

Authority shall serve an Acknowledgement of Service Commencement pursuant to clause 8.6.1 or indicate that the Service Provider may commence the Services pursuant to clause 8.6.3 (as the case may be), provided that the Intended Service Commencement Date shall not be later than the Long Stop Date (except as expressly consented to by the Authority in its absolute discretion).

**9. COMMENCEMENT, THE INDEPENDENT CERTIFIER AND THE TECHNICAL APPROVAL AUTHORITY**

From the Service Commencement Date:

- 9.1 the Service Provider shall commence delivery of the Services in accordance with the terms of this Contract;
- 9.2 the Authority and the Service Provider shall procure that the Independent Certifier appointed on or about the date of this Contract on substantially the terms of appointment set out in annexure 5 (*Form of Appointment of Independent Certifier*) shall carry out the duties throughout the Contract Period as set out in the Independent Certifier's Appointment.
- 9.3 the Service Provider shall engage the Technical Approval Authority to undertake the duties and responsibilities as set out in annexure 14 (*Technical Approval Authority Scope of Duties and Responsibilities*)

**PART D - CONDITION OF THE PROJECT NETWORK**

**10. CONDITION OF THE PROJECT NETWORK**

The Service Provider confirms that it has satisfied itself as to:

- 10.1 the condition and extent of the Project Network Parts as at the Pre-Commencement Survey Date, including the volume and type of Project Roads, Structures, Apparatus, Furniture, Vegetation and Off-Street Car Parks; and

10.2 the work that it needs to carry out on the Project Network following the Service Commencement Date in order to comply with the requirements of schedule 2 (*Output Specification*);

save in respect of:

- 10.2.1 any Latent Defect (to which clause 13 (*Latent Defects*) shall apply); and
- 10.2.2 any Unascertained Land Rights; and
- 10.2.3 any Geotechnical Failure or Geological Failure (to which clause 12 (*Geotechnical and Geological Zones*) shall apply).

## **11. CHANGES TO PROJECT NETWORK FROM THE PRE-COMMENCEMENT SURVEY DATE**

11.1 The Parties understand and acknowledge that:

- 11.1.1 the Part 1 Authority Predicted Works, together with the Project Network Parts in their condition as at the Pre-Commencement Survey Date and any subsequent deterioration of the Project Network Parts (provided that the Authority has complied with clauses 11.2 (*Authority Routine Maintenance*) and 11.8.3) shall form the Project Network at the Service Commencement Date;
- 11.1.2 without prejudice to clause 11.4.9 the Service Provider has assumed that the Authority has completed or procured the completion of the Part 1 Authority Predicted Works prior to the Service Commencement Date; and
- 11.1.3 the Annual Unitary Charge at the Service Commencement Date and Base Case at the date of the Contract are based on the assumptions set out in clauses 11.1.1 and 11.1.2.

### **11.2 Authority Routine Maintenance**

11.2.1 The Authority shall, during the period between the Pre-Commencement Survey Date and the Service Commencement Date:

- 11.2.1.1 carry out safety inspections and service inspections on the Project Network to identify the need for Authority Routine Maintenance in accordance with

the Highways Maintenance Code, the Highways Lighting Code and the Highways Structures Code;

11.2.1.2 subject to clause 11.3, undertake the Authority Routine Maintenance identified as a result of the safety inspections and service inspections carried out pursuant to clause 11.2.1.1 above;

11.2.1.3 maintain records (in accordance with Good Industry Practice) of the results of the safety inspections and service inspections undertaken pursuant to clause 11.2.1.1 and the Authority Routine Maintenance carried out pursuant to clause 11.2.1.2 and make such records available to the Service Provider; and

11.2.1.4 comply with obligations equivalent to those obligations set out in clause 35 (*Health and Safety*) and clause 36 (*CDM Regulations*) (insofar as they are applicable to the period between the Pre-Commencement Survey Date and the Service Commencement Date).

11.3 The Parties agree and acknowledge that the Authority is not obliged to spend more than two hundred and twenty five thousand pounds (£225,000) per calendar month on Authority Routine Maintenance (calculated cumulatively over the period between the Pre-Commencement Survey Date and the Planned Service Commencement Date) and the Service Provider shall not be entitled to a Compensation Event or any other relief in relation to this clause 11 from its obligations under this Contract if the Authority has complied with its obligations pursuant to clauses 11.2.1.1 and 11.2.1.2.

11.4 Part 1 Authority Predicted Works and other works

11.4.1 The Parties agree and acknowledge that any:

11.4.1.1 Part 1 Authority Predicted Works; and

- 11.4.1.2 any other Third Party Works, AHW Works and any other changes to the Project Network as a result of any works procured by the Authority,

(excluding any Authority Programmed Maintenance and Authority Routine Maintenance) carried out by the Authority (or in the case of Third Party Works, with the Authority's permission) between the Pre-Commencement Survey Date and the Service Commencement Date shall be dealt with as if those Project Network Parts had been Accrued (or an existing Project Network Part shall be deemed to be De-Accrued and then Accrued thereafter in its modified form) or De-Accrued from the Project Network (as appropriate) as at the Service Commencement Date and the provisions of:

- 11.4.1.3 clause 50.3 (*Accrual and De-Accrual of Project Network Parts*); or

- 11.4.1.4 paragraph 3.4 of schedule 18 (*Accrual and De-Accrual of Project Network Parts*),

(as appropriate) shall apply from the Service Commencement Date in respect of such Project Network Parts.

- 11.4.2 The Authority shall provide to the Service Provider on the date of the Contract a list of:

- 11.4.2.1 all the Part 1 Authority Predicted Works that the Authority is aware have been completed;

- 11.4.2.2 any other Project Network Parts arising from any other AHW Works and Third Party Works that will form part of the Project Network from the Service Commencement Date; or

- 11.4.2.3 any De-Accruals of Project Network Parts together with details of their location (by OS Grid Range Reference) and a description of such Project Network Parts,

(together the ("**Highways Asset List**")), and the Authority shall:

11.4.2.4 notify the Service Provider of any updates to the Highways Asset List as soon as reasonably practicable during the Mobilisation Period; and

11.4.2.5 provide a final updated Highways Asset List ("**Updated Highways Asset List**") on or before the Service Commencement Date;

so that that the Service Provider is able to inspect such Project Network Parts for the purpose of clause 11.4.5.

11.4.3 The Parties agree and acknowledge that any increase or decrease in the Annual Unitary Charge arising from the inclusion of any Project Network Parts on the Updated Highways Asset List shall not be taken into account for the purpose of determining the Accrual Cap and De-Accrual Cap pursuant to paragraph 5 of part 1 schedule 18 (*Accruals and De-Accruals*).

11.4.4 The Service Provider may inspect:

11.4.4.1 any Part 1 Authority Predicted Works prior to completion of such Part 1 Authority Predicted Works; and

11.4.4.2 any works included in the Updated Highways Asset List following completion of such works,

for the purposes of clause 11.4.5 and to satisfy itself that such works are being (or have been) carried out in accordance with clause 11.8.3 and, where applicable, schedule 32 (*Authority Predicted Works*).

