Loss (ABI definition), rather than the full reinstatement value.

United Kingdom including offsite storage and during inland transit.

### **1.6 Period of Insurance**

From the date of the Contract until the Service Commencement Date and thereafter in respect of defects liability until expiry of the [12] months defects liability period.

### **1.7 Cover Features & Extensions** <sup>184</sup>

Terrorism. <sup>185 186</sup>

Munitions of war clause.

Additional costs of completion clause.

Professional fees clause.

Debris removal clause.

72 hour clause.

European Union local authorities clause.

Free issue materials clause.

[10]% escalation clause.

Automatic reinstatement of sum insured clause.

Loss minimisation.

### **1.8 Principal Exclusions**

War and related perils (UK market agreed wording).

Nuclear/radioactive risks (UK market agreed wording).

Pressure waves caused by aircraft and other aerial devices traveling at sonic or supersonic speeds.

Wear, tear and gradual deterioration.

Consequential financial losses.

Cyber risks.

Inventory losses, fraud and employee dishonesty.

## **2 DELAY IN START UP INSURANCE (DSU)**

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### **2.1 Insureds**

Contractor.

Senior Lenders.

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<sup>184</sup> Additional Cover Features & Extensions may be appropriate for certain projects.

<sup>185</sup> For certain projects where there is only a very remote likelihood of the risk materialising, and the probable impact of any such loss is perceived as being very low, e.g. street lighting projects, an Authority may elect not to include this extension as a Required Insurance.

<sup>186</sup> For projects in England, Scotland and Wales the majority of this cover is typically provided by the Government-backed market mutual reinsurer: 'Pool RE'. Pool RE does not provide protection for projects in Northern Ireland. However under the provisions of the Criminal Damage (Compensation) Northern Ireland Order 1977, these projects will instead benefit from compensation provided by the Northern Ireland Office (see SoPCNI Section 24.3). (Note: This does not preclude use of commercial insurance should it become available).

Subordinated Lenders.

Authority/Trust<sup>187</sup>

each for their respective rights and interests in the Project.

## **2.2 Indemnity**

In respect of:

1. loss of anticipated Revenue during at least the Minimum Indemnity Period arising from a delay in completion of the Project as a result of loss or damage covered under the Contractors' All Risks' Insurance effected in accordance with Item 1 of Part 1 of this Schedule, including physical loss or damage which would be indemnifiable but for the application of any deductible;

2. the economic additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue of the Contractor which without such expenditure would have taken place, during the Minimum Indemnity Period.

## **2.3 Sum Insured**

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.<sup>188</sup>

## **2.4 Maximum Excess**

[ ] days.

## **2.4 Minimum Indemnity Period**

[12] months.

## **2.6 Period of Insurance**

As per the Contractors' "All Risks" Insurance, excluding the defects liability period.

## **2.7 Cover Features & Extensions<sup>189</sup>**

Denial of access.

Utilities.

Terrorism.<sup>190 191</sup>

Automatic Reinstatement of sum insured.

Professional Fees.

<sup>187</sup> The Authority/Trust should be named as a co-insured party to the extent that it has a demonstrable insurable interest. This will be in connection with any additional cost of working insured against under the terms of the policy, and not with respect to any loss of anticipated Revenue.

<sup>188</sup> For certain projects where a total interruption to the operation of the project is inconceivable (e.g. multiple sites), a sum insured which is lower than the theoretical maximum loss of Revenue may be appropriate.

<sup>189</sup> For certain projects additional Cover Features & Extensions may be appropriate e.g. suppliers extension for the premises of specified suppliers.

<sup>190</sup> For certain projects where there is only a very remote likelihood of the risk materialising, and the probable impact of any such loss is perceived as being very low, e.g. street lighting projects, an Authority may elect not to include this extension as a Required Insurance.

<sup>191</sup> For projects in England, Scotland and Wales the majority of this cover is typically provided by the Government-backed market mutual reinsurer: 'Pool RE'. Pool RE does not provide protection for projects in Northern Ireland. However under the provisions of the Criminal Damage (Compensation) Northern Ireland Order 1977, these projects will instead benefit from compensation provided by the Northern Ireland Office (see SoPCNI Section 24.3). (Note: This does not preclude use of commercial insurance should it become available).

## 2.8 Principal Exclusions

The exclusions under the Contractors' "All Risks" Insurance, other than for consequential financial losses.

Delayed response by a public body or state authority.

## 3. CONSTRUCTION THIRD PARTY LIABILITY INSURANCE<sup>192</sup>

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### 3.1 Interest

To indemnify the Insured in respect of all sums that they may become legally liable<sup>193</sup> to pay (including claimant's costs and expenses) as damages in respect of accidental:

death, or bodily injury, illness, death, disease contracted by any person;

loss or damage to property;

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.

### 3.2 Limit of Indemnity

Not less than £[ ]m<sup>194</sup> in respect of any one occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution liability.

### 3.3 Maximum Deductible £[ ] for each and every occurrence of property damage. (Personal injury claims will be paid in full<sup>195</sup>).

### 3.4 Territorial Limits

UK [and elsewhere in the world in respect of non manual visits].

### 3.5 Jurisdiction

UK [and elsewhere in the world in respect of non manual visits].

### 3.6 Period of Insurance

As per the Contractors' "All Risks" Insurance, including the defects liability period.

