

## PART K - CHANGE

### 49. MAINTAINABILITY ASSESSMENT

#### Planning Proposals

49.1 The Authority may issue a written notice to the Service Provider (a "**Planning Proposal Notice**") requesting that the Service Provider review any planning applications for New Works which may result in a change to the Project Network and the Planning Proposal Notice shall be accompanied with such of the following as the Authority considers are relevant (acting reasonably):

49.1.1 documentation received from the Third Party Developer detailing the proposals in respect of any Third Party Works; and/or

49.1.2 documentation detailing the proposals in respect of any AHW Works; and

49.1.3 any specific issues which the Authority wishes the Service Provider to comment on

as soon as reasonably practicable after the documents referred to in clauses 49.1.1 and 49.1.2 are made available to the Authority and/or the issues referred to in clause 49.1.3 become known to the Authority.

49.2 The Service Provider shall in responding to a Planning Proposal Notice adhere to the provisions of Annexure 17 (*Planning Protocol*) and within ten (10) Business Days of receipt of any Planning Proposal Notice provide to the Authority:

49.2.1 a response to the issues the Authority has requested the Service Provider to comment on pursuant to clause 49.1.3;

49.2.2 a summary of any traffic management issues relevant to the proposed New Works and the potential impact of those New Works on the Services;

49.2.3 a summary of any health and safety issues which are likely to arise as a result of the proposed New Works which the Service Provider considers

(acting reasonably) may impact on the Project Network and/or provision of the Services; and

- 49.2.4 any comments on the proposed design or layout of the New Works which are relevant to the Project Network, in particular the geometry of any proposed new roads and how such roads interface with the existing Project Network and whether they are compliant with the relevant Highways Standards.

### **Maintainability Assessment**

- 49.3 The Authority shall notify the Service Provider of any New Works which include proposals for Proposed Project Network Parts that will be, or have been, undertaken by a party other than the Service Provider (which shall include the Authority) for which it requires the Service Provider to comply with the relevant obligation of this clause 49 (*Maintainability Assessment*) ("**New Works Notice**").
- 49.4 The Authority shall provide with the New Works Notice the following information, to the extent such information has been provided to the Authority and the Authority is permitted to disclose it to the Service Provider:
- 49.4.1 the location (by OS Grid Reference Range) of the works to be carried out together with a high level description of the Proposed Project Network Part;
- 49.4.2 the likely timescale for the New Works and the anticipated completion date of the New Works;
- 49.4.3 any conditions to which the New Works have been made subject by the Authority;
- 49.4.4 any relevant documentation detailing the technical proposals received from the Third Party Developer;
- 49.4.5 any relevant documentation detailing the technical proposals in relation to the AHW Works;

- 49.4.6 in respect of a bridge, retaining wall or subway for which an Approval in Principle is required in accordance with BD 2/05 Technical Approval of Highway Structures of the DMRB, a copy of the relevant Approval in Principle.
- 49.5 The Authority shall provide updated information pursuant to clauses 49.4.3 to 49.4.6 following the issue of the New Works Notice as soon as reasonably practicable after it is made available to the Authority until the New Works are completed.
- 49.6 The Service Provider shall in undertaking a Maintainability Assessment adhere to the provisions of Annexure 17 (*Planning Protocol*) and within ten (10) Business Days of any New Works Notice and ten (10) Business Days after the date on which the Authority subsequently provides the information pursuant to clause 49.5 provide a written commentary on the contents of the New Works Notice or the information provided pursuant to clause 49.5 and such commentary shall include:
- 49.6.1 initial confirmation of whether the Proposed Project Network Part meets the Service Provider Assumptions or APW Assumptions (as the case may be) and the relevant requirements of schedule 2 (*Output Specification*) and if it does not, an explanation of why it does not together with sufficient supporting documentation to enable the Authority to assess the Service Provider's confirmation and/or explanation; and
- 49.6.2 any proposed amendments to the design of the Proposed Project Network Part which would be required to enable it to meet schedule 2 (*Output Specification*) and the Service Provider Assumptions or APW Assumptions (as the case may be);
- 49.6.3 in respect of a bridge, retaining wall or subway, the extent to which a Y Value exists for any part or parts of the bridge, retaining wall or subway and to the extent no Y Value exists for any part of a bridge, retaining wall or subway, an estimate of the likely impact on the Annual Unitary Charge as a result of the need to maintain those aspects of the bridge, retaining wall or subway to which Y Values do not apply following a Change; and

49.6.4 the time period the Service Provider requires (acting reasonably) to provide a Maintainability Assessment having regard to the nature and complexity of the Proposed Project Network Part in the context of the timetable for procuring any Necessary Consents which may be required for the proposed Project Network Part(s) and the overall timetable for the New Works,

(the "Initial New Works Response").

49.7 The Authority shall notify the Service Provider within ten (10) Business Days:

49.7.1 that it accepts the timeframe proposed by the Service Provider in the Initial Works Response; or

49.7.2 that it does not accept the timeframe proposed by the Service Provider in the Initial Works Response together with a revised timeframe by which it requires (acting reasonably) the Service Provider to produce the Maintainability Assessment; and

49.7.3 of the Maintenance Assessment Reference Number for the New Works.

49.8 If clause 49.7.2 applies and the Service Provider disagrees with the revised timeframe proposed by the Authority pursuant to clause 49.7.2, the Service Provider may refer the matter to the Dispute Resolution Procedure.

49.9 The Service Provider shall, notwithstanding any dispute pursuant to clause 49.8, and following the submission of the Service Provider's Initial New Works Response:

49.9.1 attend pre-start site meetings to familiarise itself with New Works and issues surrounding them; and

49.9.2 inspect any Proposed Project Network Part during construction at an appropriate frequency having regard to the nature and complexity of the Proposed Project Network Part,

as the Service Provider may reasonably require in order to provide the Maintainability Assessment pursuant to clause 49.11.

49.10 The Service Provider shall quote the Maintenance Assessment Reference Number on all correspondence to the Authority in respect of the New Works.

49.11 As soon as reasonably practicable following any New Works Notice and in any case within the time period confirmed pursuant to clause 49.7 or determined pursuant to clause 49.8, the Service Provider shall, in respect of all Proposed Project Network Parts or New Works provide the Authority with the following information:

49.11.1 whether the New Works or a Proposed Project Network Part meets the relevant requirements of schedule 2 (*Output Specification*) or if the Service Provider (acting reasonably) considers that the New Works or a Proposed Project Network Part does not meet the relevant requirements of schedule 2 (*Output Specification*), details of the work required to enable the New Works or Proposed Project Network Part to meet the requirements of schedule 2 (*Output Specification*);

49.11.2 the net effect of any maintenance costs resulting from any De-Accrual of a Project Network Part which forms part of any Third Party Works (particularly in relation to Third Party Works which modify an existing Project Network Part in which case the existing Project Network Part shall be deemed to be De-Accrued at the Accrual Date and then Accrued immediately thereafter in its modified form);

49.11.3 the net effect of any maintenance costs resulting from any AHW Works which modify, replace or improve existing Project Network Parts, taking into account:

49.11.3.1 any analogous Y Values listed in part 2 of schedule 18 (Accruals and De-Accruals) or as otherwise agreed pursuant to schedule 18 (Accruals and De-Accruals) in respect of the relevant Project Network Part or Project Network Parts in existence immediately prior to the AHW Works;

- 49.11.3.2 any analogous Y Values in part 2 of schedule 18 (Accruals and De-Accruals) or as otherwise agreed pursuant to schedule 18 (Accruals and De-Accruals) in respect of the relevant Project Network Part or Project Network Parts in existence immediately following the AHW Works; and
- 49.11.3.3 any financial savings made by the Service Provider and/or Service Provider Parties arising from works carried out by or on behalf of the Authority which are required in order for the Service Provider to comply with schedule 2 (Output Specification) pursuant to this Contract;
- 49.11.4 whether:
  - 49.11.4.1 the Proposed Project Network Part meets the Service Provider Assumptions or the APW Assumptions (as the case may be); or
  - 49.11.4.2 there is no relevant Y Value for the Proposed Project Network Part(s) listed in part 2 of schedule 18 (*Accruals and De-Accruals*) because the Proposed Project Network Part does not meet the Service Provider Assumptions or the APW Assumptions (as the case may be) and the Service Provider shall provide sufficient information to enable the Authority to analyse and understand how the Service Provider has arrived at this conclusion (and the Service Provider shall have acted reasonably in doing so);
- 49.11.5 to the extent clause 49.11.4.2 applies, the proposed maintenance costs (having been calculated by the Service Provider acting reasonably and taking account of analogous Y values) relating to the Proposed Project Network Part and the extent, if at all, to which:
  - 49.11.5.1 the maintenance costs exceed any Y Value for similar Project Network Parts as set out in part 2 of schedule 18 (Accruals and De-Accruals); or

49.11.5.2 in the case of Part 2 Authority Predicted Works, the maintenance costs exceed the maintenance costs of such Part 2 Authority Predicted Works had such Part 2 Authority Predicted Works met the APW Assumptions,

together with sufficient information as to how the Service Provider has calculated the maintenance costs, (why the Y Values or maintenance costs are exceeded), and whether these maintenance costs may, in the reasonable opinion of the Service Provider, be reduced or mitigated (to enable the Authority to analyse and understand how the Service Provider has arrived at this conclusion (and the Service Provider shall act reasonably in doing so)); and

49.11.6 in respect of a bridge, retaining wall or subway, an estimate of the impact on the Annual Unitary Charge as a result of the need to maintain the additional bridge, retaining wall or subway following the relevant Change,

(a "**Maintainability Assessment**").

49.12 If clause 49.11.3 and clause 49.11.5 apply, the Authority shall within twenty (20) Business Days of the date of receipt of the Maintainability Assessment, notify the Service Provider, in writing that it:

49.12.1 agrees with the Service Provider's analysis that the Proposed Project Network Part does not meet the Service Provider Assumptions or, in the case of Part 2 Authority Predicted Works, the APW Assumptions, and that the Service Provider may take into account the alternative maintenance cost proposed pursuant to clause 49.11.5 as the applicable Y Value or, in the case of Part 2 Authority Predicted Works increase in maintenance cost (as the case may be); or

49.12.2 disagrees with the Service Provider's analysis:

49.12.2.1 that the Proposed Project Network Parts does not meet the Service Provider Assumptions, or in the

case of Part 2 Authority Predicted Works, the APW Assumptions, and that the Service Provider may not take into account the alternative maintenance cost, or in the case of Part 2 Authority Predicted Works the increase in maintenance cost, proposed pursuant to clause 49.11.5 as the applicable Y Value; and

49.12.2.2 of the costs specified pursuant to clause 49.11.5, in which case the Authority shall provide (acting reasonably) a revised maintenance cost, or nominate an applicable Y Value (where applicable) or in the case of Part 2 Authority Predicted Works a increase in maintenance cost,

and the Authority shall provide an explanation of its reasons for disagreeing with the Service Provider's analysis.