11.4.5 Within thirty (30) Business Days of the Service Commencement Date, the Service Provider shall (acting reasonably) notify the Authority:

11.4.5.1 of any issues or concerns in respect of the future maintenance requirements that the Service Provider becomes aware of during any inspection of any works included on the Updated Highways Asset List; and

11.4.5.2 any issues which, in the reasonable opinion of the Service Provider, the Authority should have regard to in respect of any works included on the Updated Highways Asset List,

provided that the Authority shall not be bound to have regard to such matters. Such details shall include in particular:

11.4.5.3 whether the Part 1 Authority Predicted Works meet the APW Assumptions and/or any other works on the Updated Highways Asset List meet the Service Provider Assumptions or, if not:

- (a) details as to why;
- (b) the extent, if any, to which the maintenance costs of such Part 1 Authority Predicted Works exceed the maintenance costs of such Part 1 Authority Predicted Works had such Part 1 Authority Predicted Works met the APW Assumptions and/or the maintenance costs of any other works on the Updated Highways List exceed any relevant Y Values set out in part 2.1 of schedule 18 (*Accruals and De-Accruals*) or otherwise agreed pursuant to schedule 18 (*Accruals and De-Accruals*) with an explanation as to why; and/or

11.4.5.4 whether the Part 1 Authority Predicted Works or any other works on the Updated Highways Asset List meet the requirements of schedule 2 (*Output Specification*).

11.4.6 If the Service Provider notifies the Authority that the Part 1 Authority Predicted Works and/or any works on the Updated Highways Asset List do not meet the Service Provider Assumptions or APW Assumptions (as applicable) and/or the requirements of schedule 2 (*Output Specification*), the Authority shall notify the Service Provider within fifteen (15) Business Days that it:

11.4.6.1 agrees with the Service Provider's analysis that the Part 1 Authority Predicted Works do not meet the APW Assumptions and/or any other works on the Updated Highways Asset List do not meet the Service Provider Assumptions and/or the Part 1 Authority Predicted Works and/or any of the works on the Updated Highways Asset List do not meet the requirements of schedule 2 (*Output Specification*) and that:

- (a) in respect of the Part 1 Authority Predicted Works, the Service Provider may take into account the increase in the maintenance costs and the Annual Unitary Charge shall be adjusted in accordance with clause 65 (*Financial Adjustments*) to reflect the costs specified in the Service Provider's notice pursuant to clause 11.4.5.3(b);
- (b) in respect of any works on the Updated Highways Asset List other than Part 1 Authority Predicted Works, the Service Provider may take this into account in paragraph 4.1 of schedule 18 (*Accruals and De-Accruals*) provided that the Service Provider has complied with the provisions of this clause 11 (*Changes to Project Network from the Pre-Commencement Survey Date*); or
- (c) clause 11.4.9.3, clause 11.4.9.4 or clause 11.4.9.5 shall apply;

11.4.6.2 disagrees with the Service Provider's analysis:

- (a) that the Part 1 Authority Predicted Works do not meet the APW Assumptions and/or any other works on the Updated Highways Asset List do not meet the Service Provider Assumptions or the Part 1 Authority Predicted Works and/or any other works on the Updated Highways Asset List do not meet the requirements of schedule 2 (*Output Specification*), in which case clause 11.4.8 shall

apply unless the Service Provider refers the matter for determination pursuant to the Dispute Resolution Procedure pursuant to clause 11.4.7; or

- (b) of the costs specified pursuant to clause 11.4.5.3(b) in which case the Authority shall provide (acting reasonably) a revised cost which shall be used to adjust the Annual Unitary Charge in accordance with clause 65 (*Financial Adjustments*) unless the Service Provider refers the matter for determination under the Dispute Resolution Procedure pursuant to clause 11.4.7.

11.4.7 If the Service Provider disagrees with the Authority's notice pursuant to clause 11.4.6.2 it may refer such matter to the Dispute Resolution Procedure.

11.4.8 If the Service Provider fails to notify the Authority pursuant to clause 11.4.5 of a failure to meet the Service Provider Assumptions or the APW Assumptions or that any completed Part 1 Authority Predicted Works or any other works on the Updated Highways Assets List do not meet the requirements of schedule 2 (*Output Specification*) or if clause 11.4.6.2(a) applies, the Service Provider shall:

11.4.8.1 in respect of the Part 1 Authority Predicted Works, be deemed to accept that any such Part 1 Authority Predicted Works have been satisfactorily carried out and there shall be no additional payment or relief pursuant to the Contract; and

11.4.8.2 in respect of any works on the Updated Highways Assets List (other than Part 1 Authority Predicted Works), be deemed to accept that such Project Network Parts meet the requirements of schedule 2 (*Output Specification*),

and if clause 11.4.8.2 applies, the Authority shall be entitled to nominate (acting reasonably) a Y Value for such Project Network Parts from the Y Value set out in part 2.1 of schedule 18 (Accruals and De-Accruals) and the



Service Provider shall not be entitled to any additional payment in respect of maintenance costs which exceed such Y Value.

11.4.9 If in accordance with clause 11.4.5 the Service Provider notifies the Authority that:

11.4.9.1 the Authority has carried out or procured to be carried out Authority's Programmed Maintenance to a lesser standard than that set out in clause 11.8.3; or

11.4.9.2 any Part 1 Authority Predicted Works or any other works on the Updated Highways List have been carried out by or on behalf of the Authority (or in the case of Third Party Works, with the Authority's permission) to a lesser standard than that set out in clause 11.8.3,

the Authority shall:

11.4.9.3 undertake or procure the undertaking of the necessary works to such Part 1 Authority Predicted Works or any other works on the Updated Highways List so that such works meet the requirements of schedule 2 (*Output Specification*) and when the Authority is satisfied that any failures have been rectified, notify the Service Provider of such compliance; and/or

11.4.9.4 provide a notice requiring the Service Provider to rectify the failure to meet the requirements of schedule 2 (*Output Specification*) and the provisions of paragraphs 2.7 to 2.11 of schedule 18 (*Accruals and De-Accruals*) shall apply; and/or

11.4.9.5 specify in the opinion of the Authority (acting reasonably) which paragraphs of schedule 2 (*Output Specification*) such Part 1 Authority Predicted Works or any other works on the Updated Highways

Asset List shall be deemed to comply with and the relief that shall be provided from any other obligations on the Service Provider under the Contract.

#### 11.5 Adjustment to the Annual Unitary Charge

11.5.1 If between the Pre Commencement Survey Date and the Service Commencement Date any Project Network Parts have been De-Accrued from the Project Network as a result of any other works notified in the Updated Highways Asset List, the Authority shall decrease the Annual Unitary Charge in accordance with paragraph 4.2 of schedule 18 (*Accruals and De-Accruals*) as if such Project Network Parts had been De-Accrued from the Project Network on the Service Commencement Date.

11.5.2 If between the Pre-Commencement Survey Date and the Service Commencement Date, the Authority has not carried out (or procured to be carried out) all of the Part 1 Authority Predicted Works, the Authority shall adjust the Annual Unitary Charge in accordance with clause 65 (*Financial Adjustments*).

#### 11.6 Uncomplete Part 1 Authority Predicted Works at the Service Commencement Date

The Parties agree and acknowledge that subject to clause 11.5, any Part 1 Authority Predicted Works that remain uncompleted at the Service Commencement Date shall be dealt with in accordance with the provisions of clause 50 (*Accrual and De-Accrual of Project Network Parts*) paragraph 2.2 (*Accrual Assessment*) of schedule 18 (*Accrual and De-Accrual of Project Network Parts*) when such Part 1 Authority Predicted Works are completed.