### 3.7 Cover Features & Extensions<sup>196</sup>

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<sup>192</sup> If possible, insurance should be placed on a losses occurring basis.

<sup>193</sup> Cover should be for contractual liability, statutory liability and liability in tort.

<sup>194</sup> Limit should be determined by the Authority, in conjunction with its insurance adviser, taking into account the relevant circumstances of the project.

<sup>195</sup> For certain projects an excess may apply to personal injury claims.

<sup>196</sup> For certain projects, additional Cover Features & Extensions may need to be noted e.g. terrorism, legionella (for schools and hospitals) and liabilities arising from maintenance of site helipad (for hospitals).

Munitions of war.

Cross liability clause.

Contingent motor.

Legal defense costs.

### **3.8 Principal Exclusions**

Liability for death, illness, disease or bodily injury sustained by employees of the insured.

Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.

Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.

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/Trust which is in the care, custody and control of another Insured.

Events more properly covered under a professional indemnity policy.

Liability arising from the ownership, possession or use of any aircraft or marine vessel.

Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.

Losses indemnified under the CAR policy or DSU policy.

## PART 2

### Policies to be taken out by the Contractor and maintained during the Service Period.

Common to all policies in Part 2 (unless stated otherwise):

#### Insureds:-

Authority/Trust.

Contractor.

Operating Subcontractor.

Operating Sub-subcontractors.<sup>197</sup>

Senior Lenders.

Subordinated Lenders.

each for their respective rights and interests in the Project.

## 1. PROPERTY DAMAGE INSURANCE

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### 1.1 Insured Property

The project assets which are the property of the Contractor or for which the Contractor may be responsible including but not limited to the new facilities.

### 1.2 Coverage

“All risks” of physical loss or damage to the Insured Property from any cause not excluded, including machinery breakdown and computer breakdown in respect of appropriate equipment<sup>198</sup>.

### 1.3 Sum Insured

At all times an amount not less than the total reinstatement or replacement value of the Insured Property<sup>199</sup> plus provision to include other Principal Extensions as appropriate. (escalated periodically as appropriate)<sup>200</sup>

### 1.4 Maximum Deductible

£[ ] each and every claim. (escalated periodically as appropriate)

### 1.5 Territorial Limits

United Kingdom

### 1.6 Period of Insurance

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<sup>197</sup> To the extent that their activities are required to be insured under contract.

<sup>198</sup> For projects with large and expensive equipment/machinery (e.g. large hospital projects) a separate engineering policy may be required.

<sup>199</sup> For certain projects, where a total loss is inconceivable (e.g. road and rail) the sum insured could correspond to the Estimated Maximum Loss, rather than the full reinstatement value.

<sup>200</sup> It will be important for the parties to agree an appropriate method of escalation.

From the Service Commencement Date or as otherwise specified in the Contract for the duration of the Contract and renewable on an annual basis unless agreed otherwise by the Parties.

### 1.7 Cover Features & Extensions<sup>201</sup>

Terrorism<sup>202 203</sup>

Automatic reinstatement of sum insured.

Capital additions clause.

72 hour clause.

European Union local authorities clause.

Professional fees.

Debris removal.

Pollution and contamination to the Insured Property arising from an event which itself is not otherwise excluded.

Repair/reinstatement basis of claims settlement with cash option for non-reinstatement.

### 1.8 Principal Exclusions

War and related perils (UK market agreed wording).

Nuclear/radioactive risks (UK market agreed wording).

Pressure waves caused by aircraft and other aerial devices traveling at sonic or supersonic speeds.

Wear, tear and gradual deterioration.

Consequential financial losses.

Cyber risks.

Losses recovered under the CAR policy.

## 2. BUSINESS INTERRUPTION INSURANCE<sup>204</sup>

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### 2.1 Insureds

Contractor.

Senior Lenders.

Subordinated Lenders.

Authority/Trust.<sup>205</sup>

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<sup>201</sup> For certain hospital projects additional Cover Features & Extensions should be noted, including cover for clean up costs necessarily incurred by the Insured as a result of the outbreak of any infectious or contagious disease, including but not limited to MRSA and Legionella.

<sup>202</sup> For certain projects where there is only a very remote likelihood of the risk materialising, and the probable impact of any such loss is perceived as being very low, e.g. street lighting projects, an Authority may elect not to include this extension as a Required Insurance.

<sup>203</sup> For projects in England, Scotland and Wales the majority of this cover is typically provided by the Government-backed market mutual reinsurer: 'Pool RE'. Pool RE does not provide protection for projects in Northern Ireland. However under the provisions of the Criminal Damage (Compensation) Northern Ireland Order 1977, these projects will instead benefit from compensation provided by the Northern Ireland Office (see SoPCNI Section 24.3). (Note: This does not preclude use of commercial insurance should it become available).

<sup>204</sup> Not typically required for street-lighting projects.

each for their respective rights and interests in the Project.

## **2.2 Indemnity**

In respect of:

1. loss of anticipated Revenue during at least the Minimum Indemnity Period arising from an interruption or interference in the operation of the Project as a result of loss or damage covered under Property Damage Insurance effected in accordance with paragraph 1 of Part 2 of this Schedule including physical loss or damage which would be indemnifiable but for the application of any deductible;
2. the economic additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue of the Contractor which without such expenditure would have taken place, during the Indemnity Period.

