

**ISLE OF WIGHT COUNCIL - HIGHWAYS PFI**

**ANNEXURE 5 - FORM OF INDEPENDENT CERTIFIER'S APPOINTMENT**

**CORE INVESTMENT PERIOD**

**ANNEXURE 5**

**Form of Independent Certifier's Appointment**

**ANNEXURE 5**

**Form of Independent Certifier's Appointment**

**DATED**

**200**◆

**(1) ISLE OF WIGHT COUNCIL**

**- and -**

**(2) [SERVICE PROVIDER]**

**- and -**

**(3) [INDEPENDENT CERTIFIER]**

**APPOINTMENT OF  
INDEPENDENT CERTIFIER**

relating to

the rehabilitation, maintenance and operation  
of the Project Network pursuant to the  
Government's Private Finance Initiative

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**BETWEEN**

- (1) **ISLE OF WIGHT COUNCIL** of County Hall, High Street, Newport, Isle of Wight ("Authority");
- (2) [**SERVICE PROVIDER**] (company registration number ◆ ) whose registered office is at ◆ ("**Service Provider**");
- (3) [**INDEPENDENT CERTIFIER**] [(company registration number ◆ )] [whose registered office is at] [of] ◆ ("**Independent Certifier**").

**RECITALS**

- A The Authority and the Service Provider have entered into an agreement for the rehabilitation, maintenance and operation of the Project Network pursuant to the Government's private finance initiative ("**Project Agreement**") under the terms of which they have jointly agreed to appoint an independent certifier.
- B The Independent Certifier is an independent adviser willing to provide services to the Authority and the Service Provider.
- C The Authority and the Service Provider jointly engage the Independent Certifier to perform the duties and obligations which are ascribed to the Independent Certifier in the Project Agreement upon the terms of this Deed (and which are set out in appendix 1 (*Scope of Services - Independent Certifier*)) upon the terms and conditions set out below.

**NOW IT IS HEREBY AGREED** as follows:

**1. DEFINITIONS AND INTERPRETATION**

1.1 In this Deed, the following terms shall have the meanings given to them below:

"**Additional Fees**" means the fees to be paid to the Independent Certifier in respect of any Varied Services in accordance with clause 4.2;

"**Core Fees**" means the fees to be paid to the Independent Certifier in respect of the Core Services in accordance with clause 4.1, as set out in appendix 1 (*Scope of Services - Independent Certifier*);

"**Core Services**" means the services listed in appendix 1 (Scope of Services - Independent Certifier);

"**Counterparty**" means each of the Authority and the Service Provider, and "**Counterparties**" means both of them;

"**Fees**" means the Core Fees and the Additional Fees;

"**Final Date for Payment**" has the meaning given to it in clause 4.3;

"**Funder**" means [●];

"**Joint Notice**" means a notice in writing issued jointly by the Counterparties;

"**OpCo**" means [●];

"**Party**" means any party to this Deed;

"**Services**" means together the Core Services and the Varied Services;

"**Varied Services**" means any services provided by the Independent Certifier in addition to the Core Services, or any variation to the Core Services undertaken by the Independent Certifier, in each case in accordance with clause 2.2.

- 1.2 Unless the context otherwise requires, words and expressions defined in the Project Agreement have the same meanings in this Deed as in the Project Agreement.
- 1.3 The headings in this Deed do not affect its interpretation.
- 1.4 Unless the context otherwise requires, all references to clauses and schedules are references to clauses of and schedules to this Deed.

## 2. APPOINTMENT

2.1 The Counterparties jointly engage the Independent Certifier and the Independent Certifier agrees to perform:

2.1.1 the Core Services<sup>1</sup>; and

2.1.2 any Varied Services commissioned pursuant to clause 2.2,

upon the terms and conditions set out below.

2.2 If the Counterparties require any Varied Services:

2.2.1 the Counterparties shall issue a Joint Notice to the Independent Certifier specifying:

2.2.1.1 the services required;

2.2.1.2 which of the Counterparties will pay the Fees associated with the relevant services (or, if both are to pay, the proportion of the Fees for which they will each be responsible); and

2.2.1.3 the proposed timing of payment of the Fees associated with the relevant services;

2.2.2 within a reasonable time after issue of the Joint Notice the Independent Certifier shall provide the Counterparties with a written quote of the cost of the relevant services, which cost shall:

2.2.2.1 wherever possible be based on the rates contained in part 2 of appendix 2 (Fee Rates); and

2.2.2.2 take into account any reduction in work or other expense which may occur as a result of the required variation to the Services,

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<sup>1</sup> These Core Services will cover certification of Milestones and certification of certain types of work during the Core Investment Period.

together with any other information reasonably required by either Counterparty (such as a method statement setting out how the Independent Certifier intends to carry out the relevant services); and

- 2.2.3 if the Counterparties are satisfied with the Independent Certifier's proposals they shall issue a further Joint Notice instructing the Independent Certifier to undertake the Varied Services and the Independent Certifier shall undertake the Varied Services at the time agreed by the Parties or, in the absence of agreement, as soon as reasonably practicable.
- 2.3 The Independent Certifier shall provide the Services independently, fairly and impartially to and as between each of the Counterparties. Whilst the Independent Certifier may take account of any representations made by the Counterparties the Independent Certifier shall not be bound to comply with any representations made by either of them in connection with any matter on which the Independent Certifier is required to exercise his professional judgement.
- 2.4 The Independent Certifier shall provide the Services:
- 2.4.1 with the reasonable care, skill and diligence to be expected of a properly qualified and competent professional adviser who has held itself out as competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project;
- 2.4.2 in accordance with Good Industry Practice, all Law and Highways Standards; and
- 2.4.3 in accordance with the methodology set out in appendix 3 (Methodology to Respond to Scope of Services).

For the purposes of this clause 2.4 "**Good Industry Practice**" shall mean using standards, practices, methods and procedures (as practised in the United Kingdom) and exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator or other person (as the case may be) engaged in a similar type of undertaking as under this Deed under the same or similar circumstances.

- 2.5 All instructions to the Independent Certifier must be given jointly by the Authority's Representative and the Service Provider's Representative (or their respective

alternates appointed pursuant to clause 31 (Representatives) of the Project Agreement).