49.13 If the Service Provider disagrees with the Authority's decision pursuant to clause 49.12.2, the Service Provider may refer the matter to the Dispute Resolution Procedure.

49.14 The Authority shall notify the Service Provider as soon as reasonably practicable if it has:

49.14.1 permitted a change to the preliminary or detailed design of a Proposed Project Network Part (together with the relevant documentation); and/or

49.14.2 amended, or waived any condition to which the New Works are subject or made the New Works subject to any conditions,

in each case in respect of a Proposed Project Network Part which the Service Provider has already provided, or is in the process of providing, a Maintainability Assessment pursuant to clause 49.11 so that the Service Provider may:

49.14.3 reassess such Maintainability Assessment to take account of the changes to the Project Network Parts and/or New Works;

49.14.4 make such further inspection of the Proposed Network Part or New Works,



as it considers is required (acting reasonably) to determine if such change to the proposed Project Network Part as notified to the Service Provider pursuant to clause 49.14.1 or the amendment or waiver of any condition to which New Works are subject or the introduction of new condition, notified to the Service Provider pursuant to clause 49.14.2, has an impact on the Maintainability Assessment it has already provided in respect of the proposed Project Network Part or New Works and the Service Provider shall take into account the impact of any such change notified by the Authority pursuant to clause 49.14.1 or clauses 49.14.2 and shall provide the Authority with an updated Maintainability Assessment as soon as reasonably practicable and the provisions of clauses 49.11 to 49.13 shall apply mutatis mutandis.

49.15 The Service Provider shall notify the Authority, in writing, as soon as reasonably practicable if the Service Provider or any Service Provider Party discovers upon any inspection made pursuant to clause 49.9.2 that:

49.15.1 any Proposed Project Network Part no longer complies with the design on which the Service Provider provided the Maintainability Assessment pursuant to clause 49.11 or 49.14; and

49.15.2 in respect of any Proposed Project Network Part which may be accrued pursuant to clause 50 (*Accrual and De-Accrual of Project Network Parts*) and schedule 18 (*Accruals and De-Accruals*), the extent, to which (if at all) this affects the Service Provider Assumptions or APW Assumptions (as the case may be) or the alternative Y Value/maintenance cost commentary (as applicable) and with an explanation of why this is the case,

together with sufficient supporting documentation to enable the Authority to analyse and understand how the Service Provider arrived at this conclusion (and the Service Provider shall act reasonably in doing so), and the provisions of clauses 49.11 to 49.13 shall apply mutatis mutandis.

49.16 If the Service Provider receives a New Works Notice (or is deemed to have received a New Works Notice in accordance with clause 11.7 (*Part 2 Authority Predicted Works*) or clause 48.1.2 (*Authority Highway Works*)) and fails to provide a Maintainability Assessment in accordance with the provisions of clause 49.11 above in respect

of such New Works Notice before the completion of the New Works, the Service Provider shall only be entitled to use the Y Value nominated, or revised maintenance cost or, in the case of Part 2 Authority Predicted Works, increase in maintenance costs proposed, by the Authority (acting reasonably) for such Proposed Project Network Part and not claim any additional payment in respect of maintenance costs which exceed the relevant Y Values nominated or proposed by the Authority or in the case of Part 2 Authority Predicted Works, the revised increased maintenance costs proposed by the Authority.

49.17 Without prejudice to schedule 18 (Accruals and De-Accruals), the Authority shall not be under any obligation to take any action which the Service Provider has identified in any Maintainability Assessment as being necessary in order to ensure that the Proposed Project Network Parts or New Works meet the requirements of schedule 2 (*Output Specification*). The Authority shall always be responsible (at its sole discretion) for determining whether any Proposed Project Network Part meets the relevant adoptable standard and for adopting the relevant Project Network Part in accordance with Section 38 of the Highways Act.

#### Interface with Third Party Developers and AHW Contractors

49.18 The Service Provider shall or shall procure that a Service Provider Party shall liaise directly with any Third Party Developer or the AHW Contractor (as the case may be), as soon as reasonably practicable following the receipt of a New Works Notice, to:

- 49.18.1 obtain any further documentation or information required to assess the Proposed Project Network Part;
- 49.18.2 obtain copies of the substantial completion certificates (where relevant) when the New Works or AHW Works (as the case may be) are completed;
- 49.18.3 where the New Works include Powered Apparatus copies of the electrical test certifications for such Powered Apparatus; and/or

49.18.4 procure notification, and arrange attendance of:

49.18.4.1 any inspections or pre-start site meetings; and

49.18.4.2 any completion/handover inspections,

that the Service Provider or any Service Provider Party may wish to review or attend, in respect of any Proposed Project Network Parts forming part or all of the New Works, for the purposes of this clause 49 (*Maintainability Assessment*).

49.19 The Service Provider shall or shall ensure that any Service Provider Party shall notify the Authority of any information it receives from the Third Party Developer or AHW Contractor (as the case may be) pursuant to clause 49.18, together with copies of any documentation received from the Third Party Developer or AHW Contractor, within five (5) Business Days of receipt of such information or documentation.

49.20 The Service Provider shall notify the Authority of any further specific documentation it believes (acting reasonably) it requires in order to provide a full and detailed Maintainability Assessment pursuant to clause 49.11 and 49.14 on any Proposed Project Network Part, which it cannot obtain, having used reasonable endeavours, from the relevant Third Party Developer or AHW Contractor.

49.21 The Authority shall use reasonable endeavours to procure and provide to the Service Provider as soon as reasonably practicable any further documentation from the relevant Third Party Developer or AHW Contractor which the Service Provider has requested pursuant to clause 49.20.

49.22 The Service Provider shall and shall procure that any Service Provider Party shall keep confidential any information that it receives in the performance of any of its obligations under this clause 49 (*Maintainability Assessment*).

### **Completion of New Works**

49.23 The Service Provider shall inspect any New Works within ten (10) Business Days of the date of completion of the New Works in order to confirm that:

49.23.1 nothing has occurred during the construction of the New Works which invalidates part or all the Maintainability Assessment provided in respect of any Proposed Project Network Parts; and

49.23.2 the New Works:

49.23.2.1 meet the standard required; and

49.23.2.2 satisfy any conditions set out,

in any relevant Section 38 Agreement, Section 278 Agreement or any other relevant agreement entered into by the Authority in respect of the New Works ("**Relevant Agreement**").

49.24 Subject to clause 49.16, the Service Provider shall notify the Authority, in writing, within five (5) Business Days of an inspection carried out pursuant to clause 49.23 of the following:

49.24.1 whether any Proposed Project Network Parts meets the standard required, and/or satisfies any conditions set in the Relevant Agreement; and

49.24.2 a snagging list in respect of the New Works which require rectification; and

49.24.3 that the Maintainability Assessment completed in respect of the New Works remains valid; or

49.24.4 that the Maintainability Assessment completed in respect of the New Works does not remain valid with an explanation of why together with sufficient supporting documentation to enable the Authority to analyse and understand the Service Provider's assertions; and

49.24.5 in particular where clause 49.24.4 applies:

49.24.5.1 if the Proposed Project Network Part no longer complies with the relevant requirements of schedule 2 (*Output*

*Specification*), the Service Provider shall provide details of such failure or confirmation that the Proposed Project Network Part now complies with schedule 2 (*Output Specification*); and/or

49.24.5.2 the Service Provider shall provide revised maintenance costs relating to the Proposed Project Network Part calculated by the Service Provider acting reasonably and the extent, if any, to which:

- (a) the maintenance costs exceed any relevant Y Value as set out in the table in part 2 of schedule 18 (Accruals and De-Accruals); or
- (b) in the case of Part 2 Authority Predicted Works, the maintenance costs exceed the maintenance costs of such Part 2 Authority Predicted Works had such Part 2 Authority Predicted Works met the APW Assumptions,

with an explanation of why the maintenance costs exceed the relevant Y Value or maintenance costs (as the case may be) together with sufficient supporting documentation to enable the Authority to analyse and understand how the Service Provider arrived at this conclusion (the Service Provider having acted reasonably in doing so).

("Final New Works Response").

49.25 Subject to clause 49.16, the Authority shall within twenty (20) Business Days of the date of receipt of the Final New Works Response, notify the Service Provider, in writing that it considers that the Maintainability Assessment:

49.25.1 remains valid and that the Service Provider may take into account the applicable Y Value set out in part 2 of schedule 18 (Accruals and De-Accruals) or the alternative maintenance cost proposed as the applicable Y Value; or

49.25.2 does not remain valid and:

49.25.2.1 the Service Provider may take into account the applicable Y Value set out in part 2 of schedule 18 (Accruals and De-Accruals) or the alternative maintenance cost, or in the case of Part 2 Authority Predicted Works increase in maintenance costs, proposed pursuant to clause 49.24.5.2 as the applicable Y Value;

49.25.2.2 the Service Provider may not take into account the applicable Y Value set out in part 2 of schedule 18 (Accruals and De-Accruals) or the alternative maintenance cost, or in the case of Part 2 Authority Predicted Works increase in maintenance costs, proposed pursuant to clause 49.24.5.2 as the applicable Y Value together with details of the Authority's reasons as to why.

49.26 If the Service Provider disagrees with the Authority's decision pursuant to clause 49.25 the Service Provider may refer the matter to the Dispute Resolution Procedure.

#### Supervision Period

49.27 Where a Supervision Period applies to the New Works, the Service Provider shall inspect the New Works during the Supervision Period as often and to the extent the Service Provider considers necessary in order to ensure that the Service Provider can report to the Authority on whether the New Works comply with such standards and conditions with which the New Works are bound to comply in accordance with the Relevant Agreement during the Maintenance Period.

49.28 The Service Provider shall notify the Authority, in writing, of the results of any inspection it is required to carry out pursuant to clause 49.27 with particular reference to any standards and conditions with which the New Works are required to comply in accordance with the Relevant Agreement within five (5) Business Days of the date of such inspection.

49.29 Upon completion of the Supervision Period, the Service Provider shall carry out an inspection of the New Works and provide the Authority with an updated Final New Works Response ("**Updated Final New Works Response**") and clauses 49.25 to 49.26 shall apply mutatis mutandis.

49.30 Where the Service Provider notifies the Authority pursuant to clause 49.24 or clause 49.29 that the New Works:

49.30.1 do not meet the standard required, or satisfy any or all of the conditions set in the Relevant Agreements; and/or

49.30.2 are subject to any snagging issues,

the Service Provider shall re-inspect the New Works as required by the Authority (acting reasonably) until the New Works meet the standard required, or satisfy the conditions set out in the Relevant Agreement and/or all snagging issues have been rectified (as applicable) or until the Authority notifies the Service Provider that no further action is required (and the Authority shall be entitled in its sole discretion to notify the Service Provider pursuant to clause 50.2 that it requires the Proposed Project Network Part(s) to be Accrued).