## **2.3 Sum Insured**

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

## **2.4 Maximum Excess**

[ ] days.

## **2.5 Minimum Indemnity Period**

[12] months.

## **2.6 Period of Insurance**

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

## **2.7 Cover Features & Extensions**<sup>206</sup>

Denial of access.

Terrorism.<sup>207 208</sup>

Utilities.

Accountants Clause.

Automatic reinstatement of sum insured.

## **2.8 Principal Exclusions**

financial losses.

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<sup>205</sup> The Authority/Trust should be named as a co-insured party to the extent that it has a demonstrable insurable interest. This will be in connection with any additional cost of working insured against under the terms of the policy, and not with respect to any loss of anticipated Revenue.

<sup>206</sup> For certain projects additional Cover Features & Extensions may be required: infectious disease, specified suppliers.

<sup>207</sup> For projects in England, Scotland and Wales the majority of this cover is typically provided by the Government-backed market mutual reinsurer: 'Pool RE'. Pool RE does not provide protection for projects in Northern Ireland. However under the provisions of the Criminal Damage (Compensation) Northern Ireland Order 1977, these projects will instead benefit from compensation provided by the Northern Ireland Office (see SoPCNI Section 24.3). (Note: This does not preclude use of commercial insurance should it become available).

<sup>208</sup> For certain projects where there is only a very remote likelihood of the risk materialising, and the probable impact of any such loss is perceived as being very low, e.g. street lighting projects, an Authority may elect not to include this extension as a Required Insurance.

Delayed response by a public body or state authority.

### **3. THIRD PARTY PUBLIC AND PRODUCTS LIABILITY INSURANCE**<sup>209</sup>

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#### **3.1 Interest**

To indemnify the Insured in respect of all sums that they may become legally liable<sup>210</sup> to pay (including claimant's costs and expenses) as damages in respect of accidental:

death, or bodily injury, illness, death, disease contracted by any person;

loss or damage to property;

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 Services.

#### **3.2 Limit of Indemnity**

Not less than £[ ]m<sup>211</sup> (escalated periodically as appropriate)<sup>212</sup> in respect of any one occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution and products liability.

#### **3.3 Maximum Deductible**

£[ ] for each and every occurrence of property damage (escalated periodically as appropriate). (Personal injury claims will be paid in full).<sup>213</sup>

#### **3.4 Territorial Limits**

UK [and elsewhere in the world in respect of non manual visits].

#### **3.5 Jurisdiction**

UK [and elsewhere in the world in respect of non manual visits].

#### **3.6 Period of Insurance**

From Service Commencement Date or as otherwise specified in the Contract for the duration of the Contract and renewable on an annual basis unless agreed otherwise.

### **3.7 Cover Features & Extensions**<sup>214</sup>

Munitions of war.

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<sup>209</sup> Insurance should be maintained on a losses occurring basis.

<sup>210</sup> Cover should be for contractual liability, statutory liability and liability in tort.

<sup>211</sup> Limit should be determined by the Authority in conjunction with its insurance adviser, taking into account the relevant circumstances of the project.

<sup>212</sup> It will be important for the parties to agree an appropriate method of escalation.

<sup>213</sup> For certain projects an excess may apply to personal injury claims.

<sup>214</sup> For certain projects, additional Cover Features & Extensions may be required e.g. legionella (for schools and hospitals), liabilities arising from maintenance of site helipad (for hospitals) and terrorism.

Cross liability clause.

Contingent motor.

legal defense costs.

### **3.8 Principal Exclusions**

Liability for death, illness, disease or bodily injury sustained by employees of the insured.

Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.

Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the insured.

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/Trust which is in the care, custody and control of another Insured Party.

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.

Liability arising from the ownership, possession or use of any aircraft or marine vessel.

Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.

Losses under the property damage policy or business interruption policy.



## PART 3

### Endorsements<sup>215</sup>

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:

at least 30 days before any such cancellation or termination is to take effect;

at least 30 days before any reduction in limits or coverage or any increase in deductibles is to take effect; and

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-Vitiation 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 fulfilment 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 fulfilment 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 in this clause as a "Vitiating Act") committed

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<sup>215</sup> The endorsements in this Part 3 of Annex 1 is recommended drafting. Whilst the parties should endeavour to obtain cover in accordance with these wordings, if these are not in practice available, the parties should obtain the best terms reasonably available in the market at the time.

by that insured party save where such misrepresentation non-disclosure or breach of warranty or condition was committed innocently and in good faith.

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:

(1) 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;

(2) 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

(3) save as set out in a request from insurers to the Authority in accordance with (2) 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:

if in writing, when delivered;

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 Contractor at the relevant time. The initial address and facsimile number of the Authority are as follows:

|   |   |
|---|---|
| <u>1. _____ The Authority:</u>                      |   |
| <u>  <u>Address:</u></u>                            |   |
|   |   |
|   |   |
| <u>                    <u>Facsimile No: [ ]</u></u> |   |
| <u>  <u>Attention:</u></u>                          | <u>The Chief Executive from time to time of the Authority</u> |

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**

##### **Loss Payee (applicable only to the Physical Damage Policies)**

Subject to the provision of Clause [24.5(b)] all proceeds of this policy shall be payable without deduction or set-off to the Joint Insurance Account.