#### 11.7 Part 2 Authority Predicted Works

From the Service Commencement Date, the Service Provider shall comply with the provisions of clause 49 (*Maintainability Assessment*) in respect of all Part 2 Authority Predicted Works as if a New Works Notice had been issued and part 2 (*Part 2 Authority Predicted Works*) of schedule 32 (*Authority Predicted Works*) shall be deemed to satisfy the requirements of clause 49.4 (*Maintainability Assessment*) for

this purpose and for the avoidance of doubt the Part 2 Authority Predicted Works shall form part of the Project Network and are included within the Unitary Charge subject to the APW Assumptions set out in schedule 32 (*Authority Predicted Works*) and the Service Provider Assumptions set out in Part 3 of schedule 18 (*Accruals and De-Accruals*).

## 11.8 Records

11.8.1 For the purposes of clause 11.4 (*Part 1 Authority Predicted Works*), the Service Provider and OpCo shall have access to the Authority's records from the Pre-Commencement Survey Date until the Service Commencement Date as follows:

### 11.8.1.1 in respect of AHW Works:

- (a) such information in respect of all the proposed AHW Works being carried out or expected to be carried out by the Authority as is available to the Authority; and
- (b) details of all AHW Works that is completed specifying the quantity of additional Project Network Parts and the locations (by OS Grid Range Reference) and such construction drawings as are available;

### 11.8.1.2 in respect of Third Party Works:

- (a) such information as is available to the Authority in respect of Proposed Project Network Parts specifying, if known to the Authority, the extent, the proposed date of completion, and the location by (OS Grid Range Reference) of each item of Third Party Works; and
- (b) such details of all those Third Party Works completed as are available to the Authority including all Authority documents from its maintainability assessment role;

11.8.1.3 in respect of the Authority's Programmed Maintenance:

- (a) details of the Authority's Wight Condition Index estimate for the relevant Monitoring Length;
- (b) the Authority's Programmed Maintenance programme; and
- (c) details of completed Authority's Programmed Maintenance and the treatments carried out on the Project Roads as part thereof, lifecycle replacement or refurbishment of any Project Network Parts and the locations (by OS Grid Range Reference) and construction details of the same (to the extent these are available to the Authority,

and the Authority shall use reasonable endeavours to procure such information provided that the Authority shall not incur material expenditure in doing so.

11.8.2 The Authority shall, for the purposes of clause 11.4 (*Part 1 Authority Predicted Works*), provide the Service Provider with reasonable access to the Authority's records in relation to the Project during Office Hours provided that such access shall not put the Authority in breach of any confidentiality or data protection provisions.

11.8.3 For the purposes of clause 11.4 (*Part 1 Authority Predicted Works*) the Authority shall ensure that all Part 1 Authority Predicted Works or any other works on the Updated Highways Asset List are carried out in accordance with Good Industry Practice.

11.8.4 The Authority shall use reasonable endeavours to assign or transfer to the Service Provider the benefit of any collateral warranties or guarantees available in respect of any Part 1 Authority Predicted Works provided that the Authority shall not be obliged to use reasonable endeavours where to do so would require the Authority to incur material expenditure and/or where the Authority is not

permitted to assign or transfer the warranty or guarantee pursuant to the conditions therein.

11.8.5 The Authority shall provide the Service Provider with the electrical test certificates for any Powered Apparatus included within the Part 1 Authority Predicted Works.

#### 11.9 Disputes

Any disputes in relation to this clause 11 (*Changes to Project Network from the Pre-Commencement Survey Date*) shall be dealt with in accordance with the provisions of clause 10 (*Condition of the Project Network*), clause 11 (*Changes to Project Network from the Pre-Commencement Survey Date*) and the Dispute Resolution Procedure, provided that the Service Provider may not use the Dispute Resolution Procedure to dispute the condition of the Project Network at the Pre-Commencement Survey Date.

## 12. GEOTECHNICAL AND GEOLOGICAL ZONES

### 12.1 LTS Schemes

The Service Provider shall be responsible for carrying out and completing each LTS Scheme as described in Part 4 of schedule 9 (Geotechnical and Geological Zones) in accordance with the requirements of schedule 2 (Output Specification) and other provisions of this Contract by the end of the Milestone indicated for the LTS Scheme as indicated in Table 3.13 of paragraph 3.4.11 of Performance Standard 3 (Core Investment Period and Handback Expiry Condition) of schedule 2 (*Output Specification*);

### 12.2 STS Schemes

The Service Provider shall be responsible for carrying out and completing each STS Scheme as described in part 5 of schedule 9 (Geotechnical and Geological Zones) in accordance with the requirements of schedule 2 (Output Specification) and other provisions of this Contract by the end of the Milestone indicated for the STS Scheme as indicated in Table 3.13 of paragraph 3.4.11 of Performance Standard 3 (Core Investment Period and Handback Expiry Condition) of schedule 2 (*Output Specification*) save that, in respect of Site 15 (Shippards Chine, Military Road), the Service Provider's obligation to carry out the relevant STS Scheme (in accordance with the provisions of part 5 of Schedule 9 (Geotechnical and Geological Zones) and

by the end of the Milestone indicated for the STS Scheme in Table 3.13 of paragraph 3.4.11 of Performance Standard 3 (Core Investment Period and Handback Expiry Condition) of schedule 2 (Output Specification)) shall not arise unless and until the Authority serves written notice on the Service Provider that in the Authority's reasonable opinion the Shippards Chine has developed to such an extent that the STS Scheme is required to be implemented and requesting that the Service Provider carries out such STS Scheme in accordance with the methodology in respect of Site 15 set out in part 5 of schedule 9 (Geotechnical and Geological Zones). The Service Provider shall upon receipt of such notice proceed to commence the works comprising the STS Scheme and the relevant provisions of clause 12 and schedule 9 (Geotechnical and Geological Zones) shall apply;

### 12.3 Red Zone Failure

The Service Provider shall rectify, manage and/or mitigate any Geotechnical Failure which occurs in an LTS Red Zone or an STS Red Zone ("**Red Zone Failure**") in accordance with the provisions of clauses 12.3 to 12.5, 12.7.2 and 12.8 to 12.13 (as applicable).

### 12.4 Red Zone Failure in an LTS Red Zone

12.4.1 Where a Red Zone Failure occurs in an LTS Red Zone prior to the relevant LTS Scheme Completion Date the Service Provider shall rectify, manage and/or mitigate the Red Zone Failure provided that the Service Provider shall not be obliged to incur costs and/or expenses in excess of the LTS Cap in carrying out such rectification and/or management and/or mitigation.

12.4.2 From an LTS Scheme Completion Date, the Service Provider shall rectify, manage and/or mitigate (at the Service Provider's cost) all Red Zone Failures in the relevant LTS Red Zone.

### 12.5 Red Zone Failure in an STS Red Zone

The Service Provider's responsibility for rectifying, managing and/or mitigating any Red Zone Failure in an STS Red Zone shall be limited to:

- 12.5.1 the performance of the STS Interventions in accordance with the requirements of part 5 of schedule 9 (*Geotechnical and Geological Zones*) and the STS Scheme Programme and the other provisions of this Contract; and
- 12.5.2 to the extent any Red Zone Failure occurs which the Service Provider could not be expected (acting reasonably) to rectify as part of the next programmed STS Intervention for that STS Scheme then the Service Provider's responsibility shall be limited to carrying out the rectification, management and mitigation of such Red Zone Failure provided that the Service Provider shall not be obliged to incur costs and expenses in excess of the STS Cap in undertaking such rectification, management and mitigation.

