

the Contractor to fulfil its obligations under this Contract to provide Available Prisoner Places or Houseblock Available Prisoner Places, the Authority shall:

- 76.8.3.1 on the Contractor's written request, increase the Permitted Level (either on a temporary or a permanent basis) if and to the extent that such increase, in the Authority's opinion, will not prejudice the level of security and safety in the Prison and the control of Prisoners as required under the Operating Procedures;
  - 76.8.3.2 mitigate the relevant Losses where it is reasonably practicable to do so, for example taking reasonable steps to arrange for such prisoners to be housed in alternative accommodation that is not more costly than other suitable accommodation reasonably available to the Authority at the relevant time (having regard to the circumstances from time to time); and
  - 76.8.3.3 to the extent practicable (having regard to the then existing circumstances) consult with the Contractor as to where such prisoners should be accommodated.
- 76.8.4 The Authority shall only be entitled to recover Losses under **clause 76.1.5 (Contractor's Indemnity)** to the extent that the payment by the Authority for such accommodation exceeds the amount that the Authority would pay to the Contractor for providing an Available Prisoner Place or Houseblock Available Prisoner Place to accommodate each such Prisoner if the Contractor were satisfying all its obligations and providing the Custodial Service in full over that period.
- 76.8.5 The amount of Losses recoverable under **clause 76.1.5 (Contractor's Indemnity)** shall be calculated by deducting (to the extent not already taken into account) from the total of the relevant Losses the aggregate of the following:
- 76.8.5.1 any damages for breach of contract received by the Authority in respect of the failure by the Contractor to provide such Available Prisoner Places or Houseblock Available Prisoner Places (whether pursuant to **clauses 20 (Phase-in Period), 21.1 (Contractual Full Operation Date), 21A (Provision of JEAPPs)** or otherwise);

- 76.8.5.2 any insurance proceeds received by the Authority in respect of the failure by the Contractor to provide such Available Prisoner Places or Houseblock Available Prisoner Places; and
- 76.8.5.3 the amount of the Contract Price the Authority would have paid the Contractor if the Contractor had provided the required number of Available Prisoner Places or Houseblock Available Prisoner Places.
- 76.8.6 If the Authority recovers any amount (the "Relevant Amount") pursuant to **clause 76.1.5 (Contractor's Indemnity)** and subsequently receives amounts of the type described in **clauses 76.8.5.1 (Limit of Liability), 76.8.5.2 (Limit of Liability), 22.1 (Liability for Liquidated Damages) or 22A.1 (Liability for Liquidated Damages – Houseblock)** in circumstances that amount to double recovery, the Authority shall (subject to the other provisions of this Contract and any rights of set off) to the extent of such double recovery reimburse the party from whom the Relevant Amount was received within twenty (20) Business Days after written demand for reimbursement.
- 76.8.7 For the avoidance of doubt, this **clause 76 (Indemnities)** shall take effect without prejudice to the Contractor's obligations under **clause 79 (Liability for Loss and Damage), clause 22.1 (Liability for Liquidated Damages) and 22A.1 (Liability for Liquidated Damages – Houseblock).**

## **77. MUTUAL AID**

### **77.1 Application**

This **clause 77 (Mutual Aid)** applies only to the provision of Mutual Aid within the terms of paragraph 4.6.10 of the Custodial Service Specification.

### **77.2 Prison Officers Reporting to the Prison**

- 77.2.1 Subject to **clause 77.2.1.3 (Prison Officers Reporting to the Prison)**, the Authority shall be responsible for and shall release and indemnify and keep indemnified in full and on demand the Contractor from and against all Losses arising as a result of:

- 77.2.1.1 personal injury to any prison officer (other than a member of the Contractor's Staff) sustained during the period when such prison officer is reporting for Mutual Aid purposes to the Prison; or

77.2.1.2 injury, loss or damage to a third party (other than the Contractor or any Contractor Related Party) caused or contributed to by the act or omission of such prison officer.

77.2.1.3 The Authority shall not be responsible or be obliged to indemnify the Contractor if any such Loss has arisen in whole or in part as a result of a command given by the Contractor or any Contractor Related Party within the command structure operating at the time for Mutual Aid purposes at the Prison and either:

(a) a public duty defence in respect of the claim is unsuccessful; or

(b) with the prior written approval of the Authority, such defence is not pursued,

and such Loss shall be the responsibility of the Contractor and the Contractor shall indemnify and keep indemnified in full and on demand the Authority in respect of such Loss.

### 77.3 **Contractor's Staff Reporting to other Prisons**

77.3.1 Subject to **clause 77.3.2 (Contractor's Staff Reporting to other Prisons)**, the Contractor shall, notwithstanding the limits set out in **clause 76.8 (Limit of Liability)** be responsible for and shall release and indemnify and keep indemnified in full and on demand the Authority from and against all Losses arising as a result of:

77.3.1.1 personal injury to any member of the Contractor's Staff sustained during the period when such member of the Contractor's Staff is reporting for Mutual Aid purposes to any other prison; or

77.3.1.2 injury, loss or damage to a third party (other than the Authority and its employees) caused or contributed to by the act or omission of such member of the Contractor's Staff.

77.3.2 The Contractor shall not be responsible or be obliged to indemnify the Authority if any such Loss has arisen in whole or in part as a result of a command given by a prison officer within the command structure operating at the time for Mutual Aid purposes at such prison and either:

77.3.2.1 a public duty defence in respect of the claim is unsuccessful; or

77.3.2.2 with the prior written approval of the Authority, such defence is not pursued,

and such Loss shall be the responsibility of the Authority and the Authority shall indemnify and keep indemnified in full and on demand the Contractor in respect of such Loss.

## 78. **INSURANCE**

### 78.1 **Obligation to Maintain**

78.1.1 The Contractor shall, prior to the later of the Actual Full Operation Date and the Post Completion Works Acceptance Date, take out and maintain or procure the maintenance of the insurances described in **Part 1 of Schedule 7 (Required Insurances)** and any other insurances as may be required by law. These insurances must be effective in each case not later than the date on which the relevant risk commences.

78.1.2 The Contractor shall during the Custodial Service Period take out and maintain or procure the maintenance of the insurances described in **Part 2 of Schedule 7 (Required Insurances)** and any other Insurances as may be required by law.

78.1.3 The Contractor shall in respect of the Houseblock Works take out and maintain or procure the maintenance of the insurances described in **Part 1A of Schedule 7 (Required Insurances)** and any other insurances as may be required by law. These insurances must be effective in each case not later than the date on which the relevant risk commences.

### 78.2 **Obligation on Parties**

Neither 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 an additional insured person.

### 78.3 **Nature of Insurances**

78.3.1 With the exception of any insurances required by law, the insurances referred to in **clauses 78.1.1 (Obligation to Maintain)** and **78.1.2**

**(Obligation to Maintain)** and **78.1.3 (Obligation to Maintain)** shall:

- 78.3.1.1 subject to **clause 78.18 (Riot (Damages) Act 1886)**, name the Contractor as co-insured parties with any other party maintaining the insurance;
- 78.3.1.2 provide for non-vitiation protection in respect of any claim made by the Authority as co-insured in accordance with endorsement 2 in **Part 3 of Schedule 7 (Required Insurances)**;
- 78.3.1.3 contain a clause waiving the insurers' subrogation rights against the Authority, its employees and agents in accordance with endorsement 2 in **Part 3 of Schedule 7 (Required Insurances)**;
- 78.3.1.4 provide for thirty (30) Business Days' prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 in **Part 3 of Schedule 7 (Required Insurances)**; and
- 78.3.1.5 in respect of the Physical Damage Policies provide for payment of any proceeds received by the Contractor to be applied in accordance with **clause 78.14 (Reinstatement)**.