#### **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.

## PART 4

### Broker's Letter of Undertaking<sup>216</sup>

~~2.1.1 The Internal Rate of Return (IRR) is most commonly used in PFI Contracts as a measure of the rate of return expected to be earned by private sector capital in the project, and is thus the basis for:~~

To: The Authority

Dear Sirs

Agreement dated [ ] entered into between [ ] Limited (the "Contractor") and [ ] (the "Authority") (the "Agreement")

We refer to the Agreement. Unless the context otherwise requires, terms defined in the Agreement shall have the same meaning in this letter.

We act as insurance broker to the Contractor 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 [ ] and schedule [ ] of the Agreement:

where appropriate name you and such other persons as are required to be named pursuant to the Agreement for their respective interests;

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 Agreement; and that 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 that

the endorsements set out in Part 3 to Schedule [ ] of the Agreement are as at today's date in full force and effect in respect of the Required Insurances.

We further confirm that the attached cover notes confirm this position.

Pursuant to instructions received from the Contractor 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 in relation to the Required Insurances:

#### Notification Obligations

to notify you at least 30 (thirty) days prior to the expiry of any of the Required Insurances if we have not received instructions from the Contractor to

<sup>216</sup> The wording in this Part 4 of Annex 1 is recommended drafting. If agreement to this wording is not in practice achievable, then the parties should agree the best terms reasonably available in the market at the time.

negotiate renewal and in the event of our receiving instructions to renew, to advise you promptly of the details thereof;

to notify you at least 30 (thirty) days prior to ceasing to act as brokers to the Contractor unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as practicable; and

to pay into the Joint Insurance Account without set off or deduction of any kind for any reason all payments in respect of claims received by us from insurers in relation to the Required Insurances specified in **Clause [25.5]** of the Agreement.

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### **Advisory Obligations**

to notify you promptly of any default in the payment of any premium for any of the Required Insurances;

to notify you if any insurer cancels or gives notification of cancellation of any of the Required Insurances, at least 30 (thirty) 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 30 (thirty) days before it is to take effect;

to notify you of any act or omission, breach or default of which we have knowledge which in our reasonable opinion may either invalidate or render unenforceable in whole or in part any of the Required Insurances or which may otherwise materially impact on the extent of cover provided under the Required Insurances; and

~~calculation of the Unitary Charge at Financial Close~~to advise the Contractor of its duties of disclosure to insurers and to specifically advise upon:

the facts, circumstances and beliefs that should generally be disclosed to insurers; and

the obligation not to misrepresent any facts, matters or beliefs to insurers.

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### **Disclosure Obligations**

~~recalculation of the Unitary Charge to take account of capital expenditure resulting from Compensation Events, Authority Changes and Qualifying Changes in Law, where this expenditure is being financed by the Contractor (cf. Section 5.2.3.5)~~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 in our reasonable opinion 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

~~calculation of compensation for Authority Default / Voluntary Termination (cf. Sections 20.1.3 / 20.5)~~to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of the Contractor 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 4.3.1 of this letter. Our obligations of confidentiality shall not conflict with our duties owed to the Contractor 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.

### Administrative Obligations

~~calculation of the Estimated Fair Value of the Contract, on Contractor Default (cf. Section 20.9)~~ 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;

~~calculation of the Refinancing Gain to be shared with the Authority (cf. Section 35)~~ to supply to the Authority and/or its insurance advisers (or the Authority's or its insurance advisers' authorised representatives) promptly on written request copies of the documents set out in Clause 4.4.1 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;

~~2.1.2 — It is therefore fundamental to the negotiations, and Authorities should take care to understand thoroughly the definitions, methodology for calculation and correct usage of IRRs in PFI Contracts.~~

## **2.2 THE IRR CALCULATION**

~~2.2.1 — The IRR is defined mathematically as the discount rate which, when applied to discount a series of cash outflows followed by cash inflows, returns a net present value (NPV) of zero. The most intuitive way of understanding the meaning of the IRR is to think of it as the equivalent constant interest rate at which a given series of cash outflows must be invested in order for the investor to earn a given series of cash inflows as income. It is in this sense a measure of the underlying return the private sector expects to achieve by investing in the project.~~

~~2.2.2 — Thus in the table below Investment A, of 1,000, produces cash flows of 1,350 over the next 5 years. The IRR of this investment is 12.08%, i.e. as shown in the NPV column when each of the cash flows is discounted at 12.08% per annum the NPV of all of them is zero.~~

|              | Investment A |           |              | Investment B |             |
|--------------|--------------|-----------|--------------|--------------|-------------|
|              | End Year     | Cash flow | NPV @ 12.08% | Cash flow    | NPV @ 9.94% |
| 0            | -1,000       | -1,000    | -1,000       | -1,000       |             |
| 1            | 340          | 303       | 200          | 182          |             |
| 2            | 305          | 243       | 235          | 194          |             |
| 3            | 270          | 192       | 270          | 203          |             |
| 4            | 235          | 149       | 305          | 209          |             |
| 5            | 200          | 113       | 340          | 212          |             |
| <b>Total</b> | <b>350</b>   | <b>0</b>  | <b>350</b>   | <b>0</b>     |             |

~~2.2.3—IRR calculations are highly sensitive to the timing of cash flows: as can be seen by comparing Investments A and B in the above table. Both are investments of 1,000 which each produce a net cash flow of 1,350 over 5 years, but different IRRs (9.94% in the case of Investment B) because of the different timings of these cash flows.~~