#### 12.6 Amber Zone Failure

The Service Provider shall rectify, manage and/or mitigate any Geotechnical Failure in an Amber Zone ("**Amber Zone Failure**") provided that the Service Provider shall not be obliged to incur costs and/or expenses in excess of the relevant Amber Zone Cap in carrying out such rectification, management and/or mitigation.

#### 12.7 Geological Failures

- 12.7.1 The Service Provider shall rectify, manage and/or mitigate the occurrence of a Geological Failure in the Geological Area provided that the Service Provider shall be not obliged to incur costs and/or expenses in excess of any Geological Failure Caps in rectifying, mitigating and/or managing such Geological Failure.
- 12.7.2 In the event that a Geological Failure directly affects the condition of the Project Network within a Red Zone or Amber Zone situated within the Geological Zone then the Geological Failure Cap shall apply to that Geological Failure.

#### 12.8 Failure Notification

The Service Provider shall notify the Authority ("**Failure Notification**") as soon as reasonably practicable of it becoming aware of a Red Zone Failure, an Amber Zone Failure or a Geological Failure and such notification shall include the following information:

- 12.8.1 the nature and extent of the Red Zone Failure, Amber Zone Failure and/or Geological Failure which has occurred and which affects the Project Network Part(s);
- 12.8.2 any measures which the Service Provider has or will put into place in order to make the affected Project Network Part(s) safe to the public and allow the continued use of the affected Project Network Part(s) by persons and vehicles to the extent practicable, including any necessary traffic management, road closures, diversions and restricted access to Carriageways and/or Footways; and
- 12.8.3 any potential impact on Service Provider Programmes or CIP Milestones.

#### 12.9 Failure Notice

The Service Provider shall provide a notice to the Authority ("**Failure Notice**") within twenty (20) Business Days of it becoming aware of the occurrence of a Red Zone Failure, an Amber Zone Failure and/or a Geological Failure and such notice shall contain the following information:

- 12.9.1 any inspections, tests, surveys and/or assessments which the Service Provider (acting reasonably) believes are required to assess the nature and extent of the Red Zone Failure, Amber Zone Failure and/or Geological Failure;
- 12.9.2 any measures adopted or to be adopted by the Service Provider in order to prevent the Red Zone Failure, Amber Zone Failure and/or Geological Failure from deteriorating in the period before the rectification, management and/or mitigation works (if relevant);
- 12.9.3 an estimate of the time frame for the rectification, management and/or mitigation of the Red Zone Failure, Amber Zone Failure and/or Geological Failure;
- 12.9.4 an estimate of the likely Failure Cost and a statement of whether incurring the estimated Failure Cost means that the STS Cap, Amber Zone Cap and/or Geological Failure Caps will be met or exceeded; and
- 12.9.5 whether any Red Zone Failure, Amber Zone Failure and/or Geological Failure has previously occurred in the affected Project Network Part(s) and if



so, giving full details of any Failure Costs incurred pursuant to this clause 12 (*Geotechnical and Geological Zones*).

#### 12.10 Updates and Changes to the Failure Notice

The Service Provider shall notify the Authority once a Month of any updates and/or changes to the information contained in the Failure Notice until such time as the Failure Report is issued.

#### 12.11 Failure Report

12.11.1 The Service Provider (at the Service Provider's own expense) shall provide to the Authority a report ("**Failure Report**") within forty (40) Business Days of the date of the Failure Notice unless the Parties agree (acting reasonably) that, having regard to the nature and complexity of the Red Zone Failure, Amber Zone Failure and/or Geological Failure, an extended time for preparation of the Failure Report is necessary (in which case the Service Provider shall provide the Failure Report within such period as may be agreed between the Parties acting reasonably). The Failure Report shall contain:

12.11.1.1 updated and more detailed information of those matters contained in the Failure Notification and Failure Notice;

12.11.1.2 a full and detailed explanation of the impact of the rectification, management and/or mitigation (as applicable) of the Red Zone Failure, Amber Zone Failure and/or Geological Failure on the performance of the Services by the Service Provider in accordance with the provisions of this Contract, including whether the Service Provider believes that management of the Red Zone Failure, Amber Zone Failure and/or Geological Failure would be a more appropriate solution than rectification;

12.11.1.3 a full and detailed explanation of how the Service Provider has made the affected Project Network Parts and its surroundings safe to the public

(including the remediation of all Category 1 Defects in accordance with the provisions of schedule 2 (*Output Specification*));

12.11.1.4 a full and detailed explanation of what further actions the Service Provider is to undertake (including any inspections, tests, surveys and/or assessments in order to determine the full extent of the Red Zone Failure, Amber Zone Failure and/or Geological Failure);

12.11.1.5 a full and detailed explanation of how the Service Provider proposes to rectify, manage and/or mitigate (as appropriate) the Red Zone Failure, Amber Zone Failure and/or Geological Failure ("**Proposed Failure Solution**") which shall, where the Service Provider believes no action is required, provide a full explanation of the reasons for such belief, including any implications arising from taking no action; and

12.11.1.6 an estimate of the total amount of Failure Costs which the Service Provider shall calculate acting reasonably (including all Failure Costs incurred up to the issue of the Failure Report) required to carry out the Proposed Failure Solution ("**Proposed Failure Cost**"), together with documentary evidence such as full bills of quantity where practicable.

12.11.2 The Service Provider shall at the same time as submitting the Failure Report, amend and submit to the Authority pursuant to schedule 20 (*Review Procedure*) any Service Provider Programmes affected by the Proposed Failure Solution.

12.11.3 If requested by the Authority, the Service Provider shall as soon as reasonably practicable provide any additional information relating to the Failure Report.

12.11.4 The Authority shall notify the Service Provider, in writing, within sixty (60) Business Days of receipt of the Failure Report (provided that the Authority shall update the Service Provider monthly of the progress of its consideration of the matters provided to the Authority by the Service Provider pursuant to clause 12.11.1.1 to 12.11.1.6 inclusive), and such notice may include the following information:

12.11.4.1 any amendments the Authority proposes to make to the Failure Report;

12.11.4.2 any alternative solution to the Proposed Failure Solution the Authority wishes to propose; and

12.11.4.3 any part or parts of the Proposed Failure Cost which the Authority disputes with an explanation as to why the Authority disputes such costs,

and where the Authority has proposed any amendments pursuant to clause 12.11.4.1 or an alternative solution pursuant to clause 12.11.4.2, the Service Provider shall respond in writing to the Authority's notice issued pursuant to clause 12.11.4 and in particular, the Service Provider shall comment on the impact on the Proposed Failure Cost, within fifteen (15) Business Days of receipt of the Authority's notification pursuant to this clause 12.11.4. The Service Provider shall give due regard to the Authority's Proposed Failure Solution and shall provide a technical response to the Authority provided that nothing under this clause 12.11.4 shall oblige the Service Provider to adopt the Authority's Proposed Failure Solution.

12.11.5 The Service Provider shall, at the same time as submitting the Failure Report, amend and submit to the Authority pursuant to schedule 20 (*Review Procedure*) and Service Provider Programmes that would be affected by the Proposed Failure Solution.

12.11.6 The Authority shall be entitled at any time from delivery by the Service Provider of a Failure Notification to dispute in accordance with the provisions of clause 83 (*Dispute Resolution Procedure*) whether a Red Zone Failure, an Amber Zone Failure or Geological Failure has occurred and/or the Failure Report.