- 2.6 The Independent Certifier shall comply with all reasonable instructions given to it by the Counterparties except and to the extent that the Independent Certifier reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Deed or prejudices or might prejudice the exercise by the Independent Certifier of its professional judgment in accordance with clauses 2.3 and 2.4 above. The Independent Certifier shall promptly confirm in writing to each of the Counterparties whether or not it shall comply with any such instruction setting out the grounds upon which the decision is made.
- 2.7 The Counterparties agree to co-operate with and provide reasonable assistance to the Independent Certifier to familiarise the Independent Certifier with all necessary aspects of the Project to enable the Independent Certifier to carry out its obligations under this Deed.
- 2.8 The Independent Certifier shall be deemed to have full knowledge of the provisions of the Project Agreement, and shall be deemed to be aware of and to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of either of the Counterparties which are set out in the Project Agreement. The Service Provider shall deliver to the Independent Certifier a true and accurate copy of the Project Agreement as soon as practicable following:
- 2.8.1 the date of this Deed; and
- 2.8.2 any variation to the Project Agreement which is likely to affect the performance of the Services by the Independent Certifier.
- 2.9 The Independent Certifier shall promptly and efficiently perform the Services as soon as reasonably practicable but consistent with the standards specified in clauses 2.3 and 2.4 above.
- 2.10 Subject to clause 2.11, the Independent Certifier shall use the following partners, directors or employees in connection with the performance of the Services and such persons' services shall be available when necessary and for so long as may be necessary to ensure the proper performance by the Independent Certifier of the Services:

2.10.1 [ ] ;

2.10.2 [ ] ; and

2.10.3 [ ] .

Such persons shall have full authority to act on behalf of the Independent Certifier for all purposes in connection with this Deed.

2.11 None of the persons mentioned in clause 2.10 shall be removed or replaced unless he/she ceases to work as a partner in, or director or employee of the Independent Certifier or he/she is unable to work because of death or ill-health or by agreement of the Counterparties. The Independent Certifier shall notify (giving a minimum of ten (10) Business Days' notice) the Counterparties of any such circumstances and shall be responsible for finding a replacement whose appointment shall be subject to approval in writing of the Counterparties.

2.12 The Parties agree that, notwithstanding the terms and effect of any provision of the Limitation Act 1980 (including any amendment or re-enactment of the same), the Independent Certifier shall only be liable under this Deed in respect of claims whether for any breach of this Deed or in tort, negligence, for breach of statutory duty or otherwise which are notified to the Independent Certifier before the expiration of the period of twelve (12) years from the date of completion of all of the Services under the terms of this Deed.

### **3. DURATION**

3.1 The Services shall commence on the date of this Deed and shall terminate on the third anniversary of the commencement date unless the Counterparties agree to extend the contract period in accordance with the provisions of clause 3.2 below or the Services are terminated in accordance with clause 6 (Termination).

3.2 The Counterparties may agree to extend the contract period for up to two (2) further periods of one (1) year, by issuing a Joint Notice to the Independent Certifier no later than six (6) months before the third or fourth anniversary of the commencement date as applicable.

3.3 This Deed governs all of the Services provided by the Independent Certifier in relation to the Project whether before or after the date hereof.

#### 4. FEES

- 4.1 The Service Provider shall pay the Core Fees to the Independent Certifier in respect of the Core Services. The Independent Certifier shall issue invoices to the Service Provider for the Core Fees in accordance with part 1 of appendix 2 (Fee Instalments).
- 4.2 The Independent Certifier shall be entitled to be paid Additional Fees in respect of any Varied Services it provides. The Independent Certifier shall issue an invoice to the Counterparty responsible for payment on the date agreed by the Parties at the time the Varied Services were commissioned pursuant to clause 2.2 or, if both Counterparties are responsible for payment, the Independent Certifier shall issue an invoice to each of them on the relevant date, in the proportions agreed pursuant to clause 2.2. Where both Counterparties are responsible for payment of Varied Services, their obligations to pay shall be several and not joint.
- 4.3 The date on which an invoice is received by the Service Provider or the Authority (as appropriate) shall constitute the due date. The final date for payment by the Service Provider or the Authority (as appropriate) shall be thirty (30) days after receipt of the Independent Certifier's invoice ("**Final Date for Payment**").
- 4.4 Not later than five (5) Business Days after the due date ascertained in accordance with clause 4.3, the Service Provider or the Authority (as appropriate) may give written notice to the Independent Certifier stating the amount which it proposes to pay and the basis on which the amount is calculated.
- 4.5 Where the Service Provider or the Authority (as appropriate) intends to withhold payment of any amount stated in the invoice, it shall give written notice to the Independent Certifier not later than five (5) Business Days before the Final Date for Payment. The notice shall state the amount to be withheld and the ground or grounds for withholding the payment and if there is more than one (1) ground, the notice shall identify the amount attributable to each ground.
- 4.6 If either Counterparty fails to pay the Independent Certifier any sum payable under this Deed by the Final Date for Payment, the relevant Counterparty shall pay the Independent Certifier simple interest on that sum from the Final Date for Payment until the actual date of payment at the Default Interest Rate and such rate is agreed

as a fair and reasonable rate for the purposes of the Late Payment of Commercial Debts (Interest) Act 1998.

- 4.7 If either Counterparty fails to pay the amounts properly due pursuant to these provisions and no notice to withhold the payment has been given pursuant to clause 4.5, the Independent Certifier may suspend performance of any or all of the Services. This right is subject to the Independent Certifier first giving both Counterparties not less than seven (7) Business Days' notice in writing of such intention stating the grounds for suspension. The right to suspend performance shall cease when the Service Provider (and/or the Authority (if appropriate)) pays the amount properly due.
- 4.8 Neither Counterparty shall issue instructions or do anything which does or is reasonably likely materially to increase the Fees payable to the Independent Certifier without the prior approval of the other (such approval not to be unreasonably withheld or delayed).
- 4.9 As soon as the Independent Certifier becomes aware of the same and before acting on the same the Independent Certifier shall inform the Authority and the Service Provider of any instructions which either Counterparty has given him which will or could reasonably be expected to increase the fees payable to the Independent Certifier under the terms of this Deed. The Independent Certifier shall if requested by either the Service Provider or the Authority provide both Counterparties with as detailed an estimate as is reasonably practicable of the increase to the fees payable to it if it carries out such instructions. The estimate of increased Fees shall be based upon the rates contained in part 2 of appendix 2 (Fee Rates).

## **5. LIMITATIONS ON AUTHORITY**

The Independent Certifier shall not:

- 5.1 make or purport to make any alteration or addition to or omission from the Output Specification (including, without limitation, the setting of performance standards) or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Project; or
- 5.2 unless both the Authority and the Service Provider consent in writing or agree to any waiver or release of any obligation of the Authority or the Service Provider

under the Project Agreement or of any contractor or professional consultant employed or engaged in connection with the Project.

For the avoidance of doubt, the Independent Certifier shall not express an opinion on and shall not interfere with or give any advice, opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Deed.

## **6. TERMINATION**

### **6.1 Automatic termination**

This Deed will terminate immediately upon receipt by the Independent Certifier of a Joint Notice confirming that the Project Agreement has terminated.