~~2.2.4—The IRR calculation is most properly applied in situations where a project produces negative cash flow (outflows) in the beginning, followed by positive cash flow (inflows) in later years. This is typical of most PFI projects, where large construction costs are incurred by the Contractor early on, followed by cash inflows in the form of surpluses from operations. In cases where positive and negative cash flows alternate with each other, the IRR will not be uniquely determinate and is unlikely to be the appropriate measure.~~

~~2.2.5—The Authority should be aware that IRRs are generally not a reliable alternative to NPV-based calculations for the measurement of the value of an investment. For example, two projects with the same IRR but different concession periods (e.g. 15 and 25 years) will have very different NPVs at all discount rates except the IRR. The widespread use of IRRs in PFI projects reflects the generally even pattern of year-on-year operational cash flows in such projects. However, if a project has an uneven cash flow profile, the Authority should exercise great caution in using an IRR as the basis of valuing investment in the project.~~

## ~~2.3 TYPES OF IRRs IN PFI PROJECTS~~

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~~2.3.1—IRR can be calculated for different cash flow streams of a project, depending upon:~~

~~2.3.2—~~ which category of investor the IRR is being calculated for;

~~whether inflation is or is not included in the underlying cash flows; 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;~~

~~whether tax is or is not included in the underlying cash flows to administer the payment of claims from insurers in respect of the Insurances (the “Insurance Claims”) including;~~

~~2.3.3—**Category of Investor:** The **Project IRR** represents the weighted average cost of capital for a project. It is usually calculated from all of the non-financing project cash flows, including capital costs, operating and maintenance costs, revenues and working capital adjustments. The **Equity IRR** represents the return to investors after taking account of Senior Debt service. For tax and accounting reasons investors typically provide a mixture of share capital (equity) and Junior Debt: in which case the IRR calculation takes into account all payments received on both equity and Junior Debt, *i.e.* not just dividends, but also interest and capital repayments on the Junior Debt. This is known as the **Blended Equity IRR**.~~

~~2.3.4—**Inflation:** Where the cash flows are in real terms, *i.e.* based on constant prices,<sup>1</sup> the IRR calculation based on these is known as the **Real IRR**. Where cash flows are in nominal terms, *i.e.* are based on current prices,<sup>2</sup> the IRR calculation based on these is known as the **Nominal IRR**.~~

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<sup>1</sup>—Prices are “constant” when they are expressed by reference to a particular consistent (and usually historic) date. Hence, if sums of money arising after the year 2000 are all to be expressed in “2000 prices” (*i.e.* “constant” prices as at the year 2000), then each sum of money must be deflated (using RPI) back to 2000 to strip out the effects of

**2.3.5—Taxation:** IRR calculations may be done on a pre- or post-tax basis. In either case, the taxation taken into account should only be the tax paid by the SPV, not tax suffered by investors on the payments received from the SPV. Investors may order their tax affairs so as to pay more or less tax on investments, and this is not the concern of the Authority, nor can the Authority check whether or not calculations of the investors' own taxes are correct.

**2.3.6—**The table below summarises these different types of IRR calculation:

|  |                     | Category of Investor                                   |   |
|--|---------------------|--|---|
|  |                     | All investors<br>(Senior +<br>Junior Debt +<br>Equity) | Junior Debt +<br>Equity                             |
| Constant prices  | Tax on SPV excluded | Real Pre-Tax<br>Project IRR                            | Real Pre-Tax<br>Blended Equity<br>IRR               |
|  | Tax on SPV included | Real Post-Tax<br>Project IRR                           | <i>Real Post-Tax<br/>Blended Equity<br/>IRR</i>     |
| Current prices   | Tax on SPV excluded | <i>Nominal Pre-<br/>Tax Project<br/>IRR</i>            | Nominal Pre-<br>Tax Blended<br>Equity IRR           |
|  | Tax on SPV included | Nominal Post-<br>Tax Project<br>IRR                    | <i>Nominal Post-<br/>Tax Blended<br/>Equity IRR</i> |
| <i>Cf. 3.4.6 for the uses of the terms in italics in PFI Contracts</i> |                     |  |   |

## 2.4 USING IRRs IN PFI CONTRACTS

inflation (i.e. RPI) on general prices in the economy in the intervening years. Typical constant price items in a PFI cash flow would include the Unitary Charge to the extent it is indexed by RPI. Such items have to be indexed by the projected rate of inflation (RPI) to produce a cash flow in nominal terms:

<sup>2</sup>—Prices are “current” when they are expressed by reference to the purchasing power of the time period to which they relate. Hence, a sum of money arising in the year 2010 will be assumed to be expressed in 2010 current prices—i.e. nominal terms (sometimes referred to as “money of the day”) unless otherwise stated. It naturally follows, therefore, that a price which is fixed in nominal terms across more than one time period will reduce in real terms by the effect of inflation (RPI) during the intervening time periods. Typical fixed nominal price items in a PFI project cash flow would include a fixed price turnkey construction contract, or the unindexed element of a Unitary Charge. Such items have to be deflated by the projected rate of inflation (RPI) to produce a cash flow in real terms.