12.11.7 Following receipt by the Authority of the Service Provider's comments provided pursuant to clause 12.11.4, the Authority shall either:

12.11.7.1 notify the Service Provider that the Authority requires the Service Provider to rectify the Red Zone Failure, Amber Zone Failure or Geological Failure in accordance with the Failure Report (as may be amended during the process set out in clause 12.11.4) and the Service Provider shall then implement the Failure Solution; or

12.11.7.2 notify the Service Provider that the Authority does not require the Service Provider to carry out any further rectification, management and/or mitigation of the Red Zone Failure, Amber Zone Failure or Geological Failure (including, for the avoidance of doubt, the Failure Solution and any associated traffic management costs) pursuant to this clause 12 (*Geotechnical and Geological Zones*) and to the extent the Service Provider is required to implement any additional measures as a result of such instruction not to carry out any further rectification, management and/or mitigation this shall be at the Authority's cost.

#### 12.12 STS Cap, Amber Zone Cap Expiry and Geological Cap Expiry

12.12.1 The Service Provider shall notify the Authority prior to the implementation of the Failure Solution if it considers (acting reasonably) that the relevant STS Cap, Amber Zone Cap or relevant Geological Failure Cap will be exceeded as a result of the Failure Solution and such notification shall contain a full and detailed explanation of why the Service Provider considers that the relevant STS Cap, Amber Zone Cap or Geological Failure Cap will be exceeded ("**Failure Cap Expiry Date**").

12.12.2 Where clause 12.12.1 applies, the Parties shall hold a meeting within ten (10) Business Days of receipt by the Authority of the notice pursuant to clause 12.12.1 and the Authority shall at its absolute discretion decide whether it

requires the Service Provider to implement the Failure Solution with those costs which are incurred that are in excess of the relevant STS Cap, Amber Cap or Geological Failure Cap being at the Authority's cost.

12.12.3 Where the Service Provider has commenced the Failure Solution and discovers that the relevant STS Cap, Amber Cap or Geological Failure Cap shall be exceeded ("**Cap Expiry Date**") the Service Provider shall notify the Authority as soon as this becomes apparent and in any event prior to the date on which the Service Provider considers that the relevant STS Cap, Amber Cap or Geological Failure Cap will be exceeded and such notification shall contain a full and detailed explanation of why the Service Provider considers that the relevant STS Cap, Amber Cap or Geological Failure Cap will be exceeded.

12.12.4 The Service Provider shall, following the service of the notice pursuant to clause 12.12.3 temporarily (pending determination by the Authority pursuant to this clause 12.12.4) cease works on implementation of the Failure Solution as soon as reasonably practicable and the Parties shall hold a meeting within ten (10) Business Days of the receipt by the Authority of the notice pursuant to clause 12.12.3 and the Authority shall at its absolute discretion notify the Service Provider:

12.12.4.1 whether it wishes the Service Provider to implement the Failure Solution and to the extent that the costs which are incurred are in excess of the relevant STS Cap, Amber Zone Cap or Geological Failure Cap, there shall be a deemed Authority Change; or

12.12.4.2 that it wishes the Service Provider to implement any additional measures as a result of such instruction not to carry out any further rectification, management and/or mitigation this shall be at the Authority's cost.

### 12.13 General

12.13.1 The Service Provider shall ensure that all amounts in respect of Failure Costs incurred by the Service Provider in accordance with this clause 12

(*Geotechnical and Geological Zones*) are reasonably and properly incurred and shall provide such information as the Authority requires on an open book basis.

12.13.2 Nothing in this clause 12 (*Geotechnical and Geological Zones*) shall prevent the Authority from issuing an Authority Change in respect of any Project Network Part(s) affected by a Red Zone Failure, an Amber Zone Failure and/or a Geological Failure, in which case the provisions of schedule 17 (*Change Protocol*) shall apply.

12.13.3 Where, as a result of a Red Zone Failure, an Amber Zone Failure and/or a Geological Failure the Service Provider is unable to or is adversely affected in its ability to perform the Services in accordance with the requirements of this Contract, the Service Provider shall be entitled to an Excusing Cause in accordance with clause 47 (*Excusing Causes*).

### 13. LATENT DEFECTS

#### 13.1 Liability for Latent Defects

Subject to the provisions of clause 13.2 (*Cap on Liability for Latent Defects*), the Service Provider shall be responsible for rectifying, managing and/or mitigating the occurrence and effects of any Latent Defect in any Major Structure in accordance with this clause 13 (*Latent Defects*).

#### 13.2 Cap on Liability for Latent Defects

The Service Provider's liability for carrying out its obligations pursuant to clause 13.1 (*Liability for Latent Defects*) above shall subject to the provisions of clause 13.9 (*Latent Defect Cap*) and clause 13.10 (*Cap Expiry*) be limited to one million pounds (£1,000,000) (Indexed) in aggregate over the Term ("**Latent Defect Cap**").

#### 13.3 Latent Defect Notification and Latent Defect Notice

13.3.1 The Service Provider shall notify the Authority ("**Latent Defect Notification**") as soon as reasonably practicable of it becoming aware of the occurrence of a Latent Defect and such notification shall contain the following information:

13.3.1.1 the nature and extent of the Latent Defect which has occurred in the Major Structure;

13.3.1.2 any measures which the Service Provider has or will put into place in the period before the Agreed Latent Defect Solution is commenced in order to make the affected Major Structure safe to the public and allow, to the extent practicable, the continued use of the affected Major Structure by persons and vehicles, including any necessary traffic management measures (which shall include details of any road closures, diversions and restrictions of access to Carriageways and/or Footways).

13.3.2 The Service Provider shall provide a notice to the Authority ("**Latent Defect Notice**") within twenty (20) Business Days of it becoming aware of the occurrence of a Latent Defect and such notice shall contain the following information (to the extent such information is available to the Service Provider):

13.3.2.1 any inspections, tests, surveys and/or assessments which the Service Provider (acting reasonably) believes are required to assess the nature and extent of the Latent Defect, including the estimated costs of carrying out such inspections, tests, surveys and/or assessments and any inspections, surveys and/or assessments necessary to assess any other Major Structure that may be affected by a similar Latent Defect;

13.3.2.2 any measures adopted or to be adopted by the Service Provider in order to prevent the Latent Defect from deteriorating in the period before the Agreed Latent Defect Solution is commenced;

13.3.2.3 an estimate of the time frame for the rectification, management and/or mitigation of the Latent Defect;

13.3.2.4 an estimate of the likely Latent Defect Costs and a statement of whether incurring the estimated Latent

Defect Costs means that the Latent Defect Cap will be met or exceeded; and

13.3.2.5 whether any other Latent Defect has previously occurred in the affected Major Structure or any other Major Structure and if so, giving full details of any such Latent Defect Costs incurred pursuant to this clause 13 (*Latent Defects*) together with the impact that those costs in combination with the estimated Latent Defect Costs referred to in clause 13.3.2.4 will have on the Latent Defect Cap.

13.3.3 If, during the period between the issue of the Latent Defect Notice and the issue of the Latent Defect Report, any of the information provided to the Authority pursuant to clause 13.3.2 changes in any material way, the Service Provider shall notify the Authority of such changes as soon as reasonably practicable.

13.3.4 The Service Provider shall notify the Authority in each Monthly Service Report following the issue of a Latent Defect Notice of any updates to and/or changes to the information contained in the Latent Defect Notice until such time as the Latent Defect Report is issued. The Service Provider shall undertake in accordance with Good Industry Practice all necessary investigations required to enable the Service Provider to establish whether a Latent Defect has in fact occurred and in order to fully comply with clause 13.4 (*Latent Defect Report*).