49.31 The Service Provider shall notify the Authority, in writing, as soon as reasonably practicable after it conducts an inspection and is satisfied that the New Works meet the standards required, or satisfy the conditions set out in the Relevant Agreement and/or all snagging items have been rectified.

49.32 Subject to clause 49.16, either Party may refer a dispute to the Dispute Resolution Procedure in respect of clause 49 (*Maintainability Assessment*) save that the Parties agree and acknowledge that the Service Provider may only dispute the validity of a Maintainability Assessment if:

49.32.1 the Third Party Developer or Authority has changed the technical specification commented on by the Service Provider and such change has not been notified to the Service Provider by the Authority or the Service

Provider did not become aware of the change in the technical specifications during the conduct of the Maintainability Assessment;

49.32.2 the Proposed Project Network Part(s) have not been built in accordance with the specification commented on by the Service Provider pursuant to this clause 49.

49.33 The Service Provider shall notify the Authority as soon as reasonably practicable after it becomes aware of (or should have become aware of having complied with the provisions of this Contract) any New Works which are being carried out on the Project Network for which it has not received a New Works Notice or for which it has not been deemed to have received a New Works Notice pursuant to clause 48.1.2 (*Highways Works Authority*) or clause 11.7 (*Part 2 Authority Predicted Works*).

49.34 If clause 49.33 applies:

49.34.1 the Service Provider shall comply with all relevant provisions of this clause 49 (*Maintainability Assessment*) as if a New Works Notice had been issued; and

49.34.2 the Authority shall use reasonable endeavours to ensure the information set out in clauses 49.4.4 to 49.4.6 is made available to the Service Provider as soon as reasonably practicable after it has been made available to the Authority.

## **50. ACCRUAL AND DE-ACCRUAL OF PROJECT NETWORK PARTS**

50.1 The provisions of this clause 50 and schedule 18 (*Accruals and De-Accruals*) shall apply in relation to the Accrual of Proposed Project Network Parts and De-Accrual of Project Network Parts (except in the case of a structure for which there is no applicable or analogous Y value in part 2.1 of schedule 18 (*Accrual and De-Accrual of Project Network Parts*) and such structure in which case shall constitute a High Value Change and be dealt with in accordance with the provisions of schedule 17 (*Change Protocol*)). The Parties acknowledge and agree that the Authority is not obliged to invoke



the provisions of schedule 18 (*Accruals and De-Accruals*) and may, (at its sole discretion) Accrue Proposed Project Network Parts or De-Accrue Project Network Parts pursuant to schedule 17 (*Change Protocol*).

50.2 Subject to paragraph 5 (*Limitation on the levels of Accruals and De-Accruals*) of schedule 18 (*Accruals and De-Accruals*) and notwithstanding any dispute in respect of the New Works or pursuant to this Contract, the Authority shall notify the Service Provider in writing (an "**Authority Notice of Accrual**") of:

50.2.1 the date on which the Authority requires any Proposed Project Network Part to be Accrued to the Project Network (the "**Accrual Date**");

50.2.2 the relevant Maintenance Assessment Reference Number, if applicable; and

50.2.3 where a New Works Notice has not been issued by the Authority in respect of the Project Network Part, the location (by OS Grid Reference Range) and a description of the Project Network Part,

and the provisions of schedule 18 (*Accruals and De-Accruals*) shall apply.

50.3 From the Accrual Date:

50.3.1 the Proposed Project Network Part shall become Accrued and the Service Provider shall provide the Services to such Accrued Project Network Part(s);

50.3.2 the risk (in terms of condition) of such Accrued Project Network Part(s) shall transfer to the Service Provider save as expressly set out in schedule 18 (*Accruals and De-Accruals*) and clause 13 (*Latent Defects*);

50.3.3 the definitions of Project Network and/or Project Network Part (or any relevant element thereof) shall be amended from time to time to the extent necessary as a consequence of the operation of schedule 18 (*Accruals and De-Accruals*);

- 50.3.4 the Service Provider shall update the Management Information System in respect of the Accrued Project Network Part(s) in accordance with those timescales set out in Performance Standard 10 of schedule 2 (*Output Specification*);
- 50.3.5 the Service Provider shall, if relevant, revise the energy forecast in accordance with paragraph 4.1.2 of schedule 4 (*Payment Mechanism*); and
- 50.3.6 the Authority shall revise the Monthly Unitary Charge in accordance with paragraph 4 of schedule 18 (*Accruals and De-Accruals*).

## **51. AMENDMENTS TO THE METHOD STATEMENTS**

51.1 The provisions of schedule 20 (*Review Procedure*) shall apply to the amendment of all or any of the Method Statements.

51.2 Where an amendment is made to a Method Statement (whether by addition, modification, deletion or otherwise) which:

51.2.1 causes or will cause the Service Provider's net costs or those of a Key Sub-Contractor to decrease; and/or

51.2.2 will result in a reduction in net maintenance costs that has not been otherwise accounted for pursuant to any other provision of this Contract (including pursuant to Schedule 17 (*Change Protocol*)) or else identified as a line item or assumption in the Financial Model or an appendix to the Financial Model,

there shall be a decrease in the Annual Unitary Charge such that any net cost savings in excess of two thousand pounds (£2000) (Indexed) shall be shared between the Service Provider and the Authority on a twenty five per cent (25%) / seventy five per cent (75%) basis respectively.

51.3 Where an amendment is made to a Method Statement (whether by addition, modification, deletion or otherwise) which causes or will cause the Service Provider's net costs or those of a Key Sub-Contractor to increase then if such amendment:

51.3.1 has been generated by the Service Provider, there shall be no adjustment to the Annual Unitary Charge; or

51.3.2 has been generated by the Authority then the provisions of clause 52 (*Changes to the Services*) shall apply.

51.4 Without prejudice to clauses 51.1 to 51.3, the Service Provider shall in any event be obliged from time to time to propose such amendments to the Method Statements as are necessary to ensure that all of schedule 2 (*Output Specification*) is satisfied and as are necessary to promote efficiency, economy and effectiveness in the performance of the Services through technological improvements.

## **52. CHANGES TO THE SERVICES**

Either party may request a Change in accordance with the provisions of schedule 17 (*Change Protocol*).

## **53. CHANGE IN LAW**

### **53.1 Qualifying Change in Law**

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

53.1.1 any necessary change to the Services;

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

53.1.3 whether relief from compliance with its obligations is required, including the obligation of the Service Provider to achieve the Service Commencement Date and/or any applicable Milestone and/or meet schedule 2 (*Output Specification*) during the implementation of any relevant Qualifying Change in Law;

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

53.1.5 any Estimated Change in Project Costs that directly results from the Qualifying Change in Law; and

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

in each case giving in full detail the procedure for implementing the change in Services. Responsibility for the costs of implementation (and any resulting variation to the Annual Unitary Charge) shall be dealt with in accordance with clauses 53.2 (*Parties to discuss*) to 53.6 (*Adjustment to Unitary Charge*).

### 53.2 Parties to discuss

As soon as practicable after receipt of any notice from either Party under clause 53.1 (*Qualifying Change in Law*), the Parties shall discuss and agree the issues referred to in clause 53.1 (*Qualifying Change in Law*), and any ways in which the Service Provider can mitigate the effect of the Qualifying Change in Law, including:

- 53.2.1 providing evidence that the Service Provider has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Key Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
- 53.2.2 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Service Provider;
- 53.2.3 giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the Shareholders or their Affiliates carry on business; and
- 53.2.4 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under clauses 53.1.1, 53.1.5 and/or 53.1.6.

### 53.3 Funding for Capital Expenditure

If the Parties agree or it is determined under the Dispute Resolution Procedure that the Service Provider is required to incur additional Capital Expenditure due to a

Qualifying Change in Law (excluding the Service Provider's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change in Law under this clause 53 (*Change in Law*)) then the Service Provider shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to the Service Provider and the Senior Lenders.

#### 53.4 Party's Share

The Service Provider's Share shall be solely for the account of the Service Provider.

#### 53.5 Failure to obtain Funding for Capital Expenditure

If the Service Provider has used reasonable endeavours to obtain funding for the Capital Expenditure referred to in clause 53.3 (*Funding for Capital Expenditure*), but has been unable to do so within forty (40) Business Days of the date that the agreement or determination in clause 53.3 (*Funding for Capital Expenditure*) occurred, then the Authority shall pay to the Service Provider an amount equal to that Capital Expenditure on or before the date falling twenty (20) Business Days after the Capital Expenditure has been incurred.

#### 53.6 Adjustment to Unitary Charge

Any compensation payable under this clause 53 (*Change in Law*) by means of an adjustment to the Annual Unitary Charge shall be calculated in accordance with clause 65 (*Financial Adjustments*).

### 54. CHANGE IN HIGHWAYS STANDARDS

54.1 Subject to clause 54.2, where a Change in Highways Standards constitutes a Change in Law, the provisions of clause 53 (*Change in Law*) shall apply.

54.2 The Service Provider shall be solely responsible for any increased costs incurred as a result of changes in burning hours which result from a change from EAC to PECU as the measurement of usage.

54.3 Subject to clause 54.4, where a Change in Highways Standard does not constitute a Change in Law, the Service Provider shall comply with such Changes in Highways Standards.

- 54.4 Where a Change in Highways Standards does not constitute a Change in Law and such Change in Highways Standards has, or will require the Service Provider to install additional Project Network Parts on the Project Network and the cost to the Service Provider of installing such Project Network Parts including capital, maintenance and lifecycle costs will exceed twenty five thousand pounds (£25,000) (Indexed) (a "**Capital Change in Highways Standards**"), the Service Provider shall provide a notice to the Authority as soon as reasonably practicable setting out:
- 54.4.1 what the proposed Capital Change in Highways Standards comprises;
  - 54.4.2 how the proposed Capital Change in Highways Standards shall affect the Project Network;
  - 54.4.3 a plan of how the Service Provider would implement the proposed Capital Change in Highways Standards;
  - 54.4.4 the Service Provider's estimate (acting reasonably) of the net cost of implementing the Capital Change in Highways Standards (taking into account any savings made by the Service Provider from such implementation); and
  - 54.4.5 the Service Provider's opinion on all the issues set out in paragraph 2.1 of part 3 (*Medium Value Change*) of schedule 17 (*Change Protocol*).
- 54.5 The Authority shall notify the Service Provider within twenty (20) Business Days of receipt of the notice issued pursuant to clause 54.4 (or such timescale as the Authority believes (acting reasonably) is necessary to consider the Service Provider's plan and estimate provided pursuant to clause 54.4 taking into account the nature and scale of the Capital Change in Highways Standards) whether it agrees or disagrees with the details set out in such notice.
- 54.6 If the Service Provider disagrees with the contents of the Authority's notice issued pursuant to clause 54.5, it may refer the matter to the Dispute Resolution Procedure.