~~2.4.1—It is important that the Authority bears the following principles in mind when using IRRs in the Contract:~~

~~2.4.2—All the cash flows used to compute the relevant IRR should relate exclusively to the investor in respect of whom the IRR is being computed. For instance, if an IRR is being computed to reflect the measure of return on the project as a whole, a Project IRR should be used whereas if it is being computed to reflect the return earned by investors in equity and Junior Debt, a Blended Equity IRR should be used.~~

~~2.4.3—The timing of underlying cash flows used to compute IRRs (or cash flows which IRRs are used to discount) should always reflect the dates on which cash payments are made from the investors' account to the Contractor or vice versa for all historical cash flows, and should always reflect the dates when cash is available for Distributions to investors for all projected cash flows. All cash flows used to calculate IRRs in the Financial Model should be assumed to occur at the end of each relevant period.<sup>3</sup>~~

~~2.4.4—Inflation should be treated consistently. Real IRRs can be calculated if the underlying cash flows are expressed in constant prices, while Nominal IRRs can be computed if the underlying cash flows are expressed in current prices. Similarly, when using discount rates, cash flows in constant prices should be discounted using real discount rates, and cash flows in current prices should be discounted using nominal discount rates. Many PFI projects have Unitary Charges which are partially indexed to inflation. In such cases it is preferable to use the Nominal IRR, but if the Real IRR calculation is used the future cash flows which are not indexed or subject to inflation (i.e. are in current prices) should be decreased by the rate of inflation.~~

~~2.4.5—In this Guidance on Standardisation of PFI Contracts, IRRs have been used as discount rates to compute compensation and termination payments or refinancing shares. The table below summarises the type of IRR and the section of the Guidance in which it is recommended for use:~~

| <del>Section of SoPC</del>   | <del>Relating to</del>   | <del>Type of IRR</del>                           | <del>Usage</del>   |
|------------------------------|--|--|--|
| <del>20.1.3.6 and 20.5</del> | <del>Compensation on termination for Authority Default / Voluntary Termination</del> | <del>Real Post-tax Blended Equity IRR</del>      | <del>To calculate compensation amount for junior debt and equity holders</del> |
| <del>20.2.9</del>            | <del>Estimated Fair Value of Contract</del>  | <del>Nominal Pre-tax Project IRR*</del>          | <del>To discount future Unitary Charges less costs.</del>                      |
| <del>35</del>                | <del>Refinancing</del>   | <del>Nominal Post-tax Blended Equity IRR**</del> | <del>To compute Refinancing Gains for sharing</del>                            |

~~\* This should be adjusted for movements in underlying market interest rates as discussed in 20.2.9.9~~

~~\*\* The base case (Financial Close) calculation of this is used as the "Threshold Equity IRR" in the Refinancing provisions.~~

## ~~2.5 METHODOLOGY FOR CALCULATING IRRS~~

~~#~~

<sup>3</sup> ~~Most spreadsheet programs use this methodology in the algorithms they use to compute IRRs.~~

~~2.5.1—IRR~~s~~ are normally calculated using standard formul~~æ~~ which are embedded in the software being used to model the IRR for the Project,<sup>4</sup> and most Project Agreements refer to a particular cell in the Financial Model which reflects the relevant IRR. Consequently, it is important to ensure that the underlying cash flows in the Financial Model from which the software calculates the IRR are entirely consistent with the principles intended in the PFI Contract.~~

~~2.5.2—The calculation of equity cash inflows going into an IRR calculation should reflect all actual or projected cash available for distributions to investors, once Senior Debt service and covenant requirements have been satisfied. In the case of the Blended Equity IRR calculation used for calculation of Refinancing Gains, Distributions to investors should include the elements set out in Section 35.7 (Refinancing).~~

~~2.5.3—The calculation of cash outflows is relatively straightforward in most IRR calculations. It reflects the amounts invested (in cash or kind) by investors into the project, timed according to the date on which the investment amount was transferred into the control of the Contractor. The Authority should ensure that this approach is followed throughout the Contract and in the Financial Model. An IRR calculated on this basis is referred to as an IRR calculated on a “Cash-on-Cash” basis, and is invariably the most accurate measure of return available to the Authority.~~

~~2.5.4—In some instances, particularly in negotiations relating to refinancing, investors may suggest a different method for estimating cash outflows. In this method, outflows are timed not on the date when investment amounts are transferred to the control of the Contractor, but the date on which the investment amounts are committed to (but not necessarily transferred to or drawn down by) the Contractor. The former is usually an earlier date than the latter, and the effect of this is to reduce the IRR compared to the Cash-on-Cash basis. An IRR calculated on this basis is usually referred to as an IRR calculated on a “Cash-on-Commitments” basis.~~

~~2.5.5—The most common justification provided by bidders for the use of Cash-on-Commitment IRRs is that Senior Lenders typically require the investors to commit funding to the project (through a letter of credit or otherwise), which can be accelerated at any time. As a result, investors are required to “lock up” funds to meet this commitment on the date they are committed, and it is argued that they are as good as invested in the project on that date.~~

~~2.5.6—As this is a hybrid measure of return on investment it is not one which can be recognised as providing a meaningful financial measure of return on investment, unless a suitable adjustment is also made for the return which can be earned by investors on capital committed but undrawn. This adjustment is normally effected by crediting a notional deposit rate on the undrawn funds as a distribution to the providers or equity or Junior Debt.<sup>5</sup>~~

~~2.5.7—A Cash-on-Cash calculation is always preferable, but if the Authority agrees to a Cash-on-Commitment IRR methodology, it must ensure that the methodology is applied consistently, and its limitations recognised. This is especially relevant should a refinancing occur.~~

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<sup>4</sup>—The software used in the calculation of an IRR in the Financial Model should be specified in the Contract as different spreadsheet programs may generate different values an IRR because of the differences in the algorithms used in different software.