### **6.2 Counterparties' right to terminate**

6.2.1 The Counterparties may by Joint Notice immediately terminate this Deed if the Independent Certifier:

6.2.1.1 is in breach of any of the terms of this Deed which, in the case of a breach capable of remedy, shall not have been remedied by the Independent Certifier within twenty one (21) days of receipt by the Independent Certifier of a Joint Notice specifying the breach and requiring its remedy;

6.2.1.2 is incompetent, guilty of gross misconduct and/or any material failure, negligence or delay in the provision of the Services and/or its other duties under this Deed;

6.2.1.3 fails to comply with clauses 2.10 and 2.11;

6.2.1.4 fails or refuses after written warning to provide the Services and/or its other duties under this Deed reasonably and as properly required of him; or

6.2.1.5 is subject to an event analogous to any of the events set out in paragraphs (c), (d), (e) and (f) of the definition of Service Provider Default.

6.2.2 The Counterparties may terminate this Deed at any time by issuing a Joint Notice to the Independent Certifier at least six (6) Months prior to the proposed termination date.

### 6.3 Independent Certifier's right to terminate

6.3.1 Subject to clause 6.3.2 the Independent Certifier may terminate this Deed:

6.3.1.1 if any amount in excess of £♦ is due and payable to the Independent Certifier by either of the Counterparties, and thirty (30) days has passed since the Final Date for Payment of such amount; or

6.3.1.2 either Counterparty is otherwise in material breach of its obligations.

6.3.2 The Independent Certifier shall neither exercise nor seek to exercise any right to terminate its engagement without giving the Counterparties not less than twenty (20) Business Days' written notice of its intention to do so specifying the grounds for the proposed termination and identifying who is in breach of this Deed ("**Step-in Notice**").

6.3.3 The Independent Certifier's right to terminate its engagement under this Deed or to discontinue the performance of the Services shall cease if a Counterparty who is not in breach of this Deed gives notice to the Independent Certifier within twenty (20) Business Days of receiving a Step-in Notice under clause 6.3.2 requiring the Independent Certifier to continue the performance of the Services, provided that a Counterparty giving such notice must agree to assume all the obligations of the defaulting Counterparty and undertake to discharge all payments which are or may subsequently become due to the Independent Certifier from the defaulting Counterparty under this Deed.

6.3.4 If a Counterparty issues a notice in accordance with clause 6.3.3 this Deed shall continue in full force and effect as if the right of termination or discontinuance on the part of the Independent Certifier had not arisen and on the basis that all references in this Deed to the defaulting Counterparty thereafter shall be read and construed as references to the Counterparty which issued the notice.

6.3.5 Where a Counterparty has given notice in compliance with clause 6.3.3 and has given an undertaking of the type described in that clause the defaulting Counterparty shall reimburse and indemnify that Counterparty against each and every liability which that Counterparty may have to the Independent Certifier by virtue of such undertaking and assumption of responsibility and against any claims, demands, proceedings, damages, costs and expenses sustained, incurred or payable by that Counterparty as a consequence thereof.

#### **6.4 Consequences of Termination**

6.4.1 Following any termination of this Deed, but subject to any set-off or deductions which the Counterparties may be entitled properly to make as a result of any breach of this Deed by the Independent Certifier, the Independent Certifier shall be entitled to be paid in full and final settlement of any valid claim which the Independent Certifier may have in consequence thereof, any fees due under clause 4 (Fees) above in respect of the Services carried out in accordance with this Deed prior to the date of termination.

6.4.2 Termination of this Deed shall be without prejudice to any accrued rights and obligations under this Deed as at the date of termination (including the right of either Counterparty to recover damages from the Independent Certifier).

6.4.3 If this Deed is terminated in accordance with this clause 6 (Termination), the Counterparties shall use reasonable endeavours to engage an alternative independent certifier within thirty (30) days, subject to Law and public procurement rules. If within such period the Counterparties are unable to procure the appointment of an alternative independent certifier on reasonable commercial terms, the Independent Certifier shall pay to the Counterparties any reasonable incremental loss, damage or extra costs suffered by each of them.

6.4.4 Termination of this Deed shall not affect the continuing rights and obligations of the Parties under clause 5 (Limitations on Authority), this clause 6 (Termination), clause 7 (Confidential Information and Copyright), clause 8 (Professional Indemnity Insurance) or clause 16 (Dispute Resolution Procedure) or under any other clause which is expressed to survive

termination or which is required to give effect to such termination or the consequences of such termination.

## **7. CONFIDENTIAL INFORMATION AND COPYRIGHT**

- 7.1 The Independent Certifier shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to either Counterparty's technology or other know-how, business plans or finances or any such information relating to a subsidiary, supplier, customer or client of either Counterparty where the information was received during the period of this Deed. Upon termination of this Deed for whatever reasons the Independent Certifier shall deliver up to the relevant Counterparty all working papers, computer disks and tapes or other material and copies provided to or prepared by him pursuant either to this Deed or to any previous obligation owed to that Counterparty.
- 7.2 The copyright in all reports, calculations and other similar documents provided by the Independent Certifier in connection with the Project shall remain vested in the Independent Certifier but the Independent Certifier grants to the Counterparties and their nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such drawings and other documents and to reproduce the designs contained in them for any purpose related to the Project including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Project. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.

## **8. PROFESSIONAL INDEMNITY INSURANCE**

- 8.1 Without prejudice to its obligations under this Deed, or otherwise at law, the Independent Certifier shall maintain professional indemnity insurance with a limit of indemnity of not less than [ten million pounds (£10,000,000) (indexed)] for each claim or series of claims that arise from the same cause or a single source or event in respect of any neglect, error or omission on the Independent Certifier's part in the performance of its obligations under this Deed for the period commencing on the date of this Deed and expiring twelve (12) years after:

- 8.1.1 expiry of the Core Investment Period in accordance with the provisions of the Project Agreement; or

8.1.2 the termination of this Deed,

whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates and terms.

- 8.2 The Independent Certifier shall maintain such insurance with reputable insurers carrying on business in the United Kingdom who are acceptable to the Counterparties such acceptance not to be unreasonably withheld or delayed.
- 8.3 Any increased or additional premium required by insurers by reason of the Independent Certifier's own claims record or other acts, omissions, matters or things particular to the Independent Certifier shall be deemed to be within commercially reasonable rates.
- 8.4 The Independent Certifier shall immediately inform the Counterparties if such insurance ceases to be available at commercially reasonable rates in order that the Independent Certifier and the Counterparties can discuss means of best protecting the respective positions of the Counterparties and the Independent Certifier in respect of the Project in the absence of such insurance.
- 8.5 The Independent Certifier shall fully co-operate with any measures reasonably required by the Counterparties including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the Counterparties undertake in writing to reimburse the Independent Certifier in respect of the net cost of such insurance to the Independent Certifier above commercially reasonable rates or, if the Counterparties effect such insurance at rates at or above commercially reasonable rates, reimbursing the Counterparties in respect of what the net cost of such insurance to the Counterparties would have been at commercially reasonable rates.
- 8.6 The Independent Certifier shall, prior to commencing the provision of the Services and no less than ten (10) days after renewal dates, produce for inspection by the Counterparties documentary evidence that such insurance is being properly maintained.
- 8.7 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Deed for any reason whatsoever, including (without limitation) breach by either Counterparty.