78.3.2 Wherever possible, the insurances referred to in **clauses 78.1.1 (Obligation to Maintain), 78.1.2 (Obligation to Maintain)** and **78.1.3 (Obligation to Maintain)** shall, where specified in **Schedule 7 (Required Insurances)** name the Authority as a co-insured for its separate interest.

#### 78.4 **Evidence of Policies**

##### 78.4.1 **The Contractor shall provide to the Authority:**

- 78.4.1.1 copies on request of evidence, certified by the Contractor's insurance broker, in a form satisfactory to the Authority, that the insurance policies referred to in **clauses 78.1.1 (Obligation to Maintain), 78.1.2 (Obligation to Maintain)** and **78.1.3 (Obligation to Maintain)** (together with any other information reasonably requested by the Authority relating to such insurance) are in full force and effect and comply with the terms of Schedule 7;

78.4.1.2 evidence that the premiums payable under all insurance policies have been paid and that the insurances are in full force and effect in accordance with the requirements of this **clause 78 (Insurance)** and **Part 4 of Schedule 7 (Required Insurances)**; and

78.4.1.3 on or before the date of expiry of any insurance required by **clauses 78.1.1 (Obligation to Maintain), 78.1.2 (Obligation to Maintain)** and **78.1.3 (Obligation to Maintain)** satisfactory evidence that the relevant insurance has been or is being renewed.

#### 78.5 **Renewal Certificates**

Renewal certificates in relation to any of the insurances required by **clauses 78.1.1 (Obligation to Maintain), 78.1.2 (Obligation to Maintain)** and **78.1.3 (Obligation to Maintain)** 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.

#### 78.6 **Breach**

If the Contractor is in breach of **clauses 78.1.1 (Obligation to Maintain), 78.1.2 (Obligation to Maintain)** and/or **78.1.3 (Obligation to Maintain)**, the Authority may pay any premiums, fees, broker's costs or other expenses 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.

#### 78.7 **Notification of Claims**

[REDACTED]

#### 78.8 **Limit of Liability**

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

## 78.9 Premiums

Subject to the provisions of **Schedule 8 (Premium Costs Sharing Mechanism)**, the insurance premiums for the Required Insurances and the amount of any loss that would otherwise be recoverable under any of the Required Insurances but for the applicable uninsured deductible and limit of indemnity in respect of such insurance shall, at all times, be the responsibility of the Contractor.

## 78.10 Authority Approval

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

## 78.11 Professional Indemnity Insurance

In addition to the Required Insurances, the Contractor undertakes to procure that the Construction Sub-Contractor, and the Architect take out and maintain in force professional indemnity insurance ("PI Insurance") in respect of their liability for the design and construction of the Prison (except to the extent that clause 78.11A applies), provided that such insurance is generally available in the market to members of the relevant party's profession at commercially reasonable rates and provided further that payment of any increased or additional premiums required by insurers by reason of the relevant party's own claims record or other acts, omissions, matters or things peculiar to the relevant party will be deemed to be within the reasonable rates and, where such insurance is effected, and to:

78.11.1 [REDACTED]

78.11.1.1 [REDACTED]

78.11.1.2 [REDACTED]

78.11.2 provide the Authority with notice of:

78.11.2.1 any cancellation of the PI Insurance not less than twenty (20) Business Days before the relevant cancellation date; and

78.11.2.2 any adverse material changes to or suspension of cover relevant to the Project not less than twenty (20) Business Days before the relevant change or suspension; and

78.11.3 inform the Authority as soon as reasonably practicable of any claim under the PI Insurance in respect of the Project, provide such information to the Authority as the Authority may reasonably require in relation to such claim and provide notice of any potential breach of the aggregate limit.

**78.11A Professional Indemnity Insurance – Houseblock Works**

In addition to the Required Insurances, the Contractor undertakes to procure that the Houseblock Construction Sub-contractor takes out and maintains in force professional indemnity insurance ("Houseblock PI Insurance") in respect of their liability for the design and construction of the Houseblock, provided that such insurance is generally available in the market to members of the relevant party's profession at commercially reasonable rates and provided further that payment of any increased or additional premiums required by insurers by reason of the relevant party's own claims record or other acts, omissions, matters or things peculiar to the relevant party will be deemed to be within the reasonable rates and, where such insurance is effected, and to:

78.11A.1 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

78.11A.2 provide the Authority with notice of:

78.11A.2.1 any cancellation of the Houseblock PI Insurance not less than seventeen (17) Business Days before the relevant cancellation date; and



78.11A.2.2 any adverse material changes to or suspension of cover relevant to the Project not less than twenty (20) Business Days before the relevant change or suspension; and

78.11A.3 inform the Authority as soon as reasonably practicable of any claim under the Houseblock PI Insurance in respect of the Project, provide such information to the Authority as the Authority may reasonably require in relation to such claim and provide notice of any potential breach of the aggregate limit.

## 78.12 **Claims**

The Contractor shall, where it is obliged to effect insurance under this **clause 78 (Insurance)** not bring any claim or action against the Authority or any Authority Related Party in respect of any loss or damage in circumstances where the Contractor is able to recover such loss or damage under such insurance (or where it would have been able to recover such loss had it been complying with its obligations under this Contract) provided that this **clause 78.12 (Claims)** shall not by itself prevent the Contractor from claiming against the Authority or any Authority Related Party for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Contract or to the extent such loss or damage exceeds the maximum level of such insurance required by this Contract.

## 78.13 **Broker's Letter of Undertaking**

78.13.1 On the date of this Contract and within twenty (20) Business Days following each renewal of those Required Insurances that are set out in **Parts 1 and 2 of Schedule 7 (Required Insurances)**, the Contractor shall deliver to the Authority a broker's letter of undertaking signed by the insurance broker to the Contractor in the form set out in **Part 4 of Schedule 7 (Required Insurances)**.

78.13.1A On the date of the Amending Agreement and within twenty (20) Business Days following each renewal of those Required Insurances that are set out in Part 1A of **Schedule 7 (Required Insurances)**, the Contractor shall deliver to the Authority a broker's letter of undertaking signed by the insurance broker to the Contractor in the form set out in Part 4A of **Schedule 7 (Required Insurances)**.

78.13.2 The Contractor shall procure that any broker(s) appointed during the term of this Contract shall:

78.13.2.1 owe the Authority such obligations and give to the Authority such warranties as are substantially the same as those set out in Part 4 and 4A of **Schedule 7 (Required**

**Insurances)** and in **clauses 78.1 (Obligation to Maintain)** to **78.12 (Claims)** (inclusive); and

78.13.2.2 enter into agreements in substantially the same form as those set out in Part 4 and 4A of **Schedule 7 (Required Insurances)**.