<sup>5</sup>—More correctly, it is the opportunity cost of capital rather than a deposit rate which should be credited back in this way, but this is difficult to assess, so market practice has been to credit the deposit rate.

## ~~Annex Guidance Note~~

### ~~3 Corporate Finance Provisions for Compensation on Termination~~

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~~3.1 Section 32.1.4 of SoPC 3 refers to corporately financed projects. Guidance on suitable compensation on termination provisions for corporately financed projects is set out below.~~

~~(a) Authority Default / Voluntary Termination~~

~~The NPV of:~~

~~negotiating settlement of Insurance Claims presented in respect of the Required Insurances;~~

~~collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Required Insurances, and~~

~~insofar as it is relevant and practicable, liaising with and reporting to each Authority throughout the settlement, payment and administration of such Insurance Claims.~~

~~Future Unitary Charges as shown in the Base Case 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, in our opinion as Insurance Brokers would result in any material reduction in limits or coverage or in any increase in deductibles, exclusions or exceptions;~~

~~minus~~

~~Future operating costs and capital expenditures as shown in the Base Case where operating costs include the provision for corporate overhead costs made in the Base Case 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~~

~~Discounted at the [Nominal / Real\*] Pre-Tax Base Case Project IRR  
[\* depending on whether the Base Case is in current or constant prices, but nominal is preferable]~~

~~plus~~

~~Redundancy costs (as per SoPC)~~

~~plus~~

~~Sub-contractor breakage costs (as per SoPC)~~

~~No finance breakage costs are payable.~~

~~(b) Contractor default~~

~~The standard SoPC provisions can be applied.~~

~~(c) Force majeure~~

As follows:

~~Base Case capital costs as set out in the Base Case model~~ to use our reasonable 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 3 to Schedule [] of the Agreement.

*minus*

### Insurance Cost Reporting Procedures

~~Recoveries of capital to the date of termination as calculated (in nominal cash terms) from: (a) total Unitary Charges paid to date; less (b) operating costs and capital expenditures incurred to date as shown in the Base Case (where operating costs include the provision for corporate overhead costs made in the Base Case)~~ to prepare following request, at the expense of the Contractor, a Joint Insurance Cost Report on behalf of both the Contractor and the Authority in accordance with the Insurance Review Procedure as set forth in [Section 24.8] of the Agreement. We shall ensure that the information in the Joint Insurance Cost Report is fairly represented, based on the information available to us.<sup>217</sup>

*plus*

~~Redundancy costs (as per SoPC)~~

*plus*

~~Sub-contractor breakage costs (as per SoPC)~~

~~(c) Corrupt Gifts~~

### Notification Details

Our obligations at Clause 4 of this letter to notify or inform you shall be discharged by providing the requisite information in hard copy to:

[ ] Authority

~~Zero compensation.~~

<sup>217</sup> This provision under Clause 4.5 is Required Drafting and may not be altered.

We shall supply further letters substantially in this form on renewal of each of the Required Insurances and shall supply copies of such letters to those parties identified to us by the Authority for such purposes.

~~(d) — Breach of Refinancing Provisions~~

~~Where a deal is genuinely corporately financed from the outset, then the Refinancing provisions of SoPC do not apply. However, if the project is subsequently restructured from being genuinely corporate financed to being either project financed or a hybrid, then this will inevitably require the consent of the Authority at the time and this consent should only be given if the Refinancing provisions of SoPC (including this provision for breach) are introduced into the Project Agreement at the time of the restructuring.~~

~~It should be noted that the Permitted Borrowing concept is not suitable for application to corporately financed projects.~~

# ~~ANNEX Guidance Note~~

## ~~4 PERMITTED BORROWING~~

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Yours faithfully

### ~~4.1 PERMITTED BORROWING~~

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For and on behalf of [Contractor's broker]<sup>218</sup>

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<sup>218</sup> The Contractor's broker may wish to limit its liability and include additional liability wording in the Broker's Letter of Undertaking. Whilst this is in principle acceptable, the Authority will need to check that (i) the scope of such additional wording is appropriate (e.g. does not extend to a limitation of liability for fraudulent acts), and (ii) the capped amount is set at a sufficiently high level.