## 9. NOTICES

9.1 All notices or other communications required in connection with this Deed shall be in writing and sent by hand, by first class pre-paid post or by facsimile transmission to the relevant address or facsimile number set out below or to such other address or facsimile number as a Party may notify to the other Parties in writing:

If to the Authority: [◆]

Address : County Hall, High Street, Newport, Isle of Wight

Fax number: [◆]

If to the Service Provider: [◆]

Address: [◆]

Fax number: [◆]

If to the Independent Certifier: [◆]

Address: [◆]

Fax number: [◆]

9.2 Service shall be deemed to have been effected as follows:

9.2.1 if personally delivered, at the time of delivery to the addressee;

9.2.2 if sent by first class pre-paid post, on the second (2nd) Business Day after it is put in the post; and

9.2.3 if sent by facsimile transmission, at the time of transmission or if the time of transmission is outside normal working hours (which shall be deemed to be 9.00am to 5.00pm Monday to Friday excluding public holidays), at 9.00am on the next Business Day.

## 10. ASSIGNMENT

10.1 The Independent Certifier shall not assign or transfer any of its rights or obligations under this Deed or sub-contract the whole of the Services. The Independent Certifier shall be entitled to sub-contract part of the Services subject to consent of

the Counterparties which shall not be unreasonably withheld or delayed. For the avoidance of doubt the Independent Certifier shall remain responsible for all the Services undertaken by any sub-contractor as if the same had been undertaken by the Independent Certifier.

- 10.2 Neither of the Counterparties shall be entitled to assign or transfer any of their respective rights or obligations under this Deed save where such assignment or transfer is contemporaneous to the assignment or transfer of the Project Agreement and is made to the same assignee or transferee. In the event that the Project Agreement is novated to a third party, the term "Project Agreement" shall include any replacement contract arising from such novation.
- 10.3 The Independent Certifier shall not be entitled to contend that any person to whom this Deed is assigned in accordance with clause 10.2 is precluded from recovering under this Deed any loss incurred by such assignee resulting from any breach of this Deed (whenever happening) by reason that such person is an assignee and not a named promisee under this Deed.

## **11. CUMULATIVE RIGHTS AND ENFORCEMENT**

- 11.1 Any rights and remedies provided for in this Deed whether in favour of the Service Provider or the Authority or the Independent Certifier are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.
- 11.2 The duties and obligations of the Independent Certifier arising under or in connection with this Deed are owed to the Counterparties jointly and severally and the Authority and the Service Provider may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.
- 11.3 The Counterparties covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Deed which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

**12. WAIVER**

The failure of any Party at any one time to enforce any provision of this Deed shall in no way affect its right thereafter to require complete performance by any other Party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

**13. SEVERABILITY**

In the event that any term, condition or provision contained in this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Deed and the rest of this Deed shall stand, without affecting the remaining clauses.

**14. COUNTERPARTS**

This Deed may be executed in any number of counterparts, all of which when taken together shall constitute one (1) and the same instrument.

**15. VARIATION**

A variation of this Deed is valid only if it is in writing and signed by or on behalf of each Party.

**16. DISPUTE RESOLUTION PROCEDURE**

16.1 All disputes shall be resolved in accordance with terms equivalent (mutatis mutandis) to the Dispute Resolution Procedure as set out in the Project Agreement.

16.2 The Service Provider, the Authority and the Independent Certifier shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Deed.

16.3 Service of notice of proceedings

**17. GOVERNING LAW AND JURISDICTION**

17.1 Subject to clause 16 (Dispute Resolution Procedure) above, this Deed shall be governed by and construed in accordance with the laws of England, and (subject as

aforesaid) the Parties hereby submit to the non-exclusive jurisdiction of the courts of England.

17.2 No action or proceedings may be commenced against the Independent Certifier for any breach of this Deed after the expiry of twelve (12) years following the date of completion of the Services or the termination of this Deed, whichever is the earlier.

**18. THIRD PARTY RIGHTS**

A person who is not a party to this Deed shall have no right under the Contracts (Rights of Third Party) Act 1999 to enforce any term of this Deed. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

**19. WARRANTIES**

The Independent Certifier shall on the date of this Deed execute and deliver as a deed collateral warranties in favour of OpCo and the Funder in the relevant forms contained in Appendix 4 to this Deed.

IN WITNESS WHEREOF the Parties have executed and delivered this document as a Deed on the date first written above.

**EXECUTED** (but not delivered until the date )  
hereof) as a deed by the Authority by the affixing )  
of its common seal in the presence of:

Authorised Officer

**EXECUTED** (but not delivered until the date )  
hereof) as a deed by the Service Provider acting by )  
two of its directors or a director and its secretary:

Director

Director/Secretary

**EXECUTED** (but not delivered until the date )  
hereof) as a deed by the [Independent Certifier] )  
acting by two of its directors or a director and its  
secretary [*or as appropriate*]:

Director

Director/Secretary

## APPENDIX 1

### Scope of Services – Independent Certifier

<b>Core Services – Independent Certifier</b>	
<b>Service area</b>	<b>Services to be undertaken</b>
2. Milestones and Certification	<p>(i) To assess whether Milestone Completion has been achieved by the Service Provider and within 10 Business Days of the date of that assessment to issue to the Service Provider, a copy of the Certificate of Completion or a Certificate of Non-Completion (in the latter case the certificate should specify the outstanding matters that must be attended to before a Certificate of Completion can be issued.</p> <p>(ii) Where a Certificate of Non-Completion is issued to re-assess whether the Service Provider has achieved Milestone Completion and to continue such process until a Certificate of Completion has been issued.</p> <p>(iii) To issue within five (5) Business Days of the issue of the Certificate of Completion to issue to the Service Provider and the Authority a list of the relevant Minor Snagging Items ('Snagging List')</p>

## **APPENDIX 2**

### **Core Fees**

#### **Part 1 - Fee Instalments**

## Part 2 - Fee Rates

## **APPENDIX 3**

### **Methodology to Respond to Scope of Services**

## **APPENDIX 4**

### **Forms of Collateral Warranty**

**ISLE OF WIGHT COUNCIL - HIGHWAYS PFI**

**ANNEXURE 5 - FORM OF INDEPENDENT CERTIFIER'S APPOINTMENT**

**HANDBACK**

**ANNEXURE 5**

**Form of Independent Certifier's Appointment**

**ANNEXURE 5**

**Form of Independent Certifier's Appointment**

**DATED**

**200** ◆

**(1) ISLE OF WIGHT COUNCIL**

**- and -**

**(2) [SERVICE PROVIDER]**

**- and -**

**(3) [INDEPENDENT CERTIFIER]**

**APPOINTMENT OF  
INDEPENDENT CERTIFIER**

relating to

the rehabilitation, maintenance and operation  
of the Project Network pursuant to the  
Government's Private Finance Initiative

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APPENDIX 4

Forms of Collateral Warranty

**THIS DEED** is made on 200◆

**BETWEEN**

- (1) **ISLE OF WIGHT COUNCIL** of County Hall, High Street, Newport, Isle of Wight ("Authority");
- (2) **[SERVICE PROVIDER]** (company registration number ◆ ) whose registered office is at ◆ ("**Service Provider**");
- (3) **[INDEPENDENT CERTIFIER]** [(company registration number ◆ )] [whose registered office is at] [of] ◆ ("**Independent Certifier**").