54.7 Subject to clause 54.8, the Service Provider shall not be responsible for the cost of any Change in Highways Standards where the cost of implementing Changes in Highways Standards (including capital, maintenance and lifecycle costs) has exceeded one hundred thousand pounds (£100,000) (Indexed) in any one (1) Contract Year and any further Change in Highways Standards shall be dealt with as an Authority Change.

54.8 The Service Provider shall not be responsible for the cost of any Change in Highways Standards where the cost of implementing Changes in Highways Standards (including capital, maintenance and lifecycle costs) has exceeded five hundred thousand pounds (£500,000) (Indexed) in aggregate over the Term and any further Change in Highways Standards shall be dealt with as an Authority Change.

[REDACTED]

#### 54.10 Relevant Lighting Standards

Any change in Relevant Lighting Standards shall not be a Qualifying Change in Law or a Change in Highways Standards. To the extent that a change in Relevant Lighting Standards has a retrospective effect it shall be a Qualifying Change in Law.

#### 54.11 Change in BSCP 520

In the event of any change in the Balancing and Settlement Code Procedure 520 or the rates shown in such code, the Service Provider shall prepare and submit to the Authority a plan setting out its proposals to mitigate any related costs to the Authority under this Contract. If the Authority requires the Service Provider to make any changes in the provision of the Services and/or there is an effect on the Adjusted Forecast Electricity Consumption, such changes and/or effects shall be deemed to be an Authority Change and the provisions of schedule 17 (*Change Protocol*) shall apply.

### 55. CHANGE IN AUTHORITY POLICIES

Any change to the Authority Policies which the Authority confirms needs to be implemented and for which the Authority Representative confirms a Change to the Services is required shall be treated as an Authority Change pursuant to schedule 17 (*Change Protocol*) except where a change to the Authority Policies arises as a result of:

55.1 a Change in Law (in which case the provisions of clause 53 (*Change in Law*) shall apply); or

55.2 a change to Good Industry Practice (in which case any required change to the Services shall be implemented by the Service Provider without any adjustment to the Annual Unitary Charge).

## PART L - FINANCIAL

### 56. PAYMENT AND FINANCIAL MATTERS

#### 56.1 Calculating the Monthly Payment

The Authority shall, from the Service Commencement Date, as consideration for the performance of the Services, pay the Service Provider in accordance with the provisions of this clause 56 (*Payment and Financial Matters*).



## 56.2 Payment

For each Month (subject to the provisions of clauses 56.13 (*Payment for the first three Months of the Term*) and 56.14 (*Final Payment*)), the Authority shall pay the Service Provider or the Service Provider shall pay the Authority the Monthly Payment, such payment to be made in accordance with clauses 56.3 (*No Additional Payment*) to 56.14 (*Final Payment*) (inclusive).

## 56.3 No Additional Payment

Save as expressly set out in this Contract the Service Provider shall have no entitlement to receive any payment from the Authority, and shall not make any claim against the Authority, in respect of reimbursement of any costs or expenses suffered or to be suffered or incurred by the Service Provider.

## 56.4 Draft Monthly Payment Report

Commencing in the third Month of the Service Period and no later than five (5) Business Days after the first day of each Month, the Service Provider shall deliver to the Authority a Draft Monthly Payment Report containing the information required for the purposes of the calculation of the Monthly Payment (as set out in paragraph 3.1 of schedule 4 (*Payment Mechanism*)).

## 56.5 Monthly Payment Meeting

The Parties shall meet no earlier than five (5) Business Days and no later than ten (10) Business Days after the date of receipt by the Authority of each Draft Monthly Payment Report (or as the Parties otherwise agree) to review and seek to agree the contents of such Draft Monthly Payment Report and to discuss (as appropriate) any disputes relating to the calculation or payment of the Monthly Payment ("**Monthly Payment Meeting**").

## 56.6 Actual Monthly Payment Report

Following the Monthly Payment Meeting but no earlier than the first Business Day of the Month in respect of which the Monthly Unitary Charge is due, the Service Provider shall send the Actual Monthly Payment Report in the form and containing the content agreed by the Parties and either:

56.6.1 the Service Provider shall send an invoice to the Authority; or

56.6.2 the Authority shall send an invoice to the Service Provider,

as shall be applicable, in each case such invoice shall be for the amount due in respect of the Month to which the Actual Monthly Payment Report relates indicating any amounts which are not agreed by the Parties and which may be referred for determination pursuant to the Dispute Resolution Procedure.

#### 56.7 Invoice

Any sum set out in the invoice issued by either Party pursuant to clause 56.6 (*Actual Monthly Payment Report*) shall (subject to clause 56.8 (*Disputed Amounts*)) become due and payable by the receiving Party twenty (20) Business Days from the date of receipt of the invoice.

#### 56.8 Disputed Amounts

If either Party, in good faith, disputes any amount which is the subject of an invoice provided pursuant to clause 56.6 (*Actual Monthly Payment Report*), that Party shall, as far as practicable, prior to the earlier of (a) the date of the next Monthly Payment Meeting and (b) the date being five (5) Business Days prior to the date such invoice becomes due and payable in accordance with the provisions of clause 56.7 (*Invoice*), notify the other Party:

56.8.1 of any amounts which are not in dispute which shall become due and payable in accordance with the provisions of clause 56.7 (*Invoice*); and

56.8.2 of the amount which is in dispute ("**Disputed Sum**") providing such reasonable details of the nature of such Disputed Sum, and the Disputed Sum shall be payable in accordance with the provisions of clause 56.10 (*Adjustment of Monthly Payment*).

#### 56.9 Dispute Resolution

Without prejudice to either Party's rights under the Dispute Resolution Procedure the Parties shall use all reasonable endeavours to reach agreement in respect of any Disputed Sum. Unless agreed otherwise by both Parties, if agreement has not been reached on or before the following Monthly Payment Meeting, the dispute shall be

resolved under the Dispute Resolution Procedure and the relevant Party shall pay the Monthly Payment save for the Disputed Sum in accordance with clause 56.7 (*Invoice*).

#### 56.10 Adjustment of Monthly Payment

Any amount which is agreed or determined in accordance with the Dispute Resolution Procedure to be payable in respect of any Disputed Sum shall be paid as a Sundry Adjustment in accordance with the Dispute Resolution Procedure within the next Monthly Payment (and be paid in accordance with clauses 56.4 (*Draft Monthly Payment Report*) following such agreement or determination (or earlier as the paying Party may in its discretion decide).

#### 56.11 Amounts overpaid, underpaid or wrongfully paid or wrongfully deducted by a Party

In respect of any amounts overpaid, underpaid or wrongfully paid or wrongfully deducted by a Party:

- 56.11.1 either Party may at any time recover from the other Party or deduct from or add to a future Monthly Payment any amount agreed or determined by the Parties to have been overpaid, underpaid, wrongfully paid or wrongfully deducted for any reason including mistake of law or of fact;
- 56.11.2 each Party shall notify, in writing, the other Party of any payment which it considers to have been overpaid, underpaid, wrongfully paid, or wrongfully deducted, providing reasonable details of all relevant amounts and an explanation of why that Party considers that such amounts have been overpaid, underpaid, wrongfully paid or deducted. If the other Party does not dispute all or any of such amount within twenty (20) Business Days of being notified in accordance with this clause 56.11.2, such amount shall be included in the calculation of the next Monthly Payment, (and be paid in accordance with clauses 56.4 (*Draft Monthly Payment Report*) to 56.7 (*Invoice*) (inclusive)) or paid earlier at the paying Party's discretion;
- 56.11.3 where all or any amounts referred to in clauses 56.11.1 and 56.11.2 are disputed and the Parties (acting in good faith) are unable to agree, such Dispute shall be resolved pursuant to the Dispute Resolution Procedure and following

determination, the relevant sum shall be included in the calculation of the following Monthly Payment (and be paid in accordance with clauses 56.4 (*Draft Monthly Payment Report*) to 56.7 (*Invoice*) (inclusive)) or paid earlier at the paying Party's discretion;

56.11.4 interest shall be payable (by the paying Party) at the Prescribed Rate on any amount agreed or resolved to be payable pursuant to this clause 56.11 (*Amounts overpaid, underpaid or wrongfully paid or wrongfully deducted by a Party*) from the date on which the paying Party first had the benefit of such amount up to and including the due date for payment of such amount or the date paid, if earlier than the due date. If the paying Party does not pay any amount agreed or resolved to be payable pursuant to this clause 56.11 (*Amounts overpaid, underpaid or wrongfully paid or wrongfully deducted by a Party*) by the relevant date referred to in clause 56.11.2, interest shall be payable in accordance with clause 56.15 (*Interest on Late Payments*).

#### 56.12 Set off

The Service Provider shall not be entitled to retain or set off any amount due to the Authority by it, but the Authority may retain or set off any amount owed to it by the Service Provider under this Contract which has fallen due and payable against any amount due to the Service Provider under this Contract provided that:

56.12.1 if the payment or deduction of any amount referred to above is disputed then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with the Dispute Resolution Procedure;

56.12.2 except where expressly stated otherwise, the Authority is not entitled to set off any amount against any payment of termination compensation under clause 56.14.4, 80.1 (*Compensation Following an Authority Default or a Voluntary Termination*), 80.3 (*Compensation following a Prohibited Act*), 80.4 (*Compensation following a Force Majeure Event or Uninsurability*) or 80.5 (*Compensation on Termination for breach of the Refinancing Provisions*) save to the extent that after such an amount has been set off, the Authority Default Termination Sum or the Termination Sum would be in an amount greater than or equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount, as the case may be, at that time.

### 56.13 Payment for the first three Months of the Term

The Service Provider shall be entitled to submit an invoice to the Authority on the first Business Day of each of the first three (3) Months following Service Commencement for an amount equal to the Monthly Unitary Charge and Energy Payment for the relevant Month, calculated in accordance with paragraph 3.1 of schedule 4 (*Payment Mechanism*) without any requirement to follow the process set out in clauses 56.4 (*Draft Monthly Payment Report*) to 56.6 (*Actual Monthly Payment Report*) (inclusive).

### 56.14 Final Payment

56.14.1 The Draft Monthly Payment Report which includes the adjustments to the Monthly Unitary Charge in respect of the two (2) Months immediately prior to the final Month of the Term and the final Month of the Term (as calculated in accordance with paragraph 3.1 of schedule 4 (*Payment Mechanism*)) and the Operational Carbon adjustment and Operational Water adjustment for the last year of the Contract, shall be produced by the Service Provider and made available to the Authority as soon as possible (but no later than two (2) Months) after the end of the Term.