#### 13.4 Latent Defect Report

The Service Provider shall provide (at its own expense) to the Authority a report ("**Latent Defect Report**") within sixty (60) Business Days of the date of the Latent Defect Notice (unless the Parties agree, acting reasonably, that having regard to the nature and complexity of the Latent Defect an extended time for preparation of the Latent Defect Report is necessary, in which case the Service Provider shall provide the Latent Defect Report within such period as has been agreed between the Parties). The Latent Defect Report shall set out the following:

- 13.4.1 updated and more detailed information in respect of those matters contained in the Latent Defect Notification and Latent Defect Notice;
- 13.4.2 a full and detailed explanation of the Latent Defect and any action taken to rectify, manage and/or mitigate (as applicable) the Latent Defect and any impact the Latent Defect or any action taken to rectify, manage and/or mitigate the Latent Defect will have on the performance of the Services by the Service Provider, including whether the Service Provider believes that mitigation or management of the Latent Defect would be a more appropriate solution than rectification of the Latent Defect;
- 13.4.3 a full and detailed explanation of how the Service Provider has made and continues to make the affected Major Structure and its surroundings safe to the public (including the remediation of all Category 1 Defects in accordance with the requirements of schedule 2 (*Output Specification*));
- 13.4.4 a full and detailed explanation of what further actions the Service Provider proposes to undertake (including any inspections, tests, surveys and/or assessments in order to determine the full extent of the Latent Defect);
- 13.4.5 where the Service Provider believes (acting reasonably) that no action is required to rectify, manage or mitigate the Latent Defect a full and detailed explanation of the reasons for such belief, including the implications for the provisions of the Services arising from taking no action; or
- 13.4.6 where the Service Provider believes (acting reasonably) that action is required to rectify, manage and/or mitigate the Latent Defect, full and detailed

proposals of the Service Provider's long-term solution for rectifying, managing or mitigating the Latent Defect, including (to the extent practicable):

13.4.6.1 options for rectifying the Latent Defect (in whole or in part) including details relating to:

- (a) the mitigation of the occurrence and effect of such Latent Defect;
- (b) the management of such Latent Defect;
- (c) the impact of such Latent Defect on the Services;
- (d) any proposed amendments to the Service Provider Programmes as a result of the proposed rectification; and
- (e) the Service Provider's preferred option for rectification of the Latent Defect,

(a "**Rectification Plan**"); and

13.4.6.2 options for mitigating (but not rectifying) the occurrence and effects of the Latent Defect including details relating to:

- (a) the mitigation of the occurrence and effect of such Latent Defect;
- (b) the management of such Latent Defect;
- (c) the impact of such Latent Defect on the Services;
- (d) any proposed amendments to any Service Provider Programmes as a result of the proposed mitigation; and
- (e) the Service Provider's preferred option for mitigating the Latent Defect,

(a "**Mitigation Plan**");

13.4.7 a full breakdown of the Proposed Latent Defect Target Costs in relation to each of the Rectification Plan and the Mitigation Plan including an allocation of costs against each of the relevant activities and evidence of how the costs have been determined (including full bills of quantity where practicable), and also including:

13.4.7.1 the amount of any Latent Defect Costs already incurred by the Service Provider in managing and/or mitigating the effects of the Latent Defect; and

13.4.7.2 details of any aspects of the Proposed Latent Defect Target Costs that are unascertainable at the date of the Latent Defect Report by the Service Provider (acting reasonably) and a full and detailed explanation as to why such parts of the Proposed Latent Defect Target Costs are unascertainable,

and the Service Provider shall notify the Authority in each Monthly Service Report following the submission by the Service Provider of the Latent Defect Report of:

13.4.7.3 any updates to the information provided in the Latent Defect Report; and

13.4.7.4 whether any Proposed Latent Defect Target Costs which were specified as being unascertainable pursuant to clause 13.4.7.2 have become certain and provide detail as to the further investigations undertaken by the Service Provider in order to provide certainty in respect of the Proposed Latent Defect Target Costs.

13.4.8 The Authority shall notify the Service Provider, in writing, within sixty (60) Business Days of receipt of the Latent Defect Report (provided that the Authority shall update the Service Provider monthly of the progress of its consideration of the matters provided to the Authority by the Service Provider pursuant to clause 13.4.1 to 13.4.7 inclusive), and such notice may include the following information:

- 13.4.8.1 the Authority's preferred solution as between the Rectification Plan and/or the Mitigation Plan put forward by the Service Provider in the Latent Defect Report;
- 13.4.8.2 any amendments the Authority proposes to make to the solution referred to in clause 13.4.8.1;
- 13.4.8.3 any alternative solution the Authority wishes to propose (including a combination of parts of the Rectification Plan and/or Mitigation Plan); and
- 13.4.8.4 any part or parts of the Proposed Latent Defect Target Costs which the Authority disputes with an explanation as to why the Authority disputes such costs,

and where the Authority has proposed any amendments pursuant to clause 13.4.8.2 or an alternative solution pursuant to clause 13.4.8.3 or disputes any part or parts of the Proposed Latent Defect Target Costs pursuant to clause 13.4.8.4, the Service Provider shall respond in writing to the Authority's proposals and in particular, the Service Provider shall comment on the impact on the Proposed Latent Defect Target Costs of the Authority's proposals, within fifteen (15) Business Days of receipt of the Authority's notification pursuant to this clause 13.4.8 ("**Updated Latent Defect Report**").

- 13.5 The Service Provider shall, at the same time as submitting the Latent Defect Report, amend and submit to the Authority pursuant to schedule 20 (*Review Procedure*) any Service Provider Programmes that would be affected by the Proposed Latent Defect Solution.

- 13.6 If requested by the Authority, the Service Provider shall as soon as reasonably practicable provide any additional information relating to the Latent Defect Report to enable the Authority to prepare for Value Engineering Workshop No: 1.

13.7 Value Engineering Workshop No: 1

- 13.7.1 As soon as reasonably practicable and in any event within twenty (20) Business Days or such other period as the Parties may agree (acting reasonably) of the notification issued by the Authority pursuant to clause

13.4.8, the Parties (and their respective advisors) shall hold a meeting ("Value Engineering Workshop No: 1") to discuss the content of the Latent Defect Report, the Authority's notification issued pursuant to clause 13.4.8 and if relevant the Service Provider's response (provided in accordance with the provisions of clause 13.4.8) to the Authority's notification issued pursuant to clause 13.4.8 and at Value Engineering Workshop No: 1 the Parties shall carry out a review using Value Engineering.

13.7.2 The Parties shall endeavour to agree (acting reasonably) at Value Engineering Workshop No: 1:

13.7.2.1 any revisions to the Rectification Plan (in full or in part) or the Mitigation Plan (in full or in part);

13.7.2.2 any revisions to the Proposed Latent Defect Target Cost; and

13.7.2.3 any consequential amendments to the Service Provider Programmes required as a result of the Proposed Latent Defect Solution; and

13.7.2.4 whether any additional surveys are required to resolve any unascertained elements of the Proposed Latent Defect Target Cost;

and the Service Provider shall produce for the Authority within ten (10) Business Days (or such longer period as may be agreed (both Parties acting reasonably) at Value Engineering Workshop No: 1) of the Value Engineering Workshop No: 1 a Value Engineering Report containing the costs of any additional surveys and investigations required.