78.14 **Reinstatement**

78.14.1 [REDACTED]

78.14.2 [REDACTED]

78.14.3 [REDACTED]

78.14.3.1 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]

78.14.3.2

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]

(a) [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

78.14.4 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

78.14.5 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

## 78.15 Uninsurable Risks

78.15.1 Nothing in this **clause 78 (Insurance)** 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.

78.15.2 If a risk usually covered by construction all risks, material damage, third party liability, business interruption (but excluding loss of profits)

or delay in start up (but excluding loss of profits) or statutory insurances in each case required under this Contract becomes Uninsurable then:

78.15.2.1 the Contractor shall notify the Authority of any risk becoming Uninsurable within five (5) Business Days of becoming aware of the same and in any event at least five (5) Business Days before expiry or cancellation of any existing insurance in respect of that risk; and

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

- (a) the risk being Uninsurable is not caused by the actions, breaches, omissions or defaults of the Contractor or a sub-contractor; and
- (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 78.15 (Uninsurable Risks)**) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

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

78.15.3 If the requirements of **clause 78.15.2 (Uninsurable Risks)** are satisfied, but the Parties cannot agree as to how to manage or share the risk, then:

78.15.3.1 in respect of such third party liability insurance only the

Authority shall (at the Authority's option) either pay to the Contractor an amount equal to the amount calculated in accordance with **clause 53.2 (Compensation on Termination on Force Majeure)** and this Contract will terminate or elect to allow this Contract to continue and **clause 78.15.3.2 (Uninsurable Risks)** shall thereafter apply in respect of such risk;

78.15.3.2 in respect of such contractor's 'all risks' insurance, property damage insurance, third party liability insurance (if the Authority elects to allow this Contract to continue in accordance with **clause 78.15.3.1 (Uninsurable Risks)**) business interruption (but excluding loss of profits), delay in start up (but excluding loss of profits) or statutory insurances this 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 this Contract shall continue, or an amount equal to the amount calculated in accordance with **clause 53.2 (Compensation on Termination on Force Majeure)** plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable to the Contractor whereupon this Contract will terminate;

78.15.3.3 where pursuant to **clauses 78.15.3.1 (Uninsurable Risks)** and/or **78.15.3.2 (Uninsurable Risks)** this Contract continues, then the Contract Price shall be reduced in each Contract Year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by the Contractor in respect of the relevant risk in the Contract Year prior to it becoming Uninsurable (Indexed from the date that the risk becomes Uninsurable). Where the risk is Uninsurable for part of a Contract Year only the reduction in the Contract Price shall be pro rated to the number of Months for which the risk was Uninsurable; and

78.15.3.4 where pursuant to **clauses 78.15.3.1 (Uninsurable Risks)** and/or **78.15.3.2 (Uninsurable Risks)** this Contract continues, the Contractor shall approach the insurance market at least every four (4) Months to

establish whether 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 insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Contract;

78.15.3.5 in respect of any period between the Authority receiving notification in accordance with **clause 78.15.2.1 (Uninsurable Risks)** that a TPL Risk has become Uninsurable and the Authority's notification to the Contractor in accordance with **clause 78.15.3 (Uninsurable Risks)** in respect of such risk then, provided it is ultimately agreed or determined that the requirements of **clause 78.15.2.2 (Uninsurable Risks)** are satisfied in respect of the Uninsurable TPL Risk and subject to **clause 78.15.3.6 (Uninsurable Risks)**, **clause 78.15.3.2 (Uninsurable Risks)** shall apply in respect of occurrences of the Uninsurable TPL Risk during such period unless the Parties otherwise agree how to manage the risk during this period; and

78.15.3.6 **clause 78.15.3.5 (Uninsurable Risks)**, shall only apply provided the Contractor does not unreasonably materially delay:

(a) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements **of clause 78.15.2.2 (Uninsurable Risks)** are satisfied in respect of the Uninsurable TPL Risk; and/or

(b) meeting the Authority to discuss the means by which the risk should be managed.

78.15.4 If, pursuant to **clause 78.15.3.2 (Uninsurable Risks)**, the Authority elects to make payment to the Contractor (such that this Contract will terminate) (the "Relevant Payment"), the Contractor shall have the option (exercisable within twenty (20) Business Days after the date of such election by the Authority (the "Option Period")) to pay to the Authority on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the relevant risk not become Uninsurable, in which case this Contract will continue (and the Relevant Payment will not be made by the Authority), and the Contractor's payment shall be applied for the same

purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

#### 78.16 Increase in Insured Amounts

78.16.1 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

78.16.2 [REDACTED]  
[REDACTED]

78.16.2.1 [REDACTED]

78.16.2.2 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

78.16.3 [REDACTED]  
[REDACTED]

78.16.3.1 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

78.16.3.2 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

#### 78.17 Insurance Renewal



78.17.1 If, upon the renewal of any insurance which the Contractor is required to maintain or to procure the maintenance of pursuant to this Contract:

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

78.17.1.2 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) then **clause 78.17.2 (Insurance Renewal)** shall apply.

78.17.2 If it is agreed or determined that **clause 78.17.1 (Insurance Renewal)** applies, then the Authority shall waive the Contractor's obligations in **clause 78.1 (Obligation to Maintain)** to **78.9 (Premiums)** and/or **Schedule 7 (Required Insurances)** 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 78.17.1 (Insurance Renewal)** continue to apply to such Insurance Term.

78.17.3 To the extent that the Parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and/or condition of insurance is available to the 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 in Schedule 8 (Premium Costs Sharing Mechanism).

78.17.4 The Contractor shall notify the Authority as soon as reasonably practicable and in any event within five (5) Business Days after becoming aware that **clauses 78.17.1.1 (Insurance Renewal)** and/or **78.17.1.2 (Insurance Renewal)** 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 such **clauses 78.17.1.1 (Insurance Renewal)** and/or **78.17.1.2 (Insurance Renewal)** being so likely to apply or applying). 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.

78.17.5 In the event that **clauses 78.17.1.1 (Insurance Renewal)** and/or **78.17.1.2 (Insurance Renewal)** apply in respect of an Insurance Term, (irrespective of the reasons for such **clauses 78.17.1.1 (Insurance Renewal)** and/or **78.17.1.2 (Insurance Renewal)** being so likely to apply or applying) the Contractor shall approach the insurance market at least every four (4) Months to establish whether **clauses 78.17.1.1 (Insurance Renewal)** and/or **78.17.1.2 (Insurance Renewal)** remain applicable to the Insurance Term. As soon as the Contractor is aware that **clauses 78.17.1.1 (Insurance Renewal)** and/or **78.17.1.2 (Insurance Renewal)** 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.

#### 78.18 **Riot (Damages) Act 1886**

78.18.1 The Contractor shall not, and undertakes to procure that no:

78.18.1.1 Commercial Insurer;

78.18.1.2 Commercial Insurer's successors or permitted assignees;  
or

78.18.1.3 other person claiming by or through a Commercial Insurer,

shall bring any claim under the Riot (Damages) Act 1886 in respect of any damage to the Prison. This undertaking shall be for the benefit of any Police Authority in the United Kingdom and the statutory successors of any such Police Authority, each of which may enforce the

terms of this clause against the Contractor and/or its successors and permitted assignees (as appropriate).

78.18.2 For the purposes of this **clause 78.18 (Riot (Damages) Act 1886)**:

78.18.2.1 "Police Authority" shall have the meaning ascribed to it in section 101 of the Police Act 1996 as amended; and

78.18.2.2 "Commercial Insurer" shall mean a person providing commercial insurance in respect of the Prison.

78.18.2.3 **Clause 78.18 (Riot (Damages) Act 1886)** shall be binding upon the Contractor and each of its successors and permitted assignees.