**RECITALS**

- A The Authority and the Service Provider have entered into an agreement for the rehabilitation, maintenance and operation of the Project Network pursuant to the Government's private finance initiative ("**Project Agreement**") under the terms of which they have jointly agreed to appoint an independent certifier.
- B The Independent Certifier is an independent adviser willing to provide services to the Authority and the Service Provider.
- C The Authority and the Service Provider jointly engage the Independent Certifier to perform the duties and obligations which are ascribed to the Independent Certifier in the Project Agreement upon the terms of this Deed (and which are set out in appendix 1 (*Scope of Services - Independent Certifier*) upon the terms and conditions set out below.

**NOW IT IS HEREBY AGREED** as follows:

**1. DEFINITIONS AND INTERPRETATION**

1.1 In this Deed, the following terms shall have the meanings given to them below:

"**Additional Fees**" means the fees to be paid to the Independent Certifier in respect of any Varied Services in accordance with clause 4.2;

"**Core Fees**" means the fees to be paid to the Independent Certifier in respect of the Core Services in accordance with clause 4.1, as set out in appendix 1 (*Scope of Services - Independent Certifier*);

"**Core Services**" means the services listed in appendix 1 (*Scope of Services - Independent Certifier*);

"**Counterparty**" means each of the Authority and the Service Provider, and

"**Counterparties**" means both of them;

"**Fees**" means the Core Fees and the Additional Fees;

"**Final Date for Payment**" has the meaning given to it in clause 4.3;

"**Funder**" means [●]

"**Joint Notice**" means a notice in writing issued jointly by the Counterparties;

"**Party**" means any party to this Deed;

"**Opco**" means [●]

"**Services**" means together the Core Services and the Varied Services;

"**Varied Services**" means any services provided by the Independent Certifier in addition to the Core Services, or any variation to the Core Services undertaken by the Independent Certifier, in each case in accordance with clause 2.2.

- 1.2 Unless the context otherwise requires, words and expressions defined in the Project Agreement have the same meanings in this Deed as in the Project Agreement.
- 1.3 The headings in this Deed do not affect its interpretation.
- 1.4 Unless the context otherwise requires, all references to clauses and schedules are references to clauses of and schedules to this Deed.

## 2. APPOINTMENT

2.1 The Counterparties jointly engage the Independent Certifier and the Independent Certifier agrees to perform:

2.1.1 the Core Services<sup>1</sup>; and

2.1.2 any Varied Services commissioned pursuant to clause 2.2,

upon the terms and conditions set out below.

2.2 If the Counterparties require any Varied Services:

2.2.1 the Counterparties shall issue a Joint Notice to the Independent Certifier specifying:

2.2.1.1 the services required;

2.2.1.2 which of the Counterparties will pay the Fees associated with the relevant services (or, if both are to pay, the proportion of the Fees for which they will each be responsible); and

2.2.1.3 the proposed timing of payment of the Fees associated with the relevant services;

2.2.2 within a reasonable time after issue of the Joint Notice the Independent Certifier shall provide the Counterparties with a written quote of the cost of the relevant services, which cost shall:

2.2.2.1 wherever possible be based on the rates contained in part 2 of appendix 2 (*Fee Rates*); and

2.2.2.2 take into account any reduction in work or other expense which may occur as a result of the required variation to the Services,

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<sup>1</sup> These Core Services will cover certification of works during the handback period.

together with any other information reasonably required by either Counterparty (such as a method statement setting out how the Independent Certifier intends to carry out the relevant services); and

2.2.3 if the Counterparties are satisfied with the Independent Certifier's proposals they shall issue a further Joint Notice instructing the Independent Certifier to undertake the Varied Services and the Independent Certifier shall undertake the Varied Services at the time agreed by the Parties or, in the absence of agreement, as soon as reasonably practicable.

2.3 The Independent Certifier shall provide the Services independently, fairly and impartially to and as between each of the Counterparties. Whilst the Independent Certifier may take account of any representations made by the Counterparties the Independent Certifier shall not be bound to comply with any representations made by either of them in connection with any matter on which the Independent Certifier is required to exercise his professional judgement.

2.4 The Independent Certifier shall provide the Services:

2.4.1 with the reasonable care, skill and diligence to be expected of a properly qualified and competent professional adviser who has held itself out as competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project;

2.4.2 in accordance with Good Industry Practice, all Law and Highways Standards; and

2.4.3 in accordance with the methodology set out in appendix 3 (*Methodology to Respond to Scope of Services*).

For the purposes of this clause 2.4 "**Good Industry Practice**" shall mean using standards, practices, methods and procedures (as practised in the United Kingdom) and exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator or other person (as the case may be) engaged in a similar type of undertaking as under this Deed under the same or similar circumstances.

2.5 All instructions to the Independent Certifier must be given jointly by the Authority's Representative and the Service Provider's Representative (or their respective

alternates appointed pursuant to clause 31 (*Representatives*) of the Project Agreement).

- 2.6 The Independent Certifier shall comply with all reasonable instructions given to it by the Counterparties except and to the extent that the Independent Certifier reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Deed or prejudices or might prejudice the exercise by the Independent Certifier of its professional judgment in accordance with clauses 2.3 and 2.4 above. The Independent Certifier shall promptly confirm in writing to each of the Counterparties whether or not it shall comply with any such instruction setting out the grounds upon which the decision is made.
- 2.7 The Counterparties agree to co-operate with and provide reasonable assistance to the Independent Certifier to familiarise the Independent Certifier with all necessary aspects of the Project to enable the Independent Certifier to carry out its obligations under this Deed.
- 2.8 The Independent Certifier shall be deemed to have full knowledge of the provisions of the Project Agreement, and shall be deemed to be aware of and to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of either of the Counterparties which are set out in the Project Agreement. The Service Provider shall deliver to the Independent Certifier a true and accurate copy of the Project Agreement as soon as practicable following:
- 2.8.1 the date of this Deed; and
- 2.8.2 any variation to the Project Agreement which is likely to affect the performance of the Services by the Independent Certifier.
- 2.9 The Independent Certifier shall promptly and efficiently perform the Services as soon as reasonably practicable but consistent with the standards specified in clauses 2.3 and 2.4 above.
- 2.10 Subject to clause 2.11, the Independent Certifier shall use the following partners, directors or employees in connection with the performance of the Services and such persons' services shall be available when necessary and for so long as may be necessary to ensure the proper performance by the Independent Certifier of the Services:

2.10.1 [◆] ;

2.10.2 [◆] ; and

2.10.3 [◆] .