#### Latent Defect Solution Not Agreed by the Parties

13.7.3 Where pursuant to clause 13.7.1, the Parties are unable to agree (acting reasonably) whether any such revisions or additional surveys are required the Parties shall hold a further meeting ("Value Engineering Workshop No: 2") to endeavour to agree (acting reasonably):

- 13.7.3.1 any revisions to the Rectification Plan (in full or in part) or the Mitigation Plan (in full or in part);
  - 13.7.3.2 any revisions to the Proposed Latent Defect Target Cost; and
  - 13.7.3.3 any consequential amendments to the Service Provider Programmes required as a result of the Proposed Latent Defect Solution; and
  - 13.7.3.4 whether any additional surveys are required to resolve any unascertained element of the Proposed Latent Defect Target Cost.
- 13.7.4 In the event that the Parties are unable to agree (acting reasonably) whether any such revisions or surveys are required within twenty (20) Business Days of Value Engineering Workshop No: 2, the Parties agree that they will refer the matter for resolution in accordance with clause 83 (*Dispute Resolution Procedure*) provided always that the Authority may at its sole discretion decide not to implement the Proposed Latent Defect Solution.
- 13.7.5 Where the Parties agree to implement the Proposed Latent Defect Solution following Value Engineering Workshop No: 2, the Service Provider shall produce for the Authority within ten (10) Business Days of Value Engineering Workshop No: 2 a Value Engineering Report containing the information described in clause 13.7.2.

### 13.8 Latent Defect Solution Agreed by the Parties

- 13.8.1 Within sixty (60) Business Days of reaching agreement on the Value Engineering Workshop No: 1 or Value Engineering Workshop No: 2 any additional surveys required to resolve any unascertained Proposed Latent Defect Target Costs shall be completed to ascertain and finalise all costs and solutions.
- 13.8.2 As soon as reasonably practicable and in any event within twenty (20) Business Days of the receipt by the Authority of the survey and cost information referred to in clause 13.8.1 above the Parties shall hold a final

meeting (“**Value Engineering Workshop No: 3**”) to finalise the content of the Latent Defect Solution Report.

13.8.3 The Parties shall endeavour to agree (acting reasonably) at the Value Engineering Workshop No: 3:

13.8.3.1 whether to implement the Rectification Plan (in full or in part) or the Mitigation Plan (in full or in part);

13.8.3.2 the Proposed Latent Defect Target Cost; and

13.8.3.3 any consequential amendments to the Service Provider Programmes required as a result of the Proposed Latent Defect Solution.

and where the Parties reach agreement at Value Engineering Workshop No. 3 a final Latent Defect Solution Report detailing the Agreed Latent Defect Solution and the target costs for implementing the Agreed Latent Defect Solution as agreed by the Parties at Value Engineering Workshop No. 3 (the “**Agreed Latent Defect Target Cost**”) shall be produced within twenty (20) Business Days of the Value Engineering Workshop No: 3

13.8.4 In the event that the Parties are unable to agree (acting reasonably) the Proposed Latent Defect Solution and the Proposed Latent Defect Target Cost within twenty (20) Business Days of Value Engineering Workshop No: 3, the Parties agree that they will refer the matter for resolution in accordance with clause 83 (*Dispute Resolution Procedure*) and the determination pursuant to clause 83 (*Dispute Resolution Procedure*) shall constitute the Agreed Latent Defect Solution and/or the Agreed Latent Defect Target Cost.

13.8.5 Authority's Decision in respect of the Latent Defect

Subject to the resolution of any Dispute pursuant to clause 13.8.4, the Authority (acting reasonably) shall notify the Service Provider as soon as reasonably practicable following receipt of the final Latent Defect Solution Report that:

13.8.5.1 the Authority requires the Service Provider to:

- (a) implement the Agreed Latent Defect Solution in accordance with the Agreed Latent Defect Target Cost as set out in the Latent Defect Solution Report; or
- (b) does not require the Service Provider to implement the Agreed Latent Defect Solution; or
- (c) submit to the Service Provider any further amendments that the Authority requires the Service Provider to make to the Latent Defect Solution Report to reflect the Agreed Latent Defect Solution.

13.8.6 Where clause 13.8.5.1(a) applies, the Service Provider shall (subject to clause 13.10 (*Cap Expiry*)) proceed to implement the Agreed Latent Defect Solution in accordance with the Agreed Latent Defect Target Cost.

13.8.7 Where clause 13.8.5.2(c) applies, the Service Provider shall revise the Latent Defect Solution Report and re-submit the Latent Defect Solution Report to the Authority at which point the provisions of clause 13.8.5 shall apply *mutatis mutandis*

13.8.8 The Service Provider shall notify the Authority, in each Monthly Service Report following the issue of the Latent Defect Solution Report of any updates and/or changes to the information contained in the Latent Defect Solution Report until the Agreed Latent Defect Solution has been implemented.

13.8.9 Where clause 13.8.5.1(b) applies, the Authority may De-Accrue the Major Structure and require the Service Provider to pay an amount equivalent to the Agreed Latent Defect Target Cost agreed pursuant to clauses 13.8.2 and 13.8.3 (less any Latent Defect Costs already incurred by the Service Provider in rectifying, managing and/or mitigating the relevant Latent Defect) to the Authority within twenty (20) Business Days of receipt of a request for the same, provided that the Service Provider shall not be required to pay any sums in excess of the Latent Defect Cap.

13.8.10 The Service Provider shall not be relieved from its obligations pursuant to this Contract as a consequence of Latent Defects other than pursuant to or as provided for in this clause 13 (*Latent Defects*).



### 13.9 Latent Defect Cap

13.9.1 Within thirty (30) Business Days of the Service Provider completing the implementation of the Agreed Latent Defect Solution to the satisfaction of the Authority, the Service Provider shall notify the Authority of:

13.9.1.1 the total amount of Latent Defect Costs incurred in implementing the Agreed Latent Defect Solution (including the Service Provider's costs of the Value Engineering Workshops held pursuant to clause 13.7) ("**Actual Latent Defect Cost**") together with all relevant documentary evidence including full bills of quantity where practicable; and

13.9.1.2 a calculation showing the difference (if any) between the Agreed Latent Defect Target Cost and the Actual Latent Defect Cost.

### 13.10 Cap Expiry

13.10.1 Where the Agreed Latent Defect Target Cost is below the Latent Defect Cap and the Service Provider considers that the Latent Defect Cap will be exceeded through the implementation of the Agreed Latent Defect Solution, the Service Provider shall notify the Authority as soon as reasonably practicable after this becomes apparent to the Service Provider and in any event prior to the date on which the Service Provider considers that the Latent Defect Cap will be exceeded ("**Cap Expiry Date**") and such notification shall provide a full and detailed explanation as to why the Service Provider considers that the Latent Defect Cap will be exceeded.

13.10.2 The Service Provider shall, following the service of the notice pursuant to clause 13.10.1, continue to implement the Agreed Latent Defect Solution and the provisions of this clause 13 (*Latent Defects*) until the Cap Expiry Date.

13.10.3 Where clause 13.10.2 applies, the Authority shall issue a notice to the Service Provider requesting a meeting at which the Parties shall endeavour to agree whether the Service Provider will continue to implement the Agreed Latent Defect Solution.