## 79. **LIABILITY FOR LOSS AND DAMAGE**

### 79.1 **Responsibility for Damage**

Notwithstanding and without prejudice to the provisions of **clause 28.1.6 (Rights of Access and Inspection)** and to the obligations of the Contractor to repair, maintain and replace the Prison and subject to **clause 79.5 (Minor Damage)**, as between the Authority and the Contractor:

79.1.1 the Authority will only have any responsibility for the cost of damage to the Prison to the extent that:

79.1.1.1 the Contractor is able to prove to the Authority's satisfaction (acting reasonably) that the damage was caused or contributed to by:

(a) any act or negligence of an Authority Related Party;  
or

(b) the Contractor acting on the written instruction of the Authority, provided that the Contractor has implemented that instruction in a manner which is not negligent and is in accordance with Good Industry Practice;

79.1.1.2 such damage:

(a) does not constitute fair wear and tear; and

(b) does not arise as a result of the damaged item being used for its reasonable and proper purpose or any part of the Prison being used for its reasonable and

proper purpose; and

79.1.1.3 the cost of such damage is either:

- (a) of a value below the level of the deductible of the Required Insurance (up to the maximum deductible specified in the Required Insurances); or
- (b) is not covered by the insurances taken out, or which should have been taken out by the Contractor in accordance with this Contract,

provided that the Authority shall be liable for any excess or deductible (up to the amount of any maximum deductible specified in the Required Insurances) which is payable as a result of any Authority Damage which has resulted in a Repair Cost being incurred where such Repair Cost has been funded under any such insurance; and

79.1.1.4 the Contractor shall be responsible for the cost of all damage on or to the Prison that is not the responsibility of the Authority pursuant to **clause 79.1.1 (Responsibility for Damage)**.

## 79.2 **Obligation to Repair**

Upon the discovery of any damage the Contractor shall:

- 79.2.1 record any relevant details of the damage (including photographs if necessary); and
- 79.2.2 as soon as is practicable, reinstate, replace or make good the damage returning the damaged item to its original standard (or equivalent) in accordance with the relevant provisions of this Contract including where relevant in accordance with **clause 78.14 (Reinstatement)**.

## 79.3 **Obligation to Discuss**

79.3.1 The Contractor and the Authority's Representative shall, as soon as reasonably practicable following the discovery of any damage in accordance with **clause 79.2 (Obligation to Repair)** meet to discuss whether such damage is Authority Damage and whether there should be an extension of the Rectification Period and, if so, what reasonable extension should be agreed.

79.3.2 If the Contractor and the Authority's Representative:

- 79.3.2.1 agree that the relevant damage constitutes Authority Damage, the Contractor shall be entitled to issue an invoice in respect of its reasonable and demonstrable costs incurred in reinstating the damage, but only in respect of those costs that are the responsibility of the Authority under **clause 79.1 (Responsibility for Damage)**;
- 79.3.2.2 do not agree that the relevant damage constitutes Authority Damage, the matter shall be referred to the Dispute Resolution Procedure for resolution and if the dispute is resolved in the Contractor's favour, the Contractor shall be permitted to submit an invoice in respect of its reasonable and demonstrable costs incurred in repairing the damage, but only in respect of those costs that are the responsibility of the Authority under **clause 79.1 (Responsibility for Damage)**;
- 79.3.2.3 agree an extension to the applicable Rectification Period in accordance with **clause 79.3 (Obligation to Discuss)**, such Rectification Period shall apply in respect of the relevant damage for the purposes of **Schedule 5 (Payment Mechanism)**; or
- 79.3.2.4 do not agree either that there should be an extension to the relevant Rectification Period or what the extension should be, the matter shall be referred to the Dispute Resolution Procedure.

#### 79.4 **Supporting Information**

Any invoice submitted to the Authority pursuant to **clause 79.3 (Obligation to Discuss)** shall be supported by any relevant information recorded pursuant to **clause 79.2.1 (Obligation to Repair)**, and may be in respect of multiple incidents of damage. The Authority shall pay any such invoice within twenty (20) Business Days of receipt by the Authority of the invoice and supporting information.

#### 79.5 **Minor Damage**

If any Authority Damage is of such a minor nature (when considered item by item and in aggregate) that it can be remedied by the Contractor without incurring any additional costs through the use of its site-based resources during their normal working hours and without adversely affecting the ability of the Contractor to perform the Services, then the cost of rectifying such damage shall be for the account of the Contractor.

## 79.6 **Dispute Resolution**

Any disputes between the Parties arising from this **clause 79 (Liability for Loss or Damage)** shall be referred to the Dispute Resolution Procedure.

## 79.7 **Programmed Maintenance Costs**

79.7.1 In relation to any Repair Cost which has been funded or partly funded by the Authority or under any Required Insurance ("Damage Funding") the Contractor shall take such funding and the timing of such repair or replacement into account when preparing its maintenance schedule for the Prison and any savings to the maintenance costs as shown in the Base Case shall be shared equally between the Contractor and the Authority.

79.7.2 At the end of each Contract Year the Contractor shall supply to the Authority an account of any damage and associated Repair Costs and Damage Funding, as well as money spent or saved in accordance with the maintenance costs as shown in the Base Case.

79.7.3 On every fifth (5th) Year anniversary of the Actual Opening Date the Contractor shall provide a consolidated and reconciled account of the accounts referred to in **clause 79.7.2 (Programmed Maintenance Costs)**. If such account shows that in respect of the preceding five (5) Year period there was a saving in the costs to the Contractor in complying with its obligations under this Contract because of the Damage Funding then the Contractor shall within thirty (30) Days after submission of the account pay to the Authority half of such saving.

## 79.8 **Time Periods**

The Contractor shall perform its obligations under **clause 79.2 (Obligation to Repair)** as soon as practicable and shall in any event following the issue of the Independent Engineer's Declaration pursuant to **clause 16 (Independent Engineer's Declaration)** or the issue of the Independent Engineer's Houseblock Declaration pursuant to **clause 16A (Independent Engineer's Houseblock Declaration)** (as the case may be) use all reasonable endeavours (where practicable and taking account of the nature of the works required) to complete any works required within forty eight (48) hours after becoming aware of the loss or damage occurring.

## **PART XVII - DISPUTES**

### **80. DISPUTE RESOLUTION**

#### **80.1 Disputes**

Any dispute arising in relation to any aspect of this Contract shall be resolved in accordance with this **clause 80 (Dispute Resolution)**.

#### **80.2 Consultation**

If a dispute arises in relation to any aspect of this Contract, the Contractor and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.

#### **80.3 Adjudication**

80.3.1 Without prejudice to **clause 80.2 (Consultation)**, either Party may give the other notice of its intention to refer the dispute to adjudication (the "Notice of Adjudication"). The Notice of Adjudication shall include a brief statement of the issue to be referred and the redress sought.

80.3.2 The Party giving the Notice of Adjudication (the "Referring Party") shall on the same Day and by the same means of communication notify the other Party of the identity of the adjudicator to whom it intends to refer the dispute.