56.14.2 The Parties shall meet within ten (10) Business Days to discuss this Draft Monthly Payment Report and an Actual Monthly Payment Report shall be sent by the Service Provider to the Authority within ten (10) Business Days of such meeting.

56.14.3 An invoice shall be sent to the relevant Party and the invoice shall be due and payable in accordance with clause 56.7 (*Invoice*).

56.14.4 Any amount which is agreed or determined to be payable in respect of any Disputed Sum related to the Actual Monthly Payment Report referred to in clause 56.14.2 and/or the invoice referred to in clause 56.14.3 shall become due and payable twenty (20) Business Days from the date of agreement or determination.

### 56.15 Interest on Late Payments

The Parties shall pay interest on any amount payable under this Contract not paid on the due date, from the period from that date until the date of repayment at a rate equal to the Prescribed Rate.

**57. ELECTRICITY PROCUREMENT**

57.1 The Service Provider shall from, and including, the Supply End Date until the end of the Term, procure and pay for a continuous supply of electricity to the Powered Apparatus.

57.2 The Service Provider shall provide a report ("**the Electricity Consumption Report**") at the end of each Contract Year in accordance with Performance Standard 1.4.10 of Performance Standard 1 of schedule 2 (*Output Specification*).

**58. REVENUE SHARING**

[REDACTED]

58.3 No Double Counting

There shall be no double counting in calculating the amount due to the Authority pursuant to clause 58.1 (*Revenue Sharing*), in particular the calculation of Revenue Sharing Equity IRR shall specifically exclude:

58.3.1 any amounts received by the Service Provider in respect of third party income and shared with the Authority pursuant to clause 59 (*Additional Income*);

58.3.2 the Service Provider's share of any savings generated by a Connections Review under schedule 16 (*Original Non-Contestable Works Prices*); and

58.3.3 the Service Provider's share of any savings generated following a Service Provider Change pursuant to schedule 17 (*Change Protocol*),

and the Authority agrees and acknowledges that, subject to it receiving its share of any Refinancing Gain in accordance with clause 105 (*Refinancing*), it shall have no entitlement under clause 59 (*Additional Income*) in respect of a Refinancing.

## 59. ADDITIONAL INCOME

59.1 The Authority and the Service Provider shall co-operate with each other in order to earn, so far as reasonably practicable, income which may be derived from allowing Third Parties to use the Project Network Parts or any part thereof (excluding the costs of the Service Provider and Service Provider Parties in generating such income and any income earned by the Authority in relation to Third Party Attachments) ("**Additional Income**"). Such use shall be agreed between the Authority and the Service Provider before being implemented by the Service Provider and shall be compatible with the Authority's policies relating to the generation of Additional Income, the carrying out of the Services and the use of the Project Network Parts. The Authority may, in its absolute discretion, refuse consent to the use of any of the Project Network Parts by any person or on any occasion notwithstanding that Additional Income could be earned from such use.

59.2 Payment

In the Month following any Month in which a payment of Additional Income has been received by the Service Provider, Additional Income for that Month shall be shared on the following basis:

59.2.1 where the Additional Income achieved for that Month is [REDACTED], fifty per cent (50%) of the Additional Income for that Month shall be paid to the Authority and fifty per cent (50%) of the Additional Income for that Month shall be retained by the Service Provider; and

59.2.2 where the Additional Income achieved for that Month is [REDACTED], seventy five per cent (75%) of the Additional Income for that Month shall be paid to the Authority and twenty five per cent (25%) of the Additional Income for that Month shall be retained by the Service Provider.

All calculations of such sums shall be included in the relevant Draft Monthly Payment Report (together with supporting documentation) and the relevant Actual Monthly Payment Report.

### 59.3 Provision of Information

The Service Provider shall, as and when reasonably requested to do so, make available to the Authority and its advisers for inspection, any information in its possession or control which relates to the generation of Additional Income.

## 60. CONNECTIONS REVIEW

60.1 Within ten (10) Business Days of each anniversary of the Service Commencement Date which falls within the Core Investment Period, the Service Provider shall complete a review of the terms upon which it receives the Original Non-Contestable Works ("**Connections Review**").

### 60.2 Written report on Connections Review

The Service Provider shall submit a written report to the Authority no later than five (5) Business Days after the completion of each Connections Review undertaken in accordance with clause 60.1. The report shall:



60.2.1 contain details of and comment on the outcome of the Connections Review, having due regard to issues of quality, health and safety, operational resources and capabilities; and

60.2.2 set out the most economically advantageous terms to the Authority upon which the Service Provider would be able to procure or carry out the Original Non-Contestable Works up to the next succeeding Connections Review or (if earlier) for the remainder of the Core Investment Period.

60.3 Alteration of terms upon which Service Provider receives any Original Non-Contestable Works

The Service Provider shall not be obliged to alter the terms upon which it receives any Original Non-Contestable Works but if the Service Provider does choose to alter the terms upon which it receives such Original Non-Contestable Works during the Core Investment Period, the provisions of clauses 60.4 to 60.6 shall apply.

60.4 If the Service Provider changes the terms upon which it receives the Original Non-Contestable Works such that the price of the Original Non-Contestable Works is less than the relevant amount in schedule 16 (*Original Non-Contestable Works Prices*), the Service Provider shall (unless the Authority agrees otherwise that such changes are de minimis), revise the Base Case in accordance with clause 65 (*Financial Adjustments*) to reflect the Non-Contestable Works Saving. Such revision shall take effect on the date the revised terms come into effect.

60.5 The Service Provider shall provide such information as the Authority reasonably requires to substantiate any calculations made in accordance with clauses 60.4.

60.6 Notwithstanding any of the matters set out in this clause 60 (*Connections Review*), in no circumstances shall the Annual Unitary Charge be increased as a result of any Connections Review.

## 61. TAX

61.1 Adjustment of payments after taking a Relevant Tax Liability into account

Where either:

61.1.1 a payment (a "**Termination Payment**") is to be made to the Service Provider pursuant to clauses 80.1 (*Compensation Following an Authority Default or a Voluntary Termination*), 80.3 (*Compensation following a Prohibited Act*) or 80.4 (*Compensation following a Force Majeure Event or Uninsurability*) (but not otherwise); or

61.1.2 a payment (an "**Indemnity Payment**") is to be made to the Authority under any other provision of this Contract,

61.1.3 then the amount of a Termination Payment or, where applicable, an Indemnity Payment shall be adjusted so as to ensure that the Party receiving the Termination Payment or Indemnity Payment is in the same position after account is taken of any Relevant Tax Liability which that Party incurs as a result of such Termination Payment, Indemnity Payment or additional payment under this clause 61 (*Tax*) as it would have been had it not been for the Relevant Tax Liability. Without prejudice to the generality of this clause 61.1 (*Adjustment of payments after taking a Relevant Tax Liability into account*), if and to the extent that any sum (an "**Authority Indemnity Sum**") constituting (directly or indirectly) an indemnity or reimbursement to the Authority but paid by the Service Provider to any person other than the Authority, shall be treated as taxable in the hands of the Authority, the Service Provider shall promptly pay to the Authority such sum ("**Compensating Sum**") as (after taking into account any Tax suffered by the Authority on the Compensating Sum) shall reimburse the Authority for any Tax suffered by it in respect of the Authority Indemnity Sum after taking into account any deduction for Tax purposes obtained by the Authority in respect of the payment of, or the matter giving rise to, the Authority Indemnity Sum and the time at which the benefit of such deduction is obtained.

61.2 Determining whether the Service Provider has a Relevant Tax Liability

In determining whether the Service Provider has a Relevant Tax Liability by reason of the Termination Payment, it should be assumed that any Relevant Relief which is available to the Service Provider (or would have been so available but for a surrender by the Service Provider of such Relevant Relief by way of group or consortium relief or their utilisation to reduce or eliminate any liability for tax other than a liability for tax arising in respect of the receipt or accrual of the Annual Unitary Charge) for offset against a Termination Payment, or against Tax in relation to the same, have been so offset to the maximum extent possible.

### 61.3 Negotiations with HMRC in relation to any Relevant Tax Liability

The Service Provider shall keep the Authority fully informed of all negotiations with Revenue and Customs in relation to any Relevant Tax Liability in respect of a Termination Payment. The Service Provider shall not agree, accept or compromise any Claim, issue or dispute relating to such Relevant Tax Liability without the prior written consent of the Authority, which shall not be unreasonably withheld or delayed. The Authority may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct the Service Provider to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of a Termination Payment, provided that the cost of any such dispute (including any interest or penalties incurred as a direct result of such action) shall be at the Authority's expense. However, if the Service Provider obtains professional advice from an independent person with relevant expertise that any resistance, appeal defence or other mode of dispute is not likely to result in any more beneficial position in relation to the Relevant Tax Liability, the Service Provider shall be entitled not to continue with such resistance, appeal, defence or other mode of dispute. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under this clause 61 (*Tax*) to reflect such outcome.

### 61.4 Repayment to the Authority

If:

- 61.4.1 the Authority makes or is obliged to make a Termination Payment which gives rise to a Relevant Tax Liability; and

61.4.2 the Service Provider subsequently obtains and uses (or would have obtained and used, had it taken all reasonable steps to do so) a Relevant Relief,

then the Service Provider shall repay to the Authority such amount as will leave the Service Provider (after that payment and, where required by clause 61.3 (*Negotiations with HMRC in relation to any Relevant Tax Liability*)), on the basis that the Service Provider obtained and used that relief) in no better or worse position than it would have been in if no Relevant Tax Liability had arisen.

61.5 For the purposes of clause 61.4 (*Repayment to the Authority*) any Relevant Relief obtained and used (or which would have been obtained and used had all reasonable steps been taken to do so) by any person associated or connected with the Service Provider for any Tax purpose shall be treated as if it had been obtained and used by the Service Provider and the Service Provider shall procure at the request and expense of the Authority that the Service Provider's auditors at the time of the request certify to the Authority whether any such Relief has been obtained and used by the Service Provider or any such person (or, in their reasonable opinion, acting as experts and not as arbitrators, whether any such Relief would have been obtained and used by the Service Provider or any such person had all reasonable steps been taken to do so) and, if so, its amount.

#### 61.6 Payment of increase in amount of Termination Payment

Any increase in the amount of a Termination Payment which is payable under this clause 61 (*Tax*) shall be paid on the latter of five (5) Business Days after a demand therefore (together with evidence in sufficient detail for the Authority to satisfy itself of the Relevant Tax Liability and its calculation) is made by the Service Provider and:

61.6.1 in the case of an Actual Liability, five (5) Business Days before the date on which the relevant Tax must be paid to the tax authority in order to avoid incurring interest and penalties; and

61.6.2 in the case of a Deemed Liability, five (5) Business Days before the date on which Tax which would not have been payable but for the utilisation of the relevant Relief must be paid in order to avoid incurring interest or penalties (whether by the Service Provider or otherwise) and, for the purposes of

determining when the Relief would otherwise have been utilised, Reliefs shall be regarded as utilised in the order in which they arise.