- 13.10.4 If, following the meeting held pursuant to clause 13.10.3 the Authority instructs the Service Provider to continue to implement the Agreed Latent Defect Solution, the Service Provider shall be obliged to comply with such instructions and the Authority shall be obliged to pay the Service Provider seventy five percent (75%) of the Service Provider's reasonably and properly incurred costs in undertaking the Agreed Latent Defect Solution over and above the Latent Defect Cap and the remaining twenty five percent (25%) shall be for the sole account of the Service Provider together with the Latent Defect Cap value notwithstanding that for the avoidance of doubt any cost increase over and above the Agreed Latent Defect Target Cost shall count towards the Latent Defect Cap and the Service Provider shall not be liable to fund any of the Actual Latent Defect Cost in aggregate during the Term over one million two hundred and fifty thousand pounds (£1,250,000).
- 13.10.5 Where the Agreed Latent Defect Target Cost is in excess of the Latent Defect Cap, the Service Provider shall be responsible for meeting all Latent Defect Costs up to the Latent Defect Cap and the Authority shall be obliged to pay the Service Provider the costs of the Actual Latent Defect Cost over and above the Latent Defect Cap.
- 13.10.6 Where the Agreed Latent Defect Target Cost is in excess of the Latent Defect Cap and the resulting Actual Latent Defect Cost is less than the Latent Defect Cap, the Latent Defect Cap shall be deemed to be expired even where the Service Provider does not need to incur costs to the value of the Latent Defect Cap.
- 13.10.7 Where the Agreed Latent Defect Target Cost is in excess of the Latent Defect Cap and the Service Provider considers that the Agreed Latent Defect Target Cost shall be exceeded the Service Provider shall notify the Authority as soon as reasonably practicable after this becomes apparent to the Service Provider and such notification shall provide a full and detailed explanation as to why the Service Provider considers that the Agreed Latent Defect Target Cost will be exceeded and the Service Provider shall continue to implement the Agreed Latent Defect Solution in accordance with the Agreed Latent Defect Target Cost and the provisions of clause 13 (*Latent Defects*).

13.10.8 Where clause 13.10.7 applies, the Authority shall issue a notice to the Service Provider requesting a meeting at which the Parties shall endeavour to agree whether the Service Provider will continue to implement the Agreed Latent Defect Solution.

13.10.9 If, following the meeting held pursuant to clause 13.10.8 the Authority instructs the Service Provider to continue to implement the Agreed Latent Defect Solution, the Service Provider shall be obliged to comply with such instructions and;

where the Actual Latent Defect Cost is in excess of the Agreed Latent Defect Target Cost the Authority shall be obliged to pay the Service Provider the Agreed Latent Defect Target Cost less the Latent Defect Cap plus seventy five percent (75%) of the difference between the Actual Latent Defect Cost and the Agreed Latent Defect Target Cost provided always that the Service Provider shall not be obliged to pay any Latent Defect Costs in aggregate during the Term in excess of one million two hundred and fifty thousand pounds (£1,250,000).

13.10.10 If, following the meeting held pursuant to clause 13.10.4 or 13.10.8, the Authority instructs the Service Provider to cease to implement the Agreed Latent Defect Solution, the Service Provider shall be entitled to an Excusing Cause subject to and in accordance with the provisions of clause 47 (*Excusing Causes*).

#### 13.11 Latent Defects Log

13.11.1 The Service Provider shall maintain a record ("Latent Defects Log") of each Latent Defect or potential Latent Defect notified pursuant to this clause 13 (Latent Defects) including:

13.11.1.1 all Proposed Latent Defect Solutions and Latent Defect Solutions;

13.11.1.2 all Proposed Latent Defect Target Costs, Agreed Latent Defect Target Costs and Actual Latent Defect Costs; and

13.11.1.3 any other matters the Service Provider considers will assist the Parties in determining whether or not the Latent Defect Cap is, will or is likely to be exceeded.

13.11.2 The Service Provider shall provide a copy of the Latent Defects Log to the Authority annually, to be submitted no later than one (1) month before the start of each Contract Year, and as soon as reasonably practicable following request by the Authority at any other time during the Contract Year.

13.11.3 If either Party considers the Latent Defects Log to be inaccurate in any respect, it shall notify the other Party accordingly and the Service Provider shall correct any inaccuracy as notified (or where such inaccuracy is disputed, as determined pursuant to the Dispute Resolution Procedure) as soon as reasonably practicable and provide an updated copy to the Authority.

#### 13.12 General

13.12.1 The Service Provider shall ensure that all amounts in respect of Latent Defect Costs incurred by the Service Provider in accordance with this clause 13 (*Latent Defects*) are reasonably and properly incurred and shall provide such information as the Authority requires on those costs on an open book basis.

13.12.2 Nothing in this clause 13 (*Latent Defects*) shall prevent the Authority from issuing an Authority Change in respect of any Major Structure affected by a Latent Defect, in which case the provisions of schedule 17 (*Change Protocol*) shall apply.

13.12.3 Where, as a result of a Latent Defect or works expressly required to rectify, manage and/or mitigate a Latent Defect, the Service Provider is unable to or is adversely affected in its ability to perform the Services in accordance with the requirements of this Contract, the Service Provider shall be entitled to an Excusing Cause subject to and in accordance with the provisions of clause 47 (*Excusing Causes*).

#### 14. DEEMED TO COMPLY PROJECT NETWORK PARTS

The Service Provider shall comply with all the provisions of schedule 2 (*Output Specification*) in respect of Deemed to Comply Project Network Parts save that:

14.1 in respect of Deemed to Comply Structures the Service Provider shall not be required to:

- 14.1.1 refurbish the Structure to meet the 40 tonnes Assessment Live Loading in accordance with BD21/01 of the DMRB if the Structure is set out in table 1 – weight restricted structures of schedule 15 (*Deemed to Comply*);
  - 14.1.2 change the height of the Structure if it was subject to any Height Restriction at the date of this Contract as set out in "Table 2 – Height Restricted Structures" of schedule 15 (*Deemed to Comply*);
  - 14.1.3 change the width of the Structure if it was subject to any Width Restriction as set out in "Table 3 – Width Restricted Structures" of schedule 15 (*Deemed to Comply*); and/or
  - 14.1.4 carry out any works to the Structure so that it is no longer Deemed to Comply in respect of Containment as set out in "Table 4 – Containment (Footway/Verge Protection)" of schedule 15 (*Deemed to Comply*).
- 14.2 Deemed to Comply Street Lighting is deemed to comply with the requirements of BS5489:2003 and BS EN13201:2003.

## **PART E - LAND RIGHTS**

### **15. AUTHORITY ACCESS**

#### 15.1 Trials

- 15.1.1 Any study or trial referred to in clause 43.4.3.3 shall be conducted by or on behalf of the Authority in such manner as to minimise the loss of availability of any part of the Project Network or any adverse effect on traffic flows on the Project Network arising from such study or trial and no such study or trial shall, without the consent of the Service Provider (such consent not to be unreasonably withheld or delayed), substantially affect the physical integrity of the Project Network. If the Authority or a third party on its behalf conducts a study or trial referred to in clause 43.4.3.3 and in accordance with this clause 15.1, the Service Provider shall be entitled to an Excusing Cause (subject to and in accordance with clause 47 (Excusing Cause)).
- 15.1.2 The Service Provider shall procure that all Relevant Authorities have access to all Work Sites throughout the Term in order to carry out any work (including surveys and inspections) in accordance with any Law or to exercise any right,