#### **80.4 Identity of Adjudicator**

The Adjudicator nominated to consider a dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts selected in accordance with the following:

80.4.1 There shall be two (2) panels of experts, one (1) in respect of construction matters (the Construction Panel) and one (1) in respect of operational and maintenance matters (the 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;

80.4.2 The Construction Panel shall comprise three (3) experts, who shall be selected jointly by the Contractor and the Authority. Such selection shall take place within twenty (20) Business Days of the date of this Contract;

80.4.3 The Operational Panel shall comprise three (3) experts, who shall be selected jointly by the Contractor and the Authority. Such selection

shall take place within twenty (20) Business Days of the date of this Contract;

80.4.4 If any member of a panel resigns during the Contract Period, a replacement expert shall be selected by the Contractor and the Authority as soon as practicable;

80.4.5 In the event that the nominated Adjudicator is unable or unwilling to confirm acceptance of his appointment as Adjudicator within two (2) Business Days of receipt of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as the Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within two (2) days or if the Parties disagree as to the relevant panel of experts to be used then the Referring Party may apply to the President for the time being of the Chartered Institute of Arbitrators who shall within three (3) Business Days of any such application nominate an Adjudicator to determine the issue set out in the Notice of Adjudication; and

80.4.6 If the Authority and the Contractor are unable to agree on the identity of the experts to be selected to the panels, the President for the time being of the Chartered Institute of Arbitrators shall appoint such expert(s) within thirty (30) days of any application for such appointment by either Party.

#### 80.5 **Referral of the Dispute**

Within five (5) Business Days after the service of the Notice of Adjudication on the Adjudicator pursuant to **clause 80.4 (Identify and Adjudicator)** the Referring Party shall serve its statement of case (the "Referral Notice") on the Adjudicator and the other Party (the "Responding Party"). The Referral Notice shall include a copy of this Contract, details of the circumstances giving rise to the dispute as set out in the Notice of Adjudication, the reasons why the Referring Party is entitled to the redress sought, and the evidence upon which it relies.

#### 80.6 **Response to the Referral**

The Responding Party shall serve its statement of case (the "Response") on the Adjudicator and the Referring Party within a period of time to be directed by the Adjudicator. The Response shall include any arguments in response to the Referral Notice of the dispute set out in the Notice of Adjudication and any additional evidence on which the Responding Party relies.

#### 80.7 **Procedure**



Subject to **clause 80.11 (Adjudicator's Powers)**, the Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Contract. The Parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.

#### **80.8 Adjudicator's Decision**

In any event, the Adjudicator shall provide to both Parties his written decision on the dispute, within twenty (20) Business Days after the date of receipt of the Referral Notice (or such other period as the Parties may agree. The Adjudicator shall be entitled to extend the said period of twenty (20) Business Days by up to ten (10) Business Days with the consent of the Referring Party. Unless the Parties otherwise agree, the Adjudicator shall give reasons for his decision. Unless and until revised, cancelled or varied by the English courts, arbitration (if provided for under the Construction Sub-Contract) or by agreement of the Parties, the Adjudicator's decision shall be binding on both Parties who shall as soon as reasonably practicable give effect to the decision.

#### **80.9 Adjudicator's Costs**

The Adjudicator's costs of any referral 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 referral, including legal costs and the costs and expenses of any witnesses.

#### **80.10 Adjudicator as Expert**

The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.

#### **80.11 Adjudicator's Powers**

The Adjudicator shall act fairly and 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.

#### **80.12 Confidentiality**

All information, data or Documents 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 71 (Information and Confidentiality)**, disclose to any

person or company any such information, data or Documents and all such information, data or Documents shall remain the property of the Party disclosing or delivering such information, data or Documents and all copies shall be returned to such Party on completion of the Adjudicator's work.

#### **80.13 Liability of Adjudicator**

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.

#### **80.14 Referral to the Courts**

##### **80.14.1 If:**

**80.14.1.1 there is any dispute in respect of matters referred to in clauses 51.2 (Compensation on Termination for Authority Default), 52.4 (Compensation on Termination for Contractor Default), 52B.6 (Houseblock Works Termination), 53.2 (Compensation on Termination on Force Majeure), 54.4 (Compensation on Termination for Corrupt Gifts and Fraud and Prohibited Equality and Diversity Act), 55.2 (Compensation on Voluntary Termination), 56.2 (Compensation on Termination on Authority Break Point Date), 57.2 (Compensation on Terminating for Breach of the Refinancing Provisions), 67 (Change to Custodial Service and/or Works), 68 (Changes in Law) or 69 (Financial Adjustments);**

**80.14.1.2 either Party is dissatisfied with or otherwise wishes to challenge the Adjudicator's decision made in accordance with clause 80.8 (Adjudicator's Decision); or**

**80.14.1.3 both Parties agree,**

then either Party may (within twenty (20) Business Days after receipt of the Adjudicator's decision, where appropriate), notify the other Party of its intention to refer the dispute to the courts of England and Wales for final determination.

#### **80.15 Parties' Obligations**

The Parties shall continue to comply with, observe and perform all their obligations under this Contract regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this **clause 80 (Dispute Resolution)** and shall give effect, as soon as reasonably practicable to every decision of the Adjudicator and the courts delivered under this **clause 80 (Dispute Resolution)**.

#### **80.16 Similar Disputes**

If any dispute arising under this Contract raises issues which relate to:

80.16.1 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

80.16.2 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"),

then the Contractor may include as part of its submissions made to the Adjudicator or the courts submissions made by the Construction Sub-Contractor or by the Operating Sub-Contractor as appropriate.

#### **80.17 Jurisdiction over Sub-Contractors**

The Adjudicator shall not have jurisdiction to determine the Construction Sub-Contract Dispute or the Operating Sub-Contract Dispute but the decision of the Adjudicator and/or the courts shall 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.

#### **80.18 Sub-Contractors' Submissions**

Any submissions made by the Construction Sub-Contractor or the Operating Sub-Contractor shall:

80.18.1 be made within the time limits applicable to the delivery of submissions by the Contractor; and

80.18.2 concern only those matters which relate to the dispute between the Authority and the Contractor under this Contract.

#### **80.19 Costs**

Where the Construction Sub-Contractor or the Operating Sub-Contractor makes submissions in any reference before:

80.19.1 the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third (1/3) by the Authority and two thirds (2/3) by the Contractor; and

80.19.2 the courts, the costs of the litigation shall be in the discretion of the court.

#### **80.20 Authority's Liability**

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 the courts 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.

#### **80.21 Access to Documents**

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:

80.21.1 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

80.21.2 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 in such Document to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Construction Sub-Contractor or the Operating Sub-Contractor (as appropriate) to advise in connection with the dispute.

## **PART XVIII - INTELLECTUAL PROPERTY**

### **81. INTELLECTUAL PROPERTY RIGHTS**

#### **81.1 Project Data**

The Contractor shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by the Authority and the Contractor shall ensure that it obtains all necessary licences, permissions and consents to ensure that it can make the Project Data available to the Authority on these terms, for the purposes of:

81.1.1 the Authority complying with its duties under this Contract and/or any statutory duties which the Authority may have; and

81.1.2 following termination of this Contract, the design or construction of the Prison, the operation, maintenance or improvement of the Prison and/or the provision of works and/or services the same as or similar to the Works, the Houseblock Works and/or the Custodial Service,

(together, the "Approved Purposes"), and in this clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

#### **81.2 Licence in Respect of Intellectual Property Rights**

The Contractor:

81.2.1 hereby grants to the Authority, free of charge, an irrevocable, non exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Contract or upon or at any time following termination of this Contract) licence (carrying the right to grant sub licences) to use the Intellectual Property Rights which are or become vested in the Contractor; and

81.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in **clause 81.2.1 (Licence in Respect of Intellectual Property Rights)** to the Authority,

in both cases, solely for the Approved Purposes.

