

# **HMP ADDIEWELL CONTRACT**

## **MINUTE OF AGREEMENT**

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## **MINUTE OF AGREEMENT**

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**Lease**

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One redaction has been made to this Minute of Agreement on the grounds that the information redacted is exempt from publication as its disclosure under the Freedom of Information (Scotland) Act 2002 would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). (33 (1)(b) of the Act refers.). The item where a redaction has been made is in the Definitions section and relates to the Joint Insurance Account.

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## MINUTE OF AGREEMENT

between

**THE SCOTTISH MINISTERS** acting through the Scottish Prison Service, Calton House, 5 Redheughs Rigg, Edinburgh EH12 9HW or such other Agency, Department or other organisational unit of the Scottish Executive as they may from time to time nominate (hereinafter referred to as the "Authority")

and

**ADDIEWELL PRISON LIMITED**, a company incorporated under the Companies Acts (Registered Number SC291454) and having its registered office at 35 North Canal Bank Street, Glasgow G4 9XQ (hereinafter referred to as the "Contractor")

**WHEREAS** the Authority and the Contractor have agreed to enter into a contract whereby the latter will design, construct, manage and finance a new prison at Addiewell, West Lothian **NOW THEREFORE** the Authority and the Contractor agree as follows:-

## 2. DEFINITIONS AND INTERPRETATION

### 2.1 Definitions

In this Contract, unless the context otherwise requires the following words and expressions shall have the following meanings:

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| <b>"Actual Full Operation Date"</b>            | means the date on which the Contractor first provides 700 Available Prison Places;   |
| <b>"Actual Opening Date"</b>                   | means the date on which the Contractor first provides no less than 30 Available Prisoner Places;   |
| <b>"Actual Relevant Insurance Cost"</b>        | means the aggregate of the annual insurance premiums reasonably incurred by the Contractor to maintain the Relevant Insurance during the Insurance Review Period but excluding insurance premium tax and all broker's fees and commissions;  |
| <b>"Additional Permitted Borrowing"</b>        | means on any date, the amount equal to any amount of principal outstanding under the Senior Financing Agreements in excess of the amount of principal scheduled under the Senior Financing Agreements at Financial Close to be outstanding at that date, but only to the extent that:<br>(a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and<br>(b) in respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under Clause 10(d)(iii) of the Direct Agreement as it applies to such Additional Permitted Borrowing and provided further that any such excess amount of principal which is invested as part of any Qualifying Variation shall not be counted as Additional Permitted Borrowing; |
| <b>"Additional Permitted Borrowings Limit"</b> | means an amount equal to:<br>(a) 10% of the Original Senior Commitment for any   |

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Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the amount outstanding under the Senior Financing Agreements is reduced to 50% or less of the Original Senior Commitment; and thereafter;

- (b) the higher of:
- (i) 5% of the Original Senior Commitment; and
  - (ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in (a);

**"Additional Prisoner Place"** means an Available Prisoner Place, additional to the 700 Available Prisoner Places, to be provided by the Contractor at the request of the Authority in accordance with Clause 0 (*Additional Prisoner Places*);

**"Additional Prisoner Place Tranche"** has the meaning given in Clause 32.2;

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

- (a) the Post Termination Services Amounts (if a positive number);
- (b) the Tender Costs; and
- (c) amounts that the Authority is entitled to set off or deduct under Clause 0 (*Set-Off*),

plus an amount equal to the aggregate of:

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

to the extent that:

- (1) (i), (ii) and (iii) have not been directly taken into account in calculating the Estimated Fair Value; and
- (2) the Authority has received such amounts in accordance with the Contract or such amounts are standing to the credit of the Joint Insurance Account.

**"Adjusted Highest Compliant Tender Price"** means the Highest Compliant Tender Price less the aggregate of:

- (a) any Post Termination Services Amounts paid to the Contractor to date;
- (b) the Tender Costs; and

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(c) amounts that the Authority is entitled to set off or deduct under Clause 0 (*Set-off*),

plus an amount equal to the aggregate of:

- (i) all credit balances on any bank accounts held by or on behalf of the Contractor on the date that the highest priced Compliant Tender is received;
- (ii) any insurance proceeds and other amounts owing to the Contractor, to the extent not included in (i); and
- (iii) the Post Termination Services Amounts (if a negative number),

to the extent that:

- (a) (i), (ii) and (iii) have not been directly taken into account in that Compliant Tender; and
- (b) the Authority has received such amounts in accordance with the Contract.

**“Affiliate”**

means in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company and “holding company” and “subsidiary” shall have the meaning given to them in Section 736 of the Companies Act 1985;

**“Agent”**

means The Royal Bank of Scotland plc in its capacity as agent and/or security trustee for the Senior Lenders under the Senior Financing Agreements;

**"Ancillary Documents"**

means the Construction Sub-contract and the Operating Sub-contract as the same may be amended from time to time under this Contract;

**“APB Distribution”**

means, for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period;

**"Appropriate Level"**

**Deductible**

has the meaning given in Clause 0A(c);

**"Appropriate Level"**

**Indemnity**

has the meaning given in Clause 0A(a) or Clause 0A(b) (as the case may be);

**"Asset Register"**

means a register of all items of Equipment and Work Products which are leased or licensed, including details of the item of Equipment, the identity of the lessor or licensee and the terms and conditions pertaining to the lease or license;

**“Assets”**

means the Prison, the Site, the Equipment and all plant, fittings, fixtures, materials, machinery and other equipment in or on the Prison or the Site from time to time, required to provide the Services, whether intended to be there temporarily or permanently;

**“Associated Company”**

means in respect of a relevant company, a company

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|                                       |                 | which is a subsidiary, a Holding Company or a company that is a subsidiary of the ultimate Holding Company of that relevant company, and in the case of the Contractor shall include Holdco and each of the Shareholders;  |
| <b>"Auditor General for Scotland"</b> |                 | includes any successor office, and Audit Scotland or any other person acting on behalf of the Auditor General for Scotland or any successor office from time to time;  |
| <b>"Authority Change"</b>             |                 | means a change to the Works and/or the Services proposed by the Authority under Clause 0 ( <i>Authority Changes</i> );   |
| <b>"Authority Default"</b>            |                 | means one of the following events: <ul style="list-style-type: none"><li>(a) an expropriation, sequestration or requisition of a material part of the Assets and/or shares of the Contractor by the Authority or any Relevant Authority (other than any court with relevant jurisdiction as a result of an event described in paragraphs (c), (d), (e), (f) or (p) of the definition of Contractor Default);</li><li>(b) subject to Clause 31.1.4, a failure by the Authority to make payment of any amount of money exceeding a sum equal to the Contract Price payable for a 30 day period assuming that the Contractor has made available all required Available Prisoner Places (such sum being 30 x 700 x C (as C is defined in paragraph 3 of Schedule E)) that is due and payable by the Authority under this Contract within 30 days of service of a second formal written demand by the Contractor, provided that the second formal written demand was served by the Contractor on the Authority (i) no earlier than 60 days after the amount fell due and payable and (ii) no earlier than 14 days after a first formal written demand was served by the Contractor on the Authority;</li><li>(c) a breach by the Authority of its obligations under this Contract which substantially frustrates or renders it impossible for the Contractor to perform the Services for a continuous period of two months; or</li><li>(d) a breach by the Authority of Clause 0 (<i>Restrictions on Transfer of the Contract by the Authority</i>) occurs.</li></ul> |
| <b>Authority Termination Sum"</b>     | <b>Default</b>  | means the amount determined in accordance with Clause 0;   |
| <b>"Authority Notice of Change"</b>   |                 | has the meaning given in Clause 0;   |
| <b>"Authority's Contract Manager"</b> | <b>Contract</b> | means the representative of the Authority performing the role of contract manager in respect of the Project, as notified to the Contractor from time to time;  |

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- "Authority's Work Products"** means all Work Products in relation to which the Intellectual Property Rights are owned by the Authority, which the Authority directs the Contractor to use in performing its obligations under this Contract;
- "Available Prisoner Place",** subject to Clauses 22.1 and 22.6, means a Prisoner Place which on any particular day satisfies the following conditions:
- (a) the Cell in which the Prisoner Place is contained has been issued or reissued with a Cell Certificate pursuant to Clause 20.2 which has not subsequently been withdrawn pursuant to Clause 20.3 or 20.4; and
  - (b) during that day, the Prisoner Place has complied with the Minimum Requirements;
- "Base Case Equity IRR"** means 13 %;
- "Base Cost"** means £946,681 being the amount set out in the Financial Model which represents the insurance costs (which excludes amounts in respect of insurance premium tax and all brokers' fees and commissions) which are proposed to be incurred to maintain the Relevant Insurance in each year following the Actual Opening Date, expressed in real terms as at the Bid Date;
- "Base Relevant Insurance Cost"** means, the aggregate of the Base Costs which were (at Bid Date) projected to be incurred to maintain the Relevant Insurance during the Insurance Review Period indexed by actual RPI from the Bid Date up to the dates on which the Relevant Insurance was placed or renewed either immediately before or during the Insurance Review Period (as applicable in respect of the year in question) less any Base Relevant Insurance Reduction;
- "Base Relevant Insurance Reduction"** the reduction to be made to the Base Relevant Insurance Cost in respect of a risk which has become Uninsurable and shall be an amount that is either:
- (a) the amount by which the Base Relevant Insurance Cost would have been a lesser amount had such a risk been Uninsurable at the Bid Date (which amount, for the avoidance of doubt, can be £0); or
  - (b) if it is impossible to determine an amount pursuant to paragraph (a) above, an amount that is reasonable to be deducted from the Base Relevant Insurance Cost having due regard to:
    - (i) the amount by which the Actual Relevant Insurance Cost is less than it would have been as a result of the risk becoming Uninsurable, (the "Actual

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**"Base Senior Debt Termination Amount"**

**Debt** means:

- Reduction”);
- (ii) the size of the Actual Reduction as a percentage of the Actual Relevant Insurance Cost immediately prior to the risk becoming Uninsurable, or the term; and
- (iii) the effects of RPI since the Bid Date;

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the Contractor to the Senior Lenders under the Senior Financing Agreements and in respect of Permitted Borrowing and
- (b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Contractor to the Senior Lenders as a result of a prepayment under the Senior Financing Agreements and in respect of Permitted Borrowings subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible;

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below) :

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account) held by or on behalf of the Contractor on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding under the Senior Financing Agreements and in respect of Permitted Borrowings;
- (iv) any Additional Permitted Borrowing and any interest and Default Interest on such Additional Permitted Borrowing; and
- (v) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have;

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| <b>"Baseline Total"</b>                     |                     | means, in respect of any Performance Quarter or Performance Year (as the context may require), the relevant number of Performance Points calculated in accordance with the provisions of Schedule F;  |
| <b>"Bid Date"</b>                           |                     | means the Date of Signature;  |
| <b>"Business Day"</b>                       |                     | means a day (other than a Saturday or Sunday) on which banks are open for domestic business in the city of Edinburgh;   |
| <b>"Business Cover"</b>                     | <b>Interruption</b> | has the meaning given to it in Schedule N ( <i>Insurance</i> );   |
| <b>"C"</b>                                  |                     | has the meaning given to it in paragraph 3 of Schedule E;   |
| <b>"Capital Expenditure"</b>                |                     | means any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in the United Kingdom from time to time;   |
| <b>"CBS Private marine index"</b>           | <b>Capital non</b>  | means the index maintained by Lloyds insurance and accessed at <a href="http://www.cbs-lloyds.co.uk/cgi-bin/mri/filereader.pl">http://www.cbs-lloyds.co.uk/cgi-bin/mri/filereader.pl</a> ;  |
| <b>"Cell"</b>                               |                     | means a secure unit of accommodation in the Prison for occupation by a Prisoner or Prisoners (including segregation units and secure units for occupation by a Prisoner or Prisoners in the healthcare centre of the Prison);   |
| <b>"Cell Certificates"</b>                  |                     | means certificates issued in accordance with Clause 20 ( <i>Cell Certification</i> );   |
| <b>"Change in Law"</b>                      |                     | means the coming into effect after the date of this Contract of :<br>(a) Legislation, other than any Legislation which on the date of this Contract has been published:<br>(i) in a draft Bill as part of a Government Departmental Consultation Paper;<br>(ii) in a Bill;<br>(iii) in a draft statutory instrument; or<br>(iv) published as a proposal in the Official Journal of the European Communities;<br>(b) any Guidance; or<br>(c) any applicable judgment of a relevant court of law which changes a binding precedent. |
| <b>"Change in Law Facility"</b>             |                     | means the facility defined as such in the Senior Financing Agreements;  |
| <b>"Claim"</b>                              |                     | means any action, claim, demand or proceedings;   |
| <b>"Commercially Sensitive Information"</b> | <b>Sensitive</b>    | means information designated as such by the Parties from time to time;  |
| <b>"Compensation Date"</b>                  |                     | means either:<br>(a) if Clause 0 ( <i>Retendering Procedure</i> ) applies, the earlier of:<br>(i) the date that the New Contract is entered into; and<br>(ii) the date on which the Authority pays the  |

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|                                    |                | Adjusted Highest Compliant Tender Price to the Contractor, or   |
|                                    |                | (b) if Clause 0 ( <i>No Retendering Procedure</i> ) applies, the date that the Adjusted Estimated Fair Value of the Contract has been agreed or determined.   |
| <b>“Compensation Event”</b>        |                | means a breach by the Authority of any of its obligations under this Contract.  |
| <b>“Compliant Tender”</b>          |                | means any tender submitted by a Compliant Tenderer that meets the qualification criteria notified under Clause 0.   |
| <b>“Compliant Tenderer”</b>        |                | means a tenderer who is a Suitable Substitute Contractor.   |
| <b>"Confidential Information"</b>  |                | means:<br>(a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either Party and all personal data and sensitive personal data within the meaning of the DPA; and<br>(b) Commercially Sensitive Information; and<br>(c) Security Information; |
| <b>“Consents”</b>                  |                | means all permissions, consents, approvals, certificates, permits, licenses and authorisations of a Relevant Authority required for the performance of any of the Contractor’s obligations under this Contract;   |
| <b>"Construction Insurance"</b>    | <b>Period</b>  | means the Required Insurance in respect of the period from the Date of Signature to the Actual Opening Date as set out in Part 1 of Schedule N;   |
| <b>"Construction Sub-contract"</b> |                | means the agreement, dated on or about the date of this Contract, between the Contractor and the Construction Sub-contractor in respect of the design, execution and completion of the Works;   |
| <b>"Construction contractor"</b>   | <b>Sub-</b>    | means Interserve Project Services Limited (Company Number 00303359) having its registered office at 395 George Road, Erdington, Birmingham B23 7RZ or, subject to Clause 0 ( <i>Assignment and Subcontracting</i> ), such other sub-contractor as may be appointed by the Contractor from time to time to design, execute and complete the Works;   |
| <b>“Contingent Liabilities”</b>    | <b>Funding</b> | means any amount of equity or subordinated debt yet to be subscribed for under the Equity Subscription Agreement as at the relevant date;   |

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- "Contract"** means this agreement between the Authority and the Contractor and all Schedules, annexes, plans and drawings annexed hereto, and any agreement which replaces or supersedes any of the foregoing or any part of the foregoing, all as amended, supplemented or varied from time to time;
- "Contract Period"** means the period commencing on the Actual Opening Date and ending on the earlier of:
- (a) the Expiry Date ; or
  - (b) the Termination Date;
- "Contract Price"** means the amount payable under Clause 0 (*Price*) by the Authority to the Contractor for the performance of its obligations under the Contract;
- "Contractor Change"** means a change to the Services proposed by the Contractor under Clause 35A (*Contractor Changes*) and accepted by the Authority;
- "Contractor Default"** means one of the following events:
- (a) a breach by the Contractor of any of its obligations under Clause 8.2, Clause 25.2 or Clauses 61.3, 61.5, 61.7, 61.8, 61.9, 61.12, 61.13, 61.14, 61.15, 61.16 or 61.18 only which materially and adversely affects the carrying out of the Works;
  - (ai) following the issue of the Engineer's Declaration, any breach by the Contractor of any of its obligations under this Contract where such breach:
    - (i) has a material and adverse effect on the performance of the Custodial Services as a whole; or
    - (ii) either by itself or in addition to other such failures is, in the reasonable opinion of the Authority, a fundamental breach of its obligations as a whole or a material part thereof; provided always that no breach of the type referred to in paragraphs (j), (k) or (l) below is capable of falling within this paragraph (ai) of this definition;
  - (b) a Persistent Breach occurs (in relation to the Contractor's obligations under Clause 8.2, Clause 25.2 or Clauses 61.3, 61.5, 61.7, 61.8, 61.9, 61.12, 61.13, 61.14, 61.15, 61.16 or 61.18 only) before the Engineer's Declaration
  - (bi) a Persistent Breach occurs after the Engineer's Declaration;
  - (c) a court makes an order that the Contractor be wound up or a resolution for a voluntary winding-up of the Contractor is passed (except for the purposes of a bona fide internal reorganisation or amalgamation consented to by the Authority);

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- (d) any receiver, administrator or administrative receiver or manager in respect of the Contractor is appointed or possession is taken by or on behalf of any creditor of any property that is the subject of a charge;
- (e) any voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 or the Companies Act 1985 (except for the purposes of a bona fide internal reorganisation or amalgamation consented to by the Authority);
- (f) an administration order is made;
- (g) a breach of Clause 0 (*Assignment and Sub-contracting*) occurs;
- (h) a breach of Clause 0 occurs;
- (i) the abandonment of the Contract by the Contractor;
- (j) failure to obtain the Engineer's Declaration on or before the date falling 7 months after the Contractual Opening Date;
- (k) failure to provide 30 Available Prisoner Places within 3 months of the later of the Contractual Opening Date and the date on which the Engineer's Declaration is issued;
- (l) failure to provide 700 Available Prisoner Places within 6 months of the later of the Contractual Opening Date and the date on which the Engineer's Declaration is issued;
- (m) failure to provide 700 Available Prisoner Places and the Additional Prisoner Places which the Contractor is required to provide under the Contract for a continuous period of 20 days or more at any time after the Actual Full Operational Date;
- (n) not used;
- (o) failure to pay any liquidated damages in accordance with Clause 18 (*Liquidated Damages*) or 0 (*Additional Prisoner Places*) on or before the date falling 30 days after the due date (except where such failure results from a technical failure in the banking system);
- (p) any diligence, distress or execution of whatsoever nature being levied against any of the Contractor's assets and the amount in respect of which it is so levied is not paid or discharged within 14 days of receipt of a written notice from the Authority, or a judgement (except in the case where the Contractor has lodged a bona fide appeal against such judgement) against the Contractor in respect

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of an amount in excess of £250,000 Index Linked remains unsatisfied for more than 14 days after receipt of a written notice from the Authority, provided that any such written notice is served not earlier than 14 days after such diligence, distress or execution is levied or such judgement is made;

- (q) subject to Clause 0, a breach by the Contractor of its obligation to take out and maintain required insurances;
- (r) failure by the Contractor to deliver a duly completed declaration in the form contained in Schedule K to the Health and Safety Executive within 7 days of the Date of Signature (unless such failure is rectified within 7 days of notification from the Authority); or
- (s) any withdrawal, termination or derogation or attempted withdrawal, termination or derogation of the declaration delivered by the Contractor to the Health and Safety Executive under Clause 10.6 of this Contract, save where any such withdrawal, termination or derogation or attempted withdrawal, termination or derogation is necessitated by the replacement of the Contractor, or the appointment of a new Contractor, in accordance with Clause 0 (*Assignment and Subcontracting*);

**"Contractor Notice of Change"** has the meaning given in Clause 35A.2;

**"Contractor Related Party"** means the Contractor's agents and contractors (including without limitation the Construction Sub-contractor and the Operating Sub-contractor) and its or their subcontractors of any tier and its or their directors, officers, employees and workmen in relation to the Project and any person on or at the Site at the express or implied invitation of the Contractor (other than the Authority or any employee, agent or contractor of the Authority);

**"Contractor's Contract Manager"** means the representative of the Contractor performing the role of contract manager in respect of the Project, as notified to the Authority from time to time;

**"Contractor's Environmental Share"** means the sum of one million, two hundred thousand pounds (£1,200,000);

**"Contractor's Share"** means the percentage figure corresponding to the amount of Cumulative Capital Expenditure at the relevant time, as shown in the first column of the table set out below.

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| 1. Cumulative Capital Expenditure            | 2. Contractor's Share |
| 3. £0 – £0.3 million (inclusive)             | 4. 100%               |
| 5. £0.3 million to £0.7 million (inclusive)  | 6. 80%                |
| 7. £0.7 million to £1.0 million (inclusive)  | 8. 60%                |
| 9. £1.0 million to £1.5 million (inclusive)  | 10. 40%               |
| 11. £1.5 million to £2.0 million (inclusive) | 12. 20%               |
| 13. £2.0 million to £3.0 million (inclusive) | 14. 10%               |
| 15. £3.0 million and above                   | 16. 0%                |

provided that, in calculating the Contractor's Share of any Capital Expenditure to be borne by the Contractor, any Environmental Costs & Losses incurred or suffered by the Contractor pursuant to Clause 5A.1.1 shall be deemed to be Cumulative Capital Expenditure incurred solely by the Contractor;

**"Contractor Work Products"**

means all or any Work Products which have been created by or on behalf of the Contractor after the Date of Signature (whether or not incorporating any Existing Work Product) exclusively in the course of the design, construction, maintenance, operation or management of the Prison or otherwise in the provision of the Services;

**"Contractual Opening Date"**

means 12 December 2008, as the same may be amended pursuant to Clauses 17 (*Relief Events*) or 18 (*Compensation Events*);

**"Controller"**

means the person or persons appointed by the Authority from time to time as Controller of the Prison in accordance with section 107 of the Criminal Justice and Public Order Act 1994, and (where the context so permits) his duly appointed deputies;

**"Crown"**

includes the Authority;

**"Cumulative Capital Expenditure"**

**Capital**

means the aggregate of:

- (a) all Capital Expenditure that has been incurred as a result of each General Change in Law that has come into effect during the Services Period; and
- (b) the amount of Capital Expenditure that is agreed, or determined to be required, as a result of a General Change in Law under Clause 0 (*Qualifying Change in Law*);

**"Custodial Duties"**

means the "custodial duties" as defined in section 117(1) of the Criminal Justice and Public Order Act 1994 to be performed at the Prison as specified in and

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| <b>"Custodial Services"</b>  | pursuant to Schedule D;  |
| <b>"Daily Report"</b>        | means the performance of the Custodial Duties;   |
| <b>"Database"</b>            | means a written report, in the agreed form or as otherwise agreed between the Parties from time to time, to be delivered by the Contractor to the Authority in accordance with Clause 22.3;  |
| <b>"Date of Signature"</b>   | means the Authority's Prisoner Records application database, as the same may be amended from time to time, and any replacement for such database;  |
| <b>"Deemed New Contract"</b> | means 20 June 2006;  |
| <b>"Default Interest"</b>    | means an agreement on the same terms and conditions as this Contract, as at the Termination Date, but with the following amendments:<br>(a) if this Contract is terminated prior to the Contractual Opening Date and/or any date in the Phase-in Timetable and/or the Full Operation Date, then the Contractual Opening Date and/or any date in the Phase-in Timetable and/or the Full Operation Date shall be extended by a period to allow a New Contractor to achieve the Contractual Opening Date, any date in the Phase-in Timetable and/or the Full Operation Date (as the case may be);<br>(b) any accrued Performance Points and/or notices served under Clause 39 ( <i>Persistent Breach</i> ) shall be cancelled and any failures to provide Available Prisoner Places shall be disregarded; and<br>(c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date. |
| <b>"Delay Notice"</b>        | means any increased margin that is payable to the Senior Lenders or which accrues as a result of any payment due to the Senior Lenders not being made on the date on which it is due;  |
| <b>"Deposited Software"</b>  | means a written notice by the Contractor to the Authority under Clause 16.1;   |
| <b>"Direct Agreement"</b>    | means software, the Intellectual Property Rights in which are vested in a third party, which is used by the Contractor in connection with the provision of the Services and in respect of which the Authority reasonably requests the source code to be placed in escrow;  |
| <b>"Direct Shareholder"</b>  | means the direct agreement dated on or about the date of this Contract and made between the Authority, the Contractor and the Agent;   |
| <b>"Director"</b>            | means that person or those persons owning shares of any class in the Contractor, and a direct shareholding is the interest that the said Direct Shareholder derives from the shares;   |
|                              | means the person or persons appointed and employed   |

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- by the Contractor or the Operating Sub-contractor, and approved by the Authority, from time to time as Director of the Prison in accordance with section 107 of the Criminal Justice and Public Order Act 1994 and Clause 23 (*The Director*);
- "Disclosed Data"** means any information, documents, materials or data available or supplied to the Contractor, directly or indirectly, by or on behalf of the Authority related to the design or construction of the Works, the Site, the Services or any other matters which are or may be relevant to the Services or the obligations of the Contractor under this Contract, whether prepared by or on behalf of the Authority or by any consultant or contractor appointed by the Authority or otherwise;
- "Discriminatory Change in Law"** means a Change in Law, the terms of which apply expressly to:
- (a) the Project and not to similar projects procured under the PFI;
  - (b) the Contractor and not to other persons; and/or
  - (c) PFI Contractors and not to other persons.
- "Distribution"** means:
- (a) whether in cash or in kind, any:
    - (i) dividend or other distribution in respect of share capital;
    - (ii) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
    - (iii) payments under the Subordinated Financing Agreements (whether of principal, interest, breakage costs or otherwise);
    - (iv) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms;
    - (v) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms, or
  - (b) the early release of any Contingent Funding Liabilities, the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;
- "DPA"** means the Data Protection Act 1998.
- "EEA"** means from time to time the European Economic Area as created by The Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area;

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| <b>"Effective Date"</b>                        | means the Date of Signature;   |
| <b>"Engineers Declaration"</b>                 | means the certificate declaring that, in the opinion of the Independent Engineer, the Works have been completed in accordance with Schedule A, referred to in Clause 20.2;   |
| <b>"Environment"</b>                           | means any and all living organisms (including man), ecosystems, property and the media of air (including air in buildings, natural or man-made structures, below or above ground), water (including water within drains and sewers) and land (including any under any water as described above and whether above or below surface);  |
| <b>"Environmental Costs &amp; Losses"</b>      | means all losses, costs, expenses, demands, claims, liabilities and damages (including fines, penalties, legal and other professional fees and any third party actions or claims) arising from or in relation to any Hazardous Substances at, on, in, within or migrating to or from the Site including, without limitation:<br>(a) all reasonable costs and expenses incurred by the Contractor or its sub-contractors in carrying out any Remedial Action or which arise as a result of such Remedial Action being carried out; and<br>(b) any losses suffered by the Contractor arising under or pursuant to Schedule E of this Contract (including, without limitation, any reduction from the Contract Price as a result of the Contractor being unable to provide any Available Prisoner Places) as a result of the existence or effects of any Hazardous Substance or the requirement to carry out any Remedial Action; |
| <b>"Environmental Information Regulations"</b> | means the Environmental Information (Scotland) Regulations 2004 (S.S.I. 2004/520) together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant government department in relation to such regulations;   |
| <b>"Environmental Law"</b>                     | means all EU, national or local statutes, regulations, bylaws, orders, regulations or other law or subordinate legislation or common law, all orders, notices, ordinances, decrees or regulatory codes of practice, circulars, guidance notes and equivalent controls concerning the protection of human health or which have as a purpose or effect the protection of or prevention of harm to the Environment or health and safety;  |
| <b>"Equipment"</b>                             | means all, or any of, the fixtures, fittings, furnishings, plant, materials, machinery and other equipment specified in Schedule B, including, where the context so permits, any replacement or substitute fixtures, fittings, furnishings, plant, materials, machinery and  |

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|   | other equipment and any additions, extensions or alterations thereto, supplied to or installed at or otherwise in or on the Prison from time to time and all other fixtures, fittings, furnishings, plant, materials, machinery and other equipment supplied to or installed at or otherwise in or on the Prison and necessary for the delivery of the Services from time to time;  |
| <b>“Equity IRR”</b>                           | means the projected blended rate of return to the Relevant Persons over the full term of the Contract, having regard to Distributions made and projected to be made;  |
| <b>"Equity Subscription Agreement"</b>        | means the agreement so named and entered into between the Contractor and the Shareholders (among others);   |
| <b>“Estimated Change in Project Costs”</b>    | means in relation to Clause 18 ( <i>Compensation Events</i> ), Clause 0 ( <i>Authority Changes</i> ) and Clause 0 ( <i>Change in Law</i> ) the aggregate of any estimated increased construction costs, operating costs and financing costs less the aggregate of any reduced construction costs, operating costs and financing costs;  |
| <b>“Estimated Fair Value of the Contract”</b> | means the amount determined in accordance with Clause 0 ( <i>No Retendering Procedure</i> ) that a third party would pay to the Authority as the market value of the Deemed New Contract.   |
| <b>"Exceptional Cost"</b>                     | means, for an Insurance Review Period, the extent to which there is an Insurance Cost Increase which exceeds in amount 30% of the Base Relevant Insurance Cost for that Insurance Review Period;  |
| <b>"Exceptional Saving"</b>                   | means, for an Insurance Review Period, the extent to which there is an Insurance Cost Decrease which exceeds in amount 30% of the Base Relevant Insurance Cost for that Insurance Review Period;  |
| <b>“Exempt Refinancing”</b>                   | means: <ul style="list-style-type: none"><li>(a) any Refinancing that was fully taken into account in the calculation of the Unitary Charge;</li><li>(b) a change in taxation or change in accounting treatment;</li><li>(c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:<ul style="list-style-type: none"><li>(i) breach of representations and warranties or undertakings;</li><li>(ii) movement of monies between the Project Accounts in accordance with the terms of the Senior Financing Agreements as at Financial Close;</li><li>(iii) late or non-provision of information, consents or licences;</li></ul></li></ul> |

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- (iv) amendments to Sub-contracts;
  - (v) approval of revised technical and economic assumptions for financial model
  - (vi) runs (to the extent required for forecasts under the Financing Agreements)
  - (vii) restrictions imposed by the Senior Lenders on the dates at which the Senior Debt can be advanced to the Contractor under the Senior Financing Agreements and/or amounts released from the Revenue Account during the Availability Period, (each as defined in the Credit Agreement) and which are given as a result of any failure by the Contractor to ensure that the construction work is performed in accordance with the agreed construction programme and which are notified in writing by the Contractor or the Senior Lenders to the Authority prior to being given;
  - (viii) changes to milestones for drawdown and/or amounts released from the Revenue Account during the Availability Period (each as defined in the Credit Agreement) and which are given as a result of any failure by the Contractor to ensure that construction work is performed in accordance with the agreed construction programme and which are notified in writing by the Contractor or the Senior Lenders to the Authority prior to being given;
  - (ix) failure by the Contractor to obtain any consent by statutory bodies required by the Senior Financing Agreements; or
  - (x) voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Financing Agreements;
- (d) any amendment, variation or supplement of any agreement (other than any Subordinated Financing Agreement) approved by the Authority as part of any Qualifying Variation under this Contract;
- (e) any sale of shares in the Contractor by the shareholders or securitisation of the existing rights and/or interests attaching to shares in the Contractor;
- (f) any sale or transfer of the Subordinated Lenders' existing rights and/or interests under the

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|                                      | Subordinated Financing Agreements or securitisation of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements; or  |
|                                      | (g) any Qualifying Bank Transaction.   |
| <b>"Existing Work Product"</b>       | means any Work Product used in the provision of the Works or the Services in relation to which the Intellectual Property Rights are owned by, or licensed to, the Contractor or any Sub-contractor as at the Date of Signature;  |
| <b>"Expiry Date"</b>                 | means 11 December 2033;  |
| <b>"Extended Sentence"</b>           | means a sentence imposed on a Prisoner under section 210A of the Criminal Procedure (Scotland) Act 1995;   |
| <b>"Facilities"</b>                  | means the Prison and any training, catering or other facilities of the Contractor or the Operating Sub-contractor used in the provision of the Services, and such other facilities of any other Sub-contractor;  |
| <b>"Fair Value"</b>                  | means the amount at which an asset or liability could be exchanged in an arms length transaction between informed and willing parties, other than in a forced or liquidation sale.   |
| <b>"Fees Regulations"</b>            | means the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004;   |
| <b>"Financial Close"</b>             | has the meaning given to it in the Senior Financing Agreements;  |
| <b>"Financial Model"</b>             | means the financial model in the agreed form (as updated from time to time in accordance with the terms of this Contract unless indicated otherwise);  |
| <b>"Financing Agreements"</b>        | means all or any of the agreements or instruments entered into or to be entered into by the Contractor or any of its Associated Companies relating to the financing of the Project (including the Initial Financing Agreements and any agreements or instruments to be entered into by the Contractor or any of its Associated Companies relating to the rescheduling of their indebtedness or any Refinancing); |
| <b>"First Insurance Review Date"</b> | means the first Business Day following the first anniversary of the Relevant Insurance Inception Date;   |
| <b>"FOISA"</b>                       | means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under this Act from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner in relation to such legislation;  |
| <b>"Force Majeure Event"</b>         | means the occurrence after the date of Contract of:<br>(a) war, civil war, armed conflict or terrorism; or<br>(b) nuclear, chemical or biological contamination unless the source or cause of the contamination is the result of actions of the Contractor; or   |

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|   | <p>(c) pressure waves caused by devices travelling at supersonic speeds, which directly causes either Party (the “Affected Party”) to be unable to comply with all or a material part of its obligations under this Contract.</p>   |
| <b>"Full Operation Date"</b>            | means 6 March 2009, as the same may be altered pursuant to Clauses 17 ( <i>Relief Events</i> ) and 18 ( <i>Compensation Events</i> );   |
| <b>“General Change in Law”</b>          | means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law.  |
| <b>"Good Industry Practice"</b>         | means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced building contractor or operator of custodial facilities (as appropriate) complying in good faith with its contractual obligations and all Legislation and engaged in the same type of undertaking and under the same or similar circumstances and contractual conditions as is the Contractor under this Contract; |
| <b>"Governor"</b>                       | means member of staff of the Scottish Administration appointed by the Authority from time to time under section 111(2) of the Criminal Justice and Public Order Act 1994 to act as governor of the Prison;  |
| <b>“Guidance”</b>                       | means any applicable guidance or directions with which the Contractor is bound to comply;   |
| <b>"Hazardous Substance"</b>            | means any natural or artificial substance (whether solid, liquid, gas, noise, ion, vapour, electromagnetic or radiation, and whether alone or in combination with any other substance) in soil, sub-strata, groundwater, surface water or within underground pipes, equipment or drains which is capable of causing harm to or having a deleterious effect on the Environment;  |
| <b>“Highest Compliant Tender Price”</b> | means the price offered by the Compliant Tenderer (if any) with the highest tender price and, if no Compliant Tenders are received, zero;   |
| <b>“Holding Company”</b>                | has the meaning given to it in section 736 of the Companies Act 1985, as amended by section 144 of the Companies Act 1989;  |
| <b>“Holdco”</b>                         | means Addiewell Prison (Holdings) Limited (Company Number SC291481) having its registered office at 35 North Canal Bank Street, Glasgow G4 9XQ;   |
| <b>"Independent Engineer"</b>           | means the person or firm appointed by the Authority to act as an independent engineer for the purposes of the Contract, or such other similarly qualified and experienced person or firm so appointed from time to time by the Authority as a replacement for such person or firm, and all references to the Independent Engineer shall be deemed to include any agents, employees or representatives of any person or firm so appointed to                                       |

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| <b>"Indirect Shareholder"</b>         | act as Independent Engineer by the Authority;<br>means that person or those persons owning shares of any class in the Direct Shareholder and any indirect shareholding is the interest that the said Indirect Shareholder derives from its shares;   |
| <b>"Information"</b>                  | has the meaning given under section 73 of the Freedom of Information (Scotland) Act 2002;  |
| <b>"Initial Financing Agreements"</b> | means the Financing Agreements put in place upon signature of this Contract and listed in Schedule Q;  |
| <b>"Insurance Cost Decrease"</b>      | means the Insurance Cost Differential if the value thereof is less than zero, multiplied by minus one;   |
| <b>"Insurance Cost Differential"</b>  | shall, subject to the Insurance Review Procedure, be determined as follows:-<br>Insurance Cost Differential = (ARIC - BRIC) - ( $\pm$ PIC)<br>where:<br>ARIC is the Actual Relevant Insurance Cost<br>BRIC is the Base Relevant Insurance Cost<br>PIC is any Project Insurance Change;   |
| <b>"Insurance Cost Increase"</b>      | means the Insurance Cost Differential if the value thereof is greater than zero;   |
| <b>"Insurance Cost Index"</b>         | means any index introduced by the United Kingdom Government or the Office of National Statistics after the Date of Signature and which is anticipated to be published annually to provide an independent and objective measure of changes in prevailing market insurance costs;  |
| <b>"Insurance Review Date"</b>        | means the First Insurance Review Date and, thereafter, each date falling on the second anniversary of the previous Insurance Review Date, except where such date lies beyond the end of the Contract Period, in which case the Insurance Review Date shall be the last renewal date of the Relevant Insurance prior to the end of the Contract Period;   |
| <b>"Insurance Review Period"</b>      | means a two year period from the Relevant Insurance Inception Date and each subsequent two year period commencing on the second anniversary of the Relevant Insurance Inception Date except where the end of such period lies beyond the end of the Contract Period, in which case the Insurance Review Period shall be the period from the end of the penultimate Insurance Review Period to the last day of the Contract Period; |
| <b>"Insurance Review Procedure"</b>   | means the procedure set out in Clauses 55.5.1 to 55.5.4;   |
| <b>"Insurance Term"</b>               | means any term and/or condition required to be included in a policy of insurance by Clause 0 and/or Schedule N but excluding any risk;   |
| <b>"Insurance Undertaking"</b>        | has the meaning given in the rules from time to time of the Financial Services Authority;  |