Such persons shall have full authority to act on behalf of the Independent Certifier for all purposes in connection with this Deed.

- 2.11 None of the persons mentioned in clause 2.10 shall be removed or replaced unless he/she ceases to work as a partner in, or director or employee of the Independent Certifier or he/she is unable to work because of death or ill-health or by agreement of the Counterparties. The Independent Certifier shall notify (giving a minimum of ten (10) Business Days' notice) the Counterparties of any such circumstances and shall be responsible for finding a replacement whose appointment shall be subject to approval in writing of the Counterparties.
- 2.12 The Parties agree that, notwithstanding the terms and effect of any provision of the Limitation Act 1980 (including any amendment or re-enactment of the same), the Independent Certifier shall only be liable under this Deed in respect of claims whether for any breach of this Deed or in tort, negligence, for breach of statutory duty or otherwise which are notified to the Independent Certifier before the expiration of the period of twelve (12) years from the date of completion of all of the Services under the terms of this Deed.

### **3. DURATION**

- 3.1 The Services shall commence on the date of this Deed and shall terminate on the third anniversary of the commencement date unless the Counterparties agree to extend the contract period in accordance with the provisions of clause 3.2 below or the Services are terminated in accordance with clause 6 (*Termination*).
- 3.2 The Counterparties may agree to extend the contract period for up to two (2) further periods of one (1) year, by issuing a Joint Notice to the Independent Certifier no later than six (6) months before the third or fourth anniversary of the commencement date as applicable.
- 3.3 This Deed governs all of the Services provided by the Independent Certifier in relation to the Project whether before or after the date hereof.

#### 4. FEES

- 4.1 The Service Provider shall pay the Core Fees to the Independent Certifier in respect of the Core Services. The Independent Certifier shall issue invoices to the Service Provider for the Core Fees in accordance with part 1 of appendix 2 (*Fee Instalments*).
- 4.2 The Independent Certifier shall be entitled to be paid Additional Fees in respect of any Varied Services it provides. The Independent Certifier shall issue an invoice to the Counterparty responsible for payment on the date agreed by the Parties at the time the Varied Services were commissioned pursuant to clause 2.2 or, if both Counterparties are responsible for payment, the Independent Certifier shall issue an invoice to each of them on the relevant date, in the proportions agreed pursuant to clause 2.2. Where both Counterparties are responsible for payment of Varied Services, their obligations to pay shall be several and not joint.
- 4.3 The date on which an invoice is received by the Service Provider or the Authority (as appropriate) shall constitute the due date. The final date for payment by the Service Provider or the Authority (as appropriate) shall be thirty (30) days after receipt of the Independent Certifier's invoice ("**Final Date for Payment**").
- 4.4 Not later than five (5) Business Days after the due date ascertained in accordance with clause 4.3, the Service Provider or the Authority (as appropriate) may give written notice to the Independent Certifier stating the amount which it proposes to pay and the basis on which the amount is calculated.
- 4.5 Where the Service Provider or the Authority (as appropriate) intends to withhold payment of any amount stated in the invoice, it shall give written notice to the Independent Certifier not later than five (5) Business Days before the Final Date for Payment. The notice shall state the amount to be withheld and the ground or grounds for withholding the payment and if there is more than one (1) ground, the notice shall identify the amount attributable to each ground.
- 4.6 If either Counterparty fails to pay the Independent Certifier any sum payable under this Deed by the Final Date for Payment, the relevant Counterparty shall pay the Independent Certifier simple interest on that sum from the Final Date for Payment until the actual date of payment at the Default Interest Rate and such rate is agreed as a fair and reasonable rate for the purposes of the Late Payment of Commercial Debts (Interest) Act 1998.

- 4.7 If either Counterparty fails to pay the amounts properly due pursuant to these provisions and no notice to withhold the payment has been given pursuant to clause 4.5, the Independent Certifier may suspend performance of any or all of the Services. This right is subject to the Independent Certifier first giving both Counterparties not less than seven (7) Business Days' notice in writing of such intention stating the grounds for suspension. The right to suspend performance shall cease when the Service Provider (and/or the Authority (if appropriate)) pays the amount properly due.
- 4.8 Neither Counterparty shall issue instructions or do anything which does or is reasonably likely materially to increase the Fees payable to the Independent Certifier without the prior approval of the other (such approval not to be unreasonably withheld or delayed).
- 4.9 As soon as the Independent Certifier becomes aware of the same and before acting on the same the Independent Certifier shall inform the Authority and the Service Provider of any instructions which either Counterparty has given him which will or could reasonably be expected to increase the fees payable to the Independent Certifier under the terms of this Deed. The Independent Certifier shall if requested by either the Service Provider or the Authority provide both Counterparties with as detailed an estimate as is reasonably practicable of the increase to the fees payable to it if it carries out such instructions. The estimate of increased Fees shall be based upon the rates contained in part 2 of appendix 2 (*Fee Rates*).

## **5. LIMITATIONS ON AUTHORITY**

The Independent Certifier shall not:

- 5.1 make or purport to make any alteration or addition to or omission from the Output Specification (including, without limitation, the setting of performance standards) or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Project; or
- 5.2 unless both the Authority and the Service Provider consent in writing or agree to any waiver or release of any obligation of the Authority or the Service Provider under the Project Agreement or of any contractor or professional consultant employed or engaged in connection with the Project.

For the avoidance of doubt, the Independent Certifier shall not express an opinion on and shall not interfere with or give any advice, opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Deed.

## **6. TERMINATION**

### **6.1 Automatic termination**

This Deed will terminate immediately upon receipt by the Independent Certifier of a Joint Notice confirming that the Project Agreement has terminated.

### **6.2 Counterparties' right to terminate**

6.2.1 The Counterparties may by Joint Notice immediately terminate this Deed if the Independent Certifier:

6.2.1.1 is in breach of any of the terms of this Deed which, in the case of a breach capable of remedy, shall not have been remedied by the Independent Certifier within twenty one (21) days of receipt by the Independent Certifier of a Joint Notice specifying the breach and requiring its remedy;

6.2.1.2 is incompetent, guilty of gross misconduct and/or any material failure, negligence or delay in the provision of the Services and/or its other duties under this Deed;

6.2.1.3 fails to comply with clauses 2.10 and 2.11;

6.2.1.4 fails or refuses after written warning to provide the Services and/or its other duties under this Deed reasonably and as properly required of him; or

6.2.1.5 is subject to an event analogous to any of the events set out in paragraphs (c), (d), (e) and (f) of the definition of Service Provider Default.

6.2.2 The Counterparties may terminate this Deed at any time by issuing a Joint Notice to the Independent Certifier at least six (6) Months prior to the proposed termination date.