61.7 The Authority shall have the right to pay the amount payable under this clause 61 (*Tax*) directly to the appropriate authority entitled to receive such amount in satisfaction of the relevant tax due by the Service Provider. Where the Authority proposes to exercise its right under this clause 61 (*Tax*), it shall notify the Service Provider in advance.

## **62. NO DEDUCTIONS OR WITHHOLDINGS**

All payments due to either Party under this Contract and any Project Document or Supplemental Document shall be calculated and made free and clear of and without deduction for, or on account of, any Taxes, unless such deduction or withholding is required by Legislation.

## **63. VALUE ADDED TAX**

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

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

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

63.4 The Service Provider shall provide the Authority with any information reasonably requested by the Authority in relation to the amount of VAT chargeable in accordance with this Contract and payable by the Authority to the Service Provider.

63.5 The Authority shall pay to the Service Provider from time to time as the same is incurred by the Service Provider sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within twenty (20) Business Days of the delivery by the Service Provider to the Authority of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this clause 63.5 "**Irrecoverable VAT**" means input VAT incurred by the Service Provider on any supply which is made to it which is used or to be used exclusively in performing the Services or any of the obligations or provisions under this Contract (together with input VAT incurred as part of its overheads in relation to such activities) to the extent that the Service Provider is not entitled to repayment or credit from Her Majesty's Revenue & Customs (or any successor body) in respect of such input VAT.

#### 64. SUB-CONTRACTORS IN THE CONSTRUCTION INDUSTRY SCHEME

64.1 This clause 64 (*Sub-Contractors in the Construction Industry Scheme*) relates to the construction industry scheme, the framework of which is contained in the Finance Act 2004 with the operational details contained in the Income Tax (Construction Industry Scheme) Regulations 2005 SI 2005/2045 ("**2005 Regulations**") and which commenced on 6 April 2007 ("**CIS Scheme**").

64.2 All payments made under this Contract will be paid in accordance with this clause 64 (*Sub-Contractors in the Construction Industry Scheme*).

64.3 The Parties believe that all payments made under this Contract will be exempt from the CIS Scheme under Regulation 23 (*Arrangements involving public bodies*) of the 2005 Regulations.

64.4 If and to the extent that payments are not exempt from the CIS Scheme by virtue of Regulation 23 of the 2005 Regulations, the Parties agree to operate the CIS Scheme in accordance with the 2005 Regulations, the Finance Act 2004 or any other statute or

subordinate legislation ("**Relevant Legislation**") relating to the CIS Scheme as from time to time modified or replaced whether before or after the date of this Contract and in particular the Authority shall be entitled to make the statutory deduction from any payment due to the Service Provider in accordance with the 2005 Regulations and/or the Relevant Legislation.

64.5 If compliance with this clause 64 (*Sub-Contractors in the Construction Industry Scheme*) involves the Authority or the Service Provider in not complying with any other of the terms of this Contract (save for the Parties' obligations to comply with all Laws), then the provisions of this clause 64 (*Sub-Contractors in the Construction Industry Scheme*) shall prevail.

## 65. FINANCIAL ADJUSTMENTS

65.1 The Base Case shall be robust and free from material errors and/or omissions and shall have been independently audited by a firm approved by the Authority (at the instruction of the Service Provider and at the Service Provider's expense) prior to the execution of the Contract and the auditors opinion shall be copied to the Authority.

65.2 Any price increases arising out of the audit undertaken pursuant to clause 65.1 shall be for the account of the Service Provider and any savings identified shall be passed onto the Authority.

65.3 The Base Case forms schedule 5 (*Base Case*) to this Contract and shall be used for the purpose of calculating the Annual Unitary Charge. The Base Case shall be capable of accommodating changes carried out by a competent financial modeller and shall be accompanied by a step by step optimisation procedure, a data book of assumptions underlying the financial projections and a summary sheet of outputs.

65.4 Arrangements for the Base Case

65.4.1 The Service Provider shall, no later than ten (10) Business Days after the date of this Contract, deliver one (1) electronic copy on CD-Rom in Microsoft Excel

2003 (or any media/software that replaces this, at the Authority's request) of the Base Case to the Authority (for the Authority to hold on its own behalf).

65.4.2 The Service Provider shall lodge with the Authority one (1) electronic copy on CD-Rom in Microsoft Excel 2003 (or any media/software that replaces this, at the Authority's request) of each Base Case (in each case becoming the Base Case for the purposes of this Contract) as may be revised from time to time pursuant to this clause 65 (*Financial Adjustments*) no later than ten (10) Business Days after any revisions have been effected and agreed with the Authority.

65.4.3 Any amendments to the Base Case shall reflect, be consistent with and be made only in accordance with the provisions of this Contract.

65.4.4 Either Party shall have the right to inspect and audit the Base Case at its own cost at all reasonable times.

#### 65.5 Revisions to the Base Case

65.5.1 Where the Parties agree that the financial consequences of any Relevant Event are best dealt with without a revision to the Base Case, they shall agree to make such revision to the Unitary Charge as necessary on a one off or recurrent basis. Such change shall, on the next occasion that there is a revision to the Base Case in accordance with this clause 65 (*Financial Adjustments*), be consolidated as an update to the Annual Unitary Charge and Base Case.

65.5.2 Prior to making any changes to the Base Case (subject to any express provision of this Contract to the contrary), the Parties shall agree the date on which the change shall take effect (the "**Base Case Change Effective Date**") and the basis of the revision to the Base Case.

65.5.3 Except for revisions due to:

65.5.3.1 a Qualifying Refinancing (in which case the provisions of clause 105 (*Refinancing*) shall apply);

65.5.3.2 a Connections Review in accordance with schedule 16 (*Original Non-Contestable Works Prices*) (in



respect of the Service Provider's share of any savings); or

65.5.3.3 a Service Provider Change which results in costs savings (and such costs savings are shared in accordance with schedule 17 (*Change Protocol*)),

the Annual Unitary Charge shall be revised so as to ensure that the Service Provider is in no better and no worse position (as defined by clause 65.6.3) than it was prior to the Base Case Change Effective Date and the event which gave rise to the need for the revision. In no circumstances shall any revision provide compensation to the Service Provider for any deviation in performance from that predicted in the latest Base Case as agreed between the Parties or determined in accordance with the Dispute Resolution Procedure.

65.5.4 The Service Provider shall take all reasonable and appropriate steps to mitigate the effects of any revision including, in particular, mitigating any adverse impact upon the Authority.

65.5.5 If the Base Case is to be revised, then the Service Provider shall make appropriate electronic amendments to it to effect such revisions made in accordance with this clause 65 (*Financial Adjustments*).

65.5.6 Where a revision to the Annual Unitary Charge is required, the Service Provider shall, at its own cost, save as otherwise expressly provided, revise the Base Case and submit to the Authority a revised Base Case reflecting such adjustments.

#### 65.6 Principles of Adjustment

65.6.1 The following guidelines shall be followed in revising the Base Case:

65.6.1.1 wherever possible the revision shall be carried out without altering the logic, formulae, inputs and assumptions incorporated in the Base Case in any way whatsoever and only data such as costs incurred by the Service Provider and the timing and amounts of drawdowns of funding shall be changed;

- 65.6.1.2 where it is necessary to amend the logic, formulae, inputs and assumptions incorporated in the Base Case to permit revisions to be made, this shall be carried out to the minimum extent necessary and in accordance with generally accepted accounting principles;
- 65.6.1.3 where any amendment is made to the logic, formulae, inputs and assumptions incorporated in the Base Case, the Base Case, as amended, shall first be run with the data included in the Base Case immediately prior to amendment to ensure that the Key Ratios in the Base Case are maintained at no lower or no higher levels from the Key Ratios immediately after the amendment and the real pre-tax Project IRR after and immediately prior to amendment does not differ by more than 0.5 basis points, being 0.005%;
- 65.6.1.4 the Parties may only agree changes or additions to the guidelines set out in this clause 65.6.1 where they are required in relation to circumstances not dealt with by the assumptions in the Base Case; and
- 65.6.1.5 unless otherwise agreed by the Parties, any adjustment to the Annual Unitary Charge shall take effect from the date of the Base Case Change Effective Date.
- 65.6.2 Any amendment to the logic, formulae, inputs and assumptions incorporated in the Base Case shall be fully recorded so that the manner in which the revised Annual Unitary Charge is calculated can be readily verified.
- 65.6.3 Any reference in this Contract to "no better and no worse" and to leaving the Service Provider being in a "no better and no worse position" shall be construed by reference to the Service Provider's:

- 65.6.3.1 rights, duties and liabilities under or arising pursuant to performance of this Contract, the Senior Financing Agreements and the Key Sub-Contracts; and
- 65.6.3.2 ability to perform its obligations and exercise its rights under this Contract, the Senior Financing Agreements and the Key Sub-Contracts,

so as to ensure that on comparing the output of the Base Case (as at the Base Case Effective Date) before and after entering into the required Base Case revisions, such comparison of the output from such Base Case shows that:

- 65.6.3.3 the Base Case Equity IRR shall be unchanged;
- 65.6.3.4 the Service Provider shall be in a position which is unchanged in relation to the minimum and average Annual Debt Service Cover Ratio, the minimum and average Loan Life Cover Ratio and the minimum and average Project Life Cover Ratio;
- 65.6.3.5 the Service Provider is left in a position which is unchanged in relation to inflation hedging of the Annual Unitary Charge within the Base Case; and
- 65.6.3.6 the ability of the Service Provider to comply with the Contract is not adversely affected or improved as a consequence of the Relevant Event.

#### **Small AHW Reconciliation**

65.7 The Parties shall review annually all Small AHW Works undertaken pursuant to clause 48 (*Authority Highway Works*) during the preceding Contract Year in order to determine whether an upwards or downwards adjustment is required to the Annual Unitary Charge to reflect any changes to the Project Network as a result of such Small AHW Works undertaken. When determining such adjustment, the Parties shall take into account the following principles:

- 65.7.1 the net effect of any maintenance costs resulting from any Small AHW Works which replace or improve existing Project Network Parts;
- 65.7.2 any analogous Y Values listed in part 2 of schedule 18 (Accruals and De-Accruals) or as otherwise agreed pursuant to schedule 18 (Accruals and De-Accruals) in respect of the relevant Project Network Part or Project Network Parts in existence immediately prior to the commencement of the Small AHW Works;
- 65.7.3 any analogous Y Values in part 2 of schedule 18 (Accruals and De-Accruals) or as otherwise agreed pursuant to schedule 18 (*Accruals and De-Accruals*) in respect of the relevant Project Network Part or Project Network Parts in existence immediately following the completion of the Small AHW Works;
- 65.7.4 any maintenance costs agreed or determined pursuant to clause 49 (*Maintainability Assessment*); and
- 65.7.5 any financial savings made by the Service Provider and/or Service Provider Parties for the remainder of the Term arising from the Works carried out by or on behalf of the Authority which are required in order to comply with schedule 2 (*Output Specification*) pursuant to this Contract.