#### **81.3 Vesting of Intellectual Property Rights**

The Contractor shall:

- 81.3.1 use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Contract vest, and remain vested throughout the term of this Contract, in the Contractor; and
- 81.3.2 enter into appropriate agreements with any Contractor Related Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

#### 81.4 **Maintenance of Data**

To the extent that any of the data, materials and documents referred to in this **clause 81 (Intellectual Property Rights)** are generated by or maintained on a computer or similar system, the Contractor shall:

- 81.4.1 use all reasonable endeavours to procure for the benefit of the Authority, at no charge or at the lowest reasonable fee, the grant of a licence or sub licence for any relevant software to enable the Authority or its nominee to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such data for the Approved Purposes. As an alternative, the Contractor may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format; and
- 81.4.2 enter into the National Computing Centre's then current multi licence escrow deposit agreement or standard single licence escrow deposit agreement as appropriate in each case.

#### 81.5 **Back Up and Storage**

The Contractor shall

- 81.5.1 ensure the back up and storage in safe custody of the data, materials and Documents referred to in **clause 81.4 (Maintenance of Data)** in accordance with Good Industry Practice;
- 81.5.2 without prejudice to **clause 81.5 (Back Up and Storage)** submit to the Authority for approval its proposals for the back up and storage in safe custody of such data, materials and documents and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice;
- 81.5.3 comply, and shall ensure that all Contractor Related Parties comply with all procedures to which the Authority has given its approval pursuant to **clause 81.5.2 (Back Up and Storage)**; and

- 81.5.4 not change its procedures for such back-up and storage without the Authority's prior written approval and the Authority shall be entitled to withhold its approval if such proposed change is not in accordance with Good Industry Practice.

## 81.6 **Indemnity**

- 81.6.1 Where a claim or proceeding is made or brought against the Authority which arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Works, the Houseblock Works or the Project infringes any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with this Contract, the Contractor shall indemnify and keep indemnified in full the Authority, its employees, agents and contractors at all times from and against all Losses arising as a result of such claims and proceedings and the provisions of **clause 76 (Indemnities)** shall apply.
- 81.6.2 Where a claim or proceeding is made or brought against the Contractor which arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Works, the Houseblock Works or the Project infringes any rights in or to any Intellectual Property Rights of a third party then, if such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with this Contract and otherwise than as a result of a breach of this **clause 81 (Intellectual Property Rights)** by the Contractor then the Authority shall indemnify and keep indemnified in full the Contractor at all times from and against all Losses arising as a result of such claims and proceedings.

## 81.7 **Licence to Contractor**

The Authority hereby grants to the Contractor a non-transferable, non-exclusive, royalty free licence (carrying the right to grant sub-licences) to use for the term of this Contract only and only for purposes directly relating to the Project any Intellectual Property Rights relating to the Project which are or become vested in the Authority.

## **PART XIX - SUB-CONTRACTING, ASSIGNMENT AND CHANGE IN OWNERSHIP**

### **82. SUB-CONTRACTING AND ASSIGNMENT**

#### **82.1 Restrictions on Transfer of this Contract by the Authority**

The rights and obligations of the Authority under this Contract shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public body (being a single entity) acquiring the whole of this Contract and having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Contract being:

82.1.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975; or

82.1.2 any other public body whose obligations under this Contract and the Direct Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Contractor) by the Authority or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Contract and the Direct Agreement.

#### **82.2 Restrictions on Transfer of this Contract by the Contractor**

Subject to **clauses 82.3 (Exceptions)** and **82.4 (Approval of Sub-Contractors)** and subject always to the provisions of the Direct Agreement, the Contractor shall not sub-contract, assign, underlet, charge, sell, bargain or otherwise deal in any way with the benefit of this Contract in whole or in part except with the prior written consent of the Authority.

#### **82.3 Exception**

The provisions of **clause 82.2 (Restrictions on Transfer of this Contract by the Contractor)** do not apply to the grant of any security for any loan made to the Contractor under the Financing Agreements or to the enforcement of the Financing Agreements.

#### **82.4 Approval of Sub-Contractors**

82.4.1 Nothing in this Contract shall prohibit the Contractor from providing or procuring provision of the Works or the Houseblock Works or the Custodial Service from a Sub-Contractor having the legal capacity, power and authority to become a party to and perform the obligations of the relevant Sub-Contract and employing persons having the appropriate qualifications, experience and technical competence and



having the resources available to it which are sufficient to enable it to perform the obligations of the Sub-Contractor under the relevant Sub-Contract provided that:

- 82.4.1.1 the Contractor has notified the Authority of the identity of such Sub-Contractor and the proposed terms of such Sub-Contract and has provided the Authority with such other information as may be required by the Authority for the purposes of deciding whether to give its approval;
  - 82.4.1.2 the Authority has, prior to the appointment of such Sub-Contractor, approved such Sub-Contractor and the terms of appointment, such approval not to be unreasonably withheld and to be given (or withheld) within twenty (20) Business Days of the notice referred to in **clause 82.4.1.1 (Approval of Sub-Contractors)**, and provided that, for the purposes of the Contractor complying with **clauses 54.2.4 (Termination for Corrupt Gifts and Fraud)** or **54.3.4 (Termination for Prohibited Equality and Diversity Act)** the periods referred to in those clauses for the replacement of any Sub-Contractor shall be extended by the same period in which the Authority approves or is deemed to approve the appointment of such Sub-Contractor pursuant to this **clause 82.4.1.2 (Approval of Sub-Contractors)**; and
  - 82.4.1.3 the Contractor shall remain primarily and directly liable for the Contractor's obligations.
- 82.4.2 By entering into this Contract, the Authority:
- 82.4.2.1 approves the Sub-Contractors appointed by the Contractor as at the date of this Contract and the date of the Amending Agreement; and
  - 82.4.2.2 for the purposes of the calculation of any Sub-Contractor Breakage Costs or Unavoidable Fixed Costs only, confirms that it considers the Sub-Contracts and the Houseblock Works Sub-Contract provided to it by the Contractor at the date of this Contract and at the date of the Amending Agreement are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms.
- 82.4.3 The Authority shall be deemed to have approved any amendment to any Sub-Contract which is required as a result of any change made to

this Contract (provided that any changes made correspond exactly in each of the Sub-Contracts and this Contract).

- 82.4.4 The rights set out in **clause 82.4.4.1** may be exercised on no more than two occasions during the term of the Contract and during the same period the rights set out in **clause 82.4.4.2** may be exercised no more than once.

82.4.4.1 On the substitution or replacement of the defaulting Operating Sub- Contractor or a defaulting sub-contractor to the Operating Sub-Contractor the Contractor may elect that, for the purposes of clause 52 (Termination on Contractor Default) only:

82.4.4.1.(a) any Performance Point(s) or Deductions; and/or

82.4.4.1 (b) any period for which there has been a failure to provide any one (1) or more Available Prisoner Place or Houseblock Available Prisoner Place; and/or

82.4.4.1 (c) any warning notices or Final Warning Notices in respect of **clause 52.1 (Termination for Persistent Breach by the Contractor)**.

in each case relating to the Custodial Services in respect of which the Operating Sub Contractor or any sub-contractor to the Operating Sub Contractor is being replaced, shall be cancelled or disregarded. The Contractor shall notify the Authority on or before the appointment of any such substitute or replacement Operating Sub Contractor or sub-contractor whether it elects for this **clause 82.4.4** to apply on that occasion.