### 6.3 Independent Certifier's right to terminate

6.3.1 Subject to clause 6.3.2 the Independent Certifier may terminate this Deed:

6.3.1.1 if any amount in excess of £◆ is due and payable to the Independent Certifier by either of the Counterparties, and thirty (30) days has passed since the Final Date for Payment of such amount; or

6.3.1.2 either Counterparty is otherwise in material breach of its obligations.

6.3.2 The Independent Certifier shall neither exercise nor seek to exercise any right to terminate its engagement without giving the Counterparties not less than twenty (20) Business Days' written notice of its intention to do so specifying the grounds for the proposed termination and identifying who is in breach of this Deed ("**Step-in Notice**").

6.3.3 The Independent Certifier's right to terminate its engagement under this Deed or to discontinue the performance of the Services shall cease if a Counterparty who is not in breach of this Deed gives notice to the Independent Certifier within twenty (20) Business Days of receiving a Step-in Notice under clause 6.3.2 requiring the Independent Certifier to continue the performance of the Services, provided that a Counterparty giving such notice must agree to assume all the obligations of the defaulting Counterparty and undertake to discharge all payments which are or may subsequently become due to the Independent Certifier from the defaulting Counterparty under this Deed.

6.3.4 If a Counterparty issues a notice in accordance with clause 6.3.3 this Deed shall continue in full force and effect as if the right of termination or discontinuance on the part of the Independent Certifier had not arisen and on the basis that all references in this Deed to the defaulting Counterparty thereafter shall be read and construed as references to the Counterparty which issued the notice.

6.3.5 Where a Counterparty has given notice in compliance with clause 6.3.3 and has given an undertaking of the type described in that clause the defaulting Counterparty shall reimburse and indemnify that Counterparty against each and every liability which that Counterparty may have to the Independent

Certifier by virtue of such undertaking and assumption of responsibility and against any claims, demands, proceedings, damages, costs and expenses sustained, incurred or payable by that Counterparty as a consequence thereof.

#### **6.4 Consequences of Termination**

- 6.4.1 Following any termination of this Deed, but subject to any set-off or deductions which the Counterparties may be entitled properly to make as a result of any breach of this Deed by the Independent Certifier, the Independent Certifier shall be entitled to be paid in full and final settlement of any valid claim which the Independent Certifier may have in consequence thereof, any fees due under clause 4 (*Fees*) above in respect of the Services carried out in accordance with this Deed prior to the date of termination.
- 6.4.2 Termination of this Deed shall be without prejudice to any accrued rights and obligations under this Deed as at the date of termination (including the right of either Counterparty to recover damages from the Independent Certifier).
- 6.4.3 If this Deed is terminated in accordance with this clause 6 (*Termination*), the Counterparties shall use reasonable endeavours to engage an alternative independent certifier within thirty (30) days, subject to Law and public procurement rules. If within such period the Counterparties are unable to procure the appointment of an alternative independent certifier on reasonable commercial terms, the Independent Certifier shall pay to the Counterparties any reasonable incremental loss, damage or extra costs suffered by each of them.
- 6.4.4 Termination of this Deed shall not affect the continuing rights and obligations of the Parties under clause 5 (*Limitations on Authority*), this clause 6 (*Termination*), clause 7 (*Confidential Information and Copyright*), clause 8 (*Professional Indemnity Insurance*) or clause 16 (*Dispute Resolution Procedure*) or under any other clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

## **7. CONFIDENTIAL INFORMATION AND COPYRIGHT**

- 7.1 The Independent Certifier shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to either Counterparty's technology or other know-how, business plans or finances or any such information relating to a subsidiary, supplier, customer or client of either Counterparty where the information was received during the period of this Deed. Upon termination of this Deed for whatever reasons the Independent Certifier shall deliver up to the relevant Counterparty all working papers, computer disks and tapes or other material and copies provided to or prepared by him pursuant either to this Deed or to any previous obligation owed to that Counterparty.
- 7.2 The copyright in all reports, calculations and other similar documents provided by the Independent Certifier in connection with the Project shall remain vested in the Independent Certifier but the Independent Certifier grants to the Counterparties and their nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such drawings and other documents and to reproduce the designs contained in them for any purpose related to the Project including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Project. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.

## **8. PROFESSIONAL INDEMNITY INSURANCE**

- 8.1 Without prejudice to its obligations under this Deed, or otherwise at law, the Independent Certifier shall maintain professional indemnity insurance with a limit of indemnity of not less than [ten million pounds (£10,000,000) (indexed)] for each claim or series of claims that arise from the same cause or a single source or event in respect of any neglect, error or omission on the Independent Certifier's part in the performance of its obligations under this Deed for the period commencing on the date of this Deed and expiring twelve (12) years after:
- 8.1.1 expiry of the Core Investment Period in accordance with the provisions of the Project Agreement; or
- 8.1.2 the termination of this Deed,

whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates and terms.

- 8.2 The Independent Certifier shall maintain such insurance with reputable insurers carrying on business in the United Kingdom who are acceptable to the Counterparties such acceptance not to be unreasonably withheld or delayed.
- 8.3 Any increased or additional premium required by insurers by reason of the Independent Certifier's own claims record or other acts, omissions, matters or things particular to the Independent Certifier shall be deemed to be within commercially reasonable rates.
- 8.4 The Independent Certifier shall immediately inform the Counterparties if such insurance ceases to be available at commercially reasonable rates in order that the Independent Certifier and the Counterparties can discuss means of best protecting the respective positions of the Counterparties and the Independent Certifier in respect of the Project in the absence of such insurance.
- 8.5 The Independent Certifier shall fully co-operate with any measures reasonably required by the Counterparties including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the Counterparties undertake in writing to reimburse the Independent Certifier in respect of the net cost of such insurance to the Independent Certifier above commercially reasonable rates or, if the Counterparties effect such insurance at rates at or above commercially reasonable rates, reimbursing the Counterparties in respect of what the net cost of such insurance to the Counterparties would have been at commercially reasonable rates.
- 8.6 The Independent Certifier shall, prior to commencing the provision of the Services and no less than ten (10) days after renewal dates, produce for inspection by the Counterparties documentary evidence that such insurance is being properly maintained.
- 8.7 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Deed for any reason whatsoever, including (without limitation) breach by either Counterparty.

## 9. NOTICES

9.1 All notices or other communications required in connection with this Deed shall be in writing and sent by hand, by first class pre-paid post or by facsimile transmission to the relevant address or facsimile number set out below or to such other address or facsimile number as a Party may notify to the other Parties in writing:

If to the Authority: [◆]

Address : County Hall, High Street, Newport, Isle of Wight

Fax number: [◆]

If to the Service Provider: [◆]

Address: [◆]

Fax number: [◆]

If to the Independent Certifier: [◆]

Address: [◆]

Fax number: [◆]

9.2 Service shall be deemed to have been effected as follows:

9.2.1 if personally delivered, at the time of delivery to the addressee;

9.2.2 if sent by first class pre-paid post, on the second (2nd) Business Day after it is put in the post; and

9.2.3 if sent by facsimile transmission, at the time of transmission or if the time of transmission is outside normal working hours (which shall be deemed to be 9.00am to 5.00pm Monday to Friday excluding public holidays), at 9.00am on the next Business Day.