#### **New Works Reconciliation**

- 65.8 The Parties shall review annually and use reasonable endeavours to agree all Accruals, De-Accruals and Standard AHW Works and Major AHW Works during the relevant Contract Year in order to determine whether an upwards or a downwards adjustment to the Annual Unitary Charge is required to reflect any benefit to the Authority and/or financial savings to the Service Provider and Service Provider Parties which have not been reflected (pursuant to schedule 18 (*Accruals and De-Accruals*) and clause 48 (*Authority Highways Works*)) by the application of Y Values. When determining such adjustment, the Parties shall take into account the following principles:
- 65.8.1 the aggregate impact of each Accrual, each De-Accrual and each Standard AHW Works and Major AHW Works adjustment implement pursuant to clause

48.1.14 (*Adjustment to the Unitary Charge*) in the relevant Contract Year on the Service Provider's costs;

65.8.2 any information provided by the Service Provider to the Authority pursuant to clause 49 (*Maintainability Assessment*);

65.8.3 any financial savings made by the Service Provider and/or Service Provider Parties for the remainder of the Term arising from works carried out by (or procured by) the Authority which, pursuant to this Contract, are required in order for the Service Provider to comply with schedule 2 (*Output Specification*);

65.8.4 the timing of the realisation of lifecycle benefit to the Service Provider and/or the Service Provider Parties during the Term; and

65.8.5 the "no better and no worse" principle.

#### 65.9 **Disputes**

65.9.1 Where the Service Provider and the Authority are unable to agree the revisions to the Base Case (including the actual version of the Base Case to be used prior to the required changes being made) within twenty (20) Business Days of submission of the revised Base Case by the Service Provider to the Authority (or such other time period as is agreed between the Parties), then the matter shall be determined in accordance with the Dispute Resolution Procedure.

65.9.2 Without prejudice to clause 65.9.1, where the Parties are unable to agree any matter arising under clause 65 (*Financial Adjustments*), either Party may refer the matter for determination pursuant to the Dispute Resolution Procedure.

### **PART M - WARRANTIES AND INDEMNITIES**

#### **66. WARRANTIES AND UNDERTAKINGS**

##### 66.1 Service Provider's Warranties

66.1.1 The Service Provider warrants and represents to the Authority on the terms set out in this clause 66.1 (*Service Provider's Warranties*) that as at the date of this Contract:

66.1.1.1 the Service Provider and Holdco:

- (a) are duly incorporated under the law of England and Wales; and
- (b) each have the corporate power to own its assets and to carry on its business as it is now being conducted;

66.1.1.2 the Service Provider:

- (a) has the power to enter into and to exercise its rights and perform its obligations under this Contract and the Project Documents and Supplemental Documents to which it is a party; and
- (b) has taken all necessary action to authorise the execution of and the performance of its obligations under this Contract and the Project Documents and Supplemental Documents to which it is a party (or, in the case of any Project Documents and Supplemental Documents executed after the date of this Contract, such action will be taken before such execution);

66.1.1.3 the Service Provider is not subject to any other obligation, compliance with which will or is likely to have a material adverse effect on the ability of the Service Provider to perform its obligations under this Contract or any Project Document or Supplemental Document to which it is a party;

66.1.1.4 the obligations expressed to be assumed by the Service Provider under this Contract and each Project Document and Supplemental Document to which it is a party constitute, or will when executed constitute, legal, valid, binding and enforceable obligations on the Service Provider to the extent permitted by law and each Project Document and

Supplemental Document will be in the proper form for enforcement in England and Wales;

66.1.1.5 the execution, delivery and performance by the Service Provider of this Contract and the Project Documents and Supplemental Documents does not contravene any provision of:

- (a) any existing Legislation either in force, or enacted but not yet in force, binding on the Service Provider;
- (b) its articles of association;
- (c) any order or decree of any court or arbitrator which is binding upon the Service Provider or upon any of its assets or revenues; or
- (d) any obligation which is binding upon the Service Provider or upon any of its assets or revenues;

66.1.1.6 the copies of each Project Document and Supplemental Documents which the Service Provider delivers to the Authority are or, as the case may be, will be true and complete copies of such documents and there are not in existence any other agreements or documents replacing or relating to any such Project Document and Supplemental Document which would materially affect their interpretation or application;

66.1.1.7 the Service Provider and Holdco has not, other than in connection with the Project, traded at any time since its incorporation as a company pursuant to the Companies Act;

66.1.1.8 there are no material facts or circumstances in relation to the financial position or constitution of the Service Provider and, having made due and proper enquiry, the Service Provider is not aware of

any material facts or circumstances in relation to the financial position or operational constitution of the Sub-Contractors and each of their respective Affiliates or the Shareholders which have not been fully and fairly disclosed to the Authority and which if disclosed might reasonably have been expected to affect the decision of the Authority to enter into this Contract;

66.1.1.9 the Service Provider has conducted its own analysis and review of the Disclosed Information in accordance with this Contract;

66.1.1.10 as at the date of this Contract:

- (a) the particulars of the Service Provider and Holdco as shown in schedule 25 (*Service Provider Details*) are true, complete and accurate;
- (b) the information concerning the share capital of the Service Provider set out in the Shareholders Agreement is true and accurate; and
- (c) save to the extent provided in the Shareholders Agreement and/or Financing Agreements in respect of the subscription obligations of the Shareholders, there is no outstanding offer or other arrangement whereby any person, firm or company is (at the date of this Contract or at any future time) entitled to or obliged to subscribe for or take by means of transfer or by conversion of any other form of investment or bond, any share capital for the Service Provider (including any such entitlement or obligation that may arise in exercise of an option enforceable by or against the Service Provider or any Shareholder);

66.1.1.11 the Financial Terms are the basis on which the Service Provider will finance the Project;



- 66.1.1.12 no Claim is presently being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of the knowledge of the Service Provider, pending or threatened against the Service Provider or Holdco or any of its assets which will or may have a material adverse effect on the ability of the Service Provider to perform its obligations under this Contract and/or any Project Document and/or Supplemental Document;
- 66.1.1.13 no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Service Provider threatened) for the winding-up or dissolution of the Service Provider or Holdco or for the appointment of a receiver, manager, or administrator on behalf of a creditor, or similar officer in relation to any of its assets or revenues;
- 66.1.1.14 no Service Provider Default has occurred and no event or circumstance has occurred or arisen which, with the giving of notice, lapse of time, determination of materiality or satisfaction of any other condition may become a Service Provider Default;
- 66.1.1.15 not used
- 66.1.1.16 without prejudice to clause 99 (*Entire Agreement*) all information, representations and other matters of fact committed to the Authority by or on behalf of the Service Provider or its agents or employees in connection with or arising out of its tender including in the course of the subsequent negotiations is or are true, complete and accurate in all material respects in the context of the Project, and the Service Provider is not aware of any material facts or circumstances

which have not been disclosed to the Authority and which might, if disclosed, adversely affect the decision of anyone considering whether or not to contract with the Service Provider;

66.1.1.17 neither the Service Provider nor, having made due and proper enquiry, the Service Provider is not aware that any of its agents, Sub-Contractors or the employees of any of them or anyone acting on their behalf has committed any Prohibited Act;

66.1.1.18 in connection with this Contract and any other Project Document or Supplemental Document, no commission (excluding fees payable to the Service Provider's professional or financial advisers) has been paid or agreed to be paid by the Service Provider or on its behalf or to its knowledge having made proper and due enquiry or by or on behalf of or to the knowledge of any of its agents, Sub-Contractors or the employees of any of them.

66.1.2 The Service Provider undertakes and warrants to the Authority that:

66.1.2.1 the materials licensed or assigned under clause 84 (*Intellectual Property Rights*) are or will be (as the case may be) original works or, if they are not original works, that the same has a licence which can be sub-licensed or assigned to the Authority under the provisions of clause 84 (*Intellectual Property Rights*);

66.1.2.2 no person not a party to this Contract owns or will own or otherwise be entitled to any of the Intellectual Property Rights licensed or assigned under clause 84 (*Intellectual Property Rights*) or any interest therein save as agreed between the Parties in respect of data, materials and/or information validly

licensed to the Service Provider from a person not a party to this Contract; and

66.1.2.3 it has the right to grant the licences and assign the rights under clause 84 (*Intellectual Property Rights*).

66.2 The Parties hereby acknowledge that the Authority relies upon the warranties and representations.

66.3 Each of the Service Provider's Warranties shall be separate and independent and, save as expressly provided to the contrary, shall not be limited by reference to any of them or by any other provisions of this Contract.

66.4 The Service Provider hereby acknowledges and agrees that compliance by it with the warranties and representations (or any of them) referred to in clause 66.1 (*Service Provider's Warranties*) shall not itself constitute performance of any of its other obligations under this Contract.

#### 66.5 Service Provider's Undertakings

The Service Provider hereby undertakes with the Authority that for so long as this Contract remains in force (subject to clause 93 (*Continuing Obligations*)):

66.5.1 it shall upon becoming aware that the same is or may be threatened or pending, and again immediately after the commencement thereof, give the Authority notice of all litigation or arbitration or administrative or adjudication or mediation or similar proceedings before or of any court, arbitrator or governmental authority which would or may materially adversely affect the Service Provider's ability to perform its obligations under this Contract and shall, for so long as such proceedings subsist, keep the Authority reasonably informed of the same;

66.5.2 it shall not, without the prior written consent of the Authority, (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend or otherwise dispose of (other than by way of giving security) the whole or any part of its business or assets which would or may materially affect

the ability of the Service Provider to perform its obligations under this Contract;

- 66.5.3 it shall not cease to be resident in the United Kingdom or transfer in whole or in part its undertaking, business or trade outside the United Kingdom;
- 66.5.4 it shall not undertake the performance of its obligations under this Contract for the provision of the Services otherwise than through itself or a Sub-Contractor appointed in accordance with the obligations set out in this Contract;
- 66.5.5 it shall not without the written consent of the Authority (not to be unreasonably withheld or delayed) incorporate any company or purchase or acquire or subscribe for any shares in any company save where such company is involved in the provision of the Services;
- 66.5.6 it shall not without the written consent of the Authority (not to be unreasonably withheld or delayed) make any loans or grant any credit or give any guarantee or indemnity to, or for the benefit of, any person or otherwise voluntarily or for consideration assume any liability (whether actual or contingent) in respect of any obligation of any other person except pursuant to the Financing Agreements, Project Documents or Supplemental Documents or in the ordinary course of its business; and
- 66.5.7 it shall not change or cease its business or start any other business which is materially different from that to be carried on by it under this Contract.