## PART 5

~~4.1.1—Following discussions with public and private sector bodies on the definition of Permitted Borrowing in Section 21.3 of SoPC, HM Treasury has amended this definition. Sub paragraph (b) of the definition of Permitted Borrowing formerly allowed re-schedulings and additional advances under Senior Finance Agreements made during any Step in Period to count as additional Permitted Borrowings, up to a maximum of 10% of the original Senior Debt Amount. Senior Lenders expressed a desire to be able to reschedule and advance additional Permitted Borrowings, without having to obtain prior consent from the Authority, when a project was in need of rescue finance but without having to step in.~~

### Definitions

~~4.1.2—New provisions have now been drafted under which a new largely unfettered Additional Permitted Borrowing right is given to Senior Lenders instead of the former paragraph (b) of the definition of Permitted Borrowing (which required Banks to “step in” to the project agreement if they wanted to secure protection for their additional lending without having to get Authority consent). This will apply during the construction period as well as the operational period and is not subject to any precondition as to breach of project financial ratios. Distributions made while such Additional Permitted Borrowing was outstanding would reduce the amount payable to Senior Debt in various circumstances (and it may be that Senior Debt would therefore cash collateralise any such amount which would otherwise have been distributed until the Additional Permitted Borrowing is fully covered).<sup>†</sup>~~

~~4.1.3—This is a relaxation of the former position and offers an enhanced ability for Senior Lenders to take remedial action where projects are in need of rescue. There is a new requirement in the Direct Agreement for the Authority to be notified of any such Additional Permitted Borrowing, and the reasons for it, and to be notified on an ongoing basis, of distributions then made. In addition there are a number of concomitant changes to the termination provisions. The principal ones are set out below.~~

~~“Revenue” is defined as the projected Unavoidable Fixed Costs and Senior Debt Service Costs of the Contractor.~~

~~4.1.4—Following the making of any Additional Permitted Borrowing if the project terminates early on the grounds of Authority Voluntary Termination or Authority Default, the following will apply:~~

~~“Senior Debt Service Costs” shall mean interest and debt service costs incurred in respect of the Senior Financing Agreements less~~

~~sums which are in arrears;~~

~~all sums reserved by the Contractor and which the Contractor is entitled to use to make such payments, without breaching the Senior Financing Agreements.~~

~~“Unavoidable Fixed Costs” should mean the fixed costs incurred by the Contractor which first fall due for payment by the Contractor during the period of indemnity but excluding:-~~

~~the senior debt, plus the Additional Permitted Borrowings less any Distribution made will be paid to the Senior Banks (the “Revised Senior Debt Termination Amount”). The Senior~~

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<sup>†</sup> If no Distributions are made during this period but monies are kept in reserved accounts, the Permitted Borrowings will not be reduced, however the amount of the Senior Debt payable by the Authority on an early termination of the project is reduced, under sub paragraph (b) (i) of the definition of Senior Debt. It will be a matter for the Senior Lenders and the Equity to decide whether surplus funds are used to repay Senior Debt, or are distributed or reserved.

~~Banks will be protected even if the Revised Senior Debt Termination Amount exceeds the aggregate amount which would have been payable (to both debt and equity) had no Additional Permitted Borrowing been made (the "Original Aggregate Compensation Amount").~~ costs which could have reasonably been mitigated or avoided by the Contractor;

~~If the Revised Senior Debt Termination Amount is greater than the Original Aggregate Compensation Amount, the Equity will receive no termination payment.~~ payments to the Contractor's Associated Companies;

~~If the Original Aggregate Compensation Amount is greater than the Revised Senior Debt Termination Amount, the Equity will, broadly, be paid the excess.~~<sup>2</sup> payments which are not entirely at arm's length;

~~4.1.5—If, following the making of any such Additional Permitted Borrowing, the project terminates early on the grounds of force majeure the same principles apply.~~

~~4.1.6—On a termination for Corrupt Gifts or Breach of Refinancing Provisions, the New Senior Debt Termination Amount will be payable to Senior Banks (and no payment will be made to Equity).~~

~~4.1.7—The amount of the Additional Permitted Borrowing which may be lent in this way is 10% of initial principal commitment, reducing to 5% at such time as the initial principal senior debt is 50% paid down.~~

~~4.1.8—Senior Lenders, of course, remain able to advance new monies to Project Companies with the express consent of the Authority, but this new Additional Permitted Borrowing provision will offer senior lenders significantly increased extra flexibility to rescue projects in difficulty without having to come to the Authority for prior consent. Authorities should not give their consent to other increases to their liabilities on termination under paragraph 21.3(a) until such time as the Contractors/Senior Lenders have exhausted their rights to put more money into the project by way of Permitted Borrowing.~~

~~4.1.9—The relevant parts of Guidance which contain these new provisions are as follows: Section 21.3 (Certainty of Compensation Payment Amounts), Section 1.8 (Interpretation), Section 20 (Early Termination), Section 30.5.1 paragraph 10 (Direct Agreement).~~

payments to holders of equity in the Contractor, Subordinated Lenders and any other financing costs other than Senior Debt Service Costs;

indirect losses suffered or allegedly suffered by any person;

finances, penalties or damages for unlawful acts, breaches of contract or other legal obligations;

payments the Contractor can recover under contract or in respect of which the Contractor has a remedy against another person in respect of the same liability;

payments to the extent that the Contractor has available to it

(i) reserves which the Contractor can draw upon without breaching the Senior Financing Agreement;

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<sup>2</sup> But out of the total termination payment, the amount attributable to the senior banks will be increased and the amount attributable to the equity will be decreased, in order to reflect the increased debt levels. This follows the logic that applies to ordinary monthly payments of unitary charge. These do not increase following any Permitted Borrowing (although, as between the senior banks and the equity, the equity's share of them may decrease).

(ii) standby or contingent facilities or funds of Senior Debt or equity which the Contractor is entitled to have available;  
payments representing any profits of the Project (to the extent not already excluded in (e) above).

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