## 10. ASSIGNMENT

10.1 The Independent Certifier shall not assign or transfer any of its rights or obligations under this Deed or sub-contract the whole of the Services. The Independent Certifier shall be entitled to sub-contract part of the Services subject to consent of the

Counterparties which shall not be unreasonably withheld or delayed. For the avoidance of doubt the Independent Certifier shall remain responsible for all the Services undertaken by any sub-contractor as if the same had been undertaken by the Independent Certifier.

- 10.2 Neither of the Counterparties shall be entitled to assign or transfer any of their respective rights or obligations under this Deed save where such assignment or transfer is contemporaneous to the assignment or transfer of the Project Agreement and is made to the same assignee or transferee. In the event that the Project Agreement is novated to a third party, the term "Project Agreement" shall include any replacement contract arising from such novation.
- 10.3 The Independent Certifier shall not be entitled to contend that any person to whom this Deed is assigned in accordance with clause 10.2 is precluded from recovering under this Deed any loss incurred by such assignee resulting from any breach of this Deed (whenever happening) by reason that such person is an assignee and not a named promisee under this Deed.

## **11. CUMULATIVE RIGHTS AND ENFORCEMENT**

- 11.1 Any rights and remedies provided for in this Deed whether in favour of the Service Provider or the Authority or the Independent Certifier are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.
- 11.2 The duties and obligations of the Independent Certifier arising under or in connection with this Deed are owed to the Counterparties jointly and severally and the Authority and the Service Provider may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.
- 11.3 The Counterparties covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Deed which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

**12. WAIVER**

The failure of any Party at any one time to enforce any provision of this Deed shall in no way affect its right thereafter to require complete performance by any other Party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

**13. SEVERABILITY**

In the event that any term, condition or provision contained in this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Deed and the rest of this Deed shall stand, without affecting the remaining clauses.

**14. COUNTERPARTS**

This Deed may be executed in any number of counterparts, all of which when taken together shall constitute one (1) and the same instrument.

**15. VARIATION**

A variation of this Deed is valid only if it is in writing and signed by or on behalf of each Party.

**16. DISPUTE RESOLUTION PROCEDURE**

16.1 All disputes shall be resolved in accordance with terms equivalent (*mutatis mutandis*) to the Dispute Resolution Procedure as set out in the Project Agreement.

16.2 The Service Provider, the Authority and the Independent Certifier shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Deed.

16.3 Service of notice of proceedings

**17. GOVERNING LAW AND JURISDICTION**

17.1 Subject to clause 16 (*Dispute Resolution Procedure*) above, this Deed shall be governed by and construed in accordance with the laws of England, and (subject as

aforesaid) the Parties hereby submit to the non-exclusive jurisdiction of the courts of England.

17.2 No action or proceedings may be commenced against the Independent Certifier for any breach of this Deed after the expiry of twelve (12) years following the date of completion of the Services or the termination of this Deed, whichever is the earlier.

## **18. THIRD PARTY RIGHTS**

A person who is not a party to this Deed shall have no right under the Contracts (Rights of Third Party) Act 1999 to enforce any term of this Deed. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

## **19. WARRANTIES**

The Independent Certifier shall on the date of this Deed execute and deliver as a deed collateral warranties in favour of OpCo and the Funder in the relevant forms contained in Appendix 4 to this Deed.

**IN WITNESS WHEREOF** the Parties have executed and delivered this document as a Deed on the date first written above.

**EXECUTED** (but not delivered until the date )  
hereof) as a deed by the Authority by the affixing )  
of its common seal in the presence of:

Authorised Officer

**EXECUTED** (but not delivered until the date )  
hereof) as a deed by the Service Provider acting by )  
two of its directors or a director and its secretary:

Director

Director/Secretary

**EXECUTED** (but not delivered until the date )  
hereof) as a deed by the [Independent Certifier] )  
acting by two of its directors or a director and its  
secretary [*or as appropriate*]:

Director

Director/Secretary

**APPENDIX 1**

**Scope of Services – Independent Certifier**

<b>Core Services – Independent Certifier</b>	
<b>Service area</b>	<b>Services to be undertaken</b>
3. Hand-back	<p>(i) To review and make such representations as are necessary in connection with such General Inspections, Principle Inspections, Special Inspections and/or Structural Inspections carried out by the Service Provider prior to the commencement of the nineteenth Contract Year (Year 19) as set out in clauses 82.2.2.2 and 82.2.2.3</p> <p>(ii) To notify the Authority and the Service Provider (in writing) within five (5) Business Days prior to the end of Year 24 of the following:</p> <ul style="list-style-type: none"> <li>• Whether the works required under clause 82.2.2.4 of the Project Agreement have been completed;</li> <li>• Whether the Service Provider has complied with the Service Provider Programmes for the first six (6) Months of Year 24 in respect of the works identified in clause 82.2.2.4;</li> <li>• Whether all Structures comply with the Expiry Condition A Requirements and if any Structures do not comply with the Expiry Condition A Requirements, provide full details as to which Structures</li> </ul>

	<p>do not comply with which Performance Targets within the Expiry Condition A Requirements; and</p> <ul style="list-style-type: none"><li>• The cost of the works identified in clauses 82.2.2.11(a) to (c) inclusive provided by to independent contractors and if the Independent Certifier is unable to obtain such costs, an estimate in the Independent Certifier's opinion (acting reasonably).</li></ul> <p>(iii) The Independent Certifier shall notify the Authority and the Service provider (in writing) two (2) Months prior to the Expiry Date of:</p> <ul style="list-style-type: none"><li>• Whether the Structures comply with the Expiry Condition A Requirements;</li><li>• If any Structures do not comply with the Expiry Condition A Requirements, which Performance Targets within the Expiry Condition A Requirements have not been complied with;</li><li>• An estimate (in the reasonable opinion of the Independent Certifier) of the cost for ensuring that all Structures comply with the Expiry Condition A Requirements.</li></ul> <p>(iv) To give an estimate (acting reasonably) of the cost required to ensure that the Management Information System, the Depot(s) and/or the Isle of Wight Traffic Model comply with the Expiry Condition B requirements.</p>
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## **APPENDIX 2**

### **Core Fees**

#### **Part 1 - Fee Instalments**

*[DN: Details to be inserted]*

**Part 2 - Fee Rates**

*[DN: Details to be inserted]*

## APPENDIX 3

### Methodology to Respond to Scope of Services

*[DN: Details to be inserted]*

## **APPENDIX 4**

### **Forms of Collateral Warranty**

*[DN: Details to be inserted]*