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| <b>"Intellectual Property Rights"</b>    | means any design right, moral right, goodwill, copyright, patent, service mark, trade mark, utility mark, performing right, know-how, semi-conductor topography right, database right, trade secrets and rights of confidence and all other intellectual property protection or rights of a similar nature or having equivalent or similar effect which may subsist or be enforceable at present or in the future in any part of the world, whether or not any of them are registered and including any applications for any of them;   |
| <b>"Irremediable Contractor Default"</b> | means a Contractor Default which is not a Remediable Contractor Default;  |
| <b>"Joint Insurance Account"</b>         | means the joint bank account in the names of the Authority and the Contractor, having account number , sort code and held with The Royal Bank of Scotland plc;  |
| <b>"Joint Insurance Cost Report"</b>     | has the meaning given to it in Clause 55.5.2;   |
| <b>"Judicial Review"</b>                 | means a judicial review under Chapter 58 (Applications for Judicial Review) of the Rules of the Court of Session (whether or not such particular reference to the Rules of Court is made);  |
| <b>"Junior Debt"</b>                     | means all amounts outstanding at the Termination Date under the Subordinated Financing Agreements;  |
| <b>"Land"</b>                            | means the land and premises more particularly defined as the Premises in the Lease;   |
| <b>"Lease"</b>                           | means the lease of even date herewith entered into by the Authority and the Contractor;   |
| <b>"Legislation"</b>                     | means: <ul style="list-style-type: none"><li>(a) any Act of Parliament (including the Scottish Parliament);</li><li>(b) subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978;</li><li>(c) any exercise of the Royal Prerogative; and</li><li>(d) any enforceable community right within the meaning of Section 2 of the European Communities Act 1972, in each case in the United Kingdom</li></ul>   |
| <b>"Legitimately Out of Circulation"</b> | means that a Prisoner: <ul style="list-style-type: none"><li>(a) is properly located in the separation and care unit of the Prison; or</li><li>(b) is legitimately away from the Prison; or</li><li>(c) is assessed as medically unfit to participate in a specific activity or is attending a medical appointment in the Prison; or</li><li>(d) has a legitimate adjudication award which restricts time out of Cell; or</li><li>(e) has been segregated, as approved by the Controller, under a Prison Rule; or</li><li>(f) has been properly and temporarily confined to</li></ul> |

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|   | his Cell under a Prison Rule by a Prisoner Custody Officer;   |
| <b>“Liquid Market”</b>                              | means that there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for PFI contracts or similar contracts for the provision of services (in each case the same as or similar to the Contract) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Lenders specifically for the purposes of this Project and to which this Contract may be novated shall be discounted in assessing whether there are sufficient willing bidders in the market for such purposes.   |
| <b>"Local Authority"</b>                            | means a Council constituted under section 2 of the Local Government etc. (Scotland) Act 1994;   |
| <b>"Long Term Prisoner"</b>                         | has the meaning given in the Prisons and Young Offenders Institutions (Scotland) Rules 2006;  |
| <b>"Losses"</b>                                     | means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or at common law or in connection with judgments, proceedings, internal costs or demands;  |
| <b>"Mandatory Notice of Change"</b>                 | has the meaning given in Clause 0;  |
| <b>“Market Value Availability Deduction Amount”</b> | means for any month or part of a month, an amount equal to the availability deduction that was made to the Contract Price in the month immediately preceding the Termination Date (the "Termination Month") being:<br>(i) the aggregate of the daily availability deductions for each day of the Termination Month, such daily availability deductions being calculated for each day according to the following formula:<br>$(700 - A) \times C$<br>where:<br>A, in respect of the relevant day of the Termination Month, has the same meaning as given in paragraph 3 of Schedule E; and<br>C, in respect of the relevant day of the Termination Month, has the same meaning as given in paragraph 3 of Schedule E;<br>less<br>(ii) an amount equal to any availability deduction that was made for an Available Prisoner Place which was unavailable at the Termination Date but which has subsequently become available whether as a result of the Authority incurring |

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| <b>“Maximum Contract Price”</b>                 | Rectification Costs or otherwise;<br>means, in respect of a month, the Contract Price payable during that month for 700 Available Prisoner Places before any deductions under Clause 0 ( <i>Performance Measures</i> ) but allowing for indexation under Schedule E;   |
| <b>"Minimum Requirements"</b>                   | means, in relation to a Prisoner Place, the requirements set out in Part 2 of Schedule D;  |
| <b>"Mission Statement"</b>                      | means the Mission Statement, or any similar statement of general goals, published by the Authority from time to time in relation to its functions as prisons authority;  |
| <b>"Named Representative of the Authority"</b>  | means the Chief Executive of the Scottish Prison Service, or the holder of any post as head of the prison service in Scotland which may be created in place of such post, and such other representatives of the Authority as such Chief Executive or the holder of such post may from time to time notify to the Contractor in writing (the names of such other representatives as at the Effective Date being specified in Schedule I, which shall be deemed to be notification to the Contractor by such Chief Executive for the purposes of this provision);  |
| <b>"Named Representative of the Contractor"</b> | means the person specified in Schedule I as being the named representative of the Contractor, and such other persons as the Contractor may from time to time notify to the Authority in writing;   |
| <b>“Net Present Value”</b>                      | means the aggregate of the discounted values, calculated as of the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;   |
| <b>“New Contract”</b>                           | means an agreement on the same terms and conditions as this Contract at the Termination Date, but with the following amendments:<br>(a) if this Contract is terminated prior to the Contractual Opening Date, any date in the Phase-In Timetable and/or the Full Operation Date then the Contractual Opening Date, and/or any date in the Phase-In Timetable and/or the Full Operation Date shall be extended by a period to allow a New Contractor to achieve the Contractual Opening Date, any date in the Phase-In Timetable and/or the Full Operation Date;<br>(b) any accrued Performance Points and/or notices served under Clause 39 ( <i>Persistent Breach</i> ) shall be cancelled and any failures to provide Available Prisoner Places shall be disregarded;<br>(c) the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date; and<br>(d) any other amendments which do not adversely |

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|                                   |               | affect the Contractor;  |
| <b>“New Contractor”</b>           |               | means the person who has entered or who will enter into the New Contract with the Authority;  |
| <b>"Notice"</b>                   |               | means any agreement, approval, certificate, consent, instruction, notice, permission expression of satisfaction or other document or communication required or permitted to be given or served under this Contract;   |
| <b>“Notice Date”</b>              |               | means the later of the Termination Date and (if applicable) the date that the Adjusted Estimated Fair Vale of the Contract is agreed between the Parties pursuant to Clause 0 ( <i>No Retendering</i> );  |
| <b>"Operating Sub-contract"</b>   |               | means the agreement dated on or about the date of this Contract between the Contractor and the Operating Sub-contractor in respect of the provision of the Services to be provided by the Contractor;   |
| <b>"Operating Sub-contractor"</b> |               | means UK Detention Services Limited (Company Number 02147491) having its registered office at 12 <sup>th</sup> Floor Capital House, 25 Chapel Street, London NW1 5DH or, subject to the provisions of Clause 0 ( <i>Assignment and Subcontracting</i> ), such other sub-contractor as may be appointed by the Contractor from time to time to perform the Services (other than those undertaken by the Construction Sub-contractor in its capacity as such);              |
| <b>"Operational Procedures"</b>   |               | means the Operational Proposals as approved by the Authority in accordance with Clause 12.4 as amended from time to time in accordance with Clause 12.5;  |
| <b>"Operational Proposals"</b>    |               | means the Contractor's proposals for the performance of the Services as listed in Schedule G to this Contract, to be provided to the Authority by the Contractor in accordance with Clause 12 ( <i>Preparation for Operation of the Prison</i> );   |
| <b>“Original Commitment”</b>      | <b>Senior</b> | means the amount committed under the Senior Financing Agreements as at Financial Close as adjusted to take into account any Qualifying Variation (but excluding in respect of any such adjustment the Contractor's Share in respect of any General Change in Law);  |
| <b>“Outline Approvals”</b>        |               | means:<br>(a) the decision of West Lothian Council dated 18 May 2004 whereby the Authority was granted outline clearance under the Scottish Development Department Circular No. 21/1984 (“Crown Land and Crown Development”) to proceed with the development of the Prison in accordance with the notice of proposed development served by the Authority on West Lothian Council in respect of such development; and<br>(b) the decision of West Lothian Council dated 12 |

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November 2004 whereby the Authority was granted outline planning permission under the Town and Country Planning (Scotland) Act 1997 to proceed with the development of the Prison in respect of its planning application;

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| <b>"Parties"</b>                                     | means the Authority and the Contractor;  |
| <b>"Performance Measure"</b>                         | means an event or circumstance listed as such in Schedule F;   |
| <b>"Performance Point"</b>                           | means each point accruing on the occurrence of a Performance Measure, as more particularly set out in Schedule F;  |
| <b>"Performance Points Annual Baseline Total"</b>    | means, for any Performance Year, the relevant number of Performance Points indicated in the table contained in paragraph 3 of Schedule F;  |
| <b>"Performance Points Quarterly Baseline Total"</b> | means, for any Performance Quarter, 25% of the Performance Points Annual Baseline Total for the Performance Year in which the Performance Quarter falls, subject to adjustment in accordance with paragraph 4 of Schedule F;   |
| <b>"Performance Quarter"</b>                         | means the period commencing on the Actual Opening Date and ending 3 months thereafter, each consecutive period of 3 months thereafter, and any shorter period commencing on a day following the end of Performance Quarter and ending on the expiry or termination of this Contract;   |
| <b>"Performance Year"</b>                            | means the year commencing on the Actual Opening Date and each year commencing on each anniversary of the Actual Opening Date;  |
| <b>"Permitted Borrowing"</b>                         | means, without double counting, any:<br>(a) advance to the Contractor under the Senior Financing Agreements, provided that such advance is not made under any Change in Law Facility;<br>(b) Additional Permitted Borrowing notified to the Authority in accordance with Clause 4.2.3;<br>(c) advance to the Contractor under the Change in Law Facility which is made solely for the purpose of funding capital expenditure arising as a result of Clause 0 ( <i>Change in Law</i> ); and<br>(d) interest and, in respect of the Initial Financing Agreements only (prior to any subsequent amendment), other amounts accrued or payable under the terms of the Senior Financing Agreements,<br>except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing; |
| <b>"Persistent Breach"</b>                           | means a breach (other than a breach for which Performance Points could have been awarded under   |

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|   | <p>Clause 0 or a breach which could have resulted in a loss of Available Prisoner Places and therefore a loss under Schedule E) which has continued or recurred within 6 months after the date on which a final warning notice referred to in Clause 0 (<i>Persistent Breach</i>) is served on the Contractor;</p>  |
| <b>“Personal Data”</b>                    | <p>means personal data as defined in the DPA which is supplied to the Contractor by the Authority or obtained by the Contractor in the course of performing the Services.</p>   |
| <b>“PFI”</b>                              | <p>means the Government’s Private Finance Initiative or any similar or replacement initiative;</p>  |
| <b>“PFI Contractor”</b>                   | <p>means a person that has contracted with the Government, a local authority or other public or statutory body to provide services under the PFI;</p>   |
| <b>"Phase-in Timetable"</b>               | <p>means the phase-in timetable set out in paragraph 4 of Schedule E, as the same may be amended from time to time in accordance with Clauses 17 (<i>Relief Events</i>) and 18 (<i>Compensation Events</i>);</p>  |
| <b>"Plan"</b>                             | <p>means the plan annexed to the Lease;</p>   |
| <b>"Planning Approval"</b>                | <p>means such planning permission under the Town and Country Planning (Scotland) Act 1997 or any other Legislation as is necessary for the Contractor to discharge lawfully its obligations under the Contract, including, without prejudice to the generality of the foregoing, planning permission for the reserved matters and all other matters not covered by the Outline Approvals;</p>   |
| <b>"Portfolio Cost Saving"</b>            | <p>means any insurance cost saving which arises from the Contractor changing the placement of the Required Insurances from being on a stand-alone project-specific basis assumed at Financial Close and reflected in the Base Cost, to being on the basis of a policy (or policies) also covering risks on other projects or other matters which are outside the scope of the Project so as to benefit from portfolio savings. A Portfolio Cost Saving is defined to be a positive sum and cannot be less than zero;</p>  |
| <b>“Post Termination Services Amount”</b> | <p>means for the purposes of Clause 0 (<i>Retendering Procedure</i>), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Contract Price which would have been payable in that month under the Contract had the Contract not been terminated, less an amount equal to the aggregate of:</p> <ul style="list-style-type: none"><li>(a) the Market Value Availability Deduction Amount for that month;</li><li>(b) the Rectification Costs incurred by the Authority in that month; and</li><li>(c) (where relevant), the amount by which the Post</li></ul> |

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|                                   |                  | Termination Services Amount for the previous month was less than zero.   |
| <b>“Pre-Refinancing IRR”</b>      | <b>Equity</b>    | means the nominal post-tax Equity IRR calculated immediately prior to the Refinancing.   |
| <b>“Prescribed Rate”</b>          |                  | means 2% per annum above the base rate from time to time of The Royal Bank of Scotland plc;  |
| <b>“Prison”</b>                   |                  | means the prison constructed, or to be constructed, by the Contractor in accordance with Schedule A including, without limitation, all of the buildings and structures to be constructed on the Land as part of such prison, each and any of the component parts of such buildings and structures and the Equipment, together with any extensions and alterations made thereto from time to time;  |
| <b>“Prisoner Custody Officer”</b> |                  | means a person in respect of whom a certificate is for the time being in force certifying that he has been approved by the Authority for the purpose of performing the Custodial Services in accordance with section 114 of the Criminal Justice and Public Order Act 1994 and Clause 24 ( <i>Prisoner Custody Officers</i> );   |
| <b>“Prisoner Escort Services”</b> |                  | shall have the same meaning as that given to "prisoner escort arrangements" by section 102 (4) of the Criminal Justice and Public Order Act 1994;  |
| <b>“Prison Rules”</b>             |                  | means the Prison and Young Offenders Institutions (Scotland) Rules 2006 (as amended, replaced, consolidated or re-enacted from time to time) and references to "Rule" shall be construed accordingly;  |
| <b>“Prison Sector Market”</b>     | <b>Insurance</b> | means the insurance market which insures the majority of all prison PFI/PPP projects involving the provision of equivalent services (as determined by the number of such PFI/PPP projects). At the date of this Contract, the Prison Sector Insurance Market is in the United Kingdom;   |
| <b>“Prisoner”</b>                 |                  | means any male person for the time being detained in legal custody as a result of a requirement imposed by a court or otherwise that he be so detained;  |
| <b>“Prisoner Place”</b>           |                  | means a unit of accommodation for occupation by a Prisoner in a Cell (other than in a Cell which is a segregation unit or any cell set aside for healthcare);  |
| <b>“Prohibited Act”</b>           |                  | means: <ul style="list-style-type: none"><li>(a) offering giving or agreeing to give to any servant of the Authority or the Scottish Ministers any gift or consideration of any kind as an inducement or reward:<ul style="list-style-type: none"><li>(i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Contract or any other contract with the Authority or the Scottish Ministers; or</li><li>(ii) for showing or not showing favour or</li></ul></li></ul> |

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disfavour to any person in relation to this Contract or any other contract with the Authority;

- b) entering into this Contract or any other contract with the Authority or the Scottish Ministers in connection with which commission has been paid or has been agreed to be paid by the Contractor or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Authority;
- (c) committing any offence:
  - (i) under the Prevention of Corruption Acts 1889–1916;
  - (ii) under Legislation creating offences in respect of fraudulent acts, or
  - (iii) at common law in respect of fraudulent acts in relation to this Contract or any other contract with the Authority or the Scottish Ministers; or

(d) defrauding or attempting to defraud or conspiring to defraud the Authority or the Scottish Ministers.

**“Project”**

means the design, construction, management and finance of the Prison as contemplated by this Contract including the carrying out of the Works and the provision of the Services;

**“Project Accounts”**

means accounts referred to in and required to be established under the Senior Financing Agreements

**“Project Documents”**

means the Construction Sub-contract, Operating Sub-contract and the Financing Agreements;

**"Project Insurance Change"**

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

- (a) the claims history or re-rating of the Contractor or any Contractor Related Party;
- (b) the effect of any change in deductible unless the following applies:-
  - (i) such change is attributable to circumstances generally prevailing in either the Relevant Insurance Market or the Prison Sector Insurance Market; and
  - (ii) the deductible, further to such change, is either greater than or equal to the maximum in Schedule N (*Insurance*);
- (c) any other issue or factor other than circumstances generally prevailing in either the Relevant Insurance Market or the Prison Sector

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Insurance Market, except for any Portfolio Cost Saving

**"Qualification Criteria"**

For the purpose of determining the Insurance Cost Differential, in the event that there is a net increase, the Project Insurance Change shall have a positive value. In the event that there is a net decrease the Project Insurance Change shall have a negative value; means the criteria that the Authority requires tenderers to meet as part of the tender process which (subject to compliance with Legislation) shall include a requirement for all tenderers to submit a declaration that they have not colluded with any other tenderers, or third party who does not form part of the tenderer's response, in connection with the submission of their tender response;

**"Qualifying Bank"**

means a bank that is authorised by the Financial Services Authority to accept deposits in the United Kingdom.

**"Qualifying Transaction"**

**Bank**

means:

- (a) the syndication by a Senior Lender, in the ordinary course of its business, of any of its rights or interests in the Senior Financing Agreements;
- (b) the grant by a Senior Lender of any rights of participation, or the disposition by a Senior Lender of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Senior Financing Agreements in favour of (i) any other Senior Lender (ii) any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state (iii) a local authority or public authority (iv) a trustee of a charitable trust which has (or has had at any time during the previous two years) assets of at least £10 million (or its equivalent in any other currency at the relevant time) (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two years) at least 50 members and assets under management of at least £10 million (or its equivalent in any other currency at the relevant time) (vi) an EEA or Swiss Insurance Undertaking (vii) a Regulated Collective Investment Scheme; or (viii) any other institution in respect of which the prior written consent of

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- the Authority has been given;
- (c) the grant by a Senior Lender of any other form of benefit or interest in either the Senior Financing Agreements or the revenues or assets of the Contractor, whether by way of security or otherwise, in favour of (i) any other Senior Lender (ii) any institution specified in paragraphs (b)(ii) to (vii) above or (iii) any other institution in respect of which the prior written consent of the Authority has been given;

**“Qualifying Change in Law”**

means:

- (a) a Discriminatory Change in Law;
- (b) a Specific Change in Law; and/or
- (c) a General Change in Law which comes into effect during the Contract Period and which involves Capital Expenditure;

which was not foreseeable at the date of this Contract; means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing“.

**“Qualifying Refinancing”**

**"Qualifying Variation"**

means any Authority Change, Contractor Change or Qualifying Change in Law;

**"Rectification Costs”**

means, for the purposes of any Termination Date that occurs during the Contract Period, an amount equal to the reasonable and proper costs incurred by the Authority in a particular month or part of a month in ensuring that the Services are available.

**“Refinancing”**

means:

- (a) any amendment, variation, novation, supplement or replacement of any Financing Agreement (other than any Subordinated Financing Agreement);
- (b) the exercise of any right, or the grant of any waiver or consent, under any Financing Agreement (other than any Subordinated Financing Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Financing Agreements (other than the Subordinated Financing Agreements) or the creation or granting of any other form of benefit or interest in either the Financing Agreements (other than the Subordinated Financing Agreements) or the contracts, revenues or assets of the Contractor whether by way of security or otherwise; or
- (d) any other arrangement put in place by the Contractor or another person which has an effect which is similar to any of (a)-(c) above or which has the effect of limiting the Contractor’s ability

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to carry out any of (a)–(c) above.

**“Refinancing Gain”**

means an amount equal to the greater of zero and  $[(A - B) - C]$ , where:

A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Contract following the Refinancing;

B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Contract following the Refinancing; and

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR.

**“Regulated Collective Investment Scheme”**

has the meaning given in the rules from time to time of the Financial Services Authority;

**“Relevant Assumptions”**

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

**“Relevant Authority”**

means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom or of the European Union;

**“Relevant Insurance”**

means the Required Insurance and any other insurances as may be required by law other than:

- (a) Construction Period Insurance, and
- (b) Business interruption Insurance except to the extent that it relates to Unavoidable Fixed Costs;

**“Relevant Insurance Inception Date”**

means the date on which the Relevant Insurance is first providing active insurance cover to the

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|  | Contractor, being a date no earlier than the Actual Opening Date;  |
| <b>"Relevant Insurance Market"</b>               | means the insurance market which insures the majority of all PFI projects across all of the PFI sectors (as determined by the number of PFI projects). At the date of this Contract, the Relevant Insurance Market is in the United Kingdom insurance market;  |
| <b>"Relevant Person"</b>                         | means a Shareholder and any of its Affiliates.   |
| <b>"Relief Event"</b>                            | means: <ul style="list-style-type: none"><li>(a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion;</li><li>(b) failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;</li><li>(c) any accidental loss or damage to the Site or any roads servicing it;</li><li>(d) any failure or shortage of power, fuel or transport;</li><li>(e) any blockade or embargo which does not constitute a Force Majeure Event; and</li><li>(f) any:<ul style="list-style-type: none"><li>(i) official or unofficial strike;</li><li>(ii) lockout;</li><li>(iii) go-slow; or</li><li>(iv) other dispute, generally affecting the construction, building, maintenance, facilities management or custodial services industries or a significant sector of one of them,</li></ul></li></ul> unless any of the events listed in paragraphs (a) to (f) inclusive arises (directly or indirectly) as a result of any wilful default or wilful act of the Contractor or any of its sub-contractors. |
| <b>"Remediable Contractor Default"</b>           | means an event of the type described in paragraphs (a), (ai), (m) or (o) of the definition of Contractor Default;  |
| <b>"Remedial Action"</b>                         | means any steps reasonably necessary for limiting, removing, remedying, cleaning up, abating, containing, preventing or ameliorating damage to the Environment or carrying out such investigative or monitoring work as is reasonably required in relation thereto;  |
| <b>"Reporting Failure" Required Work Product</b> | has the meaning given in Clause 33.1;<br>means any Third Party Existing Work Product to which the Contractor knows, acting reasonably, that the Authority will require (and which it has a right to require pursuant to this Contract) its own staff to access and use during the Contract Period;   |

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- "Requests for Information"** has the meaning set out in the FOISA or the Environmental Information Regulations as relevant (where the meaning set out for the term "request" shall apply);
- "Required Insurance"** means the Insurance referred to in Schedule N;
- "Retail Price Index" or "RPI"** means the All Items Retail Prices Index (excluding mortgage interest payments) (RPIx) as published in the Focus on Consumer Price Indices by the Office of National Statistics, or any index that replaces it or, in the absence of a replacement index, such other index as the Parties may agree or, in the absence of such agreement, as determined in accordance with Clause 76 (*Dispute Resolution*);
- "Revised Senior Debt Termination Amount"** means, subject to Clause 4.2 (*Changes to Financing Agreements*)
- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the Contractor to the Senior Lenders under the Senior Financing Agreements including in respect of Permitted Borrowing other than any such amounts that are in respect of Additional Permitted Borrowings;
  - (b) all amounts of Additional Permitted Borrowings (but only to the extent that they have been notified to the Authority in accordance with Clause 4.2.3) including interest but excluding Default Interest outstanding at the Termination Date, including such Additional Permitted Borrowings accrued at that date; and
  - (c) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Contractor to the Senior Lenders as a result of a prepayment under the Senior Financing Agreements including in respect of Permitted Borrowing, subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible, less, to the extent it is a positive amount, the aggregate of (without doubt counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below) :
    - (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account held by or on behalf of the Contractor) on the Termination Date;
    - (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
    - (iii) all amounts, including costs of early termination of interest rate hedging

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arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding under the Senior Financing Agreements including in respect of Permitted Borrowing;

(iv) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have; and

(v) all APB Distributions;

**"Security Information"** means information designated as such by the Parties from time to time;

**"Senior Debt"** means the financing provided by the Senior Lenders under the Senior Financing Agreements;

**"Senior Debt Rate"** means the non-default interest rate calculated in respect of Term Advances (as defined in the Credit Agreement) in accordance with Clauses 7.2 and 7.3.2 of the Credit Agreement or such other lower rate as the Parties may agree;

**"Senior Agreements"** **Financing** means the Initial Financing Agreements as at the date of this Contract or as amended with (save where permitted under Clause 3 of this Contract) the prior written approval of the Authority;

**"Senior Lender"** means a person providing finance to the Contractor under the Senior Financing Agreements or the arranger, agent, security trustee or account bank in respect of such finance;

**"Services"** means the services required to satisfy the provisions of Schedule C and Schedule D;

**"Sex Offender"** means any Prisoner convicted at any time of a sexual offence as defined in the Sexual Offences Act 2003 or Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005;

**"Shareholders"** means, from time to time, the Direct Shareholders and the Indirect Shareholders;

**"Short Term Prisoner"** has the meaning given in the Prisons and Young Offenders Institutions (Scotland) Rules 2006;

**"Site"** means all of the Land together with any buildings or structures, and parts of buildings or structures, and each and any of their component parts, whether temporary or permanent, which may exist thereupon from time to time;

**"Specific Change in Law"** means any Change in Law which specifically refers to the design, construction, financing or operation of prisons or to the holding of shares in companies whose main business is the design, construction, financing or operation of prisons;

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**"Staff"**

means:

- (a) any person engaged at any time upon any matters relating to security at the Prison; and
- (b) any employees of the Contractor or any sub-contractor who does any work or performs any duties, whether at the Prison or Site or otherwise, arising out of or in connection with the performance of the Services at any time after the Actual Opening Date, including, for the avoidance of doubt, the Director and the Prisoner Custody Officers,

and "Member of Staff" shall mean any employee falling into either of the above categories;

**"Sub-contract"**

means any contract between the Contractor and any sub-contractor and, where the context so permits, any contract between any such sub-contractor and any person to whom that sub-contractor has further sub-contracted any obligation which it may have under this Contract;

**"Sub-Contractor"**

means the Construction Sub-contractor, the Operating Sub-contractor and any other person (excluding, for the avoidance of doubt, the Funders) to whom the Contractor has sub-contracted the performance of any obligation which it may have under the Contract;

**"Sub-Contractor Breakage Costs"**

means Losses that have been or will be reasonably and properly incurred by the Contractor as a direct result of the termination of this Contract, but only to the extent that:

- (a) the Losses are incurred in connection with the Project and in respect of the provision of the Services or the completion of the Works, including:
  - (i) any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred;
  - (ii) any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
  - (iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project; and
  - (iv) redundancy payments; and
- (b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms; and
- (c) the Contractor and the relevant Sub-Contractor has each used its reasonable endeavors to mitigate the Losses;

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|                                   |                   |  |
|-----------------------------------|-------------------|--|
| <b>"Sub-Contractor's Product"</b> | <b>Work</b>       | means any Work Product created by or on behalf of any Sub-contractor after the Date of Signature (whether or not incorporating any Existing Work Product) exclusively in the course of the design, construction, maintenance, operation or management of the Prison or otherwise in the provision of the Services;   |
| <b>"Sub-Contracts"</b>            |                   | means the contracts entered into by the Contractor and the contracts entered into by Sub-Contractors;  |
| <b>"Subordinated Agreements"</b>  | <b>Financing</b>  | means the Equity Subscription Agreement and the Loan Notes and the Loan Note Instruments (as defined in the Equity Subscription Agreement) as at the date of this Contract or as amended with the prior written approval of the Authority;   |
| <b>"Subordinated Lender"</b>      |                   | means a person providing finance under a Subordinated Financing Agreement;   |
| <b>"Substitute Entity"</b>        |                   | means a person duly appointed to be the new Contractor in replacement of the Contractor in accordance with the Direct Agreement;   |
| <b>"Suitable Contractor"</b>      | <b>Substitute</b> | means a person approved by the Authority (such approval not to be unreasonably withheld or delayed) as:<br>(a) having the legal capacity, power and authority to become a party to and perform the obligations of the Contractor under the Contract; and<br>(b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of the Contractor under the Contract; |
| <b>"Tax"</b>                      |                   | means any kind of tax, duty, levy or other charge (other than VAT) whether or not similar to any in force at the date of the Contract and whether imposed by a local, governmental or other Relevant Authority in the United Kingdom or elsewhere;   |
| <b>"Tender Costs"</b>             |                   | means the reasonable and proper costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Contract.  |
| <b>"Tender Process"</b>           |                   | means the process by which the Authority requests tenders from any parties interested in entering into a New Contract, evaluates the responses from those interested parties and enters into a New Contract with a new service provider, in accordance with Clause 0 ( <i>Retendering Procedure</i> );   |
| <b>"Tender Process Monitor"</b>   |                   | means a third party appointed by the Contractor under Clause 0;  |
| <b>"Termination Date"</b>         |                   | means any date of early termination of this Contract in  |

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|  | accordance with Clauses 0 ( <i>Termination on Authority Default</i> ), 0 ( <i>Termination on Contractor Default</i> ), 0 ( <i>Termination on Force Majeure</i> ), 0 ( <i>Termination on Corrupt Gifts and Fraud</i> ), 0 ( <i>Voluntary Termination by the Authority</i> ) and 0 ( <i>Termination for Breach of Refinancing Provisions</i> );  |
| <b>"Termination Date Discount Rate"</b>    | means a discount rate expressed as $[(1 + \text{real base case project IRR} + \text{Gilt B} - \text{Gilt A}) * (1 + i) - 1]$ where:<br>"real base case project IRR" is the real pre-tax Project IRR as set out in the Financial Model as at Financial Close;<br>"i" is the agreed assumed forecast rate of increase in the inflation index, which, for the avoidance of doubt, is equal to the Bank of England's prevailing long term inflation target;<br>"Gilt A" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model at Financial Close; and<br>"Gilt B" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model as on the date of Termination. |
| <b>"Termination Sum"</b>                   | means any compensation payable by the Authority to the Contractor on an early termination of the Contract under Clauses 0 ( <i>Termination on Authority Default</i> ), 0 ( <i>Termination on Contractor Default</i> ), 0 ( <i>Termination on Force Majeure</i> ), 0 ( <i>Termination on Corrupt Gifts and Fraud</i> ), 0 ( <i>Voluntary Termination by the Authority</i> ) and 0 ( <i>Termination for Breach of Refinancing Provisions</i> ) (excluding the Adjusted Highest Compliant Tender Price);  |
| <b>"Third Party Existing Work Product"</b> | means any Existing Work Product the Intellectual Property Rights of which are owned by a third party, excluding Deposited Software;  |
| <b>"Third Party Work Product"</b>          | means any Work Product the Intellectual Property Rights in which are owned by a third party;   |
| <b>"Threshold Equity IRR"</b>              | means 13 %.  |
| <b>"Threshold Level"</b>                   | has the meaning given in Clause 0A(a);   |
| <b>"Title Compensation Event"</b>          | means any interference with the performance by the Contractor of its obligations under this Agreement (including any delay to or increase in the cost of carrying out all or any part of the Works or performing the Services) that is due to the occurrence of any of the following title risks:<br>(a) challenge or claim by a party with right, title and interest in respect of the Authority's obligation as proprietor of the Land as more fully described in Entry  |

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1, paragraph octavo of Section D of the Land Certificate for title number MID75271 in respect of the Authority's interest in the Land;

(b) challenge or claim by a party with right, title and interest in respect of any implied or granted servitude rights of wayleave to enter the Land to maintain, repair and renew a water pipe that runs across the Land as at the Date of Signature, but that is not referred to in the Land Certificate for title number MID75271 in respect of the Authority's interest in the Land;

(c) challenge or claim by a party with right, title and interest in respect of the Authority's obligation as proprietor of the Land as more fully described in Entry 1, paragraph quarto of Section D of the Land Certificate for title number MID75271 in respect of the Authority's interest in the Land;

(d) challenge or claim by a party with right, title and interest in respect of the servitude right of wayleave as more fully described in Entry 1, paragraph quinto of Section D of the Land Certificate for title number MID75271 in respect of the Authority's interest in the Land; or

(e) challenge or claim by a party with right, title and interest in respect of the Authority's obligation as proprietor of the Land as more fully described in Entry 1, paragraph tertio of Section D of the Land Certificate for title number MID 75271 in respect of the Authority's interest in the Land;

**"Transportation Contribution Burden"**

means the agreement among West Lothian Council (as Planning Authority), West Lothian Council (as proprietors) and the Scottish Ministers acting through the Scottish Prison Service made under s75 of the Town and County Planning (Scotland) Act 1997 and recorded in the GRS for Midlothian on 16 November 2004, listed as Entry 2 in Section D of the Land Certificate for title number MID75271 in respect of the Authority's interest in the Land;

**"Uninsurable"**

means, in relation to a risk, that insurance is not available to the Contractor in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk;

**"VAT"**

means any value added taxes;

**"Works"**

means the works required in respect of the design, construction, completion and commissioning of the Prison, as further defined and described in Schedule A;

**"Work Products"**

means software (including without limitation source, object and executable code and any upgrades, updates or corrections thereto), data, records, reports, manuals,

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designs, drawings, plans, specifications, inventions, and any other works or materials of whatsoever nature which are or may at any time be protected by Intellectual Property Rights.

## 2.2 Interpretation

2.2.1 In this Contract, except where the context otherwise requires:

- (i) the masculine includes the feminine and vice-versa;
- (ii) the singular includes the plural and vice-versa;
- (iii) a reference in this Contract to any Clause, Sub-clause, Paragraph, Schedule or Annex is, except where it is expressly stated to the contrary, a reference to such Clause, Sub-clause, Paragraph, Schedule or Annex of this Contract;
- (iv) any reference to this Contract or to any other document shall include any permitted variation, amendment, or supplement to such document;
- (v) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (vi) references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification and reference to the Financial Model being "in the agreed form" means that the model is contained on a CD Rom that has been initialled by or on behalf of each of the Parties for the purpose of identification;
- (vii) a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees; and
- (viii) headings are for convenience of reference only.

2.2.2 References to amounts expressed to be "indexed" or "Index Linked" are references to such amounts multiplied by

$\frac{RPI(a)}{RPI(b)}$

where RPI (a) is the Retail Price Index for the prices prevailing in the month preceding by 3 months the month in which the date on which the payment of the sum first became due or, in the case of a limit or cap, the date on which payment of the sum to which the limit or cap relates became due and RPI(b) is the Retail Price Index relating to prices prevailing in March 2006 being 190.8.

1.3 Where any particular manager, officer or post is responsible for certain matters or is responsible for certain duties to be performed by the Contractor in delivering the Services under this Contract, any breach by such person shall, for the avoidance of doubt, be held to be a breach of this Contract by the Contractor.

## 3. DURATION

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- 3.1 This Contract and the rights and obligations of the Parties to this Contract shall take effect on the Effective Date.

#### **4. PROJECT DOCUMENTS**

##### **4.1 Changes to Ancillary Documents**

The Contractor shall perform all of its obligations under the Ancillary Documents and, without prejudice to the generality of the foregoing, shall not:

- 4.1.1 terminate or permit the termination of any Ancillary Document to which it is a party;
- 4.1.2 make or agree to any amendment to or variation of any Ancillary Document to which it is a party;
- 4.1.3 depart from, or waive or fail to enforce any rights which it has under, any of the Ancillary Documents to which it is a party in any respect; or
- 4.1.4 enter into, or permit the entry by the Operating Sub-contractor or the Construction Sub-contractor into, any agreement or document which would affect the interpretation or application of any of the Ancillary Documents;

in all cases without the prior written consent of the Authority which shall not be unreasonably withheld or delayed where the action in question:

- (a) does not and will not at any time have a material adverse effect on the ability of the Contractor to perform its obligations under the Contract; and
- (b) does not, and will not at any time, increase the liabilities or potential liabilities of the Authority under the Contract (including, but not restricted to, the Authority's liabilities on the early termination of the Contract).

##### **4.2 Changes to Financing Agreements**

4.2.1 The Contractor shall not terminate, waive or exercise its rights under the Financing Agreements if the effect of such would be to materially and adversely affect the ability of the Contractor to perform its obligations under this Contract.

4.2.2 No amendment, waiver or exercise of a right under any Financing Agreement shall have the effect of increasing the Authority's liabilities on early termination of this Contract unless:

- (i) the Contractor has obtained the prior written consent of the Authority;
- or
- (ii) it is a Permitted Borrowing.

4.2.3 The Contractor shall notify the Authority no later than 10 Business Days in advance of the Contractor procuring any Additional Permitted Borrowing.

##### **4.3 Authority's Costs**

The Contractor shall pay all reasonable costs of any advisers of the Authority incurred in connection with any matter referred to in this Clause 3 (*Project Documents*).

##### **4.4 Delivery**

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If at any time any amendment is made to any Project Document or the Contractor grants or is granted any waiver release of any of its obligations under any Project Document, or any agreement is entered into which supersedes or replaces any Project Document or which affects the interpretation of any Project Document, then the Contractor shall deliver to the Authority a certified copy of each such amendment, release, waiver or agreement or (insofar as it is not in writing) a true and complete record thereof in writing within 15 days of the date of its execution or creation, certified a true copy by an officer of the Contractor

## **5. WARRANTIES**

- 5.1 The Contractor acknowledges that it has not entered into the Contract in reliance on the accuracy or sufficiency of any of the Disclosed Data. The use or reliance upon any of the Disclosed Data by the Contractor shall be entirely at its own risk, and the Authority shall have no liability (in contract, delict or otherwise) in respect of any defect, error, omission or other inaccuracy of whatsoever nature therein, or in respect of any inadequacy or unfitness for purpose of any of the Disclosed Data; and
- 5.2 The Authority, its representatives and advisers give no warranty or undertaking that the Disclosed Data represents all of the information in his possession or power relevant to the Site or any of the obligations undertaken or to be undertaken by the Contractor under the Contract. The Authority, its representatives and advisers shall have no liability to the Contractor (in contract, delict or otherwise) in respect of any failure:
- 5.2.1 to disclose or make available (whether before or after the execution of this Contract) to the Contractor any information, documents, materials or data;
- 5.2.2 to inform the Contractor of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy in the Disclosed Data; or
- 5.2.3 to keep the Disclosed Data up to date.
- 5.3 The Contractor acknowledges and confirms that it has:
- 5.3.1 conducted its own analysis and review of the Disclosed Data and has before the Date of Signature satisfied itself as to the accuracy, completeness and fitness for purpose of such Disclosed Data on which it places reliance;
- 5.3.2 inspected the Land and its surroundings and has satisfied himself before signing the Contract as to:
- (i) the extent, form, nature, sufficiency and condition of the Land and its surroundings, including the ground and sub-soil (including, for the avoidance of doubt, the incidence of any contaminated land or toxic or hazardous waste on the Land);
- (ii) the extent of the work and materials necessary for constructing, completing, and maintaining the Works;
- (iii) the means of communication with and access to the Land; and
- (iv) the provision and location of all utilities; and
- 5.3.3 carried out all examinations, inspections and surveys and to have obtained all other facts, data and other information of whatsoever nature necessary for carrying out his obligations under the Contract.
- 5.4 In so far as the Contractor has not done any of the things referred to in Clause 5.3, it shall be deemed to have done so, and the Authority shall not be liable for any costs incurred by the Contractor arising, whether directly or indirectly, out of or in connection with the Contractor's failure to do any of such things.