82.4.4.2 On the substitution or replacement of the defaulting Construction Sub Contractor or a defaulting sub-contractor to the Construction Sub Contractor, the Contractor may elect that, for the purposes of **clause 52 (Termination on Contractor Default)** only any warning notices or Final Warning Notices in respect of **clause 52.1 (Termination for Persistent Breach by the Contractor)** in each case relating to the relevant Works in respect of which the Construction Sub Contractor or any sub-contractor to the Construction Sub Contractor is being replaced, shall be cancelled. The Contractor shall notify the Authority on or before the appointment of any such substitute or replacement Building Contractor or sub-contractor whether it elects for this **clause 82.4.4.2** to apply on that

occasion.

## **82.5 Contractor's Obligations**

The Contractor shall:

- 82.5.1 perform its obligations under and observe all the provisions of any Sub-Contract with a Sub-Contractor; and
- 82.5.2 be directly responsible for the management and supervision of all Sub-Contractors and sub-contractors.

## **82.6 Sub-Contractors**

Nothing in this Contract shall prohibit or prevent any Sub-Contractor employed by the Contractor from being employed by the Authority.

## **82.7 Payment Terms in Sub-Contracts**

Where the Contractor enters into a Sub-Contract with a Sub-Contractor, it shall include a provision in such Sub-Contract which requires:

- 82.7.1 payment by the Contractor to the Sub-Contractor within a specified period not exceeding thirty (30) Days from receipt of a valid invoice in respect of any amount which has fallen due and payable as required by the provisions of such Sub-Contract; and
- 82.7.2 a provision to be included in the contracts between the Sub-Contractor and its contractors which requires payment by the Sub-Contractor to its contractors within a specified period not exceeding thirty (30) Days from receipt of a valid invoice in respect of any amount which has fallen due and payable as required by the provisions of such contract.

## **83. CHANGE OF OWNERSHIP**

### **83.1 Restriction on Change of Ownership**

Subject to **clause 83.3 (Exceptions)**:

- 83.1.1 no Change of Ownership in respect of the Contractor and/or [REDACTED] and/or the Issuer and/or [REDACTED] may occur during the Lock In Period;
- 83.1.2 a Change of Ownership in respect of the Construction Sub-Contractor and/or the Operating Sub-Contractor may only occur to a Suitable Third Party during the Lock-In Period; and
- 83.1.3 after the Lock In Period, a Change of Ownership in respect of the Contractor [REDACTED], the Issuer and/or [REDACTED] and/or the Operating

Sub-Contractor may only occur to a Suitable Third Party.

## 83.2 Notification

### 83.2.1 The Contractor shall:

83.2.1.1 provide the Authority with no less than twenty (20) Business Days prior written notice of any Change of Ownership contemplated by **clause 83.1.2 (Restriction on Change of Ownership)**; and

83.2.1.2 at the Authority's request provide, as soon as reasonably practicable, and in any event within twenty (20) Business Days of the Authority's request details of the legal and beneficial ownership of the Contractor, [REDACTED] the Issuer, [REDACTED] the Operating Sub-Contractor and (during the Lock In Period only) the Construction Sub-Contractor.

83.2.2 The Contractor's obligations under **clause 83.2.1 (Notification)** shall, except where a legal transfer of shares has occurred, be limited to:

83.2.2.1 the extent of the Contractor's awareness having made reasonable enquiry; and

83.2.2.2 information which the Contractor would have been aware of having made all reasonable and prudent enquiries.

## 83.3 Exceptions

In respect of any Change of Ownership of any shares:

83.3.1 of a Sub-Contractor and/or [REDACTED] and/or the Issuer and/or [REDACTED] which are listed on a recognised investment exchange (as defined in section 285(1)(a) Financial Services and Markets Act 2000), the provisions of **clause 83.1 (Restriction on Change of Ownership)** shall not apply;

83.3.2 of the Contractor, [REDACTED], the Issuer, [REDACTED] or a Sub-Contractor which is being transferred as a consequence of the exercise by the Senior Creditors of their rights in respect of shares of the Contractor, [REDACTED], the Issuer, [REDACTED] and/or a Sub-Contractor granted in any document conferring security over any of the shares of the Contractor, [REDACTED], the Issuer and/or a Sub-Contractor, then the provisions of **clause 83.1.1 (Restriction on Change of Ownership)** and **83.1.2 (Restriction on Change of Ownership)** shall not apply.

83.4 Not used.

83.5 Not used.

83.6 **Contractor Warranty**

The Contractor warrants and represents to the Authority that:

- 83.6.1 legal and beneficial ownership of the Contractor, [REDACTED], [REDACTED] and any Sub-Contractor at the date of this Contract is as set out in **Schedule 16 (Contractor Warranted Data)**; and
- 83.6.2 legal and beneficial ownership of the Contractor, [REDACTED], [REDACTED] and any Sub-Contractor on the date of the Amending Agreement is as set out in **Schedule 16A (Contractor Warranted Updated Data)**; and
- 83.6.3 legal and beneficial ownership of the Contractor, [REDACTED] the Issuer, [REDACTED] and any Sub-Contractor on the date of the Second Amending Agreement is as set out in **Schedule 16B (Contractor Warranted Second Updated Data)** and that, save as set out at **Schedule 16B (Contractor Warranted Second Updated Data)**, no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares.

## **PART XX - GENERAL**

### **84. ORDERING OF GOODS AND SERVICES**

Neither Party shall place or cause to be placed any orders with suppliers or otherwise incur liabilities in the name of the other Party or any representative of the other Party.

### **85. AUDIT ACCESS**

#### **85.1 Provision of Information**

The Contractor shall provide to the Authority's Representative all information, documents, records and the like in the possession of, or available to, the Contractor and to this end the Contractor shall use all reasonable endeavours to procure that all such items in the possession of the Contractor or any sub-contractor shall be available to it and the Contractor shall (and shall procure that the sub-contractors shall) include appropriate terms in contracts with all sub-contractors to this effect as may be reasonably requested by the Authority's Representative for any purpose in connection with this Contract.

#### **85.2 Internal and External Audits**

The Contractor shall:

85.2.1 facilitate both internal and external audits which shall include audits by Her Majesty's Inspector of Prisons, the Independent Monitoring Board and the Prison and Probation Ombudsman, together with the Authority's own audit and assurance requirements; and

85.2.2 discharge all of its obligations to comply with the recommendations of internal and external audits, including Her Majesty's Inspector of Prisons, the Independent Monitoring Board and the Prison and Probation Ombudsman within a timescale agreed with the Authority, which shall include the provision of regular progress reports.

### **86. NO AGENCY**

#### **86.1 No Partnership or Employment**

Nothing in this Contract shall be construed as creating a partnership or as a contract of employment between the Authority and the Contractor.

#### **86.2 Power to Bind**

Save as expressly provided otherwise in this Contract, the Contractor shall not be, or be deemed to be, an agent of the Authority and the Contractor shall not hold itself out as having authority or power to bind the Authority in any way.

**86.3 Deemed Knowledge**

Without limitation to its actual knowledge, the Contractor shall for all purposes of this Contract, be deemed to have such knowledge in respect of the Project as is held (or ought reasonably to be held) by any Contractor Related Party.