#### 66.6 Disclosed Information

The Authority has provided the Disclosed Information but:

- 66.6.1 the Authority does not give any warranty or undertaking as to the completeness, accuracy or fitness for any purpose of any of the Disclosed Information; and
- 66.6.2 neither the Authority nor any of its agents or servants shall be liable to the Service Provider in contract, tort (including negligence or breach of statutory duty), statute or otherwise as a result of:

66.6.2.1 any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Disclosed Information; or

66.6.2.2 any failure to make available to the Service Provider any materials, documents, drawings, plans or other information relating to the Project,

provided that nothing in this Contract shall affect the liability of the Authority for any fraudulent misrepresentation in relation to the Disclosed Information.

#### 66.7 Status of Warranties

All warranties, representations, undertakings, indemnities and other obligations made, given or undertaken by the Service Provider in this Contract are cumulative and none shall be given a limited construction by reference to any other.

#### 66.8 Exclusions from Warranty

The Service Provider shall, subject to clause 10 (*Condition of the Project Network*), clause 12 (*Geotechnical and Geological Zones*), clause 13 (*Latent Defects*) and clause 29.4 (*Project Network Discoveries*) be deemed to have:

66.8.1 satisfied itself as to the assets to which it will acquire rights and the nature and extent of the risks assumed by it under this Contract;

66.8.2 gathered all information necessary to perform its obligations under this Contract and other obligations assumed, including:

66.8.2.1 information as to the nature, location and condition of the Project Network (including hydrological, geological, geo-technical and sub-surface conditions);

66.8.2.2 information relating to archaeological finds, areas of archaeological scientific or natural interest, local conditions and facilities and the quality of existing structures;

66.8.2.3 information concerning any consents or planning permissions which are or may be required and any third party rights, interests or property (including property interests affected),

save in respect of:

66.8.2.4 Geotechnical Failures and Geological Failures, to which clause 12 (*Geotechnical and Geological Zones*) shall apply:

66.8.2.5 Latent Defects, to which clause 13 (*Latent Defects*) shall apply;

66.8.2.6 Finds, to which clause 29.4 (*Project Network Discoveries*) shall apply.

66.8.3 Save as expressly set out in clauses 66.8.2.4 to 66.8.2.6, the Service Provider shall not in any way be relieved from any obligation under this Contract nor shall it be entitled to claim against the Authority on grounds that any information, whether obtained from the Authority or otherwise (including information made available by the Authority) is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

## 67. INDEMNITY

### 67.1 Matters indemnified by the Service Provider

The Service Provider shall, subject to clause 67.2 (*Limitation of Liability*), be responsible for, and shall release and indemnify the Authority, its employees, agents and contractors on demand from and against, all liability for and any losses incurred due to:

67.1.1 death or personal injury;

67.1.2 loss of or damage to Authority Property;

67.1.3 not used; and

67.1.4 third party actions, Claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis),

which may arise out of, or in consequence of:

67.1.5 subject to the provisions of clause 12 (*Geotechnical and Geological Zones*) and clause 13 (*Latent Defects*), the design, installation, operation or maintenance of the Project Network Parts under this Contract;

67.1.6 the performance or non-performance by the Service Provider of its obligations under this Contract; or

67.1.7 the presence on the Authority Property or on any of the Work Sites which are not the property of the Authority, of the Service Provider or a Service Provider Party in each case in relation to the provision of the Services or the discharge of obligations under this Contract.

67.1.A The Service Provider shall, subject to clause 67.2, be responsible for, and shall release and indemnify the Authority, its employees, agents and contractors on demand from and against all liability for direct losses and indirect losses arising from third party actions, claims or demands (as described in clause 67.1.4 above brought against the Authority or any Authority related party for breach of statutory duty which may arise out of, or in consequence of a breach by the Service Provider of its obligations under this Contract to the extent there are no other remedies available to the Authority under this Contract.

## 67.2 Limitation of Liability

The Service Provider shall not be responsible or be obliged to indemnify the Authority, its employees, agents and contractors for:

67.2.1 any of the matters referred to in clauses 67.1.1 to 67.1.4 and 67.1A which arises as a direct result of the Service Provider acting on the written instruction of the Authority Representative; or

67.2.2 any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Authority or any Authority Party to the extent that the Authority or Authority Party are working on the Project Network in a highway

maintenance capacity or by the breach by the Authority of its obligations under this Contract; or

- 67.2.3 Authority Administered Highway Claims; or
- 67.2.4 losses under clauses 67.1 and 67.1A arising as a consequence of the geometry of the Project Network, save to the extent that the Service Provider has not complied with other obligations of this Contract and that these obligations had contributed to such losses; or
- 67.2.5 any costs or liability related to managing and/or rectifying the occurrence of Latent Defect in a Major Structure in excess of the Latent Defect Cap; or
- 67.2.6 any costs or liability relating to the rectification, management and/or mitigation of a Geotechnical Failure or a Geological Failure at a Geotechnical Risk Site or Geological Risk Area in excess of the relevant Geotechnical Risk Cap or Geological Failure Cap; or
- 67.2.7 any liability incurred in respect of a claim made pursuant to clauses 67.1.2 to 67.1.4 (inclusive) and 67.1A to the extent that, when taken together with any other claims made under those clauses over the Contract Period, the amount of the Service Provider's Uninsured Losses exceeds [REDACTED] or [REDACTED];
- 67.2.8 any liability incurred in respect of a claim made pursuant to clauses 67.1.2 to 67.1.4 (inclusive) and 67.1A to the extent that, when taken together with any other claims made under those clauses, the amount of the Service Provider's Uninsured Losses exceeds [REDACTED] in any one (1) Contract Year.

### 67.3 Indemnities

The indemnities in favour of the Authority contained in clause 67.1 (*Matters indemnified by the Service Provider*):

- 67.3.1 shall extend to any liability and/or losses incurred by or due to the actions of any Service Provider Party; and



67.3.2 shall be without limitation to any indemnity by the Service Provider under any other provision of this Contract.

67.4 Conduct of proceedings for matters covered by Service Provider's and Authority's indemnities

67.4.1 This clause 67.4 (*Conduct of proceedings for matters covered by Service Provider's and Authority's indemnities*) shall apply to the conduct by a Party giving an indemnity under this Contract ("**Indemnifier**") in respect of any Claim made by a third person against a Party having (or claiming to have) the benefit of the indemnity ("**Beneficiary**"), unless otherwise agreed by the Parties in writing.

67.4.1A The Beneficiary shall at all times take all reasonable steps to minimise and mitigate any loss for which the Beneficiary is entitled to bring a claim against the Indemnifier pursuant to this Contract.

67.4.2 If the Beneficiary receives any notice, demand, letter or other document concerning any Claim from which it appears that the Beneficiary is, or may become entitled to, indemnification under this Contract or any of the Project Documents, the Beneficiary shall give notice to the Indemnifier as soon as reasonably practicable and in any event within ten (10) Business Days of receipt of such document and shall supply a copy of the relevant document to the Indemnifier.

67.4.3 Subject to the provisions of this clause 67.4 (*Conduct of proceedings for matters covered by Service Provider's and Authority's indemnities*) (and in particular clause 67.4.7), following the service of a notice by a Beneficiary pursuant to clause 67.4.2, where it appears that the Beneficiary is, or may become, entitled to indemnification from the Indemnifier in respect of all (but not part only, in which case the provisions of clause 67.4.4 shall apply) of the liability arising out of the Claim, the Indemnifier shall (subject to indemnifying the Beneficiary to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to:

67.4.3.1 dispute the Claim in the name of the Beneficiary at the Indemnifier's own expense; and

67.4.3.2 take conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations,

and the Beneficiary shall give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim.

67.4.4 With respect to any Claim conducted by the Indemnifier pursuant to clause 67.4.3:

67.4.4.1 the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the Claim;

67.4.4.2 the Indemnifier shall not bring the name of the Beneficiary into disrepute;

67.4.4.3 notwithstanding the value of any Claim, in conducting or deciding to settle any Claim the Indemnifier shall take account of any precedent which may be set whether relating to the Beneficiary itself or as a class of parties; and

67.4.4.4 the Indemnifier shall not pay, settle or compromise such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed.

67.4.5 The Beneficiary shall (without prejudice to its duty to mitigate) be free to pay or settle any Claim on such terms as it may in its absolute discretion think fit and without prejudice to its rights and remedies under this Contract if:

67.4.5.1 the Indemnifier is not entitled to take conduct of the Claim in accordance with clause 67.4.3;

67.4.5.2 the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant Claim within twenty (20) Business Days of the notice from

the Beneficiary under clause 67.4.2 or notifies the Beneficiary that it does not intend to take conduct of the Claim; or

67.4.5.3 the Indemnifier fails to comply in any material respect with the provisions of clause 67.4.4 within twenty (20) Business Days of notice from the Beneficiary of such failure.

67.4.6 Where in respect of any claim, both of the Parties are entitled to indemnification from each other or are otherwise both responsible in respect of parts of any liability arising out of the Claim, the Parties shall together decide who shall be responsible for the conduct of the Claim and thereafter:

67.4.6.1 where the Parties have agreed that one Party shall conduct the Claim on behalf of both Parties, the provisions of clauses 67.4.3 to 67.4.5 shall apply to the Party responsible for conducting the Claim; or

67.4.6.2 where the Parties have agreed that both of the Parties shall be responsible for conducting the Claim, the Parties shall cooperate and provide such reasonable assistance to each other as shall be required for the expedient conduct of the Claim, and the provisions of clauses 67.4.3 to 67.4.4 shall apply to both Parties equally.

67.4.7 The Beneficiary shall be entitled at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any Claim (or of any incidental negotiations) to which clause 67.4.3 applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim. If the Beneficiary gives any notice pursuant to this clause 67.4.7, then the Indemnifier shall be released from any liability under its indemnity under clause 67.1 (*Matters indemnified by the Service Provider*) and,

without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to clause 67.4.3 in respect of such Claim.

67.4.8 If the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the Claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:

67.4.8.1 an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses reasonably and properly incurred by the Beneficiary in recovering the same; and

67.4.8.2 the amount paid to the Beneficiary by the Indemnifier in respect of the Claim under the relevant indemnity,

provided that there shall be no obligation on the Beneficiary to pursue such recovery and further provided that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits).

67.4.9 Any person taking any of the steps contemplated by clauses 67.4.3 to 67.4.8 (inclusive) shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Contract.

## **PART N - INSURANCE**

### **68. INSURANCE**

#### **68.1 Required Insurances**

The Service Provider shall take out and maintain or procure the maintenance of:

68.1.1 the insurances set out in schedule 6 (*Insurance*); and