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- 5.5 Except where, and to the extent that, it is expressly provided for elsewhere in the Contract, no claim by the Contractor for any extension of time for the performance of any of its obligations or for any additional payment from the Authority will be made or permitted, nor shall the Contractor be released from any risks or obligations imposed on or undertaken by it under the Contract, and in particular, no such claim or release shall be made or permitted on the grounds of:
- 5.5.1 any misunderstanding or misinterpretation of any of the Disclosed Data or any of the matters referred to in Clause 5.3;
  - 5.5.2 incorrect or insufficient information relating to the Site or the Services being given to the Contractor by any person, whether or not in the employment of the Authority; and
  - 5.5.3 the Contractor did not or could not foresee any matter which might affect or have affected the execution of the Works and the performance of the Services.
- 5.6 The Contractor shall not engage in any business or activity other than the business and activities related to, and conducted for, the purposes of the execution of the Works and performance of the Services.

## **6. INDEMNITIES**

- 6.1 The Contractor shall, subject to Clauses 6.2, 5.5 and 5.6, be responsible for, and shall release and indemnify the Authority, its employees, agents, representatives and contractors on demand from and against, all liability for:
- 6.1.1 death or personal injury;
  - 6.1.2 loss of or damage to property (including property belonging to the Authority or for which it is responsible (“Authority Property”));
  - 6.1.3 breach of statutory duty; and
  - 6.1.4 third party actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis),
- 1.1 which may arise out of, or in consequence of, the design, construction, operation or maintenance of the Assets or the performance or non-performance by the Contractor of its obligations under this Contract or the presence on the Authority’s property of the Contractor, a Sub-contractor, their employees or agents.
- 6.2 The Contractor shall not be responsible or be obliged to indemnify the Authority under Clause 6.1 or Clause 6.3 for:
- 6.2.1 any of the matters referred to in Clauses 6.1.1 to 6.1.4 above or 6.3 below which arises as a direct result of the Contractor acting on the instruction of the Authority, its employees, agents or representatives (except to the extent that the Contractor implements such an instruction in a negligent manner);
  - 6.2.2 any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Authority, its employees, agents, representatives or contractors or by the breach by the Authority of its obligations under this Contract; or
  - 6.2.3 any Losses that do not arise as a direct consequence of, or are not reasonably foreseeable as a direct consequence of, the design, construction, operation or maintenance of the Assets or the performance or non-performance by the Contractor of its obligations under this Contract or the presence on the Authority's property of the Contractor, a Sub-Contractor, their employees or agents, except to the extent that such matter, losses or

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claims are or would be covered by a policy of insurance which is or is required to be maintained by the Contractor or any Sub-Contractor.

5.2A An indemnity by either Party under any provision of this Contract shall be without limitation to any indemnity by that Party under any other provision of this Contract.

6.3 In addition to the indemnity given under Clause 6.1, the Contractor shall, subject to Clauses 6.5 and 6.6, indemnify and keep indemnified the Authority and all agents, employees or representatives of the Authority in respect of all Claims which are made against the Authority, its agents, employees or representatives, by any person (including any agent, employee or representative of the Authority) and all Losses which are incurred by the Authority, its agents, employees or representatives arising directly or indirectly out of or in connection with:

6.3.1 any personal injury (including sickness or death) suffered by any agent, employee or representative of the Authority whilst deployed at the Prison in accordance paragraph 3.9 of with Part 1 of Schedule D or whilst deployed at any other prison in the event of an incident at that prison, whether caused by another agent, employee or representative of the Authority, a Prisoner or any other person;

6.3.2 any injury (including sickness or death) to, or any loss or damage to the property of, any person (other than the Contractor, and the Operating Sub-contractor and each of their employees) arising from, or contributed by, any act or omission of any agent, employee or representative of the Authority whilst deployed at the Prison in accordance with paragraph 3.9 of Part 1 of Schedule D or whilst deployed at any other prison in the event of an incident at that prison; and

6.3.3 any injury (including sickness or death) to, or any loss or damage to the property of, any person (other than the Contractor and the Operating Sub-Contractor and each of their employees) arising from, or contributed by, any act or omission of any agent, employee or representative of the Contractor or the Operating Sub-Contractor whilst deployed at any other prison in accordance with paragraph 3.9 of Part 1 of Schedule D;

in all cases whether arising by reason of the negligence of the Contractor, any Sub-contractor or any agent, employee or representative of the Contractor or any Sub-Contractor or as a consequence of the design, construction, operation or maintenance of the Prison or the performance or non-performance by the Contractor, any Sub-Contractor or any agent, employee or representative of the Contractor or any Sub-Contractor of its obligations under this Agreement or (as the case may be) any relevant Sub-Contract. For the avoidance of doubt, it is hereby expressly declared that the provisions of this Clause 6.3 shall apply whether the agent, employee or representative of the Authority who suffers injury, or who causes injury to, or loss or damage to the property of, any person, is an employee of the Authority or the Contractor or otherwise, and whether any such agent, employee or representative of the Authority is under the direction and control of the Authority or the Contractor or any other person. Further, for the avoidance of doubt, where the Contractor is obliged to indemnify the Authority under this Clause 6.3 it shall not be obliged to indemnify the Authority in respect of the same Claims and/or Losses under Clause 6.1.

6.4 The Authority shall promptly notify the Contractor of any Claim made or brought against it, or any of its agents, employees or representatives, to which the indemnity provided for in Clause 5.1 may apply. The Contractor shall comply with any reasonable request by the Authority for information for the purpose of contesting any such Claim (and if it fails to do so on any occasion shall indemnify the Authority in

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accordance with Clause 5.1 notwithstanding any subsequent failure by the Authority to comply with this Clause 5.4). The Authority shall keep the Contractor informed as to the progress and status of any such Claim until such Claim is determined, dismissed, settled or withdrawn. In contesting any such Claim, the Authority shall not knowingly take or fail to take any action which prejudices any entitlement of the Contractor to recover any proportion of the Claim from any insurer in terms of any insurance policy maintained by the Contractor in accordance with the provisions of Clause 55. The Authority agrees that it shall not settle or compromise any Claim giving rise to losses exceeding ten thousand pounds (£10,000) (Indexed) for which the Contractor is liable to indemnify the Authority under this Contract without prior consultation with the Contractor. If the Authority settles a Claim in excess of the amount that would otherwise have been payable in respect of such Claim under the insurances required to be maintained by the Contractor in accordance with this Contract, the liability of the Contractor to indemnify the Authority under this Clause 5 in respect of such Claim shall be reduced by the amount of such excess.

- 6.5 The maximum amount for which the Contractor shall be liable under Clauses 5.1, 5.3 and 6.10 in respect of Claims or Losses (or parts thereof) against which the Contractor is not required to maintain insurance pursuant to this Contract shall be £6 million (indexed) arising from any single event or series of connected events and £20 million (indexed) in aggregate over the Contract Period.
- 6.6 In respect of Claims and Losses (or parts thereof) against which the Contractor is required to maintain insurance pursuant to this Contract, the maximum amount for which the Contractor shall be liable under Clauses 5.1, 5.3 and 6.10 shall be the greater of (i) the maximum amount for which the Contractor could at such time be liable pursuant to Clause 5.5 and (ii) the amount of insurance procured or maintained or (if greater) required to be procured or maintained pursuant to this Contract at such time by or on behalf of the Contractor in respect of such Claims or Losses.

## **5A. CONTAMINATION**

- 5A.1 Save in respect of those amounts referred to in Clause 5A.2 (which shall be solely for the account of the Contractor):
- 5A.1.1 the Contractor shall, subject to Clause 5A.7, be responsible for and shall release and indemnify the Authority against any or all Environmental Costs & Losses incurred or suffered under this Contract up to an amount equal in aggregate to the Contractor's Environmental Share; and
- 5A.1.2 the Authority shall be responsible for and shall release and indemnify the Contractor against any or all Environmental Cost & Losses incurred or suffered by the Contractor or its Sub-contractors to the extent that such Environmental Cost & Losses exceed the Contractor's Environmental Share.
- 5A.2 The Contractor shall be responsible for all Environmental Costs & Losses, and the Authority shall not be liable under the indemnity set out in Clause 5A.1.2, to the extent that:
- 5A.2.1 liability arises under any Environmental Law due to the introduction of Hazardous Substances to the Site by the Contractor or any of its sub-contractors;
- 5A.2.2 liability arises under Environmental Law due to the disturbance by the Contractor or any of its Sub-contractors of Hazardous Substances existing at, on, in or within the Site as at the date of this Contract and which

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- particular Hazardous Substances the Contractor or the relevant sub-contractor knew about or ought reasonably to have known about;
- 5A.2.3 liability in respect of Hazardous Substances arises under Environmental Law as a result of the Contractor discharging or failing to discharge any of its obligations under the Outline Approvals or the Planning Approval (including, without limitation, the implementation of the contamination remediation strategy referred to in the Outline Approvals and Planning Approval);
- 5A.2.4 liability arises as a result of the Contractor failing to carry out any Remedial Action in accordance with Legislation and Good Industry Practice, where the Authority is materially prejudiced by such failure.
- 5A.3 The Contractor shall undertake any Remedial Action required under Environmental Law during the period from the Date of Signature until the earlier of the Termination Date and the Expiry Date in relation to any Hazardous Substances at, on, in or within the Site and, without prejudice to Clause 5A.2 above, any Environmental Costs & Losses incurred or suffered by the Contractor in so doing shall be dealt with in accordance with Clause 5A.1 above.
- 5A.4 As soon as reasonably practicable following the Contractor becoming aware of a claim under Clause 5A.1.2 above or circumstances which are likely to give rise to a claim under clause 5A.1.2 above, the Contractor shall, without prejudice to the Authority's rights under Clause 27 (*Monitoring and Inspection*) and Clause 65 (*Contractor's Records*), give notice to the Authority setting out in detail all relevant information known by the Contractor or its Sub-contractors, and the parties shall discuss in good faith an appropriate method of dealing with any relevant Hazardous Substances. Where the Parties are unable to agree the appropriate method of dealing with any relevant Hazardous Substances, then the provisions of Clause 76 (*Dispute Resolution Procedure*) will apply.
- 5A.5 The Contractor shall take and shall use reasonable endeavours to procure that its sub-contractors shall take all reasonable steps to avoid or mitigate any losses, costs, expenses, demands, claims, liabilities or damages which do or may give rise to a claim under Clause 5A.1.2 above. The Authority shall use reasonable endeavours to avoid or mitigate any losses, costs, expenses, demands, claims, liabilities or damages which do or may give rise to a claim under Clause 5A.1.1 above.
- 5A.6 Any claim made pursuant to the provisions of this Clause 5A shall be dealt with in accordance with the provisions of this Contract.
- 5A.7 Notwithstanding the provisions of Clauses 5A.1 and 36, the Contractor's total aggregate liability under this Contract in respect of:
- 5A.7.1 the Environmental Costs & Losses referred to in Clause 5A.1.1 which the Contractor incurs or suffers (excluding, for the avoidance of doubt, the Environmental Costs & Losses referred to in Clause 5A.2); and
- 5A.7.2 any part of the Contractor's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change in Law for which the Contractor is liable under Clause 36.3 (*Change in Law*),
- shall, in aggregate, be limited to the Contractor's Environmental Share. Where the Contractor's total liability under this Contract for those amounts referred to in Clauses 5A.7.1 and 5A.7.2 (in aggregate) exceeds the Contractors' Environmental Share, then:
- 5A.7.3 any further Environmental Costs & Losses shall be dealt with pursuant to Clause 5A.1.2; and

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5A.7.4 any further Capital Expenditure agreed or determined to be required as a result of a General Change in Law under Clause 36 shall be solely for the account of the Authority.

## **7. LAND**

7.1 Prior to, or simultaneously with, the execution of the Contract, the Authority and the Contractor shall execute the Lease and the Authority shall deliver it to the Contractor. Thereafter the Contractor shall at its own expense:

6.1.1 within 14 days of the Execution Date, submit to HM Revenue & Customs a completed SDLT1 form (with the agent's address selected as the response to Question 58) together with any applicable supplementary forms and the stamp duty land tax (if any) arising from the land transaction contemplated by the Lease. If prior to the issue of a Land Transaction Return Certificate (SDLT5) HM Revenue & Customs rejects the Contractor's SDLT application, the Contractor will without delay correct the application and resubmit it and a remittance for the correct amount of the stamp duty land tax to HM Revenue & Customs;

6.1.2 within 14 days of receipt from HM Revenue & Customs, submit the Lease and the SDLT5 for registration in the Land Register of Scotland and for registration for preservation and execution in the Books of Council and Session and will request two extracts thereof (one for the Authority and one for the Contractor); and

6.1.3 within 14 days of receipt, send to the Authority (i) one extract of the Lease and (ii) a copy of the receipted Form 4 showing the title number to be allocated to the title sheet for the Contractor's interest in the Land and, within 7 days of receipt by the Contractor of a Land Certificate in respect of that interest, a copy of the Land Certificate.

The Authority and the Contractor shall comply fully with the terms of the Lease.

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- 6.1A The Authority grants to the Contractor and Contractor Related Parties an exclusive right of access to, occupation of and egress from the areas of ground shown hatched in blue on the Plan, for the purpose of carrying out the Works, from the Date of Signature until the date on which the Independent Engineer confirms to the Authority that the Contractor has carried out the Works in respect of such areas in accordance with the provisions of Schedule A.
- 6.1B The Authority shall deliver to the Contractor such documents or evidence (including plans or bounding descriptions) sufficient to enable the whole of the Land to be identified on the Ordnance Survey map and evidence as the Keeper may require to enable the interest of the Contractor to be registered in the Land Register without exclusion of indemnity under section 12(2) of the Land Registration (Scotland) Act 1979. The Land Certificate to be issued to the Contractor will disclose no entry, deed or diligence prejudicial to the Contractor's interest other than such as are created by or against the Contractor or have been disclosed to and accepted by the Contractor prior to the Execution Date. Notwithstanding the execution of the said Lease or any limit on the continuation in force of the Contract, this Clause 6.1B shall remain in full force and effect and may be founded upon.
- 7.2 The Contractor shall be deemed to have satisfied itself that the Authority has a valid title to the Land sufficient to grant the rights conferred on the Contractor by the Lease subject to the Authority complying with its obligation set out in Clause 6.1B above. The Authority shall have no liability of whatsoever nature to the Contractor in respect of any costs or expenses sustained by the Contractor by or through any defect, failing, inadequacy or insufficiency of such title subject to the Authority complying with its obligation set out in Clause 6.1B above.
- 7.3 The Contractor shall vacate and leave the Land (and the Prison, whether wholly or partly completed) at the end of the Contract Period in such condition as is in accordance with the provisions of the Contract and the full and proper performance of the Contractor's obligations under the Contract.
- 7.4 The Contractor shall be deemed to have inspected the Site and its surroundings and to accept responsibility for and have satisfied himself before signing the Contract as to all matters relating to the Land subject to the provisions of Clause 5A (*Contamination*). The Contractor shall be responsible for obtaining all surveys and information necessary for carrying out its obligations under the Contract. The Authority has provided to the Contractor such information in relation to the Site as is available to it and any statements have been made to the best of the Authority's knowledge and belief, although the Contractor shall not rely on any information provided by the Authority, or any contractor or consultant engaged by the Authority, with regard to these matters. Neither the Authority, nor any contractor or consultant engaged by them, shall be liable for any Claims made or brought against, or any Losses incurred by, the Contractor arising from the Contractor's failure to comply with its obligations under this Clause, or from any lack of knowledge that it is deemed to have under this Clause other than in accordance with the terms of Clause 17A (*Title Compensation Events*).
- 7.5 Without prejudice to the generality of Clause 7.4, the Contractor accepts the Land as in all respects in tenable condition and in all respects fit for the purpose for which the Land is made available to it. The Authority gives no warranty or undertaking of any nature as to the condition of the Land or that the Land is suitable or sufficient for the performance of the Services. The Authority shall have no liability of whatsoever nature otherwise than in accordance with Clause 5A (*Contamination*) to the Contractor in respect of any Claims made or brought

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against, or any Losses incurred by, the Contractor by or through any contamination, defect, failing, inadequacy or insufficiency in or of or affecting the Land for any purpose arising out of or connected with the performance of the Contract.

7.6 The Contractor shall not, without the prior written approval of the Authority, other than in the performance of its obligations under the Contract:

7.6.1 subject to Clause 0 (*Maintenance*) and any other provisions of this Contract, execute any structural or other material work to the Prison;

7.6.2 carry out any business or trading activity on or at the Land or Prison except activities in the ordinary course of running a prison which are permitted by Legislation;

7.6.3 display or permit to be displayed any advertisement, sign or notice of any description outside the Prison unless such sign or notice is required to be displayed by Legislation; or

7.6.4 permit the Land, the Site or the Prison to be used for any purpose other than the performance of the Contract.

7.7 The Contractor shall immediately on receipt give to the Authority a certified copy of all notices, permissions, orders or proposals for a notice or order given or issued to the Contractor by or on behalf of any Relevant Authority or any other person under or by virtue of any Legislation in respect of the Land, the Site or the Prison and if so required by the Authority shall make or join in making such objections or representations in respect of any such notice, order or proposal as the Authority may reasonably require. In the event that the notice, permission or order, or proposal for a notice or order, or anything arising or following on therefrom may, in the reasonable opinion of the Authority, have a material detrimental effect on either the performance of the Services or the use of the Land as a Prison, then the Contractor shall make or join in making such objections or representations at its own expense; otherwise, the Authority shall reimburse all expenses reasonably and properly incurred by the Contractor in making such objections or representations.

7.8 The Contractor shall observe and perform all agreements, obligations, burdens, conditions and others referred to in the title deeds to the Land other than the Transportation Contribution Burden.

7.9 The rights conferred on the Contractor by the Lease and any provision of the Contract shall be subject always, and shall be without prejudice, to the other provisions of the Contract, and shall not restrict in any manner whatsoever the exercise of any rights, or the taking of any necessary steps to fulfil any duties, which the Authority may have under any Legislation by the Authority including, without prejudice to the generality of the foregoing, section 111 of the Criminal Justice and Public Order Act 1994.

7.10 The Contractor shall, at its own expense, and with the prior consent of the Authority (to both the obtaining and the terms of any of the aftermentioned servitude, right, licence or privilege), obtain, and take all steps appropriate and necessary to perfect, maintain in force and enforce (including, but not restricted to, the recording or registration of any deed or document) all servitudes, rights, licences and privileges which may be required to enable them to carry out their obligations under this Contract. The Contractor shall ensure and procure that all such servitudes, rights, licences and privileges are granted to, and in the name of, the Authority for the benefit of the Land and each and every part thereof. The Authority shall do all things reasonably necessary to assist the Contractor in obtaining, perfecting, maintaining and enforcing such servitudes, rights, licences

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and privileges. The Contractor will inform the Authority in writing of any such servitudes, rights, licences and privileges which have been obtained or are being sought by or on behalf of the Contractor (whether by any Sub-contractor or otherwise). The Contractor shall, subject to the limits on liability specified in Clauses 5.5 and 5.6, and subject to the terms of Clause 17 A (*Title Compensation Events*), indemnify and keep indemnified the Authority against all Losses which the Authority may incur and all Claims which may be brought against the Authority, arising out of or in connection with the acquisition of such servitudes, rights, licences and privileges, any assistance rendered by the Authority to the Contractor in acquiring such servitudes, rights and licences, any steps taken to perfect, maintain in force and enforce them (whether by the Authority, the Contractor or any Sub-contractor), or their use (whether by the Authority, the Contractor or any Sub-contractor), and against all liabilities and obligations which the Authority may incur to such owner in respect of the servitudes, rights, licences and privileges that are granted to the Authority.

- 7.11 In the event of the assignation and/or transfer of the Contract with the consent of the Authority in accordance with the provisions of the Contract or the Direct Agreement, the Contractor shall, with effect from the date of such assignation and/or transfer, assign the Lease to the person to whom the Contract is assigned or transferred.
- 7.12 Not Used.
- 7.13 The Authority and the Contractor acknowledge and agree that the Lease will automatically come to an end and be of no further force and effect on the termination or expiry of the Contract and the Authority and the Contractor shall execute any deeds reasonably required to record the same. Determination of the Lease shall be without prejudice to any claim by either Party against the other in respect of any antecedent breach of any condition contained in the Contract or the Lease.
- 7.14 Notwithstanding the provisions of Clause 8.1 of the Lease, the provisions of Clause 7.11 shall apply to the transfer of the Tenant's interest in the Lease in the event of the assignation and/ or transfer of the Contractor's interest in the Contract.
- 7.15 For the purposes of Clause 8.2 of the Lease, the Authority confirms its consent to the Contractor sharing occupancy of the Land with the Construction Sub-contractor and the Operating Sub-contractor (and their permitted sub-contractors) from time to time, any other approved sub-contractor of the Contractor and any Representative or administrators appointed in terms of the Direct Agreement.
- 7.16 Notwithstanding the terms of Clause 7 of the Lease, the Contractor's obligations are to design, construct, maintain and operate the Prison from time to time solely in accordance with the Contract.
- 7.17 Notwithstanding the provisions of Clause 8.1 of the Lease, the Contractor will be entitled to charge its interest in the Lease where such charge is permitted in terms of the Contract. Where the Authority has consented to the grant of a fixed security over the Lease in accordance with the Contract, the Authority shall deliver to the creditor under such fixed security such evidence as the Keeper of the Land Register may reasonably require that the Authority has granted his consent to such fixed charge notwithstanding the terms of Clause 8.1 of the Lease.
- 7.18 Notwithstanding the provisions of Clause 4.3 of the Lease, nothing will prevent the Authority from exercising in respect of the Land and the Prison its rights in terms of the Contract including, but without prejudice to the generality of the foregoing, its rights under Clauses 0 (*The Controller*), 0 (*Monitoring and Inspection*), 38

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*(Termination on Contractor Default) and 0 (Intervention by the Scottish Ministers Under Section 111 of the Criminal Justice and Public Order Act 1994).*

- 7.19 Not used.
- 7.20 All disputes in respect of the provisions of the Lease will be resolved by the Authority and the Contractor in accordance with the provisions of Clause 0 (*Dispute Resolution*).
- 7.21 The Authority undertakes that at all times from the Date of Signature to the date of expiry or termination of the Contract, ownership of the Land will remain vested in the party vested in the Authority's interest under the Contract.
- 7.22 For the avoidance of doubt, the grant of the Lease is without prejudice to the rights and obligations of the Authority and the Contractor under the Contract and the Direct Agreement.

## **8. PLANNING**

- 8.1 The Contractor shall comply with the conditions and recommendations specified in the Outline Approvals.
- 8.2 Without prejudice to the generality of Clause 8.1, the Contractor shall apply for, and obtain, all necessary Planning Approval for the development of the Prison.
- 8.3 In connection with any application for the Planning Approval, the Contractor shall:
  - 8.3.1 deliver to the Authority at the same time as the application for the Planning Approval is lodged a copy of the same and all other supporting and ancillary documents;
  - 8.3.2 pursue the application for the Planning Approval with a view to obtaining a satisfactory decision;
  - 8.3.3 at all times keep the Authority advised of progress and provide it with all information regarding the progress of the application for the Planning Approval which the Authority may reasonably require from time to time and, without prejudice to the foregoing, obtain the Authority's prior written approval to the terms of any agreement to be entered into or obligations to be undertaken in connection with any such Planning Approval;
  - 8.3.4 not submit any additional or substitute application or applications for Planning Approval, save with the prior written consent of the Authority;
  - 8.3.5 advise the Authority of the outcome of the application for Planning Approval as soon as a decision is known, providing the Authority with a copy of any written decision or decisions and any other relevant communication from the relevant planning authority as soon as the same is/are received by the Contractor;
  - 8.3.6 in the event that the Planning Approval requires any undertakings or obligations or liabilities to be undertaken or made by the Authority, the Contractor shall indemnify, free and relieve the Authority of any and all such undertakings, obligations or liabilities.
- 8.4 If all necessary Planning Approval has not been obtained on or before the first anniversary of the Date of Signature, the Authority may terminate the Contract on giving to the Contractor seven days' written notice of termination, provided always that no such notice of termination may be given at any time after all necessary Planning Approval has been obtained unless such Planning Approval is the subject of any challenge or legal proceedings (including an application to the courts for leave for judicial review). No sum shall be payable by the Authority to the Contractor in the event of such termination.

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- 8.5 If it is necessary to obtain planning permission in respect of any Authority Change, or otherwise in respect of any development of the Site or the Prison, the Contractor shall use its reasonable endeavours to obtain such planning permission. In the case of a Authority Change, the Contractor's obligation to comply with the Authority Change shall be conditional upon the grant of such planning permission free of conditions, whether in the planning permission or an associated legal agreement, which prevent or unduly interfere with compliance with the Authority Change. The provisions of Clause 8.3 shall apply to any application for planning permission made by the Contractor in accordance with the provisions of this Clause.
- 8.6 Nothing in the Contract nor in any consent or permission granted by the Authority shall be deemed to imply or warrant that the Prison or the Land may lawfully be used under the Town and Country Planning (Scotland) Act 1997 or any other Legislation for the purpose authorised in the Contract or the Lease, or subsequently authorised by the Authority or otherwise.
- 8.7 To the extent that any failure to provide Available Prisoner Places in accordance with the Phase-in Timetable is attributable to a Judicial Review of any element of the Planning Approval, the Contractor shall be relieved of its obligation to pay liquidated damages to the Authority in accordance with Clause 18 (*Liquidated Damages*) and shall be relieved of any liability in damages under or in relation to this Contract in respect of any such failure.

## **9. GENERAL DUTIES OF THE CONTRACTOR**

Without prejudice to any other provision of the Contract, and in particular without prejudice to any more specific obligation which the Contractor may have in terms of the Contract, the Contractor shall ensure and procure that its obligations under this Contract are at all times performed:

- 9.1 in an efficient, effective and safe manner;
- 9.2 in a manner which is not likely to be injurious to health or cause damage to property;
- 9.3 in compliance with all Legislation;
- 9.4 with good and suitable materials; and
- 9.5 without infringement of any burdens (with the exception of the Transportation Contribution Burden), rights, reservations, covenants restrictions or other encumbrances binding on or affecting the Land unless:
- 9.5.1 the beneficiary of such burden, right, reservation, covenant, restriction or other encumbrance has granted a waiver or discharge in favour of the Authority; or
- 9.5.2 in respect of infringements required in the period prior to the Actual Opening Date for the purpose of carrying out the Works, or temporary infringements required after the Actual Opening Date, the Contractor has, in advance of any such infringement, obtained the beneficiary's written consent to such infringement and has promptly notified the Authority that such consent has been given.

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## **8A MISSION STATEMENT AND KEY PERFORMANCE TARGETS**

- 8A.1 The Contractor acknowledges that the Authority is required to discharge its statutory duties and meet its undertakings and objectives set out in the Mission Statement and the key performance targets approved annually by the Scottish Ministers for Scottish prisons and that the Contractor's performance of its obligations under this Contract contributes to the Authority's ability to meet these requirements.
- 8A.2 Without prejudice to any other provision of the Contract, the Contractor shall, in performing its obligations under this Contract, have regard to the Authority's obligations referred to in Clause 8A.1 above.

## **10. PROVISION OF THE PRISON**

- 10.1 The Contractor shall design and construct the Prison in accordance with the terms of Schedule A and all other provisions of the Contract.
- 10.2 The Contractor shall be responsible for all aspects of the design of the Works, including, but not limited to, preparation of detailed calculations, drawings, plans, specifications, checking and co-ordinating and providing such information as shall be reasonably required by the Authority for all elements of the Works. Notwithstanding any other provision of the Contract, the Authority shall not have any liability whatsoever in relation to the design, execution or commissioning of the Works and that notwithstanding any right of approval or veto which it may have.
- 10.3 The Authority shall procure that the Independent Engineer shall monitor the progress of the Works upon the Site on behalf of the Authority in accordance with the provisions of Schedule L. The Contractor shall permit such monitoring to take place. The Contractor shall comply with all of its obligations under Schedule L.
- 10.4 The Contractor shall ensure and procure that:
- 10.4.1 subject to complying with all relevant safety procedures, the Independent Engineer shall have unrestricted access at all reasonable times to the Site, and any site or workshop where materials are being manufactured for the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;
  - 10.4.2 the Independent Engineer is given reasonable advance notice, and may if he so wishes, attend any progress or other meetings relating to the Works and is given copies of the minutes of all such meetings (whether attended by him or not) immediately on their preparation;
  - 10.4.3 the Independent Engineer is provided, at the Contractor's cost, with suitable accommodation and all reasonable attendant services at the Site for the use of the Independent Engineer and his representatives and staff until such time as the Engineer's Declaration has been given in accordance with Clause 19 (Engineer's Declaration), including the provision of a personal computer connected to the Internet and a dedicated telephone and fax machine and telephone line for the sole use of the Independent Engineer (in respect of which all bills, costs and expenses of whatever nature shall be borne by the Contractor); and
  - 10.4.4 the Independent Engineer is given at least one copy of all drawings for construction and of all specifications, and such other documents relating to such drawings and specifications or otherwise relating to the Works as he may reasonably require, for his own use.

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- 10.5 Nothing done by the Authority or the Independent Engineer, whether in accordance with Clause 10.3, Schedule L or any other provision of the Contract or otherwise, shall in any respect relieve or absolve the Contractor from any of its responsibilities for the design, construction, completion and commissioning of the Works. Without prejudice to the generality of the foregoing, notwithstanding that the Independent Engineer acts on behalf of the Authority, he shall have no authority to approve or accept the Contractor's performance of its obligations under the Contract as being discharged except to the extent provided for in Clause 19. The Authority shall procure that the Independent Engineer shall inform the Contractor promptly upon the Independent Engineer becoming aware of any matter which may adversely affect the issue of the Engineer's Declaration in accordance with Clause 19 (*Engineer's Declaration*).
- 10.6 The Contractor shall act as the only client for the purposes of the Construction (Design and Management) Regulations 1994 (S.I. No. 3140) for the design and construction of the Prison, and shall appoint a Planning Supervisor for the purposes of the said Regulations. The Contractor undertakes and warrants to the Authority that the Planning Supervisor has the necessary knowledge and ability to fulfil its obligations under Regulations 14 and 15(1) of the said Regulations on them. The Contractor shall deliver a duly completed declaration in the form contained in Schedule K to the Health and Safety Executive within 7 days from the Date of Signature. The Contractor shall deliver a copy of such declaration to the Authority immediately on sending same to the Health and Safety Executive, and immediately upon receipt of a notice from the Health and Safety Executive that it has received the declaration, the Contractor shall deliver a copy of such notice to the Authority.

## **11. SUPPLY OF EQUIPMENT**

- 11.1 Prior to the Actual Opening Date the Contractor shall supply, install and commission at the Prison all of the Equipment. Subject to Clause 11.4 and 11.5, all of the Equipment shall be the property of the Contractor.
- 11.2 The Contractor shall keep and maintain the Equipment in good and serviceable condition for the Contract Period. If any part of it is not capable of being kept in good and serviceable condition, the Contractor shall replace that part as required with like fixtures, fittings, furnishings, plant, materials, machinery or other equipment, as the case may be, of equal or superior quality which shall, from the time of its supply to or installation at the Prison be deemed to be part of the Equipment, all to allow the Contractor to comply with the standards set out in Schedule C. The Contractor shall ensure and procure that at the end of the Contract Period the Equipment is in a good and serviceable condition and complies in all respects with the standards set out in Schedule C.
- 11.3 The Contractor shall ensure and procure that the Equipment shall not be removed from the Prison except:
- 11.3.1 with the prior written consent of the Authority;
  - 11.3.2 temporarily for repair, provided that a suitable temporary replacement for the Equipment so removed, which replacement complies with the requirements of Schedule C, is installed at the Prison for the period of removal; or
  - 11.3.3 where any Equipment is replaced by the Contractor, in which case the Contractor shall be entitled to dispose of the items removed and to keep any proceeds of such disposal.

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- 11.4 The Contractor hereby assigns, transfers and makes over its whole right, title and interest, present and future, in the Equipment (other than such Equipment as is leased by the Contractor in accordance with Clause 11.5), and all other fixtures, fittings, furnishings, plant, materials and machinery and other equipment which is otherwise used or present in the Prison or on the Site (other than personal possessions of Staff or Prisoners) to the Authority with effect from the end of the Contract Period. The Contractor shall use its reasonable endeavours to ensure and procure that the benefit of all guarantees, warranties, documentation and service agreements relating to the Equipment and the said fixtures, furniture, furnishings and other equipment is assigned to the Authority and to obtain all necessary consents or permissions to enable it to do so or, to the extent that any of the foregoing are not assignable, is transferred in a manner agreed between the Contractor and Authority at the end of the Contract Period.
- 11.5 Notwithstanding Clause 11.1, the Contractor may lease any of the Equipment listed in Part 3 of Schedule B, provided that the Contractor shall ensure that any lease entered into in respect of any such equipment shall be on such terms as allow the Authority to use such Equipment as if it were the Contractor on any occasion where it exercises its powers under either section 111 of the Criminal Justice and Public Order Act 1994 or Clause 0 (*Termination on Contractor Default*). During such use, the Contractor shall remain liable for all payments due to be made under any such lease, whether to the lessor or otherwise. The Contractor shall not lease any Equipment other than that referred to in Part 3 of Schedule B without the prior written consent of the Authority.
- 11.6 If the Contractor leases any of the Equipment in accordance with Clause 11.5, it shall use its reasonable endeavours to do so on terms that enable the Contractor's interest in the relevant lease to be taken over by the Authority on the expiry or earlier termination of the Contract.
- 11.7 The Contractor shall prepare and maintain an Asset Register and shall provide to the Authority a copy of the Asset Register and any amendment thereto throughout the Contract Period.

## **12. PREPARATION FOR OPERATION OF THE PRISON**

- 12.1 The Contractor shall provide the Operational Proposals to the Authority in accordance with the timetable set out in Schedule G, together with such other information as the Authority reasonably requests. The Contractor shall provide to the Authority such other procedures relating to the performance of the Services as the Authority may reasonably request, provided that any such request is made by the Authority no later than 6 weeks after the date of delivery of the last Operational Proposal in accordance with Schedule G (for the sake of clarification, in calculating this 6 week period, the Parties shall disregard any amended Operational Proposals which are provided to the Authority pursuant to Clause 11.3). Any additional procedures provided to the Authority under this Clause 11.1 shall, for the purposes of Clause 11, be deemed to be Operational Proposals.
- 12.2 Without prejudice to the stipulations as to time in Clause 12.1, the Contractor shall give the Authority at least 14 days prior written notice that it intends to submit the Operational Proposals to it, and shall submit the Operational Proposals on the expiry of the period of such notice. Within 60 days (or in the event that prior written notice of the submission of the Operational Proposals has not been given by the Contractor as aforesaid, 74 days) of receipt of the last of the Operational

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Proposals, the Authority shall either give provisional approval to them (not to be unreasonably withheld) or refuse its approval to them, and in the latter case it shall provide the Contractor with written reasons as to why it has refused its approval.

- 12.3 If the Authority (acting reasonably) refuses its approval to the Operational Proposals and provides written reasons for such refusal in accordance with the provisions of Clause 12.2, the Contractor shall amend the Operational Proposals in accordance with the Authority's written reasons and shall then seek approval of the Operational Proposals as so amended. Clause 12.2 and this Clause 12.3 shall apply to such amended Operational Proposals as if they were the Operational Proposals originally submitted to the Authority except that the notice period shall be 7 days instead of the 14 days specified above.
- 12.4 Once the Authority has given provisional approval to the Operational Proposals in accordance with Clause 12.2, the Operational Proposals shall be tested in accordance with the proposals for testing in the Operational Proposals. The Contractor shall give the Authority 14 days' notice of the time and location of such tests, and shall permit representatives of the Authority to attend such tests. Within 7 days of the completion of the last of such tests, the Authority shall either finally approve the Operational Proposals or shall provide the Contractor with written reasons why either the Operational Proposals did not satisfy the tests conducted or the Operational Proposals are not satisfactory notwithstanding the Authority's earlier provisional approval of them. If the Contractor is refused approval:
- 12.4.1 because the Operational Proposals did not satisfy the tests conducted, the Contractor shall re-run the tests in accordance with the above provisions until final approval of the Operational Proposals has been granted by the Authority (which, subject to Clauses 11.4A and 11.4B shall not be withheld where such tests have been satisfied); or
- 12.4.2 because the Operational Proposals are not satisfactory notwithstanding the Authority's earlier provisional approval of them, the Contractor shall revise the Operational Proposals in accordance with the reasons given by the Authority as to why they are not satisfactory, submit the revised Operational Proposals for approval by the Authority and once the Authority has approved the revised Operational Proposals, re-run the tests in accordance with the above provisions until final approval of the Operational Proposals has been granted by the Authority (which, subject to Clauses 11.4A and 11.4B shall not be withheld where such tests have been satisfied);
- 11.4A Notwithstanding that the Operational Proposals have satisfied the tests conducted, the Authority shall be entitled to withhold approval of the Operational Proposals where it reasonably believes that the tests have been improperly conducted or that the tests have not been sufficient to test the Operational Proposals fully.
- 11.4B Where individual Operational Proposals are linked (as indicated in the Operational Proposal approved by the Authority relating to the testing of the Operational Proposals) and the tests in respect of one of the linked Operational Proposals have not been satisfied then, notwithstanding that the tests in respect of one or more of the linked Operational Proposals have been satisfied, the Authority may require the Contractor to re-run the tests for all of the linked Operational Proposals.
- 12.5 Subject to Clause 12.6, the Contractor shall carry out the Services in accordance in all respects with the Operational Procedures, and shall not make any change to the Operational Procedures or depart from the Operational Procedures in any respect without the prior consent of the Authority.

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- 12.6 The Contractor shall undertake reviews of the Operational Procedures in accordance with Schedule D. In carrying out such reviews, the Contractor shall put the Operational Procedures (or any of them, or any part of any of them) into operation in order to test their effectiveness if required by the Authority. The Authority shall not, however, make any requirement under this Clause 12.6 which would have the effect of compromising the security of the Prison. The Authority may require the Contractor to make alterations or amendments to the Operational Procedures as it thinks fit, provided always that no such alterations or amendments shall be required which are in conflict with the provisions of Schedule D, or which specifically instruct the manner in which the Services are to be carried out, unless the Authority serves an Authority Notice of Change to give effect to such alterations or amendments, in which case Clause 0 shall apply. Otherwise, the Contractor shall implement fully all such alterations and amendments.

### **13. CONTRACTUAL OPENING DATE**

Upon the Contractual Opening Date the Contractor will provide the Authority with 30 Available Prisoner Places. In the event that the Contractor does not provide 30 Available Prisoner Places to the Authority on the Contractual Opening Date, then without prejudice to any right or remedy which the Authority may have, whether under Clauses 18 (*Liquidated Damages*) or 0 (*Termination on Contractor Default*), the Contractor shall provide 30 places as soon as possible thereafter.

### **14. PHASE-IN PERIOD**

On and from the Contractual Opening Date, the Contractor shall provide the Authority with at least the number of Available Prisoner Places shown for the relevant period in the Phase-in Timetable. The Authority shall not be liable to make any payment in respect of any greater number of Available Prisoner Places which are provided by the Contractor than the number specified in the Phase-in Timetable for the relevant period.

### **15. FULL OPERATION DATE**

On the Full Operation Date, the Contractor shall provide to the Authority 700 Available Prisoner Places and on the Actual Full Operation Date shall be capable of providing 24 Additional Prisoner Places. Subject to Clause 0, on the date falling 8 weeks after the Actual Full Operation Date the Contractor shall be capable of providing a total of 96 Additional Prisoner Places. The Authority shall not be liable to make any payment to the Contractor in respect of more than 700 Available Prisoner Places (except to the extent of its obligations hereunder in respect of any Additional Prisoner Places).

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## 16. EXTENSIONS OF TIME

- 16.1 If and whenever it becomes reasonably apparent to the Contractor that the progress of its obligations under the Contract are being, or are likely to be, delayed such that the Contractor will not, or is likely not to, meet its obligations under the Contract which are to be met on or before the Contractual Opening Date or any date in the Phase-in Timetable or the Full Operation Date, the Contractor shall, immediately after the delay or likely delay becomes apparent to the Contractor, notify the Authority (either verbally or in writing) of the delay or likely delay. Thereafter the Contractor shall, within:
- 16.1.1 14 days (if the delay or likely delay becomes apparent to the Contractor at any time before the Engineer's Declaration); or
- 16.1.2 7 days (if the delay or likely delay becomes apparent to the Contractor at any time after the Engineer's Declaration)
- of the delay or likely delay becoming apparent to the Contractor, give written notice to the Authority ("Delay Notice") in accordance with Clause 16.2.
- 16.2 The Delay Notice shall:-
- 16.2.1 identify the cause or causes of the delay or likely delay;
- 16.2.2 specify an estimate of the likely effect of the delay on the performance of the Contractor's obligations which are to be met on or before the Contractual Opening Date or any date in the Phase-in Timetable or the Full Operation Date (taking into account any measures that the Contractor proposes to adopt to mitigate the effects of the delay in accordance with Clause 16.3).
- 16.3 The Contractor shall use all reasonable endeavours and take all steps necessary to prevent, or where a delay has already occurred minimise, any delay to the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operational Date.
- 16.4 If any delay or likely delay to the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operational Date is directly attributable to:-
- 16.4.1 a Relief Event, the provisions of Clause 17 (*Relief Events*) shall apply;
- 16.4.2 a Compensation Event, the provisions of Clause 18 (*Compensation Events*) shall apply;
- 16.4.3 a Force Majeure Event, the provisions of Clause 0 (*Termination on Force Majeure*) shall apply; or
- 16.4.4 a Title Compensation Event, the provisions of Clause 17A (*Title Compensation Events*) shall apply.

## 17. RELIEF EVENTS

- 17.1 Subject to Clause 16 (*Extensions of Time*) above, if and to the extent that a Relief Event:
- 17.1.1 is the direct cause of a delay to the Contractual Opening Date or any date in the Phase-in Timetable or the Full Operation Date; and/ or
- 17.1.2 adversely affects the ability of the Contractor to perform any of its obligations under this Contract,
- 1.1.1 then the Contractor is entitled to apply for relief from any rights of the Authority arising under Clause 0 (*Termination on Contractor Default*).
- 17.2 To obtain relief, the Contractor must:

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- 17.2.1 as soon as practicable, and in any event within 14 days after it became aware that the Relief Event has caused or is likely to cause delay and/or adversely affect the ability of the Contractor to perform its other obligations give to the Authority a notice of its claim for relief from its obligations under the Contract, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;
- 17.2.2 within 7 days of receipt by the Authority of the notice referred to in Clause 17.2.1 above, give full details of the relief claimed; and
- 17.2.3 demonstrate to the reasonable satisfaction of the Authority that:
- (i) the Contractor 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;
  - (ii) the Relief Event directly caused the delay to the Contractual Opening Date or any date in the Phase-in Timetable or the Full Operation Date or the need for relief from other obligations under the Contract;
  - (iii) the time lost and/or relief from the obligations under the Contract claimed could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice, without incurring material expenditure; and
  - (iv) the Contractor is using reasonable endeavours to perform its obligations under the Contract.
- 17.3 In the event that the Contractor has complied with its obligations under Clause 17.2 above, then:
- 17.3.1 the Contractual Opening Date, the date in the Phase-in Timetable or the Full Operation Date (as the case may be) shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or
- 17.3.2 the Authority shall not be entitled to exercise its rights to terminate the Contract under Clause 0 (*Termination on Contractor Default*).
- 17.4 Nothing in Clause 17.3 above shall affect any entitlement to make deductions from the Contract Price under Clause 0 (*Performance Measures*) or to receive payment under the provisions of Clause 33.2 during the period in which the Relief Event is subsisting.
- 17.5 In the event that information required by Clause 17.2 above is provided after the dates referred to in that paragraph, then the Contractor shall not be entitled to any relief during the period for which the information is delayed.
- 17.6 The Contractor 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.
- 17.7 If the Parties cannot agree the extent of the relief required, or the Authority disagrees that a Relief Event has occurred or that the Contractor is entitled to any extension of the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date (as the case may be), the Parties shall resolve the matter in accordance with Clause 0 (*Dispute Resolution*).

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## 18. COMPENSATION EVENTS

18.1 Subject to Clause 16 (*Extensions of Time*) above, if, on or before the Actual Full Operation Date, as a direct result of the occurrence of a Compensation Event:

18.1.1 the Contractor is unable to achieve Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date;

18.1.2 the Contractor is unable to comply with its obligations under this Contract; and/or

18.1.3 the Contractor incurs costs or loses revenue,

1.1.1 then the Contractor is entitled to apply for relief from its obligations and/or claim compensation under this Contract.

18.2 To obtain relief and/or claim compensation the Contractor must:

18.2.1 as soon as practicable, and in any event within 21 days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Contract and/or the Contractor to incur costs or lose revenue, give to the Authority a notice of its claim for an extension to the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date, payment of compensation and/or relief from its obligations under the Contract;

18.2.2 within 14 days of receipt by the Authority of the notice referred to in Clause 18.2.1 above, give full details of the Compensation Event and the extension of time and/or any Estimated Change in Project Costs and/or loss of revenue claimed; and

18.2.3 demonstrate to the reasonable satisfaction of the Authority that:

(i) the Compensation Event was the direct cause of the Estimated Change in Project Costs and/or loss of revenue and/or any delay in the achievement of the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date (as the case may be); and

(ii) the Estimated Change in Project Costs and/or loss of revenue, time lost, and/or relief from the obligations under the Contract claimed, could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice.

18.3 In the event that the Contractor has complied with its obligations under Clause 18.2 above, then:

18.3.1 the Contractual Opening Date, date in the Phase-In Timetable or the Full Operation Date (as the case may be) shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay;

18.3.2 in the case of an additional cost being incurred or revenue being lost by the Contractor:

(i) on or before the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date (as the case may be); or

(ii) as a result of Capital Expenditure being incurred by the Contractor at any time,

(a) the Authority shall compensate the Contractor for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred and, without double counting, for revenue actually lost (to the

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- extent it could not reasonably have been mitigated), within 30 days of its receipt of a written demand by the Contractor supported by all relevant information;
- 18.3.3 in the case of a payment of compensation for the Estimated Change in Project Costs and/or, without double counting, loss of revenue that does not result in Capital Expenditure being incurred by the Contractor referred to in Clause 18.2 above but which reflects a change in the costs being incurred by the Contractor after the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date (as the case may be), the Authority shall compensate the Contractor in accordance with Clause 18.6 below by an adjustment to the Contract Price; and /or
- 18.3.4 the Authority shall give the Contractor such relief from its obligations under the Contract, as is reasonable for such a Compensation Event.
- 18.4 In the event that information is provided after the dates referred to in Clause 18.2 above, then the Contractor shall not be entitled to any extension of time, compensation, or relief from its obligations under the Contract in respect of the period for which the information is delayed.
- 18.5 If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Contractor's obligations under the Contract, or the Authority disagrees that a Compensation Event has occurred (or as to its consequences), or that the Contractor is entitled to any relief under this Clause, the Parties shall resolve the matter in accordance with Clause 0 (*Dispute Resolution*).
- 18.6 Where compensation is payable under Clause 18.3.3 above, the value of "C" shall be varied so as to ensure that the Contractor is in no better or no worse a position as a direct result of the Compensation Event.

#### 17A. TITLE COMPENSATION EVENTS

- 17A.1 Subject to Clause 15 (*Extensions of Time*) above, if as a direct result of the occurrence of a Title Compensation Event:
- 17A.1.1 the Contractor is unable to achieve Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date;
- 17A.1.2 the Contractor is unable to comply with its obligations under this Contract; and/or
- 17A.1.3 the Contractor incurs costs or loses revenue,
- 1.1.2 then the Contractor is entitled to apply for relief from its obligations and/or claim compensation under this Contract.
- 17A.2 To obtain relief and/or claim compensation the Contractor must:
- 17A.2.1 as soon as practicable, and in any event within 21 days after it became aware that the Title Compensation Event has caused or is likely to cause delay, breach of an obligation under this Contract and/or the Contractor to incur costs or lose revenue, give to the Authority a notice of its claim for an extension to the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date, payment of compensation and/or relief from its obligations under the Contract;
- 17A.2.2 within 14 days of receipt by the Authority of the notice referred to in Clause 17A.2.1 above, give full details of the Title Compensation Event and the extension of time and/or any Estimated Change in Project Costs and/or loss of revenue claimed; and
- 17A.2.3 demonstrate to the reasonable satisfaction of the Authority that:

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- (i) the Title Compensation Event was the direct cause of the Estimated Change in Project Costs and/or loss of revenue and/or any delay in the achievement of the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date (as the case may be); and
- (ii) the Estimated Change in Project Costs and/or loss of revenue, time lost, and/or relief from the obligations under the Contract claimed, could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice.

17A.3 In the event that the Contractor has complied with its obligations under Clause 17A.2 above, then:

17A.3.1 the Contractual Opening Date, date in the Phase-In Timetable or the Full Operation Date (as the case may be) shall be postponed by such time as shall be reasonable for such a Title Compensation Event, taking into account the likely effect of delay;

17A.3.2 in the case of an additional cost being incurred or revenue being lost by the Contractor:

(i) on or before the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date (as the case may be); or

(ii) as a result of Capital Expenditure being incurred by the Contractor at any time,

(a) the Authority shall compensate the Contractor for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred and, without double counting, for revenue actually lost (to the extent it could not reasonably have been mitigated), within 30 days of its receipt of a written demand by the Contractor supported by all relevant information;

17A.3.3 in the case of a payment of compensation for the Estimated Change in Project Costs and/or, without double counting, loss of revenue that does not result in Capital Expenditure being incurred by the Contractor referred to in Clause 17A.2 above but which reflects a change in the costs being incurred by the Contractor after the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date (as the case may be), the Authority shall compensate the Contractor in accordance with Clause 17A.6 below by an adjustment to the Contract Price; and /or

17A.3.4 the Authority shall give the Contractor such relief from its obligations under the Contract, as is reasonable for such a Title Compensation Event.

17A.4 In the event that information is provided after the dates referred to in Clause 17A.2 above, then the Contractor shall not be entitled to any extension of time, compensation, or relief from its obligations under the Contract in respect of the period for which the information is delayed.

17A.5 If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Contractor's obligations under the Contract, or the Authority disagrees that a Title Compensation Event has occurred (or as to its consequences), or that the Contractor is entitled to any relief under this Clause, the Parties shall resolve the matter in accordance with Clause 76 (*Dispute Resolution*).

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17A.6 Where compensation is payable under Clause 17A.3.3 above, the value of "C" shall be varied so as to ensure that the Contractor is in no better or no worse a position as a direct result of the Title Compensation Event.

## **19. LIQUIDATED DAMAGES**

- 19.1 To the extent that on or before the Actual Full Operation Date the Contractor fails on any day to provide the number of Available Prisoner Places specified in the Phase-in Timetable, the Contractor shall, subject to Clause 7.7, pay liquidated damages to the Authority.
- 19.2 The amount of such liquidated damages shall be £110 (Index Linked) per day per Available Prisoner Place which is not available on any day for the period during which the number of Available Prisoner Places referred to in Clause 19.1 has not been provided by the Contractor. The Parties agree that such rate represents a genuine pre-estimate of the Authority's loss in consequence of the Contractor's failure to provide the appropriate number of Available Prisoner Places in accordance with the Phase-in Timetable and that such liquidated damages are, subject to the Authority's right to terminate this Contract in accordance with Clause 38, the Authority's sole and exclusive remedy under this Contract (whether by way of damages or under any indemnity) and elsewhere in respect of any failure by the Contractor to provide the requisite Available Prisoner Places in accordance with Clauses 12, 13 and/or 14.
- 19.3 The amount of any liquidated damages due shall be paid to the Authority by the Contractor monthly in arrears. Each payment, which shall consist of the full amount of liquidated damages which has become due in the relevant month, shall be made within 14 days of the end of any month in which liquidated damages have become payable to the Authority.
- 19.4 The maximum aggregate amount of liquidated damages which may be claimed by the Authority under this Clause 18 shall be £10,500,000.

## **20. ENGINEER'S DECLARATION**

- 20.1 When the Contractor considers that the whole of the Works will be, or have been, completed in accordance with Schedule A and will be, or have been, satisfactorily commissioned so that they comply in all respects with Schedule A, the Contractor may give notice in writing to that effect to the Authority with a copy to the Independent Engineer. In the event that at the time such notice is given the Contractor considers that the Works will be completed at a later date, the Contractor must specify such date, which shall be not less than ten (10) Business Days and not more than twenty (20) Business Days after the date of the notice.
- 20.2 The Authority shall procure that the Independent Engineer shall as soon as reasonably practicable and in any event:
- 19.2.1 within fifteen (15) Business Days after the date of the delivery of the notice referred to in Clause 19.1 where the Contractor considered, at the time of such notice, that the Works had been completed in accordance with Schedule A; or
- 19.2.2 where at the time of delivery of the notice referred to in Clause 19.1, the Contractor considered that the Works would be completed in accordance with Schedule A at a later date, within five (5) Business Days after the date of completion specified in the notice or, if later, the date of actual completion

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either issue a certificate declaring that in his opinion the Works have been completed in accordance with Schedule A or give notice to the Contractor in writing specifying all the matters which in the opinion of the Independent Engineer must be satisfied before the Engineer's Declaration can be issued. If such notice is given by the Independent Engineer, the Contractor shall carry out such works as may be required to obtain the Engineer's Declaration. When the Contractor considers that the whole of such matters have been satisfied so that the Works comply in all respects with Schedule A, the Contractor shall give notice in writing to that effect to the Authority, with a copy to the Independent Engineer and the provisions of this Clause 19.2 shall apply in respect of such notice as if it was a notice given under Clause 19.1 save that the reference to fifteen (15) Business Days in Clause 19.2.1 shall be replaced with a reference to 5 Business Days. Notwithstanding the foregoing provisions of this Clause 19.2, the Engineer's Declaration shall not be issued under this Clause 19.2 until West Lothian Council has issued to the Contractor a Certificate of Completion under the Building (Scotland) Act 1959 (or, if appropriate, the Building (Scotland) Act 2003), in respect of the Works.

- 20.3 Nothing in this Contract, or in any certificate or notice given under Clause 20.2, or in any other document of whatsoever nature given to the Contractor by or on behalf of the Authority or the Independent Engineer, whether under or in accordance with any provision of the Contract or otherwise, and nothing done by the Authority or the Independent Engineer shall:
- 20.3.1 be deemed to imply that the Authority makes any representation or warranty of whatsoever nature as to the value, design, construction, maintenance, operation, quality or fitness for use of the Prison, or any of the Equipment; or
- 20.3.2 in any respect relieve or absolve the Contractor from its responsibility for the design or construction of the Works or its obligations to perform the Services under or in connection with the Contract.
- 20.4 Where in this Contract anything is required to be done to the satisfaction of, or any actions are required to be performed by, the Independent Engineer, then the Authority shall procure that in forming any opinion or issuing any notice or certificate under this Contract, the Independent Engineer acts with all due care and skill.

## **21. CELL CERTIFICATION**

- 21.1 From the Actual Opening Date until the end of the Contract Period, the Contractor shall ensure that each and every Cell, and any other living accommodation to be occupied by a Prisoner, complies with such parts of Schedules A, B and C as relate to Cells and such other living accommodation to be occupied by any Prisoner in all respects.
- 21.2 A Cell shall be inspected by or on behalf of the Contractor:
- 21.2.1 prior to occupation by a Prisoner; and
- 21.2.2 subsequent to any repair, refurbishment or rebuilding following the withdrawal of a Cell Certificate and (unless the Controller has agreed pursuant to Clause 20.3 above that a Prisoner may continue to occupy the Cell) prior to its re-occupation by a Prisoner,
- to determine whether the Cell complies in all respects with such parts of Schedules A, B and C as relate to Cells. If, following such inspection, it is determined that the Cell does comply with the relevant parts of Schedules A, B and C in all respects the

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Contractor shall issue a Cell Certificate in respect of that Cell. If, following such inspection, it is determined that the Cell does not comply with the relevant parts of Schedules A, B and C in all respects, the Contractor shall carry out such works and inspections as are necessary to ensure that the Cell does so comply so as to allow a Cell Certificate to be issued in respect of such Cell. The Contractor shall notify the Authority that a Cell Certificate has been issued in respect of a Cell through submission of the Daily Report in accordance with Clause 21.3.

- 20.3 The Contractor shall be required to monitor the condition of all Cells throughout the Contract Period. The Contractor shall, immediately on becoming aware that any Cell fails to comply with any of the requirements of such parts of Schedules A, B and C as relate to Cells, record such failure in accordance with the Operational Procedures. The Contractor shall withdraw the Cell Certificate in respect of such Cell if such failure is not rectified within 5 hours of being recorded by the Contractor. If a Cell Certificate is withdrawn, the Contractor shall notify the Authority immediately and shall move any Prisoner held in the relevant Cell to another Cell in respect of which a Cell Certificate is currently issued, subject always to the provisions of Clause 21.4. If, pursuant to this Clause 20.3, the Contractor moves a Prisoner to a double Cell, which is already occupied by one Prisoner and in respect of which a Cell Certificate is currently issued, the Contractor shall be entitled to payment in respect of such Prisoner in accordance with paragraph 10.1 of Schedule E. Notwithstanding the foregoing provisions, the Contractor may, with the consent of the Controller, leave the Prisoner to continue to occupy the Cell in respect of which the Cell Certificate has been withdrawn for such period of time as the Controller agrees (provided that to do so does not result in the Contractor being in breach of any Legislation (including the Prison Rules) or create a risk to security or to the health and safety of that Prisoner), in which case the Contractor shall be entitled to payment in respect of such Prisoner in accordance with paragraph 10.2 of Schedule E. The Contractor shall take all measures necessary to rectify the Cell in respect of which the Cell Certificate has been withdrawn so that it complies in all respects with such parts of Schedules A, B and C. Following the completion of such measures, the provisions of Clause 20.2 above shall apply.
- 20.4 At any time during the Contract Period the Authority may, as it sees fit, carry out an inspection of any Cell in order to verify the certification of that Cell. In the event that the Authority identifies during any such inspection that a Cell does not comply with any of the requirements of such parts of Schedules A, B and C as relate to Cells the Authority shall notify the Contractor and, if the Contractor has not remedied the non-compliance within 5 hours of notification from the Authority, shall require the Contractor to immediately withdraw the Cell Certificate in respect of such Cell. The provisions of Clauses 20.2 and 20.3 shall apply to the remediation and re-inspection of any Cell.
- 20.5 Subject to Clause 20.3, the Contractor shall ensure that no Cell is occupied by a Prisoner, or where the Cell has been refurbished or rebuilt following the withdrawal of the Cell Certificate is not occupied subsequent to such refurbishment or rebuilding, until an inspection of the Cell has been carried out by or on behalf of the Contractor and a Cell Certificate issued (and not withdrawn) in accordance with the provisions of this Clause 20. Subject to Clause 20.3, the Contractor shall ensure that a Cell is not occupied by a Prisoner following the withdrawal of a Cell Certificate in accordance with Clause 20.3 until the Cell Certificate has been reinstated in accordance with Clause 20.2.

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## 22. AVAILABLE PRISONER PLACES

- 22.1 Notwithstanding any other provisions of the Contract, no Prisoner Place shall be an Available Prisoner Place unless and until:
- 22.1.1 the Engineer's Declaration has been obtained;
  - 22.1.2 final approval to the Operational Proposals has been given by the Authority in accordance with Clause 12.4;
  - 22.1.3 the Contractor has appointed a Director of the Prison in accordance with Clause 23 (*The Director*) and such numbers of Prisoner Custody Officers as reasonably determined by the Contractor to perform the Custodial Services in accordance with Clause 24 (*Prisoner Custody Officers*); and
  - 22.1.4 any conditions required to be satisfied prior to the holding of Prisoners (for any period, whether overnight or otherwise) at the Prison in accordance with the Planning Approval (as the same may be amended from time to time) are complied with in full.
- 22.2 The Contractor shall not hold any Prisoner in the Prison if there is not an Available Prisoner Place for him without the prior written consent of the Authority.
- 22.3 The Contractor shall on each day following the Actual Opening Date produce a Daily Report and deliver a copy thereof to the Controller by 9 am on the day following the day to which such Daily Report refers. Any representative of the Authority shall be entitled at any time to inspect the Prison and its operation to ensure that the information contained in any Daily Report is correct.
- 22.4 No Cell shall be used to accommodate more than one Prisoner at any one time, except where:
- 22.4.1 the Controller agrees that such Cell may be shared by two Prisoners, in which case the provisions of Part 2 of Schedule D and paragraph 9 of Schedule E shall apply, notwithstanding any other provision of the Contract; or
  - 22.4.2 one of the Prisoners sharing such Cell is occupying an Additional Prisoner Place.
- 22.5 No Cell, other than Cells designated for multiple occupancy in the healthcare centre of the Prison, shall be used to accommodate more than two Prisoners under any circumstances.
- 22.6 The Contractor shall not refuse to accept a Prisoner for an Available Prisoner Place where such Prisoner has been sent to the Prison by any court, and shall not refuse to accept a Prisoner for an Available Prisoner Place where it receives a request to do so from the Authority unless it would be unlawful to hold such Prisoner in custody. On each occasion that the Contractor refuses to accept a Prisoner for an Available Prisoner Place (other than where it would be unlawful to hold the Prisoner in custody) it shall be liable to pay to the Authority the sum of £15,000 (Index Linked) within ten (10) days of receipt of a written demand from the Authority.
- 22.7 The Contractor shall inform the Authority immediately if it becomes aware of the occurrence of any event which renders an Available Prisoner Place no longer an Available Prisoner Place for any reason whatsoever.

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## **23. CONDUCT OF OPERATION**

- 23.1 With effect from the Actual Opening Date, the Contractor shall provide sufficient resources, within the discretion of the Contractor, to ensure that the initial operation of the Prison is managed satisfactorily in accordance with the Phase-in Timetable.
- 23.2 Without prejudice to Clause 12.5 and Clause 0, the Contractor shall operate, manage and maintain the Prison, in accordance with Schedule C, Schedule D, the Operational Procedures and all other terms of the Contract.
- 23.3 The Contractor shall at all times operate, manage and maintain the Prison in accordance with all relevant provisions of Legislation, including but not limited to the Prisons (Scotland) Act 1989, the Criminal Justice and Public Order Act 1994 and The Prisoners and Young Offenders Institutions (Scotland) Rules 2006 (S.S.I. 2006/94) amended in force from time to time.
- 23.4 The Authority shall comply with its obligations under paragraph 3.13.4 of Part 1 of Schedule D. Where the Contractor is prevented from complying with its obligations under paragraphs 3.13.3, 3.13.6 and 3.13.8 of Part 1 of Schedule D in respect of the implementation of the SPIN system, as a result of an act or omission of the Authority, its employees or representatives, its hardware or software then the Contractor shall be relieved from such obligations to the extent that it is so prevented, provided that the Contractor is complying with its obligations under paragraphs 3.13.1, 3.13.2, 3.13.4, 3.13.5, 3.13.7 and 3.13.9 of Part 1 of Schedule D.
- 23.5 The Authority shall be entitled to charge the Contractor a fee for any training provided by the Authority in accordance with paragraphs 6.3.6, 6.3.7 and 6.3.8 of Schedule D.

## **24. THE DIRECTOR**

- 24.1 The Contractor shall ensure and procure that a person is appointed to act as Director of the Prison at least six months prior to the Contractual Opening Date and at all times during the Contract Period. The Director shall have the functions specified in section 107 of the Criminal Justice and Public Order Act 1994. However, the Contractor shall not appoint any person to act as, and shall ensure that no person acts as or exercises or purports to act or exercise (whether temporarily or otherwise) the functions of, Director of the Prison without the prior written approval of the Authority in respect of that person, given under and in accordance with section 107 of the Criminal Justice and Public Order Act 1994 and the following provisions of this Clause 23. The Director shall be a certified Prisoner Custody Officer in terms of section 114 and Schedule 6 of the Criminal Justice and Public Order Act 1994.
- 24.2 The Contractor shall submit a nomination for the position of Director to the Authority not less than six months prior to the Contractual Opening Date, which nomination the Authority may accept or reject as it thinks fit. Such nomination shall include the name and such further particulars of the proposed Director as the Authority may require in order to decide upon the appointment. If a Contractor's nominee is rejected by the Authority, the Contractor shall nominate a new candidate for the Authority's approval or rejection in the same manner as the earlier nomination, provided that the said date falling six months prior to the Contractual Opening Date shall not apply in respect of such further nomination, and the

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Contractor shall make such further nomination as soon as practicable after it has been notified of the Authority's rejection of its first (or any subsequent) nomination.

24.3 The Contractor shall ensure and procure that at all time while holding such position, the Director remains an employee of the Operating Sub-contractor. Any change to the person holding the position of Director must be approved by the Authority before being effected.

24.4 The foregoing provisions of this Clause 23 shall apply in respect of:

24.4.1 any replacement for the Director for the time being; and

24.4.2 any person required, or who may be required, to exercise the functions of the Director temporarily by reason of the Director's absence or for any other reason whatsoever,

as if all references in this Clause to the Director were references to such replacement or person, provided that Clause 24.2 shall apply in respect of any such replacement or person as if the reference therein to the date falling six months before the Contractual Opening Date was a reference to the date falling three months before such replacement first exercises the functions of Director, or before such person is first appointed to a post in which he may be required to exercise the functions of the Director.

## **24 PRISONER CUSTODY OFFICERS**

24.1 The Contractor shall ensure that all persons performing any part of the Custodial Services in the Prison shall be approved and authorised by the Authority for the purpose of performing the Custodial Services in accordance with section 114 and Schedule 6 of the Criminal Justice and Public Order Act 1994, and that no person who does not have a valid and current certificate issued under those provisions of that Act performs any part of the Custodial Services. Every person performing any part of the Custodial Services shall hold an up to date Enhanced Disclosure Scotland Certificate. The Contractor shall ensure that the Enhanced Disclosure Scotland Certificate held by a person performing any part of the Custodial Services has been obtained on the basis:

- i) of a valid request to reveal a person's full criminal history (including spent convictions) because the Effect of Rehabilitation under section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 ("ROA") has been excluded by an order of the Secretary of State under section 4(4) of ROA;
- ii) that the Enhanced Disclosure Scotland Certificate is required for a prescribed purpose, as defined by sections 9 to 12 of the Police Act 1997 (Criminal Records) (Scotland) Regulations 2006; and
- iii) that checks have been carried out on a) the Disqualified from Working with Adults at Risk List and b) the Disqualified from Working with Children List and the Enhanced Disclosure Scotland Certificate does not indicate that such a person is on either of the said lists.

24.2 The Contractor shall submit the names, and such other information as the Authority may require about all persons requiring approval and authorisation in accordance

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with Clause 24.1 at least three months prior to the Contractual Opening Date in respect of the persons to be employed as Prisoner Custody Officers on and from the Actual Opening Date, or at least three months prior to the proposed date on which any person will first be employed as a Prisoner Custody Officer in all other cases.

- 24.3 The Contractor shall ensure and procure that no person carries on any part of the Custodial Services if his approval and authorisation in accordance with section 114 and Schedule 6 of the Criminal Justice and Public Order Act 1994:
- 24.3.1 has been revoked in accordance with paragraph 4 of Schedule 6 of the Criminal Justice and Public Order Act 1994;
- 24.3.2 has been suspended in accordance with paragraph 3 of Schedule 6 of the Criminal Justice and Public Order Act 1994; or
- 24.3.3 lapses in accordance with Clause 24.4.
- 24.4 Where a Prisoner Custody Officer has not worked in the Prison for a period of more than 6 months, the authorisation and approval by the Authority of that person for the purpose of performing the Custodial Services shall lapse.

## **25 THE STAFF**

- 25.1 The Contractor shall recruit and provide sufficient personnel, as reasonably determined by the Contractor, to perform all of its obligations under the Contract, and shall ensure and procure that all such personnel shall receive proper training in their functions and duties.
- 25.2 Subject to Clause 25.3, the Contractor shall not, and shall ensure and procure that each sub-contractor shall not, permit any person (other than those certified for the purpose of performing the Custodial Services in accordance with Clause 24 (*Prisoner Custody Officers*), in respect of whom the provisions of that Clause shall apply in place of this Clause 25.2 and the Director, in respect of whom the provisions of Clause 23 (*The Director*) shall apply in place of this Clause 25.2) to commence work at the Prison or the Site, or perform any part of the Services at any time, unless and until it has obtained the approval of the Authority to that person. The Contractor shall submit the names, Enhanced Disclosure Scotland Certificate and such other information as the Authority may require about all persons requiring approval in accordance with this Clause 25.2 at least three months prior to the proposed date on which persons shall first commence work at the Prison or the Site or perform any part of the Services, as the case may be. The Contractor shall ensure that every Enhanced Disclosure Scotland Certificate submitted to the Authority pursuant to this Clause has been obtained on the basis:
- i) of a valid request to reveal a person's full criminal history (including spent convictions) because the Effect of Rehabilitation under section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 ("ROA") has been excluded by an order of the Secretary of State under section 4(4) of ROA;
  - ii) that the Enhanced Disclosure Scotland Certificate is required for a prescribed purpose, as defined by sections 9 to 12 of the Police Act 1997 (Criminal Records) (Scotland) Regulations 2006; and
  - iii) in the case of any person responsible for the direct care and/or supervision of Prisoners that checks have been carried out on a) the Disqualified from Working with Children List and b) the Disqualified from Working with Adults at Risk List and the Enhanced Disclosure Scotland Certificate does not indicate that such a person is on either of the said lists.

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- 25.3 Notwithstanding Clause 25.2, the Contractor shall not be required to obtain the Authority's approval for:
- 25.3.1.1 persons engaged in the design or execution of any aspect of the Works occurring within the Prison's perimeter wall prior to the commencement of lock installation (save for those persons engaged in the preparation for, or installation of, any mechanical and electrical services prior to such commencement); and/or
  - 25.3.1.2 persons engaged in the provision of Works or Services occurring outwith the Prison's perimeter wall; and/or
  - 25.3.1.3 persons engaged temporarily in the provision of Works or Services within the Prison's perimeter wall provided that i) the person holds an up to date Basic Disclosure Scotland Certificate (save for those persons engaged in working on the locking or other security systems in respect of whom Clause 25.3.4 shall apply in place of this Clause 25.3.3) and ii) whilst within the Prison's perimeter wall, any such person is accompanied at all times by a person approved by the Authority under Clause 25.2.
  - 25.3.4 persons engaged temporarily in the provision of Works or Services within the Prison's perimeter wall, in relation to locking or other security systems, provided that i) the person holds an up to date Standard Disclosure Scotland Certificate and ii) any such person is accompanied at all times, whilst within the Prison's perimeter wall, by a person approved by the Authority under Clause 25.2

The Authority may exempt other categories of staff from the requirements of this Clause 25.2 if it so chooses.

- 25.4 The Contractor shall, and shall ensure and procure that each sub-contractor shall, in relation to employment or engagement of any person at the Prison comply with the HMG Baseline Personnel Security Standard – A Good Practice Guide to the Pre-Employment Screening of Government Staff and Contractors (Version 1 – July 2006) ("the Guidance"). The Contractor shall, on completion of verification of any such person in accordance with the Guidance, submit a verification record to the Authority (in the form set out at Annex B to the Guidance) and such other evidence and/or information as the Authority may reasonably require to satisfy itself that the Contractor has complied with this Clause 25.4.
- 25.5 The Contractor shall provide all Staff with the operating and procedural instructions prepared in accordance with Clause 11 (*Preparation for Operation of the Prison*) which are relevant to them, and all Staff shall be provided with any revised or amended operating and procedural instructions which are relevant to them which may be issued during the term of the Contract.
- 25.6 The Contractor shall ensure and procure that all Staff are under an obligation of confidence owed not only to the Contractor but also to the Authority not to disclose any information acquired during the course of that employment otherwise than in the proper discharge of their duties. The Contractor shall provide in terms of the Sub-contract that the Sub-contractors will undertake in the same terms to the Authority as the provisions of this Clause 25.6. The Contractor shall be liable for any breach of such obligation by any Member of Staff or any Member of Staff of a Sub-contractor as if such breach was a breach of the Contract by the Contractor.
- 25.7 The Authority may at any time by written notice to the Contractor require the Contractor to remove any person from the Prison, the Site and the performance of the Services if, in the sole discretion of the Authority, it considers that such person is not a fit and proper person to be present at the Prison or Site or to be involved in the

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performance of the Services. Immediately on receipt of such notice and thereafter, the Contractor shall ensure that such person is not permitted admittance to the Prison and the Site (or, if the person in question is already in or on the Prison or the Site, without delay remove such person from the Prison and the Site and ensure that such person is thereafter refused admission to the Prison or the Site) and that the person in question is removed from and is no longer permitted any participation of whatsoever nature in the performance of the Services, and, subject always to the provisions of the Contract which may be applicable concerning any approval which may be required, shall cause the work which would otherwise be carried out by such person to be performed by such other person as may be deemed necessary. Where the person in respect of whom any such notice is given is a Prisoner Custody Officer, the Authority shall suspend or revoke that person's certificate authorising him to perform any part of the Custodial Services previously granted under section 114 of the Criminal Justice and Public Order Act 1994. For the avoidance of doubt, it is hereby declared that the Authority shall not be liable to reimburse the Contractor for any costs or expenses of whatsoever nature incurred or any payments, whether by way of compensation, damages or otherwise, made by the Contractor arising out of or in connection with any notice given to it under this Clause 25.7, or any action taken or not taken by it pursuant to any such notice.

25.8 The Contractor shall ensure the inclusion in the contract of employment of all Members of Staff a condition requiring the said Member of Staff to co-operate with and comply with the directions of any Governor who may be appointed to the Prison under the terms of section 111(2) of the Criminal Justice and Public Order Act 1994.

25.9 The Contractor shall ensure that Members of Staff (including Prisoner Custody Officers, the Director and other senior management of the Prison or their delegated representatives) with sufficient authority to take decisions necessary for the proper operation of the Prison shall be available 24 hours a day on every day during the Contract Period.

25.10 The Contractor shall ensure that a member of the senior management of the Contractor's and the Operating Sub-contractor's organisation as distinguished from the senior management of the Prison is contactable by the Authority 24 hours a day on every day during the Contract Period. The Authority shall be kept informed of the procedures by which such persons may be contacted, and in the event that the Authority requires any changes to be made to the Contractor's or Operating Sub-contractor's procedures in this regard, the Contractor shall, and shall ensure and procure that the Operating Sub-contractor shall, make any such changes.

25.11 Subject to Clause 63:

25.11.1 during the period of 6 months preceding the expiry of the Contract Period;  
or

25.11.2 following service of a valid termination notice in terms of this Contract;  
or at any time thereafter, the Contractor shall as soon as reasonably practicable provide to the Authority in writing such information as the Authority may require relating to the Staff including (but not restricted to) the number of such Staff, the post in which each Member of Staff is employed, the salary, wages and other remuneration paid to each such Member of Staff, the period of notice required to terminate the employment of each such Member of Staff, the whole terms and conditions of employment of each such Member of Staff and the whole terms and conditions of any occupational pension scheme of which any such Member of Staff is a member, together with the number of such Members of Staff who are member of each such scheme.

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## **26 THE CONTROLLER**

- 26.1 The Contractor shall, and shall ensure that all Sub-contractors do all that it can (whether by giving directions to the officers of the Prison or otherwise) to facilitate the exercise by the Controller of his functions under section 107 of the Criminal Justice and Public Order Act 1994 and the Contract and any other functions which the Authority may confer upon the Controller.
- 26.2 The Controller shall be allowed unrestricted access to the Prison (and, prior to the issue of the Engineer's Declaration, the Site, subject always to the Controller complying with the Contractor's reasonable health and safety requirements) at any time of every day during the Contract Period.
- 26.3 The Contractor shall provide accommodation at the Site and (following the Engineer's Declaration) in the Prison in accordance with the specifications set out in Schedules A and B, at no cost, for the use of the Controller and his staff, and any other representative of the Authority who has cause to visit the Site or the Prison.

## **27 MONITORING AND INSPECTION**

- 27.1 The Contractor shall give or procure access to the Facilities for, and will otherwise co-operate with parole representatives, Her Majesty's Chief Inspector of Prisons for Scotland, the Scottish Prisons Complaints Commissioner, the Visiting Committee, and any other statutory, regulatory or other properly interested body, including any relevant international bodies.
- 27.2 The Contractor shall permit or procure reasonable access to the Facilities for any other person whom the Authority notifies to the Contractor at all reasonable times subject to the Contractor's and any relevant Sub-contractor's security and operational requirements.
- 27.3 The Authority or a representative of the Authority may enter upon any property used by the Contractor to perform its obligations under the Contract, to inspect the construction, operation and maintenance of the Project and to monitor compliance by the Contractor with its obligations.
- 27.4 The Authority and a representative of the Authority may at all times enter upon any property used by the Contractor as training or workshop facilities and places where work is being prepared or materials being obtained for the Project.
- 27.5 The Contractor shall procure that satisfactory facilities are made available to the Authority and any representative of the Authority and that reasonable assistance is given for the purposes of Clauses 27.3 and 27.4 above, subject to the Contractors and Sub-contractors construction or operational requirements not being adversely affected and, in respect of Clause 27.4 only, subject to reimbursement of any reasonable costs or expenses of the Contractor.

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27.6 If the Authority is or becomes aware of a breach by the Contractor of its obligations under Clause 29 (*Maintenance*) then the Authority may notify the Contractor of the following:

27.6.1 the nature of the breach that has occurred; and

27.6.2 the period of time within which the Authority requires the Contractor to remedy the breach (which shall be reasonable, taking into account the nature of and circumstances surrounding the breach in question).

If the Contractor fails to remedy the breach within the period of time specified by the Authority under Clause 27.6.2 then the Authority may exercise its right of access and remedy such breach and shall be entitled to recover any costs or expenses incurred from the Contractor as a debt.

27.7 The Authority and its representative shall at all times comply with any health and safety requirements when exercising its rights under this Clause.

27.8 If the Authority or its representative causes material damage to any asset in exercising any right under this Clause, then the Authority shall be liable to the Contractor for the reasonable costs directly caused by such damage.

## **28. ESCORT ARRANGEMENTS**

28.1 The Contractor shall co-operate with any other person providing a Prisoner Escort Service subject always to the maintenance of the security and control of the Prison.

28.2 The Contractor will provide the Emergency Prisoner Escort Services specified in Part 1 of Schedule D from the Actual Opening Date at no charge to the Authority.

## **29. MAINTENANCE**

29.1 Throughout the duration of the Contract, and without prejudice to any other provision of the Contract, the Contractor shall at his own expense maintain, repair, renew, replace, rebuild and make good any loss or damage to or from, the Prison and the Site (irrespective of the cause of decay, damage or destruction necessitating the same or the nature of such loss or damage) so that at all times following the date of the Engineer's Declaration the Prison and the Site:

29.1.1 are in good, serviceable, substantial and safe repair and condition, taking into account the age of the Prison and the provisions of Schedule C;

29.1.2 fully meet the standards and requirements set out in Schedule C;

29.1.3 are in such condition as will enable the Contractor to comply in all respects with its obligations under the Contract; and

29.1.4 are handed over to the Authority on the Expiry Date or Termination Date in a condition complying with the requirements of this Clause 0.

29.2 Without prejudice to the generality of Clause 0, all works carried out by the Contractor in the performance of its obligations under Clause 0 shall be carried out in accordance with all the provisions of the Contract and in accordance with any applicable provisions of Schedule A as if such works formed part of the Works.

## **30. SURVEYS**

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- 30.1 If the Authority reasonably believes that the Contractor is in breach of its obligations under Clause 0 (*Maintenance*) then it may carry out (or procure) a survey of the Prison to assess whether the Prison has been and is being maintained by the Contractor in accordance with its obligations under Clause 0 (*Maintenance*). This right may not be exercised more often than once every two years.
- 30.2 The Authority shall notify the Contractor in writing a minimum of 14 days in advance of the date on which it wishes to carry out the survey. The Authority shall consider in good faith any reasonable request by the Contractor for the survey to be carried out on a different date if such request is made at least 7 days prior to the notified date and the Contractor (acting reasonably) is able to demonstrate that carrying out the survey on the notified date would materially prejudice the Contractor's ability to provide the Services.
- 30.3 When carrying out any survey, the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Contractor. The cost of the survey shall, except where Clause 0 below applies, be borne by the Authority. The Contractor shall give the Authority (free of charge) any reasonable assistance required by the Authority during the carrying out of any survey.
- 30.4 If the survey shows that the Contractor has not complied or is not complying with its obligations under Clause 0 (*Maintenance*), the Authority shall:
- 30.4.1 notify the Contractor of the standard that the condition of the Assets should be in to comply with its obligations under Clause 0 (*Maintenance*);
  - 30.4.2 specify a reasonable period within which the Contractor must carry out such rectification and/or maintenance work; and
  - 30.4.3 be entitled to be reimbursed by the Contractor for the cost of the survey.
- 30.5 The Contractor shall carry out such rectification and/or maintenance work within the period specified and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense.

## **31. PAYMENT PROVISIONS**

### **31.1 Price**

- 30.1.1 The Authority shall pay to the Contractor an amount calculated by reference to the formula in paragraph 2 of Schedule E.
- 30.1.2 No payment of the Contract Price shall become due to the Contractor until after the date when 30 Available Prisoner Places have been provided to the Authority by the Contractor.
- 30.1.3 Payment of the Contract Price shall be made by the Authority monthly in arrears. Each such payment shall be claimed by the Contractor by the submission of an invoice at the address specified in Clause 72.3 on or after the last day of the month for which the payment is claimed. Such an invoice must be accompanied by such other documentation supporting the invoice and information as the Authority may from time to time reasonably require. Any request by the Authority for additional documentation and information shall be made within 10 Business Days after receipt by the Authority of the relevant invoice. If the Authority requests further documentation or information supporting the invoice later than 10 Business Days after receipt of the invoice, the amount in respect of which the Authority has requested further documentation or information shall be deemed to be disputed for the

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purposes of Clause 31.1.4. Subject to Clause 0, payment of each part of the Contract Price shall be made by the Authority within 30 days of the later of:

- (a) the receipt of an original valid invoice in respect of that payment at the address specified in Clause 72.3; and
- (b) if the Authority has requested documentation within 10 Business Days after receipt of the invoice, the date on which any such documentation and information is provided.

30.1.4 In the event that the Authority disputes that any amount claimed by the Contractor in accordance with Clause 0 is actually due to it under the Contract then:

- (i) the Authority shall pay such part of the amount claimed as is not in dispute, but shall be entitled to withhold the balance pending resolution of the dispute;
- (ii) the Parties shall use all reasonable endeavours to resolve the dispute; and
- (iii) following resolution of the dispute, that part of the balance of the amount claimed by the Contractor in accordance with Clause 0 agreed to be due to the Contractor shall be paid to it by the Authority together with interest on that amount at the Prescribed Rate for the period from the date that the amount was due to be paid in accordance with Clause 0 to the date of actual payment.

### **31.2 Set-off**

31.2.1 The Contractor shall not be entitled to retain or set off any amount due to the Authority by it but, subject to Clause 51, the Authority may retain or set off any amount owed to it by the Contractor under this Contract which has fallen due and payable against any amount due to the Contractor under this Contract.

31.2.2 If the payment or deduction of any amount referred to in Clause 0 above is disputed then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with Clause 0 (*Dispute Resolution*).

### **31.3 VAT**

31.3.1 All amounts due under this Contract are exclusive of VAT.

31.3.2 If any supply made or referred to in this Contract is or becomes chargeable to VAT then the person receiving the supply (the "Recipient") shall in addition pay the person making the supply (the "Supplier") the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.

31.3.3 Where under this Contract any amount is calculated by reference to any sum which has or may be incurred by any person, the amount shall include any VAT in respect of that amount only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set-off or repayment.

31.3.4 The Contractor shall provide the Authority with any information reasonably requested by the Authority in relation to the amount of VAT chargeable in accordance with the Contract and payable by the Authority to the Contractor.

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31.3.5 The Authority shall pay to the Contractor from time to time as the same is incurred by the Contractor sums equal to any irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within 28 days of the delivery by the Contractor to the Authority of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this Clause 0 "Irrecoverable VAT" means input VAT incurred by the Contractor on any supply which is made to it which is used or to be used exclusively in performing the Works or the Services or any of the obligations or provisions under the Contract (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Contractor is not entitled to repayment or credit from HM Customs & Excise in respect of such input VAT.

#### **31.4 Rates and Charges**

31.4.1 The Contractor shall pay any cost, charge, fee or penalty, whether required to be paid under any Legislation or otherwise, arising out of or in connection with the Contractor's occupation or use of the Prison, the Site or the Equipment or otherwise arising out of or in connection with the performance of the Services or the execution of the Works. Without prejudice to the generality of the foregoing, the Contractor shall pay and be liable for any cost, charge or fee arising out of or in connection with the provision of utilities in respect of the Prison.

31.4.2 The Contractor shall pay any non-domestic rates (or any tax or charge imposed in substitution for same) or Local Authority or other charges or taxes payable (or any sum payable, or contributions requested from the Scottish Ministers, in lieu of any such rates or charges or taxes) in respect of the Site and the Prison. The Authority shall reimburse the Contractor in respect of such rates, taxes and charges within 30 days of receipt of an original valid invoice therefore together with all supporting information at the address specified in Clause 72.3. The timing and frequency of any invoices submitted to the Authority under this Clause 31.4.2 shall reflect the timing and frequency of the payments due from the Contractor to the Local Authority in respect of such rates, taxes and charges.

31.4.3 The Contractor shall promptly notify the Authority of the Local Authority's initial valuation, and any subsequent re-evaluation, of the Site and the Prison for the purposes of calculating the rates, charges or taxes referred to in Clause 31.4.2 above. The Contractor acknowledges that the Authority shall be entitled to appeal the Local Authority's valuation decision and undertakes to do all things reasonably necessary to assist the Authority in making any such appeal. If the Authority successfully appeals the Local Authority's valuation decision, the Contractor shall pay to the Authority any amount which it is agreed or determined has been overpaid by the Authority in respect of such rates, charges or taxes within 30 days of recovering the same from the Local Authority.

31.4.4 For the avoidance of doubt, it is hereby expressly declared that the Contractor shall pay and be liable for all charges in respect of water, sewerage, refuse disposal, electricity, gas, telephones and all other services

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and utilities provided to or in respect of the Site or the Prison from time to time.

- 31.5 The Parties will pay interest on any amount payable under this Contract, not paid on the due date, for the period from the due date to the date of actual payment at the Prescribed Rate.
- 31.6 The Contractor shall pay all discharge grants and travel expenses, properly claimed by any Prisoner on his release from the Prison, in accordance with the instructions issued by the Authority from time to time. The Authority shall reimburse the Contractor in respect of all such payments monthly in arrears within 30 days of receipt of an original valid invoice together with all supporting information in respect of every such payment at the address specified in Clause 72.3. In the event that the Authority disputes any payment that has been made by the Contractor to a Prisoner, it shall pay the undisputed element of the invoice and the disputed element shall be dealt with in accordance with Clause 76 (*Dispute Resolution*).

### **32. ADDITIONAL PRISONER PLACES**

- 32.1 The Authority may, by giving written notice at any time after the Actual Full Operation Date, require the Contractor to provide up to 24 Additional Prisoner Places with immediate effect. The Authority may, by giving written notice at any time, notify the Contractor that it is no longer required to provide such Additional Prisoner Places.
- 32.2 In addition to the 24 Additional Prisoner Places requested by the Authority under Clause 32.1 above, the Authority may, by giving 8 weeks' prior written notice at any time after the Actual Full Operation Date require the Contractor to provide up to a further 72 Additional Prisoner Places, provided that the Authority shall be obliged to request such further Additional Prisoner Places in multiples of twelve ("Additional Prisoner Place Tranche"). The Authority may, by giving 8 weeks' prior written notice, notify the Contractor that it is no longer required to provide one or more Additional Prisoner Place Tranches.
- 32.3 The Contractor shall receive a daily payment for the Additional Prisoner Places provided or required to be provided by the Contractor under this Clause 32 that satisfy the requirements under this Contract for being an Available Prisoner Place. The daily payment for such Additional Prisoner Places shall be calculated in accordance with paragraph 8 of Schedule E.
- 32.4 The Contractor shall not refuse to accept a Prisoner for an Additional Prisoner Place which is required to be provided by the Contractor pursuant to this Clause 32 where such Prisoner has been sent to the Prison by any court, and shall not refuse to accept a Prisoner for an Additional Prisoner Place where it receives a request to do so from the Authority, unless it would be unlawful to hold such Prisoner in custody. On each occasion that the Contractor refuses to accept a Prisoner for an Additional Prisoner Place (other than where it would be unlawful to hold the Prisoner in custody) it shall be liable to pay to the Authority the sum of £15,000 (Index Linked) within ten (10) days of receipt of a written demand from the Authority.

### **33. PERFORMANCE MEASURES**

- 33.1 The Contractor shall report all Performance Measures that have occurred and all incidents that the Contractor considers may give rise to Performance Measures in accordance with Schedule F, and may report all Performance Measures suspected to

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have occurred, promptly to the Authority, and in any event by no later than 9 a.m. on the day following the occurrence (or suspected occurrence) of the Performance Measure or relevant incident. No later than 7 days after the end of each Performance Quarter the Contractor shall submit to the Authority a report detailing each Performance Measure that has occurred, and each suspected Performance Measure and each incident that has been reported to the Authority, during that Performance Quarter ("Quarterly Report"). Within 14 days thereafter, the Controller and the Director shall meet to discuss the content of the Quarterly Report and shall report to the Authority's Contract Manager and the Contractor's Contract Manager respectively on the outcome of their discussions. The Authority's Contract Manager and the Contractor's Contract Manager shall thereafter agree the content of the Quarterly Report. Any dispute between the Authority's Contract Manager and the Contractor's Contract Manager as to the content of the Quarterly Report may be referred by either Party to be resolved in accordance with Clause 76 (*Dispute Resolution*). The Performance Points attributable to the Performance Measures that occurred during the relevant Performance Quarter shall be calculated in accordance with Schedule F. Without prejudice to the Authority's rights under Clause 38, if it is agreed or determined that the number of Performance Points accrued during the Performance Quarter exceeds the Baseline Total for the relevant Performance Quarter, the next (and, if necessary, any subsequent) payment due by the Authority to the Contractor under the Clause 31.1 shall be reduced in accordance with the provisions of Schedule E. For the avoidance of doubt, but subject to Clause 33.1A below, once the content of the Quarterly Report has been agreed or determined the Authority shall not be entitled to any further reduction in amounts payable under the Contract in respect of Performance Measures that are subsequently found to have occurred during the relevant Performance Quarter, save where the Contractor has acted fraudulently in preparing the Quarterly Report, has made a negligent misrepresentation to the Authority, has deliberately withheld information from the Authority or has failed to report a Performance Measure because of a failure to comply with its monitoring obligations contained in the Operational Procedures or paragraph 6.5 of Part 1 of Schedule D (a "Reporting Failure").

33.1A Where a Performance Measure reported to the Authority under Clause 33.1 was caused by an incident that occurred in a previous Performance Quarter, or where a Performance Measure has not been reported to the Authority because the Contractor has committed a Reporting Failure, the Performance Measure shall be attributed to the Performance Quarter in which the relevant incident occurred and, notwithstanding that it may have been previously agreed in accordance with Clause 33.1 above, the Quarterly Report for that Performance Quarter shall be amended, and the Performance Measures, Performance Points and deductions from the Contract Price attributable to that Performance Quarter shall be recalculated, accordingly. If, following such recalculation, the deduction from the Contract Price that is attributable to that Performance Quarter is higher than originally calculated, the Authority shall be entitled to deduct a sum equal to the amount of such increase from future payments due by the Authority to the Contractor under Clause 31.1.

33.2 In addition to any other right or remedy which the Authority may have under this Contract, and in addition to any Performance Points which may accrue, in both cases either in respect of such an event or the causes of or circumstances leading to such an event:

33.2.1 on each occasion that one or more Prisoners escape from within the Prison walls the Contractor shall be liable to pay to the Authority the sum of

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£75,000 (Index Linked) for each High Supervision Prisoner (or any Prisoner falling into any category which may replace the category of "High Supervision Prisoner") who escapes from within the Prison walls and £50,000 (Index Linked) for every other Prisoner who escapes from within the Prison walls, subject to a maximum of £1,000,000 (Index Linked) for each incidence of escape or for a series of co-ordinated escapes within a 24 hour period; and

33.2.2 on each occasion that one or more Prisoners escape from the custody of the Contractor or any of its sub-contractors whilst being escorted outside the Prison, the Contractor shall be liable to pay to the Authority the sum of £20,000 (Index Linked) for each Prisoner that escapes, subject to a maximum of £80,000 (Index Linked) for each incidence of escape and a maximum of £200,000 (Index Linked) in respect of all such escapes during any Performance Year.

Any payments due to the Authority in accordance with this Clause 0 shall be made within ten (10) days of receipt of a written demand from the Authority.

#### **34. EURO FUNCTIONALITY**

The Contractor shall ensure that any Equipment and Services supplied under this Contract shall be capable of operating with effect from the date of the United Kingdom joining the European Monetary Union such that it:

34.1 complies with all legal requirements applicable to the Euro including, but without limitation, the rules on conversion and rounding set out in the EC Regulation Number 1103/97; and

34.2 is capable of displaying and printing and will incorporate in all relevant screen layouts, all symbols and codes adopted by the EU Commission in relation to the Euro. (together "Euro Compliant").

#### **35. AUTHORITY CHANGES**

35.1 If the Authority, in its sole discretion, considers that a change to the Works and/or the Services is required to meet an emergency, to comply with a Change in Law that requires urgent implementation, or otherwise urgently for whatever reason the Authority shall issue a notice of the proposed change (a "Mandatory Notice of Change") on the Contractor. The changes specified therein shall come into effect on the date on which the Mandatory Notice of Change is received by the Contractor. The terms of the Contract shall be varied as set out in the Mandatory Notice of Change and the value of "C" shall be varied as set out in Clause 0 below.

35.2 Subject to Clause 0 above the Authority has the right to propose changes to the Works and/or the Services in accordance with this Clause. If the Authority requires a change to the Works and/or Services and/or to any provision of this Contract, it must serve a notice of the proposed change (an "Authority Notice of Change") on the Contractor.

35.3 The Authority Notice of Change shall:

35.3.1 set out the change to the Works and/or the Services required in sufficient detail to enable the Contractor to calculate and provide the Estimated Change in Project Costs and/or loss of revenue in accordance with Clause 0 below (the "Estimate");

35.3.2 in the event that the change will require Capital Expenditure, state whether the Authority intends to pay to the Contractor the costs involved in

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implementing the change or whether the Authority requires the Contractor to use its reasonable efforts to obtain funding in accordance with Clause 0 below; and

- 35.3.3 require the Contractor to provide the Authority within 21 days of receipt of the Authority Notice of Change with the Estimate.
- 35.4 As soon as practicable and in any event within 21 days after having received the Authority Notice of Change, the Contractor shall deliver to the Authority the Estimate. The Estimate shall include the opinion of the Contractor on:
- 35.4.1 whether relief from compliance with obligations is required, including the obligations of the Contractor to achieve the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date and perform the Services during the implementation of the Authority Change;
- 35.4.2 any impact on the provision of the Services;
- 35.4.3 any amendment required to this Contract and/or any Project Document as a result of the Authority Change;
- 35.4.4 any Estimated Change in Project Costs that result from the Authority Change;
- 35.4.5 any loss of revenue that results from the Authority Change;
- 35.4.6 any Capital Expenditure that is required or no longer required as a result of the Authority Change;
- 35.4.7 any regulatory approvals which are required; and
- 35.4.8 the proposed method of certification of any construction or operational aspects of the Works or the Services required by the Authority Change.
- 35.5 As soon as practicable after the Authority receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate, including:
- 35.5.1 providing evidence that the Contractor has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-contractors to minimise any increase in costs and maximise any reduction in costs;
- 35.5.2 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, foreseeable Changes in Law at that time have been taken into account by the Contractor; and
- 35.5.3 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 Authority Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clause 0 and/or 0 and/or 0 above.
- In such discussions the Authority may modify the Authority Notice of Change and (if the estimated increase in Capital Expenditure in respect of the change in Services is expected to exceed £100,000 (indexed) and it is practicable for the Contractor to do so), the Authority may require the Contractor to seek and evaluate competitive tenders for the relevant capital works. In each case the Contractor shall, as soon as practicable, and in any event not more than 14 days after receipt of such modification, notify the Authority of any consequential changes to the Estimate.
- 35.6 If the Contractor does not intend to use its own resources to implement any Authority Change it shall comply with Good Industry Practice with the objective of ensuring that it obtains best value for money (taking into account all relevant circumstances including, in particular, the requirement that the Contractor should not be worse off as a result of the implementation of the Authority Change) when procuring any work,

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- services, supplies, materials or equipment required in relation to the Authority Change.
- 35.7 If the Parties cannot agree on the contents of the Estimate then the dispute will be determined in accordance with Clause 0 (*Dispute Resolution*).
- 35.8 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to Clause 0 (*Dispute Resolution*), the Authority shall:
- 35.8.1 confirm in writing the Estimate (as modified); or
- 35.8.2 withdraw the Authority Notice of Change.
- 35.9 If the Authority does not confirm in writing the Estimate (as modified) within 30 days of the contents of the Estimate having been agreed in accordance with Clause 0 above or determined pursuant to Clause 0 above, then the Authority Notice of Change shall be deemed to have been withdrawn.
- 35.10 In the event that the Estimate (as modified) involves estimated Capital Expenditure then (unless the Authority has elected to fund such costs in accordance Clause 0) the Contractor shall use its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, on terms reasonably satisfactory to it and the Senior Lenders.
- 35.11 If the Contractor has used its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, but has been unable to do so within 60 days of the date that the Authority confirmed the Estimate, then the Contractor shall have no obligation to carry out the Authority Change, unless the Authority agrees within 20 days of the end of such period to pay the costs for which funding is not available on the basis provided in Clause 0 below.
- 35.12 The Authority may, at any time following the date on which the Estimate is confirmed, agree to meet all or, to the extent the Contractor has obtained funding for part of the Capital Expenditure, the remaining part of the estimated Capital Expenditure.
- 35.13 In the event that the Authority serves a Mandatory Notice of Change under Clause 0 or the Estimate has been confirmed by the Authority, then, to the extent that the Contractor is not otherwise compensated by way of a lump sum paid by the Authority, the value of "C" shall be varied (upwards or downwards) to reflect such Estimate or the cost of implementing the Mandatory Notice of Change so as to ensure that the Contractor is in no better or no worse a position as a direct result of the Mandatory Notice of Change or the Authority Notice of Change (as the case may be) provided always that any increase in C shall only become effective as follows:
- 35.13.1 If the increase to "C" which would occur by reason of the Mandatory Notice of Change or the Authority Notice of Change is equal to or greater than 1% of the value of C at the time immediately prior to the issuing of such Mandatory Notice of Change or Authority Notice of Change then C shall be increased with effect from the date on which the Mandatory Notice of Change or Authority Notice of Change becomes effective; or
- 35.13.2 If the increase to "C" which would occur by reason of the Mandatory Notice of Change or the Authority Notice of Change, when taken together with other such increases to "C" which would have taken effect previously during the same Performance Year but for the provisions of Clause 0 above (excluding any increase in C which has taken effect by virtue of the provisions of Clause 0 above) is in total equal to or greater than 1% of the value of "C" immediately prior to the issuing of such Mandatory Notice of Change or Authority Notice of Change then:

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- (i) C shall be increased by the cumulative value of all of the increases to C which would have taken effect previously during the same Performance Year but for the provisions of Clause 0 (for the avoidance of doubt, such increases in C applying from the date on which the current Mandatory Notice of Change or Authority Notice of Change becomes effective, and not applying retrospectively) in addition to the increase in C which is made in respect of the specific change to the Contractor's obligations under the Contract under that Mandatory notice of Change or Authority Notice of Change, all with effect from the date on which the current Mandatory Notice of Change or Authority Notice of Change becomes effective;
- (ii) as from the date on which that Mandatory Notice of Change or Authority Notice of Change became effective, the increase in C which has been made during that Performance Year shall, for the purposes of this Clause 0, be deemed to be zero; and

35.13.3 If, at the end of any Performance Year the cumulative increases to C that would occur by reason of all of the changes to the Services, which would have taken effect during that Performance Year but for the provisions of Clause 35.13, (excluding any increase in C which has taken effect by virtue of the provisions of Clauses 35.13.1 or 35.13.2) is in total less than 1% of the value of C at the start of that Performance Year, then C shall be increased by the cumulative value of all of the increases to C which would have taken effect previously during the same Performance Year but for the provisions of Clauses 35.13.1 or 35.13.2 with effect from the start of the following Performance Year.

35.14 Where the Authority agrees to pay the costs for which funding is not available pursuant to Clause 0 above

35.14.1 the Authority and Contractor shall agree:

- (a) a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by Contractor in carrying out the Authority Change to the extent borne by the Authority; and
- (b) where payment for part of the Authority Change reflects the carrying out of, or specific progress towards, an element within the Authority Change, an objective means of providing evidence confirming that the part of the Authority Change corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment schedule and evidence to be determined in accordance with Clause 0 (Dispute Resolution Procedure) in the event of the Authority and Contractor failing to agree as to its terms);

35.14.2 the Authority shall make a payment to Contractor within 15 Business Days of receipt by the Authority of invoices presented to the Authority (in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Authority Change has been carried out; and

35.14.3 if payment is not made in accordance with Clause 35.14.2 above, the Authority shall pay interest to Contractor on the amount unpaid from the

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date 15 Business Days after receipt of the relevant invoice until paid at the default rate set out in Clause 0.

### **35A CONTRACTOR CHANGES**

- 35A.1 If the Contractor wishes to introduce a change in Services, it must serve a Contractor Notice of Change on the Authority.
- 35A.2 The Contractor Notice of Change must:
- 35A.2.1 set out the proposed change in Services in sufficient detail to enable the Authority to evaluate it in full;
  - 35A.2.2 specify the Contractor's reasons for proposing the change in Services;
  - 35A.2.3 request the Authority to consult with the Contractor with a view to deciding whether to agree to the change in Services and, if so, what consequential changes the Authority requires as a result;
  - 35A.2.4 indicate any implications of the change in Services;
  - 35A.2.5 indicate, in particular, whether a variation to the Contract Price is proposed (and, if so, give a detailed cost estimate of such proposed change); and
  - 35A.2.6 indicate if there are any dates by which a decision by the Authority is critical.
- 35A.3 The Authority shall evaluate the Contractor's proposed change in Services in good faith, taking into account all relevant issues, including whether:
- 35A.3.1 a change in the Contract Price will occur;
  - 35A.3.2 the change affects the quality of the Services or the likelihood of successful delivery of the Services;
  - 35A.3.3 the change will interfere with the relationship of the Authority with third parties;
  - 35A.3.4 the financial strength of the Contractor is sufficient to perform the changed Services;
  - 35A.3.5 the residual value of the Assets is reduced; or
  - 35A.3.6 the change materially affects the risks or costs to which the Authority is exposed.
- 35A.4 As soon as practicable after receiving the Contractor Notice of Change, the Parties shall meet and discuss the matter referred to in it. During their discussions the Authority may propose modifications or accept or reject the Contractor Notice of Change.
- 35A.5 If the Authority accepts the Contractor Notice of Change (with or without modification), the relevant change in Services shall be implemented within 7 days of the Authority's acceptance. Within this period, the Parties shall consult and agree the remaining details as soon as practicable and shall enter into any documents to amend this Contract or any relevant Project Document which are necessary to give effect to the change in Services.
- 35A.6 If the Authority rejects the Contractor Notice of Change, it shall not be obliged to give its reasons for such a rejection.
- 35A.7 Unless the Authority's acceptance specifically agrees to an increase in the Contract Price, there shall be no increase in the Contract Price as a result of a change in Services proposed by the Contractor.
- 35A.8 If the change in Services proposed by the Contractor causes or will cause the Contractor's costs or those of a Sub-contractor to decrease, the value of "C" shall be varied such that the savings are shared equally between the Parties.

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35A.9 If a change in Service is required to give effect to a Change in Law, the Authority may only reject the Contractor Notice of Change on the grounds that it does not agree with the Contractor's proposed method of complying with the Change in Law and shall give reasons for such rejection. Following any such rejection, the Parties shall negotiate in good faith an alternative change (to be reflected in an amended Contractor Notice of Change) to ensure that the Contractor is able to comply with the Change in Law and all provisions of the Contract. The costs of introducing a change in Service resulting from a Qualifying Change in Law (including any resulting variation in the Contract Price) shall be dealt with in accordance with Clause 36 (*Change in Law*) and to the extent not dealt with shall be borne by the Contractor.

## **36. CHANGE IN LAW**

36.1 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:

36.1.1 any necessary change to the Works or the Services;

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

36.1.3 whether relief from compliance with obligations is required, including the obligation of the Contractor to achieve the Contractual Opening Date, any date in the Phase-in Timetable or the Full Operation Date and/or perform the Services during the implementation of any relevant Qualifying Change in Law;

36.1.4 any loss of revenue that will result from the relevant Qualifying Change in Law;

36.1.5 any Estimated Change in Project Costs that directly result from the Qualifying Change in Law; and

36.1.6 any Capital Expenditure that is required or no longer required as a direct result of a Qualifying Change in Law taking effect during the Contract Period,

1.1.2 in each case giving in full detail the procedure for implementing the change in the Works or the Services. Responsibility for the costs of implementation (and any resulting variation to the Contract Price) shall be dealt with in accordance with Clauses 0 to 0 below.

36.2 As soon as practicable after receipt of any notice from either Party under Clause 01 above, the Parties shall discuss and agree the issues referred to in Clause 0 above and any ways in which the Contractor can mitigate the effect of the Qualifying Change of Law, including:

36.2.1 providing evidence that the Contractor has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-contractors to minimise any increase in costs and maximise any reduction in costs;

36.2.2 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

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- Changes in Law at that time have been taken into account by the Contractor;
- 36.2.3 giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the shareholders or their Affiliates carry on business; and
- 36.2.4 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 0 or 0 above.
- 36.3 If the Parties agree or it is determined under Clause 0 (*Dispute Resolution*) that the Contractor is required to incur additional Capital Expenditure due to a Qualifying Change in Law, then the Contractor shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it and the Senior Lenders. This Clause 0 shall not apply to the Contractor's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change in Law under this Clause 0 which, subject to Clause 5A.7, shall be solely for the account of the Contractor.
- 36.4 If the Contractor has used reasonable endeavours to obtain funding for Capital Expenditure referred to in Clause 0, but has been unable to do so within 60 days of the date that the agreement or determination in Clause 0 occurred, then the Authority shall pay to the Contractor an amount equal to that Capital Expenditure on or before the date falling 30 days after the Capital Expenditure has been incurred.
- 36.5 Where compensation is payable under this Clause 0, the value of C shall be varied so as to ensure that the Contractor is in no better or no worse a position as a direct result of the Qualifying Change in Law.

### **37. TERMINATION ON AUTHORITY DEFAULT**

- 37.1 If an Authority Default has occurred and the Contractor wishes to terminate the Contract, it must serve a termination notice on the Authority within 45 days of becoming aware of the Authority Default.
- 37.2 The termination notice served by the Contractor under Clause 0 must specify the type of Authority Default which has occurred entitling the Contractor to terminate.
- 37.3 The Contract will terminate on the day falling 45 days after the date the Authority receives the termination notice, unless the Authority rectifies the Authority Default within 30 days of receipt of the termination notice.

### **38. TERMINATION ON CONTRACTOR DEFAULT**

#### **Termination Notice**

- 38.1 Where a Contractor Default has occurred, the Authority may (subject to Clause 38.2) terminate the Contract by giving notice in writing (a "Termination Notice") to the Contractor, receiver, liquidator or other person in whom the Contractor's interest in the Contract may be vested at that time. The Termination Notice shall specify:
- 38.1.1 the Contractor Default that has occurred; and
- 38.1.2 where appropriate, the circumstances which have given rise to the Contractor Default; and
- 38.1.3 the date on which the Contract will terminate.

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Subject to the provisions of the Direct Agreement, the Contract will terminate on the date specified in the Termination Notice.

### **Remediable Contractor Default**

38.2 Where a Remediable Contractor Default occurs the Authority may not serve a Termination Notice on the Contractor under Clause 38.1 unless it has first given the Contractor a notice (a "Rectification Notice") specifying:

38.2.1 the Contractor Default that has occurred; and

38.2.2 the circumstances which have given rise to the Contractor Default.

The Authority may only serve a Termination Notice on the Contractor under Clause 38.1 in respect of a Remediable Contractor Default after the occurrence of one of the circumstances described in Clause 38.6.

38.3 On receipt of a Rectification Notice, the Contractor shall immediately ensure that the Contractor uses all reasonable endeavours to deal with or mitigate the effect of the Remediable Contractor Default and shall begin to remedy the Remediable Contractor Default. Further, the Contractor shall provide to the Authority, as soon as practicable (and in any event not later than the date falling 3 days after the receipt of such Rectification Notice) details of the steps that it is taking to deal with or mitigate the effects of the Remediable Contractor Default (an "Initial Rectification Plan"). As soon as practicable thereafter (and in any event not later than the date falling 5 Business Days after delivery of the Initial Rectification Plan) the Contractor shall propose a programme of the steps which it intends to take to remedy such Remediable Contractor Default (the "Proposal for Rectification"). For the avoidance of doubt, such Proposal for Rectification may include a proposal by the Contractor to terminate any relevant Sub-contract and to enter into a contract with another party for the latter to provide that part of the Works or the Services currently being provided by the relevant Sub-contractor in accordance with the provisions of Clause 58 (Assignment and Subcontracting).

38.4 The Contractor shall provide such evidence as the Authority may reasonably require to demonstrate to the Authority that the Contractor is using its reasonable endeavours, taking into account the seriousness, materiality and circumstances surrounding the Remediable Contractor Default.

38.5 Where an Initial Rectification Plan is received by the Authority within 3 days of receipt of the Rectification Notice by the Contractor, and a Proposal for Rectification is received by the Authority within 5 Business Days of delivery of the Initial Rectification Plan and is approved by the Authority (such approval not to be unreasonably withheld or delayed), the Contractor shall carry out such approved rectification and remedy of the Remediable Contractor Default within the period and on the terms specified in the Rectification Notice or, where different, the period and terms specified in the approved Proposal for Rectification. At the expiry of such period, if the Contractor has remedied the Remediable Contractor Default, no further action will be taken, the Rectification Notice will be deemed to be withdrawn and the Contract will continue. In the event that the Authority withholds its consent to a Proposal for Rectification on reasonable grounds, then provided that the Contractor continues to use all reasonable endeavours to deal with or mitigate the effect of the Remediable Contractor Default and has begun to remedy the Remediable Contractor Default in accordance with Clause 38.3, the Contractor may submit one further Proposal for Rectification. Such further Proposal for Rectification shall be submitted to the Authority for its approval (such approval not to be unreasonably withheld or delayed) within 5 Business Days of the date of the Authority notifying the Contractor

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of its reasons for withholding its approval to the original Proposal for Rectification. If the Authority approves the further Proposal for Rectification (such approval not to be unreasonably withheld or delayed), then the Contractor shall carry out such approved rectification and remedy of the Remediable Contractor Default within the period and on the terms specified in the Rectification Notice or, where different, the period and terms specified in the approved Proposal for Rectification. At the expiry of such period, if the Contractor has remedied the Remediable Contractor Default, no further action will be taken, the Rectification Notice will be deemed to have been withdrawn and the Contract will continue.

38.6 If:

38.6.1 the Contractor does not deliver an Initial Rectification Plan within 3 days of the date of receipt of such Rectification Notice by the Contractor or does not deliver a Proposal for Rectification within 5 Business Days of the date of delivery of the Initial Rectification Plan or, where approval for a Proposal for Rectification has been withheld on reasonable grounds and the Contractor does not deliver a further Proposal for Rectification in accordance with Clause 38.5; or

38.6.2 the Contractor does not, at any time following approval of a Proposal for Rectification under Clause 38.5, implement the approved Proposal for Rectification within the period and on the terms specified in the Rectification Notice or, where different, the period and terms specified in the approved Proposal for Rectification, to the reasonable satisfaction of the Authority; or

38.6.3 the Contractor does not at any time exercise reasonable endeavours to remedy the Remediable Contractor Default; or

38.6.4 a further Proposal for Rectification is not approved by the Authority (acting reasonably) pursuant to Clause 38.5; or

38.6.5 compliance with the approved Proposal for Rectification has failed to remedy the Remediable Contractor Default (which shall include failure to achieve any interim steps or milestones within the approved Proposal for Rectification)

then the Authority may proceed to terminate the Contract by serving a Termination Notice on the Contractor, in accordance with Clause 38.1.

#### **Authority Step-in**

38.7 Without prejudice to its rights under Clause 38.1, but subject to the provisions of Clause 38.9, at any time after an Irremediable Contractor Default has occurred the Authority shall be entitled to assume control and management and/or provision of the Services or any of them as agent on behalf of the Contractor. For the avoidance of doubt, the Authority shall only be entitled to exercise its rights under this Clause 38.7 after the Actual Opening Date.

38.8 Without prejudice to its rights under Clause 38.6, but subject to the provisions of Clause 38.9, where a Remediable Contractor Default has occurred the Authority shall be entitled to assume control and management and/or provision of the Services or any of them as agent on behalf of the Contractor at any time after the occurrence of one of the circumstances described in Clause 38.6. For the avoidance of doubt, the Authority shall only be entitled to exercise its rights under this Clause 38.8 after the Actual Opening Date.

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- 38.9 If the Authority wishes to exercise its rights under Clauses 38.7 or 38.8 (the "Step-in Rights") it shall give the Contractor written notice prior to exercising such Step-in Rights specifying:
- 38.9.1 the action that the Authority wishes to take;
  - 38.9.2 the date that it wishes to commence such action;
  - 38.9.3 the time period which it believes will be necessary for such action;
  - 38.9.4 to the extent practicable, the effect on the Contractor and the extent of its obligation to continue to provide the Services during the period such action is being taken.
- 38.10 Where the Authority has exercised the Step-in Rights, but without prejudice to the generality of the powers of the Authority to act as agent of the Contractor in relation to the control and management and/or provision of the Services or any of them, the Contractor shall procure that:
- 38.10.1 the Director shall co-operate with and where requested act upon the instructions of such one or more named representatives nominated by the Authority (the "Designated Representative");
  - 38.10.2 the Contractor and each Sub-contractor shall, without prejudice to their contractual obligations in relation to the provision of the Services, do all that they reasonably can do to enable the Authority to exercise its rights and to procure that the Services (or such part thereof as the Authority has assumed control and management of) are carried out; and
  - 38.10.3 the Staff shall act in accordance with any reasonable instructions given by the Designated Representative.
- 38.11 In exercising the Step-in Rights, but without prejudice to any other rights under this Contract, the Authority shall have no rights:
- 38.11.1 to amend, waive, terminate, vary or compromise any contract the Contractor has entered into in relation to the provision of or financing of the provision of Services;
  - 38.11.2 to appoint or dismiss staff employed by the Contractor; or
  - 38.11.3 to enter into any contracts or other arrangements on behalf of the Contractor that will survive or will involve the Contractor in any Claims or Losses that will arise or extend past the date upon which the Authority ceases to act as agent for the Contractor pursuant to this Contract.
- 38.12 For so long as, and to the extent that, the Authority is exercising the Step-in Rights and this prevents the Contractor from providing any part of the Services in accordance with the terms of this Contract:
- 38.12.1 the Contractor shall be relieved of its obligations to provide such part of the Services; and
  - 38.12.2 the Contract Price payable to the Contractor under Clause 31.1 shall equal the amount that the Contractor would receive if it were satisfying all its obligations in respect of the Services affected by the Authority exercising the Step-in Rights less any amount due to the Authority by the Contractor under Clause 38.14 below;
  - 38.12.3 for the avoidance of doubt the Authority shall retain the right to:
    - (i) make deductions from the Contract Price in accordance with Clause 33.1 in respect of Performance Points; and
    - (ii) reduce the Contract Price to the extent that the Contractor has failed to provide Available Prisoner Places and/or Additional Prisoner Places;

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where such Performance Points and/or failure to provide Available Prisoner Places and/or Additional Prisoner Places are attributable to the Contractor's delivery of the Services that are not affected by the Authority exercising the Step-in Rights.

- 38.13 To the extent that, in exercising the Step-in Rights, the Authority performs any of the obligations of the Contractor under this Contract or undertakes tasks that would otherwise be undertaken by the Contractor pursuant to this Contract the Authority shall perform such obligations or undertake such tasks in accordance with the provisions of the Planning Approval and Clauses 6.8, 8 and 22.2 and to the standards contained in Clauses 29.1.1 (excluding references to Schedule C) and 29.1.3 and Part 1 of Schedule D.
- 38.14 The Authority shall, subject to Clause 38.15, be fully indemnified and held harmless by the Contractor whilst it is acting as agent for the Contractor in accordance with the terms of this Contract in respect of all reasonable costs and expenses incurred and Losses suffered in exercising the Step-in Rights provided that the Authority uses its reasonable endeavours to mitigate such Losses. The Authority shall provide such evidence as the Contractor may reasonably require in support of any claim for indemnification made under this Clause 38.14.
- 38.15 The Contractor shall not be obliged to indemnify the Authority under:
- 38.15.1 Clause 38.14 above; or
  - 38.15.2 Clause 5.1 (notwithstanding the provisions of such Clause)
- to the extent that the costs, expenses or Losses incurred arise from the negligence of the Authority or from a breach by the Authority of its obligations under Clause 38.13.
- 38.16 The Authority shall not be liable as principal nor be deemed to have adopted any contract (including any contract of employment of any of the Staff) or any other liability of the Contractor with or to a third party save where it has acted in breach of Clause 38.11.
- 38.17 The Authority's rights to act as the Contractor's agent pursuant to Clause 38.7 shall cease on the date specified in any Termination Notice served pursuant to Clause 38.1 (in which case the Contract will terminate) or, where no Termination Notice has been served, on the earlier of:
- 38.17.1 the date falling 6 months after the date of the Step-in Notice (in which case the Contract will continue); and
  - 38.17.2 the date on which the Contractor has demonstrated to the reasonable satisfaction of the Authority that it is capable of performing its obligations under the Contract (in which case the Contract will continue).
- 38.18 The Authority's rights to act as the Contractor's agent pursuant to Clause 38.8 shall cease on the earlier of:
- 38.18.1 the date falling 6 months after the date of the Step-in Notice, in which case the Authority shall thereafter be entitled to exercise its rights under Clause 38.1; and
  - 38.18.2 the date on which the Contractor demonstrates to the reasonable satisfaction of the Authority that it is capable of performing its obligations under the Contract (in which case the Contract will continue).
- 38.19 For the purposes of this Clause 38, in considering what is a reasonable period of time or whether a Party is using its reasonable endeavours, account shall be taken, inter alia, of:
- 38.19.1 the seriousness of the Contractor Default;
  - 38.19.2 the materiality of the Contractor Default and the financial resources required to remedy the Contractor Default;

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- 38.19.3 the circumstances surrounding the Contractor Default;
  - 38.19.4 the causes of the Contractor Default;
  - 38.19.5 the effect on the safety and/ or welfare of Prisoners of the Contractor Default;
  - 38.19.6 the effect on security at the Prison of the Contractor Default;
  - 38.19.7 the effect on the operation and maintenance of the Prison of the Contractor Default;
  - 38.19.8 the effect on the Services of the Contractor Default;
  - 38.19.9 any period of time already available to or afforded to the Contractor to remedy the Contractor Default; and
  - 38.19.10 where appropriate, whether it is the right to exercise the Step-in Rights or the right to deliver a Termination Notice pursuant to Clause 38.1 which it is sought to exercise.
- 38.20 The Authority agrees that it will not, and is not entitled to, terminate the Contract other than in accordance with this Clause 38, or as otherwise specifically provided in the Contract.
- 38.21 No Contractor Default shall be deemed to have occurred, and the Authority shall have no right to terminate this Contract under this Clause 38, to the extent that the Contractor Default is directly attributable to a Force Majeure Event.

### **38A. REPLACEMENT OF SUB-CONTRACTORS**

38A.1 On the substitution or replacement of the Construction Sub-contractor or the Operating Sub-contractor or a sub-contractor to the Construction Sub-contractor or the Operating Sub-contractor due to a breach or default under the Construction Sub-contract or Operating Sub-contract or relevant sub-contract the Contractor may (subject to Clause 38A.4 below and provided that the Contractor is acting in compliance with Clause 4.1 (*Changes to Ancillary Documents*) and 0 (*Assignment and Sub-contracting*)) elect that for the purposes of Clause 0 (*Termination on Contractor Default*) only:

- 38A.1.1 any failures to provide Available Prisoner Places; and/or
- 38A.1.2 any failures to provide Additional Prisoner Places; and/or
- 38A.1.3 any Performance Points; and/or
- 38A.1.4 any warning notices or final warning notices in respect of Clause 39 (Persistent Breach),

accrued prior to the date of such substitution or replacement, in each case relating to the Works, Equipment or Services in respect of which the Construction Sub-contractor or Operating Sub-contractor or sub-contractor to the Construction Sub-contractor or Operating Sub-contractor is being replaced, shall be disregarded by virtue of the provisions of Clause 38A.2 or 38A.3 below (as appropriate). The Contractor shall notify the Authority on or before the appointment of any such substitute or replacement Construction Sub-contractor or Operating Sub-contractor (or its sub-contractor as appropriate) whether it elects for this Clause 38A.1 to apply on that occasion.

38A.2 Where an election is made pursuant to Clause 38A.1 above on the substitution or replacement of the Construction Sub-contractor or a sub-contractor to the Construction Sub-contractor then for the purposes of Clause 0 (*Termination on Contractor Default*) only, and with effect from the date of such substitution or replacement, any warning notices or final warning notices in respect of Clause 0 (*Persistent Breach*) accrued prior to the date of such substitution or replacement shall

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be disregarded for the purposes of sub-paragraph (b) of the definition of Contractor Default.

38A.3 Where an election is made pursuant to Clause 38A.1 above on the substitution or replacement of the Operating Sub-contractor or a sub-contractor to the Operating Sub-contractor then for the purposes of Clause 0 (*Termination on Contractor Default*) only and with effect from the date of such substitution or replacement:

38A.3.1 any failures to provide Available Prisoner Places prior to the date of such substitution or replacement shall be disregarded for the purposes of sub-paragraphs (k), (l) and (m) of the definition of Contractor Default; and

38A.3.2 any failures to provide Additional Prisoner Places prior to the date of such substitution or replacement shall be disregarded for the purposes of sub-paragraph (m) of the definition of Contractor Default; and

38A.3.3 any warning notices or final warning notices in respect of Clause 0 (*Persistent Breach*) accrued prior to the date of such substitution or replacement shall be disregarded for the purposes of sub-paragraph (bi) of the definition of Contractor Default.

For the avoidance of doubt, the Authority shall retain the right to make deductions from the Contract Price in accordance with Clause 0 in respect of Performance Points accrued prior to the date of such substitution or replacement and the Contract Price shall be reduced to the extent that the Contractor has failed to provide Available Prisoner Places and/or Additional Prisoner Places prior to the date of such substitution or replacement.

38A.4 The Contractor shall be entitled to make an election under Clause 38A.1 above on a maximum of three occasions throughout the Contract Period and no more than once in any 12-month period.

### **39. PERSISTENT BREACH**

39.1 If a breach has occurred more than 2 times in any 6 month period then the Authority may serve a notice on the Contractor:

39.1.1 specifying that it is a formal warning notice;

39.1.2 giving reasonable details of the breach; and

39.1.3 stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Contract.

39.2 If, following service of such a warning notice, the breach specified has continued beyond 30 days or recurred 3 or more times within the 6 month period after the date of service of the notice referred to in Clause 0, then the Authority may serve another notice on the Contractor:

39.2.1 specifying that it is a final warning notice;

39.2.2 stating that the breach specified has been the subject of a warning notice served within the twelve month period prior to the date of service of the final warning notice; and

39.2.3 stating that if such failure continues or recurs within the six month period after the date of service of the final warning notice, the Contract may be terminated.

39.3 A warning notice may not be served in respect of any breach in respect of which a separate warning notice has already been served until a period of 12 months has elapsed since the date of service of the previous warning notice or final warning notice.

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#### **40. TERMINATION ON FORCE MAJEURE**

- 40.1 No Party shall be entitled to bring a claim for a breach of obligations under the Contract 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 it is prevented from carrying out obligations by that Force Majeure Event.
- 40.2 Nothing in Clause 0 above shall affect any entitlement to make deductions in accordance with the provisions of Clause 0 and Schedule F or to receive payment under the provisions of Clause 33.2 in the period during which the Force Majeure Event is subsisting.
- 40.3 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.
- 40.4 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 the Contract.
- 40.5 If no such terms are agreed on or before the date falling 90 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 Contract for a period of more than 120 days, then, subject to Clause 0 below, either Party may terminate the Contract by giving 30 days' written notice to the other Party.
- 40.6 If the Contract is terminated under Clause 0 above or 0:
- 40.6.1 compensation shall be payable by the Authority in accordance with Clause 0 (*Compensation on Termination for Force Majeure*); and
- 40.6.2 the Authority may require the Contractor to transfer its title, interest and rights in and to any Assets to the Authority.
- 40.7 If the Contractor gives notice to the Authority under Clause 0 above that it wishes to terminate the Contract, then the Authority has the option either to accept such notice or to respond in writing on or before the date falling 10 days after the date of its receipt stating that it requires the Contract to continue. If the Authority gives the Contractor such notice, then:
- 40.7.1 the Authority shall pay to the Contractor the Unitary Charge from the day after the date on which the Contract would have terminated under Clause 0 as if the Services were being fully provided; and
- 40.7.2 the Contract will not terminate until expiry of written notice (of at least 30 days) from the Authority to the Contractor that it wishes the Contract to terminate.
- 40.8 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 Contractor 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.
- 40.9 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 Contract. Following such notification the Contract shall

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continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

#### **41. TERMINATION ON CORRUPT GIFTS AND FRAUD**

##### **41.1 Corrupt Gifts and Fraud**

The Contractor warrants that in entering the Contract it has not committed any Prohibited Act.

##### **41.2 Termination for Corrupt Gifts and Fraud**

41.2.1 If the Contractor or any Sub-contractor (or anyone employed by or acting on behalf of any of them) or any of its or their agents or shareholders commits any Prohibited Act, then the Authority shall be entitled to act in accordance with Clauses 0 to 0 below.

41.2.2 If a Prohibited Act is committed by the Contractor or by an employee not acting independently of the Contractor, then the Authority may terminate the Contract by giving notice to the Contractor.

41.2.3 If the Prohibited Act is committed by an employee of the Contractor acting independently of the Contractor, then the Authority may give notice to the Contractor of termination and the Contract will terminate, unless within 30 days of receipt of such notice the Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Services by another person.

41.2.4 If the Prohibited Act is committed by a Sub-contractor or by an employee of that Sub-contractor not acting independently of that Sub-contractor, then the Authority may give notice to the Contractor of termination and the Contract will terminate, unless within 30 days of receipt of such notice the Contractor terminates the relevant Project Document and procures the performance of such part of the Services by another person.

41.2.5 If the Prohibited Act is committed by an employee of a Sub-contractor acting independently of that Sub-contractor, then the Authority may give notice to the Contractor of termination and the Contract will terminate, unless within 30 days of receipt of such notice the Sub-contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Services by another person.

41.2.6 If the Prohibited Act is committed by any other person not specified in Clauses 0 to 0 above, then the Authority may give notice to the Contractor of termination and the Contract will terminate unless within 30 days of receipt of such notice, the Contractor procures the termination of such person's employment and of the appointment of their employer (where not employed by the Contractor or the Sub-contractors) and (if necessary) procures the performance of such part of the Services by another person.

41.2.7 Any notice of termination under this Clause 41 shall specify:

- (i) the nature of the Prohibited Act;
- (ii) the identity of the party whom the Authority believes has committed the Prohibited Act;
- (iii) the date on which the Contract will terminate, in accordance with the applicable provision of this Clause 41; and

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(iv) the Authority's chosen option under Clause 0 (*Compensation on Termination for Corrupt Gifts and Fraud*).

#### **42. VOLUNTARY TERMINATION BY THE AUTHORITY**

- 42.1 Subject to Clause 0, the Authority may terminate the Contract at any time on or before its Expiry Date by complying with its obligations under Clauses 0 to 0 below.
- 42.2 If the Authority wishes to terminate the Contract under this Clause 0, it must give notice to the Contractor stating:
- 42.2.1 that the Authority is terminating the Contract under this Clause 0 (*Voluntary Termination by Authority*);
- 42.2.2 that the Contract will terminate on the date falling 30 days after the date of receipt of the notice; and
- 42.2.3 whether the Authority has chosen to exercise its option under Clause 0.
- 42.3 On termination, the Authority shall have the option to require the Contractor to transfer to the Authority all of its right, title and interest in and to the Assets.
- 42.4 The Contract will terminate on the date falling 30 days after the date of receipt of the notice referred to in Clause 0 above.
- 42.5 The Authority may not terminate the Contract or serve a notice under this Clause 0 at any time whilst an Authority Default is subsisting and the Contractor has a right to terminate the Contract under Clause 0 (*Termination on Authority Default*).

#### **43. TERMINATION FOR BREACH OF REFINANCING PROVISIONS**

- 43.1 If the Contractor wilfully breaches Clause 0 (*Refinancing*) then the Authority may terminate the Contract at any time on or before its Expiry Date by complying with its obligations under Clause 0 below.
- 43.2 If the Authority wishes to terminate the Contract under this Clause 43, it must give notice to the Contractor stating:
- 43.2.1 that the Authority is terminating the Contract under this Clause 0 (*Termination by the Authority for Breach of the Refinancing Provisions*);
- 43.2.2 that the Contract will terminate on the date falling 30 days after the date of receipt of the notice; and
- 43.2.3 whether the Authority has chosen to exercise its option under Clause 0 below.
- 43.3 On termination, the Authority shall have the option to require the Contractor to transfer to the Authority all of its right, title and interest in and to the Assets.
- 43.4 The Contract will terminate on the date falling 30 days after the date of receipt of the notice referred to in Clause 0 above;

#### **44. COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT**

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- 44.1 On termination of the Contract under Clause 0 (*Termination on Authority Default*) the Authority shall pay the Contractor the “Authority Default Termination Sum” in accordance with Clause 0.
- 44.2 Subject to Clauses 0 to 0 below the Authority Default Termination Sum shall be an amount equal to the aggregate of:
- 44.2.1 the Base Senior Debt Termination Amount; and
  - 44.2.2 redundancy payments for employees of the Contractor that have been or will be reasonably incurred by the Contractor as a direct result of termination of this Contract and any Sub-Contractor Breakage Costs; and
  - 44.2.3 the aggregate amount for which the share capital of the Contractor and the amounts outstanding under the Subordinated Financing Agreements could have been sold on an open market basis based on the Relevant Assumptions.
- 44.3 On payment of the amount referred to in Clause 0 above, the Authority shall have the option to require the Contractor to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority.
- 44.4 If the aggregate of the amounts referred to in Clauses 0 and 44.3 is less than the Revised Senior Debt Termination Amount , then the Authority Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in Clause 0 provided always that :
- (i) the amount referred to in Clause 0 shall only be paid to the extent that the Contractor has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and
  - (ii) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle the Contractor to terminate such Sub-Contract.
- 44.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under Clause 11.4.4.1 of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount .
- 44.6 If the Contractor has wilfully or through gross negligence failed to comply with its obligations under Clause 11.4.4.2 of the Direct Agreement and there has been an overstatement of the cash balances by the Contractor as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Clause 0, then the Authority Default Termination Sum, shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

## **45. COMPENSATION ON TERMINATION FOR CONTRACTOR DEFAULT**

### **45.1 Retendering Election**

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- 45.1.1 Subject to Clause 45.1.2, the Authority shall be entitled either to:
- (i) retender the provision of the Services in accordance with Clause 0 (*Retendering Procedure*); or
  - (ii) require an expert determination in accordance with Clause 0 (*No Retendering Procedure*).
- 45.1.2 The Authority shall be entitled to retender the provision of the Services in accordance with Clause 0 (*Retendering Procedure*) if:
- (i) the Authority notifies the Contractor on or before the date falling 20 Business Days after the Termination Date; and
  - (ii) there is a Liquid Market; and either:
    - 1.2 (A) the Senior Lenders have not exercised their rights to step-in under Clause 7 of the Direct Agreement ;  
or
    - 1.3 (B) the Contractor or Senior Lenders have not procured the transfer of the Company's rights and liabilities under this Contract to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so.
- but otherwise the Authority shall not be entitled to re-tender the provision of the Services and Clause 0 shall apply.

## 45.2 Retendering Procedure

If the Authority elects to retender the provision of the Services under Clause 0 (*Retendering Election*), then the following provisions shall apply:

- 45.2.1 The objective of the retendering procedure shall be to establish and pay to the Contractor the Highest Compliant Tender Price, as a result of the Tender Process.
- 45.2.2 The Authority shall (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.
- 45.2.3 The Authority shall notify the Contractor of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process but shall act reasonably in setting such requirements and terms.
- 45.2.4 The Contractor authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under Clause 0 (*Information and Confidentiality*) that is reasonably required as part of the Tender Process.
- 45.2.5 The Contractor may, at its own cost, appoint a person (the "Tender Process Monitor") to monitor the Tender Process for the purpose of monitoring and reporting to the Contractor and the Senior Lenders on the Authority's compliance with the Tender Process and making representations to the Authority. The Tender Process Monitor will not disclose any confidential information to the Contractor or any other person (and shall provide an undertaking to the Authority to such effect as a condition of its appointment) but shall be entitled to advise the Contractor as to whether it considers that the Authority has acted in accordance with the Tender Process, and correctly determined the Adjusted Highest Compliant Tender Price.

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- 45.2.6 The Tender Process Monitor shall enter into a confidentiality agreement with the Authority in a form acceptable to the Authority and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of the tender documentation and bids and shall be required to make written representations to the Authority regarding compliance with the Tender Process. All representations shall be made by the Tender Process Monitor in a timely manner as the Tender Process proceeds. The Authority shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the Contractor in the event that the Contractor refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 0 (*Dispute Resolution*).
- 45.2.7 For all or any part of a month, falling within the period from the Termination Date to the Compensation Date, the Authority shall pay to the Contractor:
- (i) the Post Termination Services Amount for that month, on or before the date falling 10 Business Days after the end of that month; and
  - (ii) the Post Termination Services Amount for the period ending on the Compensation Date, on or before the date falling 20 Business Days after the Compensation Date.
- 45.2.8 If any Post Termination Services Amount is less than zero then it shall be carried forward and shall be set off against any future positive Post Termination Services Amounts. If any such Post Termination Services Amount has not been set off on or before the Compensation Date then it shall be taken into account in the calculation of the Adjusted Highest Compliant Tender Price.
- 45.2.9 The Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under material damage insurance policies and amounts (if any) standing to the credit of the Joint Insurance Account on the date that the New Contract is entered into.
- 45.2.10 As soon as practicable after tenders have been received, the Authority shall (acting reasonably) determine the Compliant Tenders and shall notify the Contractor of the Adjusted Highest Compliant Tender Price.
- 45.2.11 If the Contractor refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 0 (*Dispute Resolution*), the Authority shall be entitled to enter into a New Contract. The Authority shall pay to the Contractor the Adjusted Highest Compliant Tender Price on or before the date falling 20 Business Days after it has been determined in accordance with Clause 0 (*Dispute Resolution*) and the Authority shall pay interest to the Contractor at the Senior Debt Rate on any amount of Adjusted Highest Compliant Tender Price which had been withheld, from the date specified in Clause 0 below until the date specified in this Clause 0. Any part of the Adjusted Highest Compliant Tender Price which is not in dispute shall be paid in accordance with Clause 45.2.12.
- 45.2.12 Subject to Clauses 0 and 0, the Authority shall pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling 20 Business Days after the date of the New Contract.
- 45.2.13 The discharge by the Authority of its payment obligation in Clauses 0 and 0 above shall be in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Contract

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and the Project Documents whether under contract, delict, restitution or otherwise, save for any liability of the Authority which arose prior to the Termination Date that has not already been taken into account in the Adjusted Highest Compliant Tender Price.

- 45.2.14 Subject to Clauses 0 and 0 below, if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to the Contractor on or before the date falling two years after the Termination Date then the following provisions of this Clause 45.2 shall not apply to that termination and the provisions of Clause 0 (*No Retendering Process*) shall apply instead.
- 45.2.15 If the Adjusted Highest Compliant Tender Price is zero or a negative number then the Authority shall have no obligation to make any payment to the Contractor and with effect from the time that the Authority gives notice of that event to the Contractor, the Authority shall be released from all liability to the Contractor for breaches and/or termination of this Contract and any other Project Document whether under contract, delict, restitution or otherwise save for any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price.
- 45.2.16 If the Adjusted Highest Compliant Tender Price is less than zero then an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by the Contractor to the Authority on the date of the New Contract.
- 45.2.17 The Authority may elect at any time prior to the receipt of a Compliant Tender to follow the no retendering procedure under Clause 0 (*No Retendering Procedure*) by notifying the Contractor that this election has been made.
- 45.2.18 If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify the Contractor of this decision and pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price within 20 Business Days of such notification.

### **45.3 No Retendering Procedure**

- 45.3.1 If either the Authority is not entitled to retender the provision of the Services under Clause 0 (*Retendering election*) or the Authority elects to require an expert determination in accordance with this Clause 0 (*No Retendering Procedure*) then the procedure shall apply in Clauses 0 to 0.
- 45.3.2 Subject to Clause 0 below, the Contractor shall not be entitled to receive any Post Termination Services Amount.
- 45.3.3 If the Authority elects to require an expert determination in accordance with this Clause 0 (*No Retendering Procedure*) after it has elected to follow the procedure under Clause 0 (*Retendering Procedure*), then the Authority shall continue to pay to the Contractor each Post Termination Services Amount until the Compensation Date, in accordance with Clause 0 (*Retendering Procedure*).
- 45.3.4 In agreeing or determining the Estimated Fair Value of the Contract the Parties shall be obliged to follow the principles set out below:

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- (i) all forecast amounts should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in the Contract;
- (ii) the total of all future payments of the full Contract Price (without deductions) forecast to be made shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate;
- (iii) the total of all costs forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Termination Date Discount Rate and deducted from the payment calculated pursuant to sub-paragraph (ii) above, such costs to include (without double counting):
  - (i) (A) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;
  - (ii) (B) the costs of the service forecast to be incurred by the Authority to the standard required; and
  - (iii) (C) any rectification costs required to deliver the service to the standard required (including any costs forecast to be incurred by the Authority to complete construction or development work and additional operating costs required to restore operating services standards),

in each case such costs to be forecast at a level that will deliver the full Contract Price referred to in paragraph (ii) above.

45.3.5 If the Parties cannot agree on the Adjusted Estimated Fair Value of the Contract on or before the date falling 30 days after the date on which the Authority elected to require an expert determination in accordance with this Clause 0 (*No Retendering Procedure*), then the Estimated Fair Value of the Contract shall be determined in accordance with Clause 0 (*Dispute Resolution*).

45.3.6 The Authority shall pay to the Contractor an amount equal to the Adjusted Estimated Fair Value of the Contract on the date falling 60 days after the date on which the Adjusted Estimated Fair Value of the Contract has been agreed or determined in accordance with this Clause 0 (*No Retendering Procedure*).

45.3.7 The discharge by the Authority of its obligation in Clause 0 is in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Contract or other Project Document whether in contract, delict, restitution or otherwise save for any liability that arose prior to the Termination Date (but not from the termination itself) that has been taken into account in determining the Adjusted Estimated Fair Value of the Contract.

45.3.8 To the extent that the Adjusted Estimated Fair Value of the Contract is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Contract shall be due and payable by the Contractor to the Authority on the Compensation Date.

## 46. COMPENSATION ON TERMINATION FOR FORCE MAJEURE

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- 46.1 On termination of the Contract under Clause 0 (*Termination on Force Majeure*) or Clause 55.3 (*Uninsurable Risks*), the Authority shall pay to the Contractor the “Force Majeure Termination Sum” in accordance with Clause 0.  
Subject to Clauses 0 to 0 below the Force Majeure Termination Sum shall be the amount equal to the aggregate of:
- 46.1.1 the Base Senior Debt Termination Amount;
  - 46.1.2 the Junior Debt less an amount equal to the aggregate of payments of interest and principal made by the Contractor under the Subordinated Financing Agreements;
  - 46.1.3 all amounts paid to the Contractor by way of subscription for shares in the capital of the Contractor less dividends and other distributions paid to the shareholders of the Contractor (save to the extent deducted under Clause 0 above); and
  - 46.1.4 redundancy payments for employees of the Contractor that have been or will be reasonably incurred by the Contractor as a direct result of termination of the Contract and any Sub-contractor Breakage Costs.
- 46.2 If the amounts referred to in Clauses 0 and/or 0 are less than zero, then, for the purposes of the calculation in Clause 0 they shall be deemed to be zero.
- 46.3 If the aggregate of the amounts referred to in Clauses 0, 0 and 0 is less than the Revised Senior Debt Termination Amount , then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in Clause 0 provided always that:
- 46.3.1 the amount referred to in Clause 0 shall only be paid to the extent that the Contractor has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution and
  - 46.3.2 if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle the Contractor to terminate such Sub-Contract.
- 46.4 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under Clause 11.4.4.1 of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount , the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount .
- 46.5 If the Contractor has wilfully or through gross negligence failed to comply with its obligations under Clause 11.4.4.2 of the Direct Agreement and there has been an overstatement of the cash balances by the Contractor as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Clause 0, then the Force Majeure Termination Sum, shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount .
- 46.6 Such amount shall be determined and paid in accordance with Clause 0 (*Payment on Termination*).

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**47. COMPENSATION ON TERMINATION FOR CORRUPT GIFTS AND FRAUD**

- 47.1 On termination of the Contract in accordance with Clause 0 (*Termination for Corrupt Gifts and Fraud*), the Authority shall pay the Contractor an amount equal to the Revised Senior Debt Termination Amount.
- 47.2 Such amount shall be determined and paid in accordance with Clause 0 (*Payment on Termination*).
- 47.3 If termination occurs then the Authority may require the Contractor to transfer its rights, title and interest in and to the Assets to the Authority.

**48. COMPENSATION ON VOLUNTARY TERMINATION BY THE AUTHORITY**

On termination under Clause 0 above, the Authority shall pay the Contractor an amount equal to the amount payable under Clause 0 (*Authority Default*) in accordance with Clause 0 (*Payment on Termination*).

**49. COMPENSATION ON TERMINATION FOR BREACH OF THE REFINANCING PROVISIONS**

On termination under Clause 0 above, the Authority shall pay the Contractor an amount equal to the amount payable under Clause 0 (*Compensation on Termination on Corrupt Gifts and Fraud*) in accordance with Clause 0 (*Payment on Termination*).

**50. GROSS UP**

If any amount of compensation payable by the Authority under Clauses 0 (*Compensation on Termination for Authority Default*), 0 (*Compensation on Termination for Force Majeure*), 0 (*Compensation for Termination for Corrupt Gifts and Fraud*), 0 (*Voluntary Termination*) and 0 (*Compensation on Termination for Breach of the Refinancing Provisions*) is subject to Tax payable to a Relevant Authority in the United Kingdom, then the Authority shall pay to the Contractor such additional amount as will put the Contractor in the same after Tax position as it would have been had the payment not been subject to Tax, taking account of any relief, allowances deduction, setting off or credit in respect of Tax (whether available by choice or not) which may be available to the Contractor to reduce the Tax to which the payment is subject.

**51. SET-OFF ON TERMINATION**

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Except where expressly stated otherwise, the Authority is not entitled to set off any amount against any payment of termination compensation under Clauses 0 (*Compensation on Termination for Authority Default*), 0 (*Compensation on Termination for Force Majeure*), 0 (*Compensation on Termination for Corrupt Gifts and Fraud*), 0 (*Compensation on Voluntary Termination*) and 0 (*Compensation on Termination for Breach of the Refinancing Provisions*), save to the extent that after such an amount has been set off, the termination payment made would be in an amount greater than or equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount, as the case may be, at that time.

## **52. PAYMENT ON TERMINATION**

### **52.1 Method of Payment**

52.1.1 The Authority shall pay to the Contractor the Termination Sum on or before the date falling 60 days after the Notice Date unless it elects to pay in accordance with Clause 0 below.

52.1.2 The Authority may, subject to Clause 0 below, elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum:

- (i) in instalments, on the dates (the “Instalment Dates”) and in the amounts that the Contractor would have been required to pay principal to the Senior Lenders (under the terms of the Senior Financing Agreements) had the Termination Date not occurred; or
- (ii) as the Parties may otherwise agree.

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

52.1.4 If the Authority has elected to pay in accordance with Clause 0 above, it may (on 28 days prior written notice to the Contractor) elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in full on any Instalment Date.

52.1.5 If the Authority:

- (i) fails to make a payment to the Contractor in accordance with Clauses 0 and/or 0 above; or
- (ii) breaches Clause 0 (*Assignment and Sub-contracting*),  
the Contractor may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Contract, the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum to be immediately due and payable.

52.1.6 The Authority may not make an election to pay the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount or Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in instalments where the Contract has been terminated under Clause 0 (*Termination on Authority Default*) and compensation is payable under Clause 0 (*Compensation on Termination for Authority Default*).

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## **52.2 Exclusive Remedy**

1.3.2 Any payment of compensation shall be in full satisfaction of any claim which can be made against the Authority by the Contractor in relation to termination of this Contract or any Project Document. The compensation payable under Clauses 0 (*Compensation on Termination for Authority Default*), 0 (*Compensation on Termination for Force Majeure*), 0 (*Compensation for Termination for Corrupt Gifts and Fraud*) and 0 (*Compensation on Voluntary Termination by the Authority*) shall be the sole remedy of the Contractor against the Authority on termination of the Contract.

## **53. CONSEQUENCES OF EXPIRY**

53.1 Upon the expiry or termination of the Contract, for any reason whatsoever, the Contractor shall co-operate with the Authority to such extent as the Authority may require for a period of up to 6 months from the date of expiry or termination, the duration of such period to be determined solely by the Authority, to ensure an orderly and efficient transition from the management of the Prison by the Contractor to the management of the Prison by the Authority or some other person. The Contractor shall procure that provisions obliging the Sub-contractors to comply with this Clause 53 are inserted in the Sub-Contracts and shall use reasonable endeavours to ensure that any Sub-contractor complies with such provisions. The Contractor shall transfer to the Authority all if its right title and interest to the Assets. The Authority shall reimburse to the Contractor and the Sub-contractors all reasonable costs and expenses incurred in satisfying the provisions of this Clause 53.1, such amount of reimbursement being subject to reduction in respect of any amounts outstanding from the Contractor or any Sub-contractor to the Authority.

53.2 The Authority may give the information provided to it by the Contractor in accordance with Clause 25.10 to any firm, company, person or other legal entity invited to tender in respect of any contract for the provision of the Works and/or the Services, or any part thereof, for any period commencing after the expiry or earlier termination of the Contract.

53.3 The Contractor irrevocably consents to the disclosure of the information provided by it in terms of Clause 25.10 in accordance with the provisions of Clause 53.2, and irrevocably waives any right of confidentiality which it may have in respect of the said information and any other right which it may have in respect of the said information which would enable it to prevent the disclosure or publication of the said information by it or the Authority in accordance with the provisions of Clauses 25.10 and 53.2. The Contractor shall ensure and procure that the conditions of employment of each Member of Staff shall be such that the Contractor shall be entitled to release to the Authority for the purposes of the Contract information which may otherwise be confidential as between the Members of Staff and their respective employers.

53.4 The provisions of Clauses 53.1 to 53.3 shall apply during the existence of the Contract and after its expiry or termination.

## **54. SURVEYS ON EXPIRY**

54.1 If the Contractor has been notified under Clause 0 that rectification and/or maintenance work is required, in each of the 12 months prior to the Expiry Date the Authority shall make an equal monthly deduction of one twelfth of the costs of that work as quantified by that survey from the Contract Price payable in each such month

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and pay such amount into an interest bearing account (the “Retention Fund Account”) until the Contract has expired or terminated.

- 54.2 Eighteen months prior to the Expiry Date, the Authority shall be entitled to carry out or procure the carrying out of a final survey of the Prison and the Site to assess whether they have been and are being maintained by the Contractor in accordance with its obligations under Clause 0 (*Maintenance*).
- 54.3 The Authority shall notify the Contractor in writing a minimum of 7 days in advance of the date it wishes to carry out the final survey. The Authority shall consider in good faith any reasonable request by the Contractor for the final survey to be carried out on a different date if such request is made at least 2 days prior to the notified date and the Contractor (acting reasonably) is able to demonstrate that carrying out the final survey on notified date would materially prejudice the Contractor’s ability to provide the Services.
- 54.4 When carrying out the final survey, the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Contractor. The Contractor shall afford the Authority (free of charge) any reasonable assistance required by the Authority during the carrying out of the final survey. The cost of the final survey shall be borne by the Authority.
- 54.5 If the final survey shows that the Contractor has not complied with or is not complying with its obligations under Clause 0 (*Maintenance*), the Authority shall:
- 54.5.1 notify the Contractor of the rectification and/or maintenance work which is required to bring the condition of the Assets to the standard they would have been in if the Contractor had complied or was complying with its obligations under Clause 0 (*Maintenance*);
- 54.5.2 at its sole discretion either (i) specify a reasonable period within which the Contractor must carry out such work or (ii) subject to Clause 54.5A, inform the Contractor that it is not required to carry out such work and that the amounts to be paid into the Retention Fund Account in accordance with Clause 0 will be retained by the Authority; and
- 54.5.3 recover the cost of the survey from the Contractor by means of a withdrawal from the Retention Fund Account or deduction from the next payment of the Contract Price.
- 54.5A The Contractor shall be relieved of its obligations to provide the Services and the Authority shall not be entitled to make deductions from the Contract Price in accordance with Clause 0 in respect of Performance Points or reduce the Contract Price for failure to provide Available Prisoner Places or Additional Prisoner Places, to the extent that the Contractor demonstrates that its ability to deliver the Services is adversely affected by complying with the Authority's instruction under Clause 54.5.2(ii) above to refrain from carrying out the maintenance and/or work referred to in Clause 0 above. The Authority shall indemnify the Contractor in respect of any third party claims that arise as a result of the Contractor refraining from carrying out such maintenance and/or rectification work following any such instruction from the Authority.
- 54.6 Subject to Clause 0, the Contractor shall carry out such rectification and/or maintenance work to the Authority’s reasonable satisfaction within the period specified and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense.
- 54.7 Subject to Clause 0, if and to the extent that the Contractor carries out the necessary rectification and/or maintenance work to the Authority’s reasonable satisfaction within the specified period, the Authority shall reimburse the Contractor’s costs of so

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doing by withdrawing amounts from the Retention Fund Account. If the amount in the Retention Fund Account is insufficient to cover the Contractor's costs, the Contractor shall bear the balance of its costs itself.

54.8 Subject to Clause 0, if and to the extent that the Contractor fails to carry out the necessary rectification and/or maintenance work to the Authority's reasonable satisfaction within the specified period, the Authority shall be entitled to carry out itself, or procure, such rectification and/or maintenance work at the Contractor's expense and shall make withdrawals from the Retention Fund Account to pay for such work or, where there are insufficient funds in the Retention Fund Account, make deductions from the Contract Price to pay for such work.

54.9 Subject to Clause 0, if:

54.9.1 all the rectification and/or maintenance work identified by the Authority has been carried out to the Authority's reasonable satisfaction; and

54.9.2 all such work has been paid for by the Contractor; and

54.9.3 no other Termination Notice is outstanding,

1.3.3 then the Authority shall pay any credit balance on the Retention Fund Account to the Contractor as soon as practicable.

## **55. INSURANCE**

### **55.1 Insurance**

55.1.2 The Contractor shall, throughout the period from the Date of Signature to the Actual Opening Date, take out and maintain or procure the maintenance of the insurances described in Part 1 of Schedule N and any other insurances as may be required by law. These insurance must be effective in each case not later than the date on which the relevant risk commences.

55.1.2 The Contractor shall during the Contract Period take out and maintain or procure the maintenance of the insurances described in Part 2 of Schedule N (Required Insurances) and any other insurances as may be required by law. For the avoidance of doubt, the Contractor shall ensure that the insurances referred to in this Clause 0 are in force no later than the expiry date of the insurances referred to in Clause 0 and in each case no later than the date on which the relevant risk commences.

55.1.3 No Party to this Contract 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 additional insured person.

55.1.4 The insurances referred to in Clauses 0 and 0 shall:

(i) be taken out with the insurer named in Schedule N, or where no such insurer is named, an insurer approved by the Authority in writing (such approval not to be unreasonably withheld or delayed);

(ii) subject to Clause 0 below, name the Contractor as co-insured with any other party maintaining the insurance (save in respect of professional indemnity insurance);

(iii) provide for non-vitiating protection in respect of any claim made by the Authority as co-insured (save in respect of professional indemnity insurance);

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- (iv) contain a clause waiving the insurers' subrogation rights against the Authority, its employees and agents (save in respect of professional indemnity insurance);
- (v) provide for 30 days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority;
- (vi) provide for payment of any proceeds to be made by insurers in accordance with Clause 0 (*Reinstatement*); and
- (vii) shall, in respect of the insurances referred to in Clause 0 above only and where specified as a "Cover Feature" and "Extension" under Part 2 of Schedule N, contain a waiver from the insurer of any rights it may have (as subrogee or otherwise) to bring any claim under the Riotous Assemblies (Scotland) Act 1822 in respect of (i) any damage to; or (ii) any monies paid for or in respect of, the Prison, the Site or any Assets. Such waiver shall be expressed to be binding upon each of the insurer's successors and permitted assignees and shall be expressly provided for the benefit of any Local Authority in the United Kingdom and the statutory successors of any such local authority, each of which may enforce such waiver against the insurer and/or its successors and permitted assigns (as appropriate).

55.1.5 Wherever possible and as specified in Schedule N, the insurances referred to in Clause 0 and 0 shall name the Authority as a co-insured for its separate interest.

55.1.5A With effect from each renewal date the minimum limits of indemnity, maximum deductibles and any sub-limits specified in respect of the insurances referred to in Part 2 of Schedule N shall be indexed, provided that where insurance cannot be obtained on the basis of the exact minimum limit of indemnity (indexed) and/or maximum deductible (indexed) and/or sub-limit (indexed) then the minimum level of indemnity and/or sub-limit shall be increased to an amount that is equal to or greater than the Appropriate Indemnity Level and/or the maximum deductible may be increased to an amount that is equal to or less than the Appropriate Deductible Level.

For the purposes of this Clause 55.1.5A:

- (a) where the minimum level of indemnity (indexed) or sub-limit (indexed) is less than the previous level required by the Contract plus 40 per cent of the difference between such previous minimum level and the next available whole amount in the insurance market (the total being the "Threshold Level") the Appropriate Indemnity Limit shall be the previous minimum level required by the Contract;
- (b) where the minimum limit of indemnity (indexed) or sub-limit (indexed) is greater than the Threshold Level, then the Appropriate Indemnity Limit shall be the next level of whole insurable amount that is available in the insurance market; and
- (c) the Appropriate Deductible Level shall be the level of a whole deductible amount which is closest to the maximum deductible limit (indexed) at such time.

55.1.6 The Contractor shall provide to the Authority:

- (i) copies on request of all insurance policies referred to in Clauses 0 and 0 (together with any other information reasonably requested by the

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- Authority relating to such insurance policies) and the Authority shall be entitled to inspect them during ordinary business hours; and
- (ii) 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 0 (*Insurance*) and Schedule N (Required Insurances).
- 55.1.7 Renewal certificates in relation to the insurances referred to in Clauses 0 and 0 shall be obtained as and when necessary and copies (certified in a manner acceptable to the Authority) shall be forwarded to the Authority as soon as possible but in any event on or before the renewal date.
- 55.1.8 If the Contractor is in breach of Clauses 0 and 0 above, 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 Contractor on written demand.
- 55.1.9 The Contractor shall give the Authority notification within 30 days after any claim in excess of £5,000 on any of the insurance policies referred to in this Clause accompanied by full details of the incident giving rise to the claim.
- 55.1.10 Neither failure to comply nor full compliance with the insurance provisions of this Contract shall limit or relieve the Contractor of its liabilities and obligations under this Contract.
- 55.1.11 The insurance premiums referred to in Clauses 0 and 0 shall be the responsibility of the Contractor.
- 55.1.12 The Contractor shall ensure that its brokers give the Authority a letter of undertaking in substantially the same form as that contained in Part 4 of Schedule N on the placement and subsequent renewal of the Required Insurances.

#### 55.1A Professional Indemnity Insurance

Except for Clauses 55.1.1, 55.1.3, 55.1.6 and 55.1.7 the provisions of Clause 55.1 (*Insurance*) shall not apply to professional indemnity insurance of the Construction Sub-contractor and any guarantor of the Construction Sub-contractor ("PI Insurance") and in respect of PI Insurance the Contractor undertakes (and agrees to procure that its sub-contractors undertake) to:

- 55.1A.1 provide evidence satisfactory to the Authority (as and when reasonably required by the Authority) of the PI Insurance being in full force and effect during the period from the Date of Signature until the date falling 12 years after the Actual Full Operation Date (such evidence to include details of the cover) including confirmation of territorial limits, indemnity limit (which shall be a minimum of twenty million pounds (£20,000,000) for any occurrence or series of occurrences arising out of each and every event in the aggregate in any one (1) year of insurance with a minimum of one (1) automatic reinstatement of the aggregate indemnity limit in any one (1) year of insurance), levels of excess, insurers and policy number);
- 55.1A.2 provide the Authority with copies of all notices under the PI Insurance relative to the Project;
- 55.1A.3 provide the Authority with notice of:
- (i) any cancellation of the PI Insurance not less than twenty (20) Business Days prior to the relevant cancellation date;

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- (ii) any material changes to or suspension of cover relevant to the Project not less than twenty (20) Business Days prior to the relevant change or suspension;
  - (iii) any event of which it becomes aware, or of which it could reasonably be expected to become aware, which may vitiate the PI Insurance;
  - (iv) any act, omission or event which may adversely affect the terms and scope of the PI Insurance relevant to the Project or invalidate or render it unenforceable;
- 55.1A.4 provide such information to the Authority as the Authority may reasonably require in relation to any claim or circumstance notified to it under the PI Insurance in respect of the Project and any potential breach of the aggregate limit of the policy;
- 55.1A.5 disclose to the relevant insurers:
- (i) any matters which could reasonably be expected to be material in the context of the Project; and
  - (ii) any of the other insurances required to be maintained under Clause 55.1 (Insurance);
- 55.1A.6 include the interests (if any) of the Authority in any claim or circumstances notified under the PI Insurance relative to the Project and provide a copy of such notification to the Authority.

## 55.2 Reinstatement

- 55.2.1 Subject to Clause 55.2.6 and Clause 55.2A (*Economic Test*) all insurance proceeds received under any policy referred to in Part 1 of Section 1 of Schedule N and Part 2 of Section 1 of Schedule N (Property Damage Insurance) shall be applied to repair, reinstate and replace each part or parts of the Assets in respect of which the proceeds were received.
- 55.2.2 All insurance proceeds paid under any Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of £125,000 (indexed) shall be paid into the Joint Insurance Account.
- 55.2.3 Notwithstanding the provisions of this Clause 0, but subject to Clause 55.2.6, the Contractor will be obliged to repair, make good or reinstate any damage to the Prison and/or the Site and that in accordance with the Contractor's obligations under this Contract. Subject to Clause 55.2A, where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the ("Relevant Incident")) in an amount in excess of £125,000 (Indexed):
- (i) the Contractor shall deliver as soon as practicable and in any event within 28 days after the making of the claim a plan prepared by the Contractor for the carrying out of the works necessary (the "Reinstatement Works") to repair, reinstate or replace (the "Reinstatement Plan") the part or parts of the Prison and/or Site which are the subject of the relevant claim or claims in accordance with Clause 0 below. The Reinstatement Plan shall set out:
    - (i) (A) if not the Construction Sub-contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Authority (not to be unreasonably withheld or delayed); and

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- (ii) (B) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority (not to be unreasonably withheld or delayed);
- (ii) subject to Clause 55.2.6 below provided that the Authority, acting reasonably, is satisfied that the Reinstatement Plan will enable the Contractor to comply with Clause 0 below, within a reasonable timescale:
  - (iii) (A) the Reinstatement Plan will be adopted and implemented by the Contractor in accordance with its terms;
  - (iv) (B) the Contractor shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the approved Reinstatement Plan approved by the Authority;
  - (v) (C) 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 Contractor from Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in paragraph (ii)(B) above, and to meet any other reasonable costs and expenses of the Contractor for the sole purposes of funding the Reinstatement Works and the Parties shall operate the signatory requirements of the Joint Insurance Account in order 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;
  - (vi) (D) the Authority agrees and undertakes that, subject to compliance by the Contractor with its obligations under this Clause, and provided that the Contractor procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in paragraph (ii) (B), it shall not exercise any right which it might otherwise have to terminate this Contract by virtue of the event which gave rise to the claim for the Relevant Proceeds;
  - (vii) (E) the Authority undertakes to use reasonable endeavours to assist the Contractor in the carrying out of the Reinstatement Plan; and
  - (viii) (F) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with Clause 0 below the Authority shall permit withdrawal by the Contractor of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under paragraph (ii)(C) above, in respect of the Relevant Incident, together with any interest accrued.

55.2.4 Where insurance proceeds are to be used, in accordance with this Contract, to repair, reinstate or replace any part or parts of the Prison and/or the Site, the Contractor shall carry out the work in accordance with Schedule A so

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that on completion of the work, the provisions of the Contract are complied with. Unless otherwise agreed between the Parties, the mechanisms contained in Clauses 9 (*General Duties of the Contractor*), 10 (*Provision of the Prison*), 10 (*Supply of Equipment*), 18 (*Liquidated Damages*), 19 (*Engineers Declaration*), 20 (*Cell Certification*) and 21 (*Available Prisoner Places*) (amended to reflect the timing and scope of the Reinstatement Works) shall apply to the repair, reinstatement or replacement of any part or parts of the Prison and/or the Site by the Contractor pursuant to this Clause 0.

55.2.5 In carrying out any repair, reinstatement or replacement of any part or parts of the Prison and/or the Site the Contractor shall not depart from the terms of the Reinstatement Plan or the provisions of this Contract without the prior written consent of the Authority.

55.2.6 Notwithstanding the provisions of Clause 55.2.3(ii), the Authority may, following a Relevant Incident, issue an Authority Notice of Change requiring the Contractor to carry out such alternative reinstatement works as the Authority may require (including, for the avoidance of doubt and without limitation, partial reinstatement and/or reinstatement to such alternative standards and specifications as the Authority may specify) provided that the Authority may only issue such an Authority Notice of Change following a Relevant Incident that occurs after the Engineers Declaration. Where the Authority issues an Authority Notice of Change to the Contractor as referred to in this clause 55.2.6 prior to the date on which the Reinstatement Works are completed, then:

- (a) the provisions of Clause 35 (*Authority Change*) shall apply;
- (b) the Relevant Proceeds will be applied to fund such Authority Change (to the extent permitted by the insurers) and the provisions of clause 35 shall apply in respect of any additional costs to be incurred in order to give effect to any such Authority Notice of Change; and
- (c) if the issue, negotiation, implementation or withdrawal of the Authority Notice of Change has resulted in a delay to the Reinstatement Works otherwise required in accordance with this Clause 55.2, the Authority shall indemnify the Contractor in respect of any revenue lost as a direct result of the delay to the Reinstatement Works caused by the issue, negotiation implementation or withdrawal of the Authority Notice of Change (which shall, for the avoidance of doubt, include any revenue that would otherwise have been generated by the provision of Available Prisoner Places during the period of any such delay) provided that the Contractor uses reasonable endeavours to minimise any such revenue lost.

#### 55.2A Economic Test

55.2A.1 If all of the Assets are destroyed or substantially destroyed in a single event and the insurance proceeds (when taken together with any other funds available to the Contractor) are equal to or greater than the amount required to repair or reinstate the Assets, then the Contractor shall calculate the senior debt loan life cover ratio as used in the Financial Model (on the assumption that the Assets are repaired or reinstated in accordance with Clause 55.2.3).

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55.2A.2 If the calculation referred to in Clause 55.2A.1 above shows that the senior debt loan life cover ratio is greater than or equal to 1.05:1 for any Calculation Period (as defined in the Credit Agreement) up to but excluding 31 December 2014 and 1.10:1 for any Calculation Period from and including 31 December 2014 then the Contractor shall be subject to the procedure set out in Clause 55.2 (*Reinstatement*).

55.2A.3 If the calculation referred to in Clause 55.2A.1 above shows that the senior debt loan life cover ratio is less than 1.05:1 for any Calculation Period (as defined in the Credit Agreement) up to but excluding 31 December 2014 and 1.10:1 for any Calculation Period from and including 31 December 2014 then an amount equal to the lesser of

- (i) the insurance proceeds; and
- (ii) the Base Senior Debt Termination Amount or, if any Additional Permitted Borrowing has been advanced, the Revised Senior Debt Termination Amount,

shall be released from the Joint Insurance Account to the Contractor.

55.2A.4 If, pursuant to Clause 55.2A.3 above, insurance proceeds are released from the Joint Insurance Account the Contractor shall be in breach of its obligations under this Contract and shall not, pursuant to Clause 16 (*Relief Events*) be relieved of its obligations unless it can demonstrate, to the satisfaction of the Authority, that it can carry out the works necessary to repair, reinstate or replace the assets which are subject to the relevant claims in accordance with Clause 55.2 (*Reinstatement*) and within a reasonable timescale.

### **55.3 Uninsurable Risks**

55.3.1 Subject to Clause 0 below, the Contractor shall notify the Authority as soon as it becomes aware that one of the risks required to be insured against pursuant to Clauses 55.1.1 or 55.1.2 is going to become Uninsurable and shall notify the Authority at least 5 days in advance of any such risk becoming Uninsurable (but shall not be obliged to give such notification earlier than the date 60 days prior to the Renewal Date). Where such risk has become Uninsurable as a result of the insolvency of an insurer, then such notification shall be given promptly (and in any event within 5 Business Days) following the Contractor becoming aware of such insolvency. If both Parties agree, or it is determined in accordance with Clause 0 (*Dispute Resolution*) that the risk is Uninsurable and that:

- (ix) (A) the risk being Uninsurable is not caused by the actions of the Contractor or a sub-contractor of the Contractor (of any tier); and
- (x) (B) the Contractor has demonstrated to the Authority that the Contractor and a prudent board of directors of a company operating the same or substantially similar PFI businesses in the United Kingdom to that operated by the Contractor would in similar circumstances (in the absence of the type of relief envisaged by this clause) 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

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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

the Parties shall meet to discuss the means by which the risk should be managed (including considering the issue of self-insurance by either Party).

55.3.2 If the requirements of Clause 0 are satisfied, but the Parties cannot agree as to how to manage the risk, then:

- (i) in respect of third party liability insurance or medical malpractice insurance only the Authority shall (at the Authority's option) either pay to the Contractor an amount equal to the amount set out in Clause 0 (*Compensation on Termination for Force Majeure*) and the Contract will terminate, or elect to allow the Contract to continue and paragraph (ii) below shall thereafter apply in respect of such risk; and
- (ii) in respect of construction all risks, material damage, third party liability or medical malpractice (if the Authority elects to allow the Contract to continue in accordance with Clause 00), business interruption (but not loss of profits) or statutory insurances the Contract 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 Contractor an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and the Contract will continue, or an amount equal to the amount set out in Clause 0 (*Compensation on Termination for Force Majeure*) plus (in relation to third party liability insurance and medical malpractice insurance only) the amount of insurance proceeds that would have been payable to the Contractor whereupon the Contract will terminate.

55.3.3 Where pursuant to Clauses 0 and/or 0 this Contract continues then the Contract Price shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid by the Contractor in respect of the relevant risk in the year prior to it becoming Uninsurable (indexed from the date that the risk becomes Uninsurable). Where the risk is Uninsurable for part of a year only, the reduction in the Contract Price shall be pro-rated to the number of months for which the risk is Uninsurable.

55.3.3A Where pursuant to Clauses 0 and/or 55.3.2(ii) this Contract continues the Contractor shall approach the insurance market at least every four months to establish whether the risk remains Uninsurable. The Contractor shall notify the Authority in advance of every such approach it makes to the insurance market and shall, following every such approach, notify the Authority as to whether or not the risk remains Uninsurable. As soon as the Contractor is aware that the risk is no longer Uninsurable, the Contractor shall take out and maintain or procure the taking out and maintenance of the insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Contract.

55.3.4 Where pursuant to Clauses 55.3.2(i) and/or 55.3.2(ii) this Contract continues then the Contractor shall continue to comply with the terms and conditions of the last insurance policy under which the Uninsurable risk was insured and references to the insurer within that insurance policy shall be deemed to be references to the Authority.

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- 55.3.5 Where the Contractor fails to notify the Authority of a risk becoming Uninsurable within the timescale specified in Clause 0 above, the provisions of Clause 0 shall apply from the date on which the Contractor notifies the Authority of the risk becoming Uninsurable and in the event that the relevant risk occurs within the period of 5 days prior to such notification by the Contractor to the Authority, the Contractor shall indemnify the Authority in the amount equal to the insurance proceeds which would have been payable had the relevant insurance continued to be available.
- 55.3.6 Nothing in this Clause 55.3 shall oblige the Contractor to take out insurance in respect of a risk which is Uninsurable save where the predominant cause of the risk being Uninsurable is any act(s) or omission(s) of the Contractor or a Contractor Related Party.

#### **55.4 Unavailable Terms and Conditions**

- 55.4.1 If, upon the renewal of any insurance which the Contractor is required to maintain or procure the maintenance of pursuant to this Contract:
- 55.4.1.1 any Insurance Term is not available to the Contractor in the worldwide insurance market with reputable insurers of good standing; and/or
- 55.4.1.2 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 contractors in the United Kingdom,  
(other than, in each case, by reason of one or more actions of the Contractor and/or any sub-contractor of the Contractor (of any tier)) then Clause 55.4.2 shall apply.
- 55.4.2 If it is agreed or determined that Clause 0 applies then the Authority shall waive the Contractor's obligations in Clause 0 and/or Schedule N in respect of that particular Insurance Term and the Contractor shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Contract as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in Clause 0 continue to apply to such Insurance Term.
- 55.4.3 To the extent that the Parties agree (acting reasonably), or it is determined pursuant to Clause 0 (*Dispute Resolution Procedure*), that an alternative or replacement term and/or condition of insurance is available to the Contractor 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 Contractor'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 Contractor shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Contract, the costs of such insurance shall be subject to the premium costs sharing mechanism set out at Clause 55.5.
- 55.4.4 The Contractor shall notify the Authority as soon as reasonably practicable and in any event within five days of becoming aware that Clause 55.4.1.1

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and/or Clause 55.4.1.2 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 Contractor 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.

55.4.5 In the event Clause 55.4.1.1 and/or Clause 55.4.1.2 apply in respect of an Insurance Term (irrespective of the reasons for the same) the Contractor shall approach the insurance market at least every four months to establish whether Clause 55.4.1.1 and/or Clause 55.4.1.2 remain applicable to the Insurance Term. The Contractor shall notify the Authority in advance of every such approach it makes to the insurance market and shall, following every such approach, notify the Authority as to whether or not Clause 55.4.1.1 and/or Clause 55.4.1.2 remain applicable to the Insurance Term. As soon as the Contractor is aware that Clause 55.4.1.1 and/or Clause 55.4.1.2 has ceased to apply to the Insurance Term, the Contractor shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Contract.

## **55.5 Insurance Review Procedure**

55.5.1 This procedure shall be used to determine whether the Authority shall bear any increase or benefit from any decrease in Relevant Insurance costs.

55.5.2 The Contractor's insurance broker shall prepare a report on behalf of both the Contractor and the Authority (the "Joint Insurance Cost Report"). The Joint Insurance Cost Report is to be prepared at the Contractor's expense, and should, as a minimum, contain the following information for the relevant Insurance Review Period:

- (i) A full breakdown of the Actual Relevant Insurance Cost;
- (ii) A full breakdown of the Base Relevant Insurance Cost;
- (iii) A spreadsheet (the "Insurance Summary Sheet") detailing separately:-
  - (A) the sum(s) insured / limit of indemnity (i.e. rateable factor) for each of the Relevant Insurances;
  - (B) the premium rate for each of the Relevant Insurances;
  - (C) the net premium paid (or to be paid) for each of the Relevant Insurances (i.e. excluding both insurance premium tax and brokers fees and commissions);
  - (D) the deductible(s) for each Relevant Insurance;
  - (E) details of any claims (paid or reserved) (including incident date, type and quantum) in excess of £5,000, being the amount stated in Clause 55.1.9;
- (iv) An assessment and quantification of each Project Insurance Change together with the reasons therefore;
- (v) Full details of any Portfolio Cost Saving;
- (vi) Any other reasons that the Contractor believes may have caused a change (by way of increase or decrease relative to the Base Relevant Insurance Costs) in the Actual Relevant Insurance Cost;
- (vii) The opinion of the Contractor's insurance broker as to the reasons why the Actual Relevant Insurance Cost has varied from the Base

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Relevant Insurance Cost, specifying the impact of each of the factors and quantifying the amount attributable to each factor specified above;

- (viii) The calculation of the Insurance Cost Differential and any Exceptional Cost or Exceptional Saving arising from this calculation; and
- (ix) Evidence satisfactory to the Authority (acting reasonably) of any changes to circumstances generally prevailing in the Relevant Insurance Market or the Prison Sector Insurance Market that are claimed to account for the Insurance Cost Differential
- (x) Details of movements in the CBS Private Capital non marine index plus, if available from other appropriate sources, details of changes in insurance cost across the PFI market as a whole.

55.5.3 The Contractor shall procure that the broker, no later than the date which is ten (10) Business Days after the Insurance Review Date, delivers to the Authority, at the same time as it delivers to the Contractor, at least two copies of the Joint Insurance Cost Report to the address specified in Clause 72.3. Following receipt of the Joint Insurance Cost Report, the Authority shall notify the Contractor in writing within fifteen (15) Business Days whether or not it accepts the Joint Insurance Cost Report including full details of any disagreement. If the Authority does not provide such notification and/or details of any disagreement to the Contractor within fifteen (15) Business Days, the Authority shall be deemed to have accepted the Joint Insurance Cost Report. If the Authority disagrees with any item in the Joint Insurance Cost Report, the Parties shall use their respective reasonable endeavours acting in good faith to agree the contents of the Joint Insurance Cost Report. If the Parties fail to agree the contents of the Joint Insurance Cost Report within thirty five (35) Business Days from the date it was delivered to the Authority, the matter shall be resolved pursuant to Clause 76 (Dispute Resolution), provided always that references in Clause 76.4 to an expert shall be construed as references to an independent insurance expert agreed by the Parties or, in the absence of agreement, appointed by the President for the time being of the Chartered Institute of Arbitrators.

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

55.5.5 If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Cost, the Authority shall within thirty (30) days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Contractor equal to 85% of the Exceptional Cost.

55.5.6 If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Saving, the Contractor shall within thirty (30) days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Authority equal to 85% of the Exceptional Saving.

55.5.7 Following the completion of the Insurance Review Procedure, if it is agreed or determined that there is neither an Exceptional Cost nor an Exceptional

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Saving, any Insurance Cost Differential shall be borne by or benefit the Contractor.

55.5.8 If at any time an Insurance Cost Index is published and intended for use in PFI contracts of a similar nature to this Contract, the Parties shall meet with a view to agreeing (a) its application to the Project, taking into account any relevant guidance issued by HM Treasury and (b) how a Portfolio Cost Saving may be accounted for when the index is in use.

## **56. RIOTOUS ASSEMBLIES (SCOTLAND) ACT 1822**

56.1 The Contractor shall, and undertakes to procure that any (i) insurer; or (ii) insurer's successors or permitted assignees; or (iii) other person claiming by or through an insurer, shall, waive their rights to bring any claim under the Riotous Assemblies (Scotland) Act 1822 in respect of any damage to the Prison, the Site or any Assets. This undertaking shall be for the benefit of any Local Authority in the United Kingdom and the statutory successors of any such Local Authority, each of which may enforce the terms of this Clause against the Contractor and/or its successors and permitted assignees (as appropriate).

56.2 Clause 0 shall be binding upon the Contractor and each of its successors and permitted assignees.

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## **57. REFINANCING**

57.1 The Contractor shall obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and the Contractor shall at all times act in good faith with respect to any Refinancing.

57.2 The Authority shall be entitled to receive a 50 per cent share of any Refinancing Gain arising from a Qualifying Refinancing.

57.3 The Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater than 50 per cent share of the Refinancing Gain.

57.4 The Contractor shall promptly provide the Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing (whether that Refinancing is a Qualifying Refinancing or not).

57.5 The Authority shall have the right to elect to receive its share of any Refinancing Gain as:

57.5.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;

57.5.2 a reduction in the Contract Price over the remaining term of the Contract; or

57.5.3 a combination of any of the above.

57.6 The Authority and the Contractor will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Authority's share of the Refinancing Gain (taking into account how the Authority has elected to receive its share of the Refinancing Gain under Clause 0 above). If the Parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Authority's share, the dispute shall be determined in accordance with Clause 0 (*Dispute Resolution*).

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57.8 The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each Party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Authority will be paid to the Authority by the Contractor within 28 days of any Qualifying Refinancing.

## **58. ASSIGNATION AND SUBCONTRACTING**

### **58.1 Restrictions on Transfer of the Contract by the Authority**

The Authority may assign its interest in the Contract in whole or in part to any person, or jointly and severally to any persons, who shall assume all or part of the Authority's functions in relation to the Prison, or prisons generally, provided always that unless the person to whom the Authority's interest (or part thereof) in the Contract is assigned is a part of the Scottish Administration (as defined in the Scotland Act 1998) or a Minister of the Crown, Government Department or Executive Agency of any such Department:

58.1.1 the Authority shall guarantee that person's or those person's obligations under the Contract as so assigned; and

58.1.2 the Authority shall obtain the Contractor's prior written consent to such assignation, which consent shall not be unreasonably withheld or delayed.

### **58.2 Restrictions on Contractor**

The Contractor shall not, without the prior written consent of the Authority (not to be unreasonably withheld or delayed):

58.2.1 sub-contract to any other person any obligation which it may have under the Contract, or otherwise permit any other person to perform any of its obligations under the Contract by any means whatsoever, provided that, subject to the other provisions of this Clause 0, the Authority hereby consents to the sub-contracting of such obligations as are contained in the Sub-contract entered into by the Contractor with the Construction Sub-contractor in accordance with the Construction Sub-contract and such part of the Services as are sub-contracted to the Operating Sub-contractor in accordance with the Operating Sub-contract;

58.2.2 assign, sell or otherwise dispose of to any other person by any means whatsoever the Contract or any part thereof, or any right or liability or interest therein or thereunder; or

58.2.3 create or allow to subsist any security, encumbrance, trust or interest in the Land, the Prison, the Assets, the Contract, the Construction Sub-contract or the Operating Sub-contract or any other contract entered into by the Contractor in respect of the performance of the Services (whether a Sub-contract or otherwise) or any part thereof or any right or liability or interest therein or thereunder;

58.2.4 make any amendment to (other than amendments which are solely to correct manifest errors), nor grant any extension of time to nor waive any rights under any Sub-Contract entered into by the Contractor unless the Authority has agreed a like amendment, extension or waiver under this Contract provided that such agreement may not be withheld or delayed where the Sub-Contractor is legally entitled to such extensions of time under the terms of the relevant Sub-Contract (provided that the granting of

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such extension of time shall not relieve the Contractor of its obligations under this Contract).

- 58.3 Subject to Clause 4.1 the Contractor shall not terminate the engagement or employment of the Construction Sub-contractor or the Operating Sub-contractor without the prior written consent of the Authority (not to be unreasonably withheld or delayed), provided that such consent shall not be required in the event that the Authority has given notice of a Prohibited Act to the Contractor under Clause 41.2 (*Termination for Corrupt Gifts and Fraud*).
- 58.4 In the event that the Authority does consent to the sub-contracting of any of the Contractor's obligations under the Contract to a sub-contractor, the Contractor shall, unless the Authority otherwise agrees, ensure and procure that:
- 58.4.1 each such sub-contractor assumes obligations direct to the Authority corresponding to those imposed in Clause 0 (*Information and Confidentiality*);
- 58.4.2 each such sub-contractor is, and all Staff employed by each such sub-contractor are, under an obligation of confidence owed to the Authority not to disclose any information acquired during the course of that employment otherwise than in the proper discharge of their duties or as authorised by the Authority;
- 58.4.3 the Construction Sub-contractor (and any consultants employed by the Construction Sub-contractor for any purposes associated with the performance of this Contract) provides a collateral warranty to the Authority in the appropriate form set out in Schedule O; and
- 58.4.4 each sub-contract provides that the sub-contractor appointed under it shall not assign the sub-contract to which it is a party, or further sub-contract or otherwise dispose of, transfer or make over to any other person by any means whatsoever any obligation which it may have under such sub-contract, in all cases without the prior written consent of the Authority (not to be unreasonably withheld or delayed).
- 58.5 The Contractor shall not be relieved or excused of responsibility or liability under the Contract, nor shall performance of its obligations be affected, by the appointment of any sub-contractor, supplier or consultant or any other delegation of its duties under the Contract.
- 58.6 Where the Contractor enters into a sub-contract with a sub-contractor for the purpose of performing any of the Contractor's obligations under the Contract, it shall cause a term to be included in such sub-contract which requires payment by the Contractor to the sub-contractor within a specified period not exceeding 28 days from receipt of a valid invoice by the Contractor from such Sub-contractor.
- 58.7 The prohibitions specified in Clauses 0 and 0 shall not apply to:
- 58.7.1 any security or assignment by way of security over the Contract, any Ancillary Document or any part thereof granted or to be granted by the Contractor in favour of the Senior Lender pursuant to the Initial Financing Agreements; or
- 58.7.2 any assignment or other disposal of the Contract, any Ancillary Document or any part thereof or any advantage or benefit or interest therein or thereunder to a Suitable Substitute Contractor in accordance with the provisions of the Direct Agreement.

## 59. CHANGE OF CONTROL

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- 59.1 The Contractor shall inform the Authority immediately of any change in the ownership of the Contractor. Change of ownership means any material change to the direct or indirect legal or beneficial ownership of any shareholding in the Contractor, and a change in the ownership is material if it is a change to the ownership of 3% or more of the Contractor's issued share capital.
- 59.2 The Contractor shall obtain the Authority's prior written consent (which may be given subject to conditions) prior to any change of control of the Contractor (other than where the Funders exercise their rights in respect of shares of the Contractor granted in any document conferring security over any of the shares of the Contractor or if any Shareholder transfers any shares to an existing Shareholder). The Authority may terminate the Contract in accordance with Clause 0 if such approval is not so obtained. For the purposes of this Clause 0 a change of control means an event where any single person or group of persons acting in concert (within the meaning of the City Code on Takeovers and Mergers) acquires direct or indirect control of the Contractor or any interest in the relevant share capital (as defined in Section 198(2) of the Companies Act 1985) of the Contractor as a result of which that person or group of persons have:
- 59.2.1 a direct or indirect interest in more than twenty five per cent.(25%) of the relevant share capital of the Contractor, the Direct Shareholders or the Indirect Shareholders; or
- 59.2.2 (in relation to a person or group of persons who at the relevant time already has a direct or indirect interest in more than twenty five per cent. (25%) of the relevant share capital of the Contractor, the Direct Shareholders or the Indirect Shareholders) a direct or indirect interest in seventy five per cent. (75%) or more of the relevant share capital of the Contractor, the Direct Shareholders or the Indirect Shareholders.
- 59.2A For the purposes of Clauses 0 and 0 above, any change in beneficial or legal ownership of shares that are listed on a stock exchange shall be disregarded.
- 59.2B For the purposes of Clause 0 above, any transfer of shares or of any interest in shares by a person to its affiliate shall be disregarded. For these purposes, and notwithstanding the definition set out in Clause 2.1, an affiliate is, in relation to any person, any holding company of that person and any subsidiary of that person or of such holding company, "subsidiary" and "holding company" having, for this purpose, the meanings ascribed to those terms in the Companies Act 1985.
- 59.3 The Contractor will notify the Authority immediately of any change of director of the Contractor.

**60. INTERVENTION BY THE SCOTTISH MINISTERS UNDER SECTION 111 OF THE CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994**

- 60.1 The Contractor shall comply with the provisions of section 111 of the Criminal Justice and Public Order Act 1994.
- 60.2 In the event that the Scottish Ministers appoint a Governor of the Prison by virtue of his powers under section 111, the Contract shall continue in force, and all provisions of the Contract shall, without prejudice to the Authority's rights under Clause 0 (*Termination on Contractor Default*), continue to operate, save that the functions that

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would otherwise be exercisable by the Director or the Controller shall be exercised by the Governor.

60.3 Any and all costs and expenses properly incurred by the Authority as a result of action being taken by virtue of section 111 will be reimbursed to the Authority by the Contractor, and, subject to Clause 0 (*Set-off on Termination*), the Authority shall be entitled to set off all such amounts due to it against any other amounts due to the Contractor from the Authority hereunder.

## **61. INFORMATION AND CONFIDENTIALITY**

61.1 The following provisions of this Clause 61 shall apply in relation to the disclosure of this Contract and the Project Documents and information relating to this Contract and the Project Documents.

61.2 Certain provisions of this Contract or a Project Document designated as Commercially Sensitive Information or Security Information shall, subject to Clause 0 below, be kept confidential for such periods as are agreed between the Parties from time to time.

61.3 The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Contract and Project Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

61.4 Clauses 0 and 0, shall not apply to:

61.4.1 any disclosure of information that is reasonably required by any person engaged in the performance of the obligations under the Contract for the performance of those obligations;

61.4.2 any matter which a Party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause 0;

61.4.3 any disclosure to enable a determination to be made under Clause 0 (Dispute Resolution) or in connection with a dispute between the Contractor and any of its subcontractors;

61.4.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the Party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;

61.4.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;

61.4.6 any provision of information to the Parties' own professional advisers or insurance advisers or to the Senior Lenders or the Senior Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Contractor to enable it to carry out its obligations under the Contract, or may wish to acquire shares in the Contractor and/or Holdco in accordance with the provisions of this Contract to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;

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- 61.4.7 any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Project, and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders, should the Authority decide to retender the Contract;
- 61.4.8 any registration or recording of the Consents and property registration required;
- 61.4.9 any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Authority for any purpose related to or ancillary to the Contract; or
- 61.4.10 any disclosure for the purpose of :
- (i) the examination and certification of the Authority's or the Contractor's accounts;
  - (ii) any examination pursuant to Section 23(1) of the Public Finance and Accountability (Scotland) Act 2000 of the economy, efficiency and effectiveness with which the Authority has used its resources;
  - (iii) complying with a proper request from either Party's insurance adviser, or insurer on placing or renewing any insurance policies; or
  - (iv) (without prejudice to the generality of Clause 0 above) compliance with the FOISA and/or the Environmental Information Regulations,
- provided that, for the avoidance of doubt, neither Clause 61.4.10(iv) nor Clause 0 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 61.3 above where that information is exempt from disclosure under section 36 of the FOISA.
- 61.5 Where disclosure is permitted under Clause 61.4, other than Clauses 0, 0, 0, 0 and 0, the Party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Contract.
- 61.6 For the purposes of the Public Finance and Accountability (Scotland) Act 2000, the Auditor General for Scotland may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Contractor and any subcontractor and may require the Contractor and any sub-contractor to produce such oral or written explanations as he considers necessary.
- 61.7 The Contractor shall not disclose any provision of, or make use of, the Contract or any information issued or provided by or on behalf of the Authority in connection with the Contract otherwise than for the purpose of the Project or for the purposes referred to in Clause 61.4 (subject to the provisions of Clause 61.5), except with the written consent of the Authority.
- 61.8 Where the Contractor, in carrying out its obligations under the Contract, is provided with information relating to Prisoners, the Contractor shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Contractor has sought the prior written consent of that Prisoner and has obtained the prior written consent of the Authority.
- 61.9 At the end of the Contract Period, the Contractor shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any Prisoner who is or has been detained at the Prison, and any such documents or computer records in the possession, custody or control of a Sub-contractor, are delivered to the Authority. Any rights which the Contractor may

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have in the said documents are hereby assigned to the Authority with effect from the end of the Contract Period.

61.10 Not used.

61.11 The provisions of this Clause 0 are without prejudice to the application of the Official Secrets Acts 1911 to 1989

61.12 The Contractor acknowledges that the Authority is subject to the requirements of the FOISA and the Environmental Information Regulations and shall facilitate the Authority's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in Clauses 0 to 61.18 (inclusive) below.

61.13 Where the Authority receives a Request for Information in relation to Information that the Contractor is holding on its behalf and which the Authority does not hold itself the Authority shall refer to the Contractor such Request for Information that it receives as soon as practicable and in any event within five (5) Business Days of receiving a Request for Information and the Contractor shall:

61.13.1 provide the Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within ten (10) Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and

61.13.2 provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to a Request for Information within the time for compliance set out in section 10 of the FOISA or Regulation 5 of the Environmental Information Regulations.

61.13A Where the Authority receives a Request for Information in relation to Commercially Sensitive Information the Authority shall notify the Contractor of such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving the Request for Information.

61.14 Following notification under Clause 0 or Clause 61.13A, and up until such time as the Contractor has provided the Authority with all the Information specified in Clause 0, the Contractor may make representations to the Authority as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:-

61.14.1 whether Information is exempt from disclosure under the FOISA and the Environmental Information Regulations;

61.14.1 whether Information is to be disclosed in response to a Request for Information, and

in no event shall the Contractor respond directly, or allow its subcontractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.

61.15 Subject to Clause 0, the Contractor shall ensure that all Information held on behalf of the Authority relating to Prisoners is retained for disclosure from the date it is acquired until the earlier of either the date of delivery of all documents and computer records pursuant to Clause 0 or:

61.15.1 in the case of a Prisoner serving a life sentence, the death of that Prisoner;

61.15.2 in the case of a Prisoner serving an Extended Sentence, the date falling 3 years after the expiry of that Prisoner's sentence;

61.15.3 in the case of a Long Term Prisoner, the date falling 3 years after the expiry of that Prisoner's sentence;

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- 61.15.4 in the case of a Prisoner who is a Sex Offender, the death of that Prisoner;  
and
- 61.15.5 in the case of a Short Term Prisoner, the date falling 3 years after the earliest date of liberation for that Prisoner,  
and the Contractor shall permit the Authority to inspect such Information as requested from time to time.
- 61.16 The Contractor shall transfer to the Authority any Request for Information received by the Contractor as soon as practicable and in any event within five (5) Business Days of receiving it.
- 61.17 The Contractor acknowledges that any lists provided by it listing or outlining Confidential Information, are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of the FOISA and the Environmental Regulations.
- 61.18 In the event of a request from the Authority pursuant to Clause 0 above, the Contractor shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of the Contractor's estimated costs of complying with the request to the extent these would be recoverable if incurred by the Authority under Section 12(1) of the FOISA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the prescribed amount referred to in Section 12(1) of the FOISA and as set out in the Fees Regulations the Authority shall inform the Contractor in writing whether or not it still requires the Contractor to comply with the request and where it does require the Contractor to comply with the request the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as the Authority is entitled to under Section 10 of the FOISA. In such case, the Authority shall notify the Contractor of such additional days as soon as practicable after becoming aware of them and shall reimburse the Contractor for such costs as the Contractor incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOISA policy from time to time.
- 61.19 The Contractor acknowledges that (notwithstanding the provisions of Clauses 0 to 0 (inclusive) above), the Authority may, acting in accordance with the Scottish Ministers' Codes of Practice on the Discharge of Functions of Public Authorities under the Freedom of Information (Scotland) Act 2002 (the "Code"), be obliged under the FOISA, or the Environmental Information Regulations to disclose Information concerning the Contractor or the Project:-
- 61.19.1 in certain circumstances without consulting with the Contractor; or
- 61.19.2 following consultation with the Contractor and having taken their views into account;
- provided always that where Clause 0 above applies the Authority shall, in accordance with the recommendations of the Code, draw this to the attention of the Contractor prior to any disclosure.

## **62. PUBLIC RELATIONS AND PUBLICITY**

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- 62.1 The Contractor shall not by itself, its employees, agents or representatives, and shall procure that its Sub-contractors shall not, communicate with representatives of the press, television, radio or other communications media on any matter concerning the Contract without the prior written approval of the Authority.
- 62.2 No facilities to photograph or film in or upon any property used in relation to the Project shall be given or permitted by the Contractor unless the Authority has given its prior written approval.

### **63. DATA PROTECTION**

- 63.1 In relation to all Personal Data, the Contractor shall at all times comply with the DPA as a data controller if necessary, including maintaining a valid and up to date registration or notification under the DPA covering the data processing to be performed in connection with the execution of the Works and performance of the Services.
- 63.2 The Contractor shall, and shall procure that any Sub-contractor shall, only undertake processing of Personal Data reasonably required in connection with the Works and the Services and shall not transfer any Personal Data to any country or territory outside the European Economic Area.
- 63.3 The Contractor shall not disclose Personal Data to any third parties other than:
  - 63.3.1 to employees and Sub-contractors to whom such disclosure is reasonably necessary in order for the Contractor to carry out the Services; or
  - 63.3.2 to any other third parties to whom disclosure is reasonably necessary in order for the Contractor to carry out the Services; or
  - 63.3.3 to the extent required under a court order,
    - 1.4.1 provided that disclosure under Clauses 0 and 63.3.2 is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this Clause 0 and that the Contractor shall give notice in writing to the Authority of any disclosure of Personal Data it or a Sub- Contractor is required to make under Clause 0 immediately it is aware of such a requirement.
- 63.4 The Contractor shall, and shall procure that any Sub-Contractor shall, bring into effect and maintain all appropriate technical and organisational measures to prevent unauthorised or unlawful processing of Personal Data and accidental loss or destruction of, or damage to, Personal Data including but not limited to taking reasonable steps to ensure the reliability of staff having access to the Personal Data.
- 63.5 The Authority may, at reasonable intervals, request a written description of the technical and organisational methods employed by the Contractor and/or the Sub-contractors referred to in Clause 0. Within 30 days of such a request, the Contractor shall supply written particulars of all such measures detailed to a reasonable level such that the Authority can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.
- 63.6 The Contractor shall indemnify and keep indemnified the Authority against all losses, claims, damages, liabilities, costs and expenses (including reasonable legal costs) incurred by it in respect of:
  - 63.6.1 any breach of this Clause 0 by the Contractor; and/or
  - 63.6.2 any act or omission of any Sub-Contractor which, if it had been performed or omitted (as the case may be) by the Contractor, would have constituted a breach of this Clause 0.

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## **64. INTELLECTUAL PROPERTY RIGHTS**

### **Authority Work Products**

64.1 All rights in the Work Products produced by the Authority in relation to this Contract shall vest in and be the property of the Crown. The Authority hereby grants to the Contractor, from the Date of Signature until the Expiry Date or Termination Date (whichever is earlier) a non-exclusive, non-transferrable and free of charge licence, with the right to sub-license to the Sub-contractors (or any other sub-contractor or third party approved by the Authority):

64.1.1 to use any of the Authority's Work Products constituting or incorporating any computer software; and

64.1.2 to use, copy, adapt, translate, arrange and otherwise alter any other of the Authority's Work Products,

in each case, for the purpose of the Contractor providing the Works and/or the Services or otherwise fulfilling its obligations under this Contract.

### **Licence to Use Contractor's Work Products, Sub-contractor's Work Products and Existing Work Products**

64.2 The Contractor hereby grants the Authority an irrevocable, non-exclusive, transferable licence, in perpetuity, free of any charge to do all acts (including to use, copy, adapt, translate, arrange and otherwise alter and to grant sub-licences to third parties) in relation to the Contractor's Work Products and the Existing Work Products, the Intellectual Property Rights in which are vested in the Contractor, for the purpose of, or in connection with, maintaining and operating the Prison, or procuring the same, or the conduct of the Services or any similar services carried out by or on behalf of the Authority at any time in connection with the Prison. The Contractor shall ensure and procure that each of its Sub-contractors provides a written licence to the Authority in relation to any Sub-contractor's Work Products and any Existing Work Products, the Intellectual Property Rights in which are vested in the Sub-contractor on the same terms as specified in this Clause 64.2 prior to the relevant Sub-contractor carrying out any works or services in relation to the performance of the Contract.

### **Obligation to Provide Software**

64.3 Where any Contractor's Work Product, or any Existing Work Product, the Intellectual Property Rights in which are vested in the Contractor, constitutes or incorporates any computer software the Contractor shall, where requested by the Authority, provide to the Authority or its nominee (or procure the provision to the Authority or its nominee of) a copy of such software, together with a copy of the source code, preparatory materials, manuals and any related documents and information in the possession or control of the Contractor relating to such software, provided that the Authority shall ensure that any such software, source code and materials provided hereunder is kept, at all times, safe and secure to at least the same standards of security as the Authority uses for its own proprietary or confidential information. The Contractor shall, where requested by the Authority, provide all of the foregoing materials in relation to any corrected, upgraded or updated version of the Contractor's Work Product or Existing Work Product, the Intellectual Property Rights in which are vested in the Contractor that is used in the provision of any part of the Services (to which the Authority shall apply the same standards of security as referred to above). The Contractor shall ensure and procure that each of its Sub-contractors complies with this Clause 64.3 in

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relation to any Sub-contractor's Work Product which constitutes or incorporates software as if this Clause 64.3 referred to such Sub-contractor's Work Product.

64.4 The Contractor, where the proprietor of Deposited Software, the Intellectual Property Rights in which are vested in a third party, has confirmed in writing that the source code for such Deposited Software can be placed into escrow and licensed to the Authority in accordance with the terms of this clause (which confirmation the Contractor shall use its reasonable endeavours to obtain provided that in using its reasonable endeavours the Contractor shall not be required to pay any fee to the third party):

64.4.1 shall use its reasonable endeavours following such written confirmation and within 21 days of a request from the Authority ensure that the source code of that Deposited Software is placed in escrow with the National Computing Centre (NCC) (or other reputable escrow agent acceptable to the Authority) on the basis of such escrow agent's standard escrow agreement or on such other terms as the Authority, the Contractor and the escrow agent shall agree.

64.4.2 shall ensure that the Deposited Software includes material modifications, developments, updates, patches, enhancements or other modifications to the originally Deposited Software from time to time; and

64.4.3 hereby grants to the Authority an irrevocable, perpetual, transferable and non-exclusive licence to use, reproduce, modify, adapt and enhance (and to grant sub licences to third parties to do the same) the source code and object code versions of the Deposited Software. However, the foregoing licence shall only become effective if the Authority becomes entitled to obtain access to the source code version of the Deposited Software pursuant to the escrow agreement referred to in Clause 64.4.1 above and the licence shall be subject to any restrictions contained herein in respect of the object code version of the Deposited Software.

64.4.4 The Authority shall pay all fees and expenses in respect of the placing and maintaining of any Deposited Software in escrow pursuant to this clause 64.4 and its retrieval from escrow.

#### **Use of Contractor's Work Products, Subcontractor's Work Products and Existing Work Products**

64.5 The Contractor shall not, and shall ensure and procure that the Sub-contractors shall not, use any Existing Work Product, the Intellectual Property Rights in which are vested in a third party (other than the relevant Sub-contractor) for any purpose in connection with the design, construction, maintenance, operation or management of the Prison or otherwise in the performance of its obligations under the Contract unless:

64.5.1 where, at the Date of Signature, (i) the Contractor (or relevant Sub-contractor) already has the benefit of a licence (and at the time of use still has the benefit of that licence), whether express or implied in relation to the use of the Existing Work Product, and (ii) if that Existing Work Product is a Required Work Product, under the terms of that licence the Contractor (or relevant Sub-contractor) is entitled to grant the Authority a non-exclusive, sub-licence, to use the relevant Required Work Product for the purpose of, or in connection with, maintaining and operating the Prison, or procuring the same, or the carrying out of the Services; or

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64.5.2 where, at the Date of Signature, the Contractor (or relevant Sub-contractor) does not already have the benefit of a licence (or at the time of use does not have the benefit of a licence), whether express or implied, in relation to the use of the Existing Work Product, or where the licence it does have does not comply with Clause 64.5.1, the Contractor (or relevant Sub-contractor) first procures at the Contractor's sole cost and expense a licence or equivalent arrangement (including, without limitation, an additional, direct licence in favour of the Authority with the relevant Required Work Product licensor) which complies with the terms of or fulfils the intended purpose of that Clause.

64.5.3 Where a licence is granted to the Authority by or in consequence of this Clause 64, such use will include:

64.5.3.1 in respect of any licence of a Contractor's Work Product or a Sub-contractor's Work Product, access to and copying of any or all of the licensed material during the Contract Period, and thereafter; and

64.5.3.1 in respect of any Third Party Work Product, any other rights the benefit of which the Contractor has acquired by way of its licence with the relevant third party licensor, for the full then remaining term of that licence,

save, in each case, that such use or copying shall be only for the purpose of maintaining and operating the Prison or procuring the same, whether by a Substitute Entity or any other person.

64.5.4 On and from termination or expiry of the Contract for whatever reason:

64.5.4.1 the Contractor shall, in relation to any Third Party Work Product being used exclusively by the Contractor or a Sub-Contractor for the purpose of providing the Works and/or the Services, or otherwise exclusively for fulfilling its obligations under this Contract or the relevant Sub-Contract, procure the novation to the Authority (or its nominee) (except in relation to such Third Party Work Product that constitutes or incorporates software, in respect of which the Contractor shall only be obliged to use reasonable endeavours to procure novation) of its licence to that Third Party Work Product on the same terms and for the same purpose as granted to the Contractor or Sub-Contractor (as the case may be), any such licence to be effective from the termination of this Contract; and

64.5.4.2 the Contractor shall, in relation to any Third Party Work Product:

64.5.4.2.1 that constitutes or incorporates software, the licence of which the Contractor is unable to novate to the Authority (or its nominee) pursuant to clause 64.5.4.1; or

64.5.4.2.2 which is used non-exclusively by the Contractor or a Sub-Contractor for the purpose of providing the Works and/or Services or otherwise fulfilling its obligations under this Contract,

use its reasonable endeavours, to assist the Authority in its negotiations to procure an equivalent licence of that Third Party Work Product or a licence for an equivalent Work Product, each at the Contractor's cost, in favour of the Authority (or its nominee),

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provided nothing in this Clause 64.5 shall oblige the Contractor to pay more than normal commercial rates for any such licence or novation.

- 64.6 For the avoidance of doubt, nothing in this Clause 64 shall limit the Contractor's obligations under Clause 53 of this Contract.
- 64.7 During the Contract Period, the Contractor shall not, and shall ensure and procure that all of the Sub-contractors shall not, sell, copy or use any Contractor's Work Product or Sub-contractor's Work Product for any purpose other than the performance of its obligations under the Contract (and, in the case of any Sub-contractor, for the performance of any of its obligations under its Sub-contract) without the prior written consent of the Authority.
- 64.8 During the Contract Period the Contractor shall not, and shall ensure and procure that all of the Sub-contractors shall not, without the prior written consent of the Authority, grant a licence to use any Contractor's Work Product or Sub-contractor's Work Product to a third party,:
- 64.8.1 for any purpose other than the performance of its obligations under the Contract (or, in the case of any Sub-contractor, for the performance of its obligations under its Sub-contract); or
- 64.8.2 other than to any Substitute Entity where such a licence is necessary to enable such Substitute Entity to properly perform its duties under the Contract.
- 64.8A Notwithstanding any provision of this Clause 64, but subject always to the provisions of Clause 61, the Contractor and each Sub-contractor shall be entitled to use or exploit, in any way it chooses (including without limitation in respect of projects other than the Project), any know-how, trade secrets, business processes or similar confidential information which is:
- 64.8A.1 created or acquired (other than where acquired from the Authority) by the Contractor or Sub-contractor in the course of producing or acquiring any Contractor Work Product or Sub-contractor Work Product; or
- 64.8A.2 already owned by the Contractor or Sub-contractor in respect of any Existing Work Products in which the Intellectual Property Rights are vested in the Contractor or Sub-contractor.

#### **Assignment of Intellectual Property Rights**

- 64.9 The Contractor shall notify any proposed assignee of any Intellectual Property Rights subsisting in or relating to the Contractor's Work Products or Existing Work Products in respect of which the Intellectual Property Rights are owned by the Contractor, and shall ensure and procure that the Sub-contractors shall notify any assignee of any Intellectual Property Rights subsisting in or relating to the Sub-contractor's Work Products or Existing Work Products in receipt of which the Intellectual Property Rights are owned by the Sub-contractors, of the existence of the Contract and of the licences granted under or in accordance with the Contract and shall otherwise ensure that any such assignment is subject to such licences.

#### **Contractor Warranty**

- 64.10 The Contractor warrants to the Authority that use of any of the Contractor's Work Products, any Sub-contractor's Work Products or any Existing Work Products by:
- 64.10.1 the Authority;
- 64.10.2 any sub-licensees of the Authority (within the scope of the licences granted under or in accordance with this Clause 64); or
- 64.10.3 any Substitute Entity;

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shall not infringe the Intellectual Property Rights of any third party, provided that such use by any of the above parties is in accordance with any applicable terms of this Contract and is not contrary to any instructions notified in writing by the Contractor to the Authority and is for the purpose of providing and/or receiving the Services.

64.11 Without prejudice to the generality of Clause 5 (Indemnities), subject to Clause 64.12, the Contractor shall indemnify the Authority in respect of all Losses incurred by the Authority arising out of or in connection with any Claims that:

64.11.1 the Project;

64.11.2 the provision of the Services by the Contractor or the Sub-contractors; or

64.11.3 the Authority's receipt of any of the Services or use of the Existing Work Products, Contractor's Work Products or Sub-contractor's Work Products infringes the Intellectual Property Rights of any third party,

save, in each case, to the extent that the infringement or alleged infringement results from:

(a) a breach by the Authority, any of the Authority's sub-licensees or a Substitute Entity of any of the terms of this Contract, the licences granted, or purported to be granted, to the Authority pursuant to this Clause 64 or otherwise granted by the Contractor and/or any Sub-contractor; or

(b) the Authority, any of the Authority's sub-licensees or a Substitute Entity using of any of the Existing Work Products, Contractor's Work Products or Sub-contractor's Work Products in a manner not in accordance with any instructions or guidance issued by the Contractor on or following termination or expiry of this Contract as part of transition of the Works, Services or Assets to the Authority or its nominee.

64.12 The Authority shall ensure that:

64.12.1 the Contractor is notified of any such Claim as soon as reasonably practicable after the same comes to the attention of the Authority;

64.12.2 none of the Authority or any of the Authority's sub-licensees makes any admission in relation to any such Claim;

64.12.3 full conduct of any such Claim (including the authority to compromise or settle any such Claim) is given to the Contractor; and

64.12.4 the Authority or any of the Authority's sub-licensees provides the Contractor, at the Contractor's sole cost and expense, all assistance reasonably required by the Contractor in defending or resisting such Claims.

64.13 The Contractor shall not be responsible or be obliged to indemnify the Authority under Clause 64.11 for:

64.13.1 any of the matters referred to in Clause 64.11 which arises as a direct result of the Contractor acting on the instruction of the Authority (except to the extent that the Contractor implements such an instruction in a negligence manner); or

64.13.2 any injury, loss, damage, cost, and expense caused by the negligence or wilful misconduct of the Authority, its employees, agents, representatives or contractors or by a breach by the Authority of its obligations under this Contract.

64.14 If a Prisoner creates or produces a work or an invention or a performance, no Intellectual Property Rights shall vest in the Authority or the Contractor in relation to the said work, invention or performance.

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**65. CONTRACTOR'S RECORDS**

- 65.1 The Contractor shall, and shall ensure and procure that each of its Sub-contractors shall, keep and maintain appropriate and full records relating to the performance of its obligations under the Contract. Without prejudice to the generality of the foregoing, the Contractor shall, and shall ensure that each of its Sub-contractors shall, keep and maintain any records which it is instructed to keep and maintain by the Authority from time to time.
- 65.2 The Contractor shall, and shall ensure and procure that each of its Sub-contractors shall, allow the Authority (or any representative of the Authority) to examine, and shall provide copies of, all information, documents, records and the like in the possession of, or available to, the Contractor or Sub-contractor as may be requested by the Authority from time to time for any purpose in connection with this Contract.
- 65.3 The records referred to in this Clause 0 shall be retained for a period of at least 5 years after the Contractor's and Sub-contractors obligations under the Contract have come to an end. Records relating to the construction of the Prison will be retained and provided to the Authority as set out in Schedule M.
- 65.4 Upon the termination of the Contract, and in the event that the Authority wishes to enter into another contract for the operation and management of the Prison with any party (whether the Contractor or otherwise), the Contractor and all Sub-contractors shall comply with all requests of the Authority to provide information (either directly to such party or to the Authority, who may thereafter provide it to such party) relating to the Contractor's and Sub-contractors costs of operating and maintaining the Prison. Such information shall include information relating to the anticipated cost of a transfer of the Prison to a new Contractor.
- 65.5 The Contractor and all Sub-contractors will control any documents relating to the performance of the Contract, and access thereto, referred to in Schedule M in the manner set out in that Schedule.

**66. DISCRIMINATION**

- 66.1 The Contractor shall not unlawfully discriminate within the meaning and scope of any law, enactment, order, or regulation relating to discrimination (whether in age, colour, race, gender, ethnic or national origin, religion, disability, sexual orientation or otherwise).
- 66.2 The Contractor shall take all reasonable steps to secure the observance of Clause 0 by all servants, employees or agents of the Contractor and all sub-contractors employed in the performance of the Contract.

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## **67. WAIVER**

- 67.1 No term or provision of this Contract shall be considered as waived by any Party to this Contract unless a waiver is given in writing by that Party.
- 67.2 No waiver under Clause 0 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Contract unless (and then only to the extent) expressly stated in that waiver.
- 67.3 Without prejudice to the generality of Clause 0, the giving of the Engineer's Declaration shall not on its own relieve or absolve the Contractor from any obligation under the Contract (except to the extent that such obligation has been properly performed) and shall not be taken as conclusive proof that any obligation of the Contractor has been performed in accordance with the Contract.

## **68. SEVERABILITY**

If any term, condition or provision contained in this Contract shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision to that extent shall not affect the validity, legality or enforceability of the remaining parts of this Contract.

## **69. INDEPENDENT CONTRACTOR**

- 69.1 The Contractor shall at all times be an independent contractor and nothing in the Contract shall be construed as creating the relationship of employer and employee between the Authority and the Contractor or any of the Contractor's employees. Neither the Contractor nor any of its employees shall at any time hold itself or themselves out to be the employee of the Authority and neither the Contractor nor any of its employees shall be entitled to any of the benefits provided by the Authority to its established or unestablished officers and staff.
- 69.2 In performing its obligations under the Contract, the Contractor shall act as principal and not as agent of the Authority. Neither the Contractor nor any of its agents, employees, representatives and Sub-contractors shall say or do anything (or omit to say or do anything) which might lead any other person to believe that the Contractor, or any agent, employee, representative or Sub-contractor of the Contractor is an agent of the Authority.

## **70. EXCLUSION OF LEGISLATION AND THIRD PARTY RIGHTS**

- 70.1 This Contract is entered into under the private finance initiative and the consideration due under this Contract is determined in part by reference to the standards attained in the performance of a service. Accordingly, in accordance with the Construction Contracts (Scotland) Exclusion Order 1998 (S.I. 1998/686), this Contract shall be excluded from the operation of Part II of the Housing Grants, Construction and Regeneration Act 1996. The Contractor acknowledges that the operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Sub-contract shall not affect the Parties' rights or obligations under this Contract.
- 70.2 Save to the extent expressly provided in this Contract and, to avoid doubt, without prejudice to the form of the Direct Agreement, it is expressly declared that no rights shall be conferred under and arising out of this Contract upon any person other than the Authority and the Contractor and without prejudice to the generality of the

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foregoing, there shall not be created by this Contract a jus quaesitum tertio in favour of any person whatsoever.

## **71. REPRESENTATIVES**

- 71.1 A change in the Named Representatives of the Authority does not constitute a variation of the Contract. In the event of any change to the Named Representatives of the Authority, the Authority shall give written notice of the change to the Contractor.
- 71.2 Only the Named Representatives of the Authority shall have the power to vary the terms and conditions of the Contract, or to commit the Authority to additional expenditure. Any purported variation of the terms and conditions of the Contract or commitment to additional expenditure which is not agreed to in writing by one of such Named Representatives shall be null and void and shall not bind the Authority in any respect.

## **72. SERVICE OF NOTICES**

- 72.1 Subject to Clause 0, any Notice required or permitted to be given or served by the Authority in terms of the Contract other than a Rectification Notice shall be sufficiently given if it is sent by recorded or registered post addressed to any Named Representative of the Contractor at the address specified in Schedule I, or such other address as may be notified from time to time by the Contractor for the purposes of this Clause 0. Such Notice shall be deemed to have been given on the second business day after the letter containing same was posted and to prove that any Notice was so given or served, it shall be necessary to prove only that the same was properly addressed and posted as aforesaid.
- 72.2 Any Rectification Notice to be given or served by the Authority shall only be sufficiently given if it is delivered by hand to the Director (or where the Director is absent from the Prison, to any of his deputies or the most senior representative of the Contractor then present) and sent by facsimile transmission to the Contractor at 020 7725 7211 or to any other number intimated to the Authority by the Contractor for the purpose of service of such a notice. Such notice shall be deemed to be served, and shall take effect, when delivered (in the case of hand delivery) and on transmission of the said facsimile. In proving service of the Rectification Notice by facsimile transmission, it shall be sufficient to prove that such facsimile was duly transmitted to the correct number.
- 72.3 Subject to Clause 72.4 any Notice required or permitted to be given or served by the Contractor in terms of the Contract shall be sufficiently given if it is sent by recorded or registered post addressed to The Director of Finance and Business Services, Scottish Prison Service, Calton House, Redheughs Rigg, Edinburgh EH12 9HW or such other address as may be notified from time to time by the Authority to the Contractor for the purposes of this Clause. Such Notice shall be deemed to have been given on the second business day after the letter containing same was posted and to prove that any Notice was so given or served, it shall be necessary to prove only that the same was properly addressed and posted as aforesaid.
- 72.4 Notwithstanding the provisions of Clause 0, any notice to be given or served by the Contractor under Clause 0 (*Termination on Authority Default*) shall only be sufficiently given or served if it is sent by recorded or registered post and addressed to The Director of Finance and Business Services, Scottish Prison Service, Calton House, Redheughs Rigg, Edinburgh EH12 9HW or such other address as may be

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notified from time to time by the Authority to the Contractor for the purposes of this Clause 72 and also sent by recorded or registered post and addressed to The Contract Manager for HMP Addiewell, Scottish Prison Services, Calton House, Redheughs Rigg, Edinburgh EH12 9HW or such other address as may be notified from time to time by the Authority to the Contractor for the purposes of this Clause 72. Such Notice shall be deemed to have been given on the second business day after the letter containing the same was posted and, to prove that any such notice was so given or served, it shall be necessary to prove only that the same was properly addressed and posted as aforesaid.

72.5 Notwithstanding the foregoing provisions of Clause 0, any notice given under Clause 20 shall be sufficiently given if it is delivered by hand to the Director (or where the Director is absent from the Prison, to any of his deputies or the most senior representative of the Contractor then present) or, where the notice is given under Clause 20 (*Cell Certification*) by the Contractor, to the Controller or where he is absent from the Prison to any of his deputies. Such notice shall be deemed to be served, and shall take effect, when delivered. Further, the Parties may at any time agree that any other Notices provided for in the Contract shall be sufficiently given if they are given on behalf of the Contractor by the Director to the Controller, or by the Controller on behalf of the Authority to the Director and if such agreement is recorded in writing, it shall have full effect notwithstanding the foregoing provisions of this Clause 0.

### **73. DIRECT AGREEMENT**

73.1 The provisions of this Contract shall be read and interpreted subject always to the Direct Agreement. Accordingly, in the event of any conflict between the provisions of this Contract and the provisions of the Direct Agreement, the provisions of the Direct Agreement shall prevail.

### **74. CONTINUING OBLIGATIONS**

74.1 Save as otherwise expressly provided in this Contract:

74.1.1 expiry of the Contract Period or earlier termination of the Contract shall be without prejudice to any accrued rights and obligations under this Contract as at the Termination Date; and

74.1.2 expiry of the Contract Period or earlier termination of the Contract shall not affect the continuing rights of the Authority and the Contractor under Clauses 6 (*Indemnities*), 0 (*Restrictions on Transfer of the Contract by the Authority*), 0 (*Information and Confidentiality*), 0 (*Public Relations and Publicity*), 0 (*Data Protection*), 0 (*Contractor's Records*), 0 (*Dispute Resolution*) and 0 (*Law of the Contract and Jurisdiction*) or under any other provision of this Contract which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

### **75. EXCLUSIVE REMEDIES**

75.1 Neither Party shall have the right to terminate this Contract for breach of contract save as expressly set out in this Contract.

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- 75.2 The Contractor will not be entitled to any common law rights including (but not limited to) rights to damages or any other rights under contract, delict or otherwise (other than specific implement, interim specific implement, interdict or interim interdict, or their equivalent in any jurisdiction) in relation to any breach of this Contract by the Authority, save:
- 75.2.1 in relation to a breach by the Authority of its obligations under Clauses 6.4, 38.11 or 38.13; or
  - 75.2.2 as otherwise provided in this Contract.
- 75.3 Save as otherwise provided in terms of this Contract, the Authority will not be entitled to any common law rights, save in relation to Clause 5 (*Warranties*), including (but not limited to) rights to damages or other rights under contract, delict or otherwise (other than specific implement, interim specific implement, interdict or interim interdict, or their equivalent in any jurisdiction) in relation to any breach of this Contract which leads or could lead directly to deductions being made pursuant to Clause 0 and Schedule F or leads or could lead directly to the Contractor failing to provide an Available Prisoner Place or Additional Prisoner Place and the sole remedy of the Authority in that regard, subject as aforesaid, shall be the operation of the provisions of Schedules E and F.

## **76. DISPUTE RESOLUTION**

- 76.1 Any dispute arising out of or in connection with any aspect of the Contract (a "Dispute") shall be resolved in accordance with this Clause 76.
- 76.2 If a Dispute arises, the Contractor and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.
- 76.3 Without prejudice to Clause 76.2 above, either Party may at any time give the other notice of intention to refer the Dispute to adjudication and the Adjudicator shall be selected in accordance with Clause 0 below.
- 76.4 The Adjudicator nominated to consider a Dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts appointed in accordance with the following:
- 76.4.1 there shall be two panels of experts, one in respect of construction matters ("Construction Panel") and one in respect of operational and maintenance matters ("Operational Panel"). All the experts on each panel shall be wholly independent of the Contractor, the Authority, the relevant Sub-contractor and any of the major competitors of the Contractor or relevant Sub-contractor;
  - 76.4.2 the Construction Panel shall be comprised of 3 experts who, if possible, shall be appointed jointly by the Contractor and the Authority. Such appointments shall take place within 28 days of the date of this Contract;
  - 76.4.3 the Operational Panel shall be comprised of 3 experts who, if possible, shall be appointed jointly by the Contractor and the Authority. Such appointments shall take place on or before the Actual Opening Date;
  - 76.4.4 if any member of a panel resigns during the term of the Contract, a replacement expert shall be appointed by the Contractor and the Authority as soon as practicable;
  - 76.4.5 if the Authority and the Contractor are unable to agree on the identity of the experts to be appointed to the panel(s), the President for the time being of the Chartered Institute of Arbitrators shall appoint such expert(s) within 30 days of any application for such appointment by either Party;

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- 76.4.6 no member of the Construction Panel or Operational Panel shall be entitled to accept an appointment to act as an adjudicator under this Contract unless he is willing also to be appointed as the adjudicator to adjudicate a dispute between the Contractor and its Construction Sub-Contractor or its Operating Sub-Contractor, as the case may be, which raises similar questions of fact and/or law and where the adjudication in relation to that dispute is commenced before or within seven days after the notice to be given pursuant to Clause 0.
- 76.5 Within 7 days of appointment in relation to a particular Dispute, the Adjudicator shall require the Parties to submit in writing their respective arguments. The Adjudicator shall, in his absolute discretion, consider whether a hearing is necessary in order to resolve the Dispute.
- 76.6 In any event, the Adjudicator shall provide to both Parties his written decision on the Dispute, within 28 days of appointment (or such other period as the Parties may agree after the reference, or 42 days from the date of reference if the Party which referred the Dispute agrees). Unless the Parties otherwise agree, the Adjudicator shall give reasons for his decision. Unless and until revised, cancelled or varied by the Arbitrator, the Adjudicator's decision shall be binding on both Parties who shall forthwith give effect to the decision.
- 76.7 The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the Parties. Each Party shall bear its own costs arising out of the reference, including legal costs and the costs and expenses of any witnesses.
- 76.8 The Adjudicator shall be deemed not to be an arbitrator and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.
- 76.9 The Adjudicator shall act impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Contract.
- 76.10 All information, data or documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 0 (Information and Confidentiality), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Adjudicator's work.
- 76.11 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.
- 76.12 Without prejudice to Clause 0, if:
- 76.12.1 there is any Dispute in respect of matters referred to in Clause 0 (*Authority Changes*), Clause 0 (*Change in Law*), Clause 0 (*Compensation on Termination for Authority Default*), Clause 0 (*Compensation on Termination for Contractor Default*), Clause 0 (*Compensation on Termination for Force Majeure*), Clause 0 (*Compensation on Termination for Corrupt Gifts and Fraud*) or Clause 0 (*Compensation on Voluntary Termination by the Authority*); or

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- 76.12.2 either Party is dissatisfied with or otherwise wishes to challenge the Adjudicator's decision made in accordance with Clause 0; or
- 76.12.3 both Parties agree,
- 1.4.2 then either Party may (within 28 days of receipt of the Adjudicator's decision, where appropriate), notify the other Party of its intention to refer the Dispute to arbitration. Such notification shall invite the other Party to concur in the appointment of a sole arbitrator who shall be a solicitor, barrister or arbitrator. In the case of an arbitrator, the person must be recognised by the Chartered Institute of Arbitrators of not less than 10 years' standing (the "Arbitrator"). If the Parties are unable within 14 days to agree the identity of the Arbitrator either Party may request the President of the Law Society to make the appointment. A person shall not be entitled to accept an appointment to act as the arbitrator under this Contract unless he is willing also to be appointed as the arbitrator in a dispute between the Contractor and its Construction Sub-Contractor or its Operating Sub-Contractor, as the case may be, which raises similar questions of fact and/or law and where the arbitration in relation to that dispute is commenced before or within 14 days after the notice to be given pursuant to this Clause 0.
- 76.13 The Arbitrator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Contract, to vary or cancel the decision of the Adjudicator and, where appropriate, to order financial compensation to be paid by one Party to the other. The arbitration shall take place in Scotland.
- 76.14 The Arbitrator shall in his absolute discretion, make such procedural directions as he considers necessary such as ordering the Parties to provide written submissions within such time period as he considers appropriate and/or to attend such hearings as he deems necessary.
- 76.15 The Arbitrator shall deliver his decision on any matter referred to him as soon as practicable and in any event within 6 months (or such other period as the Parties may agree) of his appointment. In cases which the Arbitrator, in his sole discretion, determines to be complex the Arbitrator may grant himself an extension (up to a further 2 months) to the said 6 month period. The Arbitrator's decision shall be in writing and shall state his reasons for his decision. The decision of the Arbitrator shall be final and binding on both Parties. The costs of the arbitration will be in the discretion of the Arbitrator.
- 76.16 The Parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the Dispute for resolution under this Clause 0 and shall give effect forthwith to every decision of the Adjudicator and the Arbitrator delivered under this Clause 0.
- 76.17 If any Dispute arising under this Contract raises issues which relate to:
- 76.17.1 any dispute between the Contractor and the Construction Sub-contractor arising under the Construction Sub-contract or otherwise affects the relationship or rights of the Contractor and/or the Construction Sub-contractor under the Construction Sub- Contract (the "Construction Sub-contract Dispute"); or
- 76.17.2 any dispute between the Contractor and the Operating Sub-contractor arising under the Operating Sub-contract or otherwise affects the relationship or rights of the Contractor and/or the Operating Sub-contractor under the Operating Sub-contract (the "Operating Sub-contract Dispute"),

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then the Contractor may include as part of its submissions made to the Adjudicator or to the Arbitrator, where the dispute is referred to arbitration, submissions made by the Construction Sub-contractor or by the Operating Sub-contractor as appropriate.

- 76.18 The Adjudicator or the Arbitrator, as appropriate, shall not have jurisdiction to determine the Construction Sub-contract Dispute or the Operating Sub-contract Dispute but the decision of the Adjudicator or the Arbitrator shall, subject to Clause 0, be binding on the Contractor and the Construction Sub- Contractor insofar as it determines the issues relating to the Construction Sub-contract Dispute and on the Contractor and the Operating Sub-contractor insofar as it determines the issues relating to the Operating Sub-contract Dispute.
- 76.19 Any submissions made by the Construction Sub-contractor or the Operating Sub-contractor shall:
- 76.19.1 be made within the time limits applicable to the delivery of submissions by the Contractor; and
  - 76.19.2 concern only those matters which relate to the dispute between the Authority and the Contractor under this Contract.
- 76.20 Where the Construction Sub-contractor or the Operating Sub-contractor makes submissions in any reference before:
- 76.20.1 the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the Authority and two-thirds by the Contractor; and
  - 76.20.2 the Arbitrator, the costs of the arbitration shall be in the discretion of the Arbitrator.
- 76.21 The Authority shall have no liability to the Construction Sub-contractor or the Operating Sub-contractor arising out of or in connection with any decision of the Adjudicator or Arbitrator or in respect of the costs of the Construction Sub-contractor or the Operating Sub-contractor in participating in the resolution of any dispute under this Contract.
- 76.22 The Contractor shall not allow the Construction Sub-contractor or the Operating Sub-contractor access to any document relevant to the issues in dispute between the Authority and the Contractor save where:
- 76.22.1 the document is relevant also to the issues relating to the Construction Sub-contract Dispute or the Operating Sub-contract Dispute as the case may be; and
  - 76.22.2 the Contractor has first delivered to the Authority a written undertaking from the Construction Sub-contractor and/or the Operating Sub-contractor (as appropriate) addressed to the Authority that they shall not use any such document otherwise than for the purpose of the dispute resolution proceedings under this Contract and that they shall not disclose such documents or any information contained therein to any third party other than the Adjudicator or Arbitrator or any professional adviser engaged by the Construction Sub-contractor or the Operating Sub-contractor (as appropriate) to advise in connection with the dispute.

## **77. FINANCIAL MODEL**

- 77.1 Unless otherwise agreed between the Parties, the Financial Model shall be updated to reflect the impact on the Project of:
- 77.1.1 any Authority Change;
  - 77.1.2 any Contractor Change;

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- 77.1.3 any Refinancing;
- 77.1.4 any Qualifying Change in Law;
- 77.1.5 any Compensation Event; and
- 77.1.6 any Title Compensation Event

but shall not otherwise be amended or updated and all such amendments shall be subject to the prior written approval of the Authority (such approval not to be unreasonably withheld or delayed). In the event that the Parties fail to agree any proposed amendment to the Financial Model the matter shall be referred for resolution in accordance with Clause 76 (*Dispute Resolution*).

- 77.2 Following the approval by the Authority of any amendment to the Financial Model in accordance with Clause 77.1, the Contractor shall promptly deliver a copy of the revised Financial Model to the Authority in the same form as the original (or such other form as may be agreed by the Parties from time to time).
- 77.3 The Contractor shall keep a copy of all versions of the Financial Model on disc and in hard copy.

**78. ENTIRE AGREEMENT**

The Contract, the Direct Agreement and the Lease supersede and invalidate all prior commitments, representations, understandings, agreements and documents between or made by the Parties or either of them prior to the Date of Signature, whether orally or in writing, with reference to the subject matter of the Contract or the Direct Agreement or the Lease, all of which shall become null and void from the Date of Signature. The Contract, Direct Agreement and the Lease set out the entire, complete and exclusive agreement and understanding between, and the rights and liabilities of, the Parties relating to the subject matter of the Contract.

**79. LAW OF THE CONTRACT AND JURISDICTION**

The Contract shall be construed according to and shall be interpreted in accordance with the laws of Scotland and, subject to Clause 0 (*Dispute Resolution*), the Parties irrevocably submit to the exclusive jurisdiction of the courts of Scotland. IN WITNESS WHEREOF these presents consisting of this and the preceding 216 pages together with Schedules A to Q annexed hereto are executed all together at Edinburgh on the twentieth day of June 2006 as follows:

**SUBSCRIBED** for and behalf of **THE SCOTTISH MINISTERS** by

..... AUTHORISED SIGNATORY  
 Tony Cameron ..... FULL NAME

**BEFORE THIS WITNESS**

..... WITNESS  
 William F Pretswell..... FULL NAME  
 Calton House, 5 Redheughs Rigg, ..... ADDRESS  
 Edinburgh, EH12 9H

**SUBSCRIBED** for and behalf of the said **ADDIEWELL PRISON LIMITED** by

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.....DIRECTOR/SECRETARY  
.....FULL NAME

BEFORE THIS WITNESS

.....WITNESS  
.....FULL NAME  
.....ADDRESS

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