**87. ENTIRE AGREEMENT**

**87.1 Prior Representations etc Superseded**

Except where expressly provided in this Contract, this Contract constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Contract save in so far as any representation is expressly set out in replies to written enquiries set out in Parts 1 and 2 of **Schedule 20 (Title Matters)** and only to the extent of such representation.

**87.2 Acknowledgements**

Each of the Parties acknowledges that:

87.2.1 subject to **clause 5.1 (Contractor Warranties)** and **clause 5.1A (Contractor Warranties – Houseblock)**, it does not enter into this Contract on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Contract or not) except those expressly repeated or referred to in this Contract and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy under this Contract; and

87.2.2 this **clause 87 (Entire Agreement)** shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Contract which was induced by fraud, for which the remedies available shall be all those available under the law governing this Contract.

**88. THIRD PARTY RIGHTS**

88.1 Any Police Authority in the United Kingdom (and the statutory successors of any Police Authority) has the right to enforce **clause 78.18 (Riot (Damages) Act**

**1986)** only of this Contract, subject to and in accordance with **clause 78.18 (Riot (Damages) Act 1986)** and in accordance with the provisions of the Contracts (Rights of Third Parties) Act 1999.

88.2 Except as stated in **clause 88.1 (Third Party Rights)**, no term of this Contract is enforceable under the Contracts (Rights of Third Parties) Act 1999 by any person who is not a Party to this Contract.

## 89. **REPRESENTATIVES**

### 89.1 **Representatives of the Authority**

89.1.1 The Authority's Representative(s) shall be:

89.1.1.1 the person appointed as the director of offender management for London; or

89.1.1.2 such other person appointed pursuant to this **clause 89.1 (Representatives of the Authority)**.

89.1.2 The Authority's Representative shall exercise the functions and powers of the Authority in relation to the Project which are identified in this Contract as functions or powers to be carried out by the Authority's Representative. The Authority's Representative shall also exercise such other functions and powers of the Authority under this Contract as may be notified to the Contractor from time to time.

89.1.3 The Authority's Representative shall be entitled at any time, by notice to the Contractor, to authorise any other person to exercise the functions and powers of the Authority delegated to him pursuant to this clause, either generally or specifically. Any act of any such person shall, for the purposes of this Contract, constitute an act of the Authority's Representative and all references to the "Authority's Representative" in this Contract (apart from this clause 89.1.3 (Representatives of the Authority)) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.

89.1.4 The Authority may by notice to the Contractor change the Authority's Representative. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to the Contractor in the execution of its obligations under this Contract).

89.1.5 During any period when no Authority's Representative has been appointed (or when the Authority's Representative is unable through



illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Contract) the Authority shall carry out the functions which would otherwise be performed by the Authority's Representative.

89.1.6 Except where notified in writing by the Authority before such act or instruction, the Contractor and Contractor's Representative shall be entitled to treat any act or instruction of the Authority's Representative which is authorised by this Contract as being expressly authorised by the Authority and the Contractor and the Contractor's Representative shall not be required to determine whether authority has in fact been given.

89.1.7 Except where notified in writing by the Authority before such act or instruction, the Contractor and Contractor's Representative shall not be entitled to treat any act or instruction of the Authority's Representative or any other officer, employee or other person engaged by the Authority which is not authorised by this Contract as being authorised by the Authority and shall be required to determine by notice to the Authority whether an express authority has in fact been given.

## 89.2 **Representatives of the Contractor**

89.2.1 The Contractor's Representative(s) shall be:

89.2.1.1 the general manager of [REDACTED]; or

89.2.1.2 such other person appointed pursuant to this **clause 89.2 (Representatives of the Contractor)**.

89.2.2 The Contractor's Representative shall have full authority to act on behalf of the Contractor for all purposes of this Contract. Except as previously notified in writing before such act by the Contractor to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of the Contractor's Representative in connection with this Contract as being expressly authorised by the Contractor and the Authority and the Authority's Representative shall not be required to determine whether any express authority has in fact been given.

89.2.3 The Contractor may by notice to the Authority, change the Contractor's Representative. Where the Contractor wishes to do so it shall, by written notice to the Authority, propose a substitute representative, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).

### 89.3 **Appointment of Representatives**

At any time the Authority may appoint more than one Authority's Representative and the Contractor may appoint more than one Contractor's Representative provided in each case the appointer provides written confirmation to the Contractor or Authority as appropriate of the extent of its representative's authority.

### 90. **NOTICES**

All notices required to be issued under this Contract shall be served in accordance with the provisions of **Schedule 23 (Notices)**.

### 91. **SEVERABILITY**

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

### 92. **WAIVER**

#### 92.1 **Waiver to be Written**

No term or provision of this Contract shall be considered as waived by any Party unless a waiver is given in writing by that Party.

#### 92.2 **Extent of Waiver**

No waiver under **clause 92.1 (Waiver to be Written)** 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.

### 93. **GOVERNING LAW AND JURISDICTION**

This Contract shall be governed by and construed in all respects in accordance with the laws of England and Wales. Subject to the Dispute Resolution Procedure the English Courts shall have exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Contract.

### 94. **SOLE REMEDY**

#### 94.1 **Common Law Rights for the Contractor**

Without prejudice to any entitlement of the Contractor:

94.1.1 to specific performance of any obligation under this Contract;

94.1.2 to injunctive relief; or

94.1.3 to any other express right of the Contractor pursuant to this Contract,

the Contractor's sole remedy in relation to (i) any Compensation Event in respect of the Site that occurs prior to the applicable Actual Full Operation Date or Post Completion Works Longstop Date (as the case may be) shall be the operation of **clause 15.4 (Delays due to a Compensation Event)**, and (ii) any Compensation Event in respect of the Expansion Site that occurs prior to the applicable Actual Houseblock Full Operation Date or Post Completion Houseblock Works Longstop Date (as the case may be) shall be the operation of **clause 15.4A (Delays due to a Compensation Event)**.

#### 94.2 **No Breach**

The Contractor shall not be held to be failing to comply with its obligations under this Contract to the extent that such failure to comply is a result of the Authority's breach of its obligations under this Contract.

#### 94.3 **Indirect Losses**

Save where stated to the contrary, the indemnities under this Contract shall not apply and (without prejudice to the Authority's rights under **Schedule 5 (Payment Mechanism)**) there shall be no right to claim damages for breach of this Contract, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is for Indirect Losses. The Authority agrees that, notwithstanding the foregoing, any Losses of the Contractor arising under the Sub-Contracts or the Financing Agreements as originally executed (or as amended in accordance with the terms of this Contract) which are not of themselves Indirect Losses, shall not be excluded from such a claim solely by reason of this clause.

#### 94.4 **Right to Terminate**

Neither Party may terminate this Contract, except as expressly set out in this Contract.

#### 95. **NO DOUBLE RECOVERY**

Notwithstanding any other provision of this Contract, neither Party shall be entitled to recover compensation or make a claim under this Contract in respect of any loss that it has incurred to the extent that it has already been compensated in respect of that loss pursuant to this Contract or otherwise.

#### 96. **COUNTERPARTS**





**SIGNED** by )

for and on behalf of )

**THE SECRETARY OF STATE FOR JUSTICE** )

in the presence of:

Name of witness:

Signature of Witness:

Address:

Occupation:

**SIGNED** by )

[REDACTED]

)

[REDACTED]

Name of witness:

Signature of Witness:

Address:

Occupation: