



**HIGHWAYS MAINTENANCE AND  
MANAGEMENT SERVICE PFI  
(PROC/0091)**

***VOLUME 2 - PROJECT AGREEMENT &  
SCHEDULES***

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DATED

2010

**(1) BIRMINGHAM CITY COUNCIL**

**- and -**

**(2) AMEY BIRMINGHAM HIGHWAYS LIMITED**

**PROJECT AGREEMENT**

relating to

the rehabilitation, maintenance,  
management and operation of the roads and  
street lighting network in the City of  
Birmingham pursuant to the Government's  
Private Finance Initiative

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**BETWEEN**

- (1) **BIRMINGHAM CITY COUNCIL** of the Council House, Victoria Square, Birmingham, B1 1BB (the "**Authority**"); and
- (2) **AMEY BIRMINGHAM HIGHWAYS LIMITED** of the Sherard Building, Edmund Halley Road, Oxford, Oxfordshire, OX4 4DQ, registered company number 7064140 (the "**Service Provider**").

**WHEREAS:**

- (A) In accordance with the Government's Private Finance Initiative and pursuant to a notice published in the Official Journal of the European Union on 25 May 2004, the Authority invited expressions of interest from appropriately qualified consortia for services relating to the rehabilitation, maintenance, management and operation of the Project Network for a period of 25 years from the Planned Service Commencement Date.
- (B) The Authority's objectives are to provide a Project Network which is safe and which facilitates the free movement of traffic and economic development of the Project Area.
- (C) The Service Provider has submitted proposals to the Authority setting out how it will meet the Authority's requirements relating to the rehabilitation, maintenance, management and operation of the Project Network.
- (D) The Authority has selected the Service Provider for the rehabilitation, maintenance, management and operation of the Project Network pursuant to this Contract.
- (E) By virtue of, inter alia, section 1(2) of the 1980 Act the Authority is the Highway Authority for the Project Area.
- (F) The 2009 Order enables a Highway Authority to authorise another person or that person's employees to exercise certain of its functions in relation to management, maintenance, improvement and other dealings with highways in respect of which it is the relevant authority.
- (G) The Parties intend and consent to this Contract being a certified contract within the meaning of section 2 of the 1997 Act, and the Certification Requirements are intended to be satisfied by the Authority before the end of the certification period of six (6) weeks beginning on the day on which the Authority enters into this Contract.

- (H) The Service Provider has consented to the issue of a certificate under section 3 of the 1997 Act.
- (I) The Authority is a "Best Value Authority" and the functions in respect of which the Authority wishes to procure the rehabilitation, maintenance, management and operation of the Project Network are functions to which the general duty set out at section 3(1) of the 1999 Act applies.
- (J) The relevant discharge terms are set out in clause 69.6 (*Relevant Discharge Terms*).
- (K) This Contract is entered into under the Government's Private Finance Initiative and accordingly is excluded from part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of paragraph 4 of the Construction Contracts (England and Wales) Exclusion Order 1998. The Service Provider acknowledges that the operation of the Housing Grants Construction and Regeneration Act 1996 upon any other Project Document shall not affect the Parties' rights and obligations under this Contract.

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

## **PART A - INTRODUCTION**

### **1. DEFINITIONS, INTERPRETATION AND CONSTRUCTION**

1.1 This Contract comprises:

1.1.1 the Main Body;

1.1.2 the schedules; and

1.1.3 the annexures;

together, the "**Contract**".

#### **1.2 Priority**

This Contract shall be construed and interpreted as a whole provided that in the event of any conflict or inconsistency between the provisions of the Main Body, the schedules and the annexures, or between any of the schedules, or between any of the annexures, then, save as expressly provided for by clause 1.3, the conflict or

inconsistency shall be resolved according to the following descending order of priority:

1.2.1 the Main Body and schedule 1 (*Definitions, Interpretation and Construction*);

1.2.2 schedule 2 (*Output Specification*);

1.2.3 schedule 4 (*Payment Mechanism*); and

1.2.4 all other schedules and annexures.

1.3 Notwithstanding the provisions of clause 1.2 (*Priority*), the provisions of the Direct Agreement shall prevail over this Contract in the event of any conflict or inconsistency between the Direct Agreement and this Contract.

1.4 If there is any conflict or inconsistency between the terms of this Contract and any Project Document (other than the Direct Agreement), then in determining the rights and liabilities of the Parties, the provisions of this Contract shall prevail over and have effect in place of the relevant provisions of the relevant Project Document.

1.5 The provisions of clause 21 (*Inconsistencies relating to the provision of the Services*) shall apply where there is any conflict or inconsistency within the Output Specification.

#### **1.6 Effect**

The provisions of schedule 1 (*Definitions, Interpretation and Construction*) shall apply and have effect in relation to the words and expressions used in this Contract and the interpretation and construction of this Contract.

#### **1.7 Statutory Capacity**

1.7.1 Save as otherwise expressly provided, the obligations of the Authority under this Contract are obligations of the Authority in its capacity as a contracting counterparty.

1.7.2 Nothing contained or implied in this Contract or any Project Document shall prejudice or affect the Authority's rights, powers, duties and obligations in the exercise of its functions as Highway Authority, lighting authority, planning authority, local authority or in any other statutory capacity and the rights,

powers, duties and obligations of the Authority under all public and private laws, statutes, byelaws, orders and regulations may be fully and effectually exercised in relation to the Project.

1.7.3 Save insofar as the same arises out of an express provision of this Contract, the Service Provider shall have no Claim against the Authority arising out of or under this Contract or any Project Document for any act or omission or the exercise of the rights, powers, duties and obligations of the Authority whether as Highway Authority, public lighting authority, planning authority, local authority or in any other statutory capacity.

## **1.8 Update of Definitions**

The definitions of Project Network or Project Network Part (or any relevant element thereof) shall be amended from time to time to the extent necessary as a consequence of additional project network parts installed as a result of the Service Provider's compliance with the Output Specification, Method Statements and/or the Service Provider's technical solution and such project network parts were not specified by the Authority.

## **2. COMMENCEMENT AND EXPIRY OF THIS CONTRACT**

### **2.1 Execution and Delivery of Documents**

On or prior to the execution of this Contract:

2.1.1 the Service Provider shall deliver to the Authority the documents set out in section A of part 2 of schedule 1 (*Definitions, Interpretation and Construction*) (unless the requirement to deliver any such documents is waived by the Authority by written notice to the Service Provider); and

2.1.2 the Authority shall deliver to the Service Provider the documents set out in section B of part 2 of schedule 1 (*Definitions, Interpretation and Construction*) (unless the requirement to deliver any such documents is waived by the Service Provider by written notice to the Authority).

### **2.2 Duration of this Contract**

This Contract and the rights and obligations of the Parties to this Contract shall take effect on the date of this Contract and shall terminate on the earlier of the Expiry Date or the Termination Date.

### **3. MOBILISATION**

#### **3.1 Permission**

The Authority shall, from the date of this Contract, permit the Service Provider and any Service Provider Party, to enter the Project Facilities and the Project Network and to inspect and/or carry out such further surveys as are necessary to the Project Network to carry out the Service Provider's obligations under this clause 3 (*Mobilisation*) during the Mobilisation Period or to enable the Service Provider to otherwise prepare for Service Commencement, subject to:

- 3.1.1 any Land Rights;
- 3.1.2 the rights of access referred to in clause 14 (*Authority Access*);
- 3.1.3 the provisions of clause 18.1 (*Security of Project Network and UTC Centre*);
- 3.1.4 the provisions of schedule 20 (*Land*) relating to Reserved Areas;
- 3.1.5 any requirement for planning consent under the TC 1990 (as amended);
- 3.1.6 clause 15 (*Ownership of Apparatus and Access to the Project Network*), and without prejudice to clause 30 (*Third Party Undertaking and Agreements*), subject to any rights of Third Parties notified to the Service Provider from time to time by or on behalf of the Authority including street trading or market trading licences and Specified Licences; and
- 3.1.7 in relation to the Project Facilities, any reasonable regulations that may be made by the Authority from time to time and notified to the Service Provider, in relation to health and safety, access and management of the Depot and/or the premises of which the UTC Centre forms part.

#### **3.2 Mobilisation Plan**

- 3.2.1 The Service Provider shall, during the Mobilisation Period, implement the Mobilisation Plan and use all reasonable endeavours to ensure that the

Conditions to Service Commencement are satisfied by the Planned Service Commencement Date.

3.2.2 During the Mobilisation Period, the Service Provider shall:

3.2.2.1 provide the Authority with weekly updates on its progress in satisfying the Conditions to Service Commencement as against the Mobilisation Plan, and the Service Provider shall promptly respond to any queries or comments that the Authority may raise; and

3.2.2.2 permit the Authority access to any information or premises of the Service Provider or any Service Provider Party to make such inspections as it may reasonably require in order to determine the Service Provider's progress in satisfying the Conditions to Service Commencement.

### 3.3 Service Commencement

3.3.1 No later than seven (7) Business Days prior to the Planned Service Commencement Date, the Service Provider shall notify the Authority, in writing, that it considers (acting reasonably) that:

3.3.1.1 all Conditions to Service Commencement will be satisfied on the Planned Service Commencement Date; or

3.3.1.2 it will not have satisfied or is not able to satisfy all the Conditions to Service Commencement on the Planned Service Commencement Date together with:

- (a) all appropriate reasons and supporting information; and
- (b) the date on which the Service Provider considers (acting reasonably) that the Conditions to Service Commencement will be satisfied ("**Intended Service Commencement Date**") provided that the Intended Service Commencement Date shall be no later than the Service Commencement Longstop Date.

3.3.2 Following notification by the Service Provider in accordance with clause 3.3.1.1 the Authority shall, within two (2) Business Days of receipt of such notification, notify the Service Provider in writing that either:

3.3.2.1 it requires the Service Provider to demonstrate, within two (2) Business Days of receipt of the notice required under this clause 3.3.2, that the Conditions to Service Commencement will be satisfied on the Planned Service Commencement Date; or

3.3.2.2 it is satisfied that all the Conditions to Service Commencement are likely to be satisfied on the Planned Service Commencement Date and if they are the Planned Service Commencement Date shall be the Service Commencement Date.

3.3.3 If:

3.3.3.1 the Authority issues a notice to the Service Provider in accordance with clause 3.3.2.1; or

3.3.3.2 the Service Provider issues a notice to the Authority in accordance with clause 3.3.1.2,

then after such demonstration has been effected by the Service Provider the Authority shall notify the Service Provider in writing as soon as reasonably practicable, and in any event, not less than two (2) Business Days prior to the Planned Service Commencement Date or the Intended Service Commencement Date (as the case may be) that either:

3.3.3.3 it is not satisfied that the Conditions to Service Commencement will be satisfied on the Planned Service Commencement Date or the Intended Service Commencement Date (as the case may be), together with reasons for its decision; or

3.3.3.4 it is satisfied that all the Conditions to Service Commencement will be satisfied on the Planned Service Commencement Date or the Intended Service Commencement Date (as the case may be) in which case the Planned Service Commencement Date or the Intended Service Commencement Date (as appropriate) shall be the Service Commencement Date.

- 3.3.4 If the Authority issues a notice to the Service Provider in accordance with clause 3.3.3.3 the Service Provider shall:
- 3.3.4.1 continue to take all actions as are necessary to achieve the Conditions to Service Commencement; and
  - 3.3.4.2 issue a notice in writing to the Authority, as soon as reasonably practicable after the Service Provider reasonably considers that the Conditions to Service Commencement will be satisfied, stating the revised Intended Service Commencement Date.
- 3.3.5 Upon receipt of the notice issued by the Service Provider pursuant to clause 3.3.4.2, the provisions of clauses 3.3.1 to 3.3.4 (changed according to context) shall apply, as appropriate, until the earlier of:
- 3.3.5.1 the date on which the Authority issues a notice pursuant to either of clauses 3.3.2.2 or 3.3.3.4; or
  - 3.3.5.2 the Service Commencement Longstop Date.
- 3.3.6 The Authority may, in its absolute discretion, notify the Service Provider that it will waive the requirement that the Service Provider satisfies a particular Condition to Service Commencement.
- 3.4 The Service Provider shall purchase the Project Assets in accordance with part 3 of schedule 12 (*Mobilisation*) within twenty (20) Business Days following the Service Commencement Date.
- 3.5 In respect of any Vehicle Lease the Service Provider shall comply with the provisions of part 4 of schedule 12 (*Mobilisation*).
- 3.6 The Service Provider shall ensure that all Transferring Employees have received one and a half hours of induction training by the Service Commencement Date provided that:
- 3.6.1 subject to clause 3.6.2 the Authority has:
    - 3.6.1.1 provided such co-operation as shall reasonably be requested by the Service Provider in relation to the provision of training including making such Transferring Employees available to the



Service Provider for one and a half hours for each Transferring Employee during normal working hours; and

3.6.1.2 procured that, subject to clause 3.6.1.1 such Transferring Employees attend the training provided by the Service Provider in accordance with this clause 3.6 provided that within 2 Business Days following the undertaking of each session of training the Service Provider shall provide the Authority with an accurate list of the names of the Transferring Employees who attend such training,

in each case to allow the Service Provider to fulfil its obligations pursuant to this clause 3.6; and

3.6.2 the Service Provider shall act reasonably in requesting the availability of Transferring Employees.

3.7 The Service Provider shall establish an operational Help Desk in place that is capable of performing the functions set out in paragraph 2.5 to 2.7 of part 8 of schedule 2 (*Output Specification*) by the Service Commencement Date.

#### **4. APPOINTMENT OF AN INDEPENDENT CERTIFIER**

On or prior to the date of this Contract the Authority and the Service Provider shall appoint jointly the Independent Certifier using the Independent Certifier's Appointment. The Independent Certifier's Appointment shall set out the duties owed by the Independent Certifier to the Authority and to the Service Provider.

### **PART B - CONDITION OF THE PROJECT NETWORK**

#### **5. CONDITION OF THE PROJECT NETWORK**

5.1 The Service Provider confirms that, subject to clause 5.2, it has satisfied itself as to:

5.1.1 the condition and extent of the Project Network at the Pre-Commencement Survey Date (including the volume and type of Apparatus and Highway Trees); and

5.1.2 the work that it needs to carry out on the Project Network in order to comply with the requirements of schedule 2 (*Output Specification*).

- 5.2 The Parties understand and acknowledge that:
- 5.2.1 the Authority's Programmed Maintenance, together with the Project Network in its condition as at the Pre-Commencement Survey Date, shall form the Project Network at the Service Commencement Date;
  - 5.2.2 without prejudice to clause 5.11 the Service Provider has assumed that the Authority has completed or procured the completion of the Authority's Programmed Maintenance prior to the Service Commencement Date;
  - 5.2.3 the Service Provider shall assume that all Project Roads designated as Highway in the Highways Register and/or included in the Project Network Model at the Pre-Commencement Survey Date shall be adopted by the Authority by the Service Commencement Date; and
  - 5.2.4 the Annual Unitary Charge at the Service Commencement Date and Base Case Financial Model are based inter alia on the assumptions set out in clauses 5.2.1 to 5.2.3.

#### **Authority Routine Maintenance**

- 5.3 The Authority shall carry out safety inspections and service inspections on the Project Network from the Pre-Commencement Survey Date until the Service Commencement Date to identify the need for Authority Routine Maintenance in accordance with the Highway Structures Code, the Highways Lighting Code and the Highways Maintenance Code.
- 5.4 Subject to clause 5.5, the Authority shall undertake the Authority Routine Maintenance identified as a result of the safety inspections and service inspections referred to in clause 5.3.
- 5.5 The Parties acknowledge and agree that the Authority will not have been obliged to spend more than seven hundred and fifty thousand pounds (£750,000) per calendar month on Authority Routine Maintenance during the period between the Pre-Commencement Survey Date (calculated cumulatively across the period) and the Service Commencement Date and the Service Provider shall not be entitled to claim a Compensation Event or other relief from its obligations under this Contract if the Authority has done so.

- 5.6 The Authority shall notify the Service Provider of all Authority Routine Maintenance carried out on the Project Network between the Pre-Commencement Survey Date and the Service Commencement Date together with details of the work undertaken, the date such work was undertaken and the results of the relevant safety and service inspections within five (5) Business Days of the Service Commencement Date.

#### **Authority's Programmed Maintenance**

- 5.7 The Authority shall notify the Service Provider of any Authority Programmed Maintenance that has commenced during the Mobilisation Period within 10 Business Days of the Authority becoming aware of the commencement of such work so that the Service Provider may inspect it for the purposes of clause 5.8 and the Authority shall, if the Service Provider so requests, procure access for the Service Provider to undertake such inspection.
- 5.8 The Service Provider may inspect the Authority's Programmed Maintenance prior to its completion to satisfy itself that such Authority's Programmed Maintenance is being carried out in accordance with clause 5.25 and schedule 30 (*Authority's Programmed Maintenance*) and the Authority shall, if the Service Provider so requests, procure access for the Service Provider to undertake such inspection.
- 5.9 The Service Provider shall notify the Authority of any issues or concerns in respect of the future maintenance requirements that it becomes aware of during any inspection carried out pursuant to clause 5.8 and clause 5.10 of any Authority Programmed Maintenance together with details of any issues which, in the reasonable opinion of the Service Provider, the Authority should have regard to in respect of the Authority's Programmed Maintenance.
- 5.10 The Authority shall notify the Service Provider of any Authority Programmed Maintenance which has been completed together with details of the work undertaken and the date such work was undertaken so that the Service Provider may inspect such Authority Programmed Maintenance, for the purposes of clause 5.21 (*Making a Claim*) and the Authority shall, if the Service Provider so requests, procure access for the Service Provider to undertake such inspection.
- 5.11 If, between the Pre-Commencement Survey Date and the Service Commencement Date, the Authority has carried out or procured to be carried out less Authority's Programmed Maintenance or carried out or procured to be carried out Authority's

Programmed Maintenance to a lesser standard than that set out in clause 5.23 then the Service Provider shall be entitled to a Compensation Event pursuant to the provisions of clause 0 (

5.12

5.13 *Compensation Events*) subject to compliance with clause 5.21 (*Making a Claim*).

#### **Pre-Service Commencement New Build and Third Party Works**

5.14 The Parties agree and acknowledge that any New Build or Third Party Works or (to the extent that they relate to Project Roads designated as Highways in the Highways Register since the Pre-Commencement Survey Date) any other changes to the Project Network (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 in accordance with the provisions of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) as if those Project Network Parts had been Accrued or De-Accrued from the Project Network (as appropriate) as at the Service Commencement Date, in particular:

5.14.1 the Y value for any New Build or Third Party Works completed between the Pre-Commencement Survey Date and the date of this Contract shall be calculated in accordance with paragraph 4.1.1 or 4.1.2 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) (as applicable); and

5.14.2 the Y value for any New Build or Third Party Works completed during the Mobilisation Period shall be calculated in accordance with this clause 5.14 and clause 5.17 and schedule 19 (*Accrual and De-Accrual of Project Network Parts*).

5.15 The Authority shall notify the Service Provider of any New Build or Third Party Works that have commenced during the Mobilisation Period so that the Service Provider may inspect such New Build or Third Party Works for the purposes of clause 5.16.

5.16 The Service Provider may inspect any New Build and/or Third Party Works in construction during the Mobilisation Period to satisfy itself that such New Build and/or Third Party Works are being carried out in accordance with clause 5.25 and

the Authority shall, if the Service Provider so requests, procure access for the Service Provider to undertake such inspection.

5.17 The Service Provider shall notify the Authority in writing of any issues or concerns in respect of the future maintenance requirements that it becomes aware of during any inspection of any New Build or Third Party Works in construction during the Mobilisation Period together with details of any issues which, in the reasonable opinion of the Service Provider, the Authority should have regard to in respect of the New Build or Third Party Works (provided that the Authority shall not be bound to have regard to such matters); and

5.17.1 whether the maintenance costs of the Service Provider related to the New Build or Third Party Works meet the Service Provider's Assumptions or if such costs do not meet the Service Provider's Assumptions details as to why;

5.17.2 the maintenance costs related to the New Build or Third Party Works and the extent, if any, to which these maintenance costs exceed any relevant Y values as set out in part 2.1 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) or otherwise agreed pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*) because the Service Provider Assumptions are not met with an explanation as to why and any relevant supporting documentation;

5.17.3 whether the additional maintenance costs of the Service Provider related to the New Build or Third Party Works may be reduced or mitigated in order to meet the Service Provider's Assumptions;

5.17.4 whether the standard of the New Build or Third Party Works will meet or exceed the relevant requirements as set out in schedule 2 (*Output Specification*).

5.18 If clause 5.17.2 applies, the Authority shall notify the Service Provider in writing within five (5) Business Days of receipt by the Authority of the notice referred to in clause 5.17 that it:

5.18.1 agrees with the Service Provider's analysis that the Service Provider's Assumptions do not apply in whole or in part to the New Build or Third Party Works and that the Service Provider may take this into account in paragraph

4 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) provided that the Service Provider has complied with the provisions of this clause 5 (*Condition of the Project Network*); or

5.18.2 disagrees with the Service Provider's analysis and that the Service Provider's Assumptions do not apply.

5.19 If the Service Provider disagrees with the Authority's decision under clause 5.18.2 it may refer such matter to Dispute Resolution.

5.20 The Authority shall notify the Service Provider of any New Build or Third Party Works which have been completed during the Mobilisation Period so that the Service Provider may inspect such New Build or Third Party Works (for the purposes of clause 5.21) in accordance with clause 5.17 and the Authority shall, if the Service Provider so requires, procure access for the Service Provider to undertake such inspection.

#### **Making a claim**

5.21 Without prejudice to clause 7 (*Latent Defects*) the Service Provider shall only be entitled to:

5.21.1 a Compensation Event (as referred to in clause 5.11); or

5.21.2 any increase in the Monthly Unitary Charge over and above the Y value specified in the table in part 2.1 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) or as determined by the Authority (acting reasonably) pursuant to paragraph 4 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) in respect of New Build and Third Party Works inspected during the Mobilisation Period (as referred to in clause 5.14.2),

if the Service Provider within, ninety (90) Business Days of the Service Commencement Date, notifies the Authority of such entitlement and provided that, in respect of clause 5.21.2 above, the Service Provider provides the Authority with a commentary in accordance with clause 5.17 in respect of New Build and Third Party Works by the date ninety (90) Business Days following the Service Commencement Date.

5.22 If the Service Provider fails to make a claim in accordance with clause 5.21 (*Making a Claim*), then the Service Provider shall be deemed to accept that any such Authority's Programmed Maintenance, New Build and/or Third Party Works have been satisfactorily carried out and there shall be no additional payment or relief pursuant to this Contract.

5.23 For the purposes of this clause 5 (*Condition of the Project Network*), the Service Provider shall have access to the Authority's records in respect of the Authority's Programmed Maintenance, New Build and Third Party Works from the date of this Contract until ninety (90) Business Days following the Service Commencement Date as follows:

5.23.1 in respect of Authority's Programmed Maintenance:

5.23.1.1 details of the Authority's NCI estimate for the relevant RSLs;

5.23.1.2 the Authority's Programmed Maintenance programme; and

5.23.1.3 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 and construction details of the same,

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

5.23.2 in respect of New Build:

5.23.2.1 such information in respect of all proposed New Build being carried out or expected to be carried out by, or on behalf of, the Authority;

5.23.2.2 details of all New Build that is completed specifying the quantity of additional Project Network Parts and locations and all such construction drawings (and any as built drawings to the extent such exist),

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

5.23.3 in respect of Third Party Works;

5.23.3.1 such information to the Authority in respect of Third Party Works specifying, if available to the Authority, the proposed date of completion and the location of each item of Third Party Works; and

5.23.3.2 such details of all those Third Party Works that are completed including all Authority documents from its maintainability assessment role,

and the Authority shall use reasonable endeavours to procure such information and details provided that the Authority shall not incur any material expenditure.

5.24 The Authority shall, for the purposes of this clause 5 (*Condition of the Project Network*), 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.

5.25 For the purposes of this clause 5 (*Condition of the Project Network*), the Authority shall ensure that all Authority's Programmed Maintenance, Authority Routine Maintenance, New Build and Third Party Works carried out by or on behalf of 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 are in accordance with Good Industry Practice.

5.26 The Authority shall provide the Service Provider with the electrical test certificates for any Powered Apparatus included within the Authority Programmed Maintenance, where relevant.

5.27 Any disputes in relation to this clause shall be dealt with in accordance with the provisions of clause 70 (*Dispute Resolution*) provided that the Service Provider may not use the provisions of clause 70 (*Dispute Resolution*) to dispute the Pre Commencement Survey Date condition of the Project Network.



- 5.28 The definitions of Project Network and 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 this clause 5 (*Condition of the Project Network*).
- 5.29 The Authority shall provide the Service Provider on or before the Service Commencement Date with a list of all Project Roads designated as Highways in the Highways Register since the Pre-Commencement Survey Date or any part thereof, Grassed Areas and Hard Landscape Areas or any part thereof, Apparatus or any part thereof or Highway Trees that will form part of the Project Network from the Service Commencement Date or any De-Accruals of Project Network Parts (the "**Updated Highways List**") and, any increase or decrease in the Annual Unitary Charge arising from the inclusion of such Project Network Parts on the Updated Highways List shall not be taken into account for the purpose of determining the Accrual Caps and De-Accrual Caps pursuant to paragraph 5 of part 1 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*).
- 5.30 If within three (3) Months of the Service Commencement Date the Authority determines that any additional Project Roads that should have been designated as Highways in the Highways Register or any part thereof, Grassed Areas and Hard Landscape Areas or any part thereof, Apparatus or any part thereof, Highway Trees or any De-Accruals of Project Network Parts should have been included on the Updated Highways List on the Service Commencement Date, the Authority shall notify the Service Provider of such Project Network Parts, and:
- 5.30.1 the provisions of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) shall apply; and
- 5.30.2 subject to clause 5.31, any increase or decrease in the Annual Unitary Charge arising from any additional Project Network Parts notified to the Service Provider pursuant to this clause 5.30 shall not be taken into account for the purpose of determining the Accrual Caps and De-Accrual Caps pursuant to paragraph 5 of part 1 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*).
- 5.31 If the net increase or decrease in the aggregate number of any Project Network Parts added to the Updated Highways List pursuant to clause 5.30 gives rise to more than a one per cent (1%) increase or decrease in the Annual Unitary Charge, then any such increase or decrease in the Annual Unitary Charge in excess of one per cent (1%)

shall be taken into account for the purpose of determining the Accrual Caps or De-Accrual Caps (as applicable) pursuant to paragraph 5 of part 1 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*).

- 5.32 The Service Provider shall inform the Authority within thirty (30) Business Days of the issue of the Updated Highways List and/or any notice issued pursuant to clause 5.30 if they dispute the content of such Updated Highways List or notice issued pursuant to clause 5.30, if the Service Provider does not provide notice pursuant to this clause 5.32 within thirty (30) Business Days of the issue of the Updated Highways List or notice issued pursuant to clause 5.30 the Service Provider is deemed to have accepted the inclusion of the relevant Project Network Parts onto the Project Network and the Service Provider shall be paid in accordance with clause 5.14.
- 5.33 The Parties agree and acknowledge that (without prejudice to the operation of Schedule 18) whilst the A38 was designated as Highway in the Highways Register at the Pre-Commencement Survey Date:
- 5.33.1 the A38 shall not form part of the Project Network at or after the date of this Contract and shall be deemed not to have formed part of the Project Network at or after the Pre-Commencement Survey Date;
- 5.33.2 subject to any Authority Change agreed pursuant to clause 5.32;
- 5.33.2.1 the Service Provider shall have no liability and the Authority shall have no remedy, whether under this Contract, in tort or otherwise, in respect of any act, omission or other matter relating to the A38; and
- 5.33.2.2 without prejudice to the generality of clause 5.33.2.1, the Service Provider is not under any obligation to provide the Services in respect of the A38.
- 5.34 During the Mobilisation Period, the Parties shall use their reasonable endeavours to agree an Authority Change such that, with effect from the Service Commencement Date, the Services are amended to include Safety Inspections, Reactive Maintenance and Routine Maintenance in respect of the A38.

## 6. SURVEYS AND INSPECTIONS

### 6.1 General

6.1.1 The Service Provider shall undertake all inspections, surveys, tests and assessments and provide strategy documents and reports in accordance with this clause 6.1 (*General*) and (subject to the provisions of this clause 6 (*Surveys and Inspections*)), and clause 41.6 (*Change in Highway Standard*) the Highways Maintenance Code, the Highway Structures Code and the Highways Lighting Code so that all the unprocessed data provided as a result of undertaking the inspections, surveys, tests and assessments is available to:

- 6.1.1.1 the Authority to enable it to support a defence under section 58 of the 1980 Act and any other Legislation that requires the Authority to know or reasonably be expected to know whether or not the condition of the Project Network (or part thereof) was likely to cause danger to users of the Project Network;
- 6.1.1.2 the Authority to monitor that the Services are being provided in accordance with the requirements of schedule 2 (*Output Specification*);
- 6.1.1.3 the Authority to provide such evidence as may be required by the DfT or the Audit Commission (or such other replacement or successor body) that the NIs (or such replacement or successor local government performance indicators) have been calculated correctly; and
- 6.1.1.4 the Service Provider to run the NCI Calculation Methodology, the FWCI Calculation Methodology, the VGCI Calculation Methodology, the KBCI Calculation Methodology and the CTCI Calculation Methodology using the Pavement Management Model (and, for the purposes of this Contract, solely the Service Provider shall perform such calculations and such calculations shall only be performed using the Pavement Management Model).

6.1.1A The Service Provider may update the Pavement Management Model from time to time:

6.1.1A.1 in accordance with any changes made to the Project Network Model pursuant to this Contract; and

6.1.1A.2 with any other updates or modifications that the Service Provider requires provided that such updates or modifications are submitted to the Authority pursuant to the Review Procedure, provided that there shall be no update or modification to the NCI Data Deterioration Methodology during the Core Investment Period.

6.1.2 The Service Provider shall:

6.1.2.1 carry out safety inspections on Highway Trees during the Safety Inspections of the Project Roads pursuant to clause 6.2.1 (*Safety Inspection Strategy and Safety Inspections*); and

6.1.2.2 during the safety inspections carried out pursuant to clause 6.1.2.1 above, carry out a visual inspection from the Project Network of all Trees and notify the Authority:

(a) within one (1) hour (and shall provide written notice (which may be electronic mail) as soon as reasonably practicable thereafter) if, in the Service Provider's reasonable opinion, it believes any Tree poses an immediate or imminent hazard; or

(b) as soon as reasonably practicable and in any event within five (5) Business Days (in writing) if, in the Service Provider's reasonable opinion, it believes the Authority should take action to prevent damage to the Project Network or prevent potential injury to the public.

6.1.3 The Service Provider shall update the Service Provider Programmes to take into account:

6.1.3.1 the results of all inspections, surveys, tests and assessments; and

6.1.3.2 all strategies, reports, and programmes,  
required pursuant to this clause 6 (*Surveys and Inspections*).

## 6.2 Safety Inspection Strategy and Safety Inspections

- 6.2.1 The Service Provider shall carry out all Safety Inspections in accordance with this clause 6 (*Surveys and Inspections*) and the Safety Inspection Strategy for the relevant Contract Year.
- 6.2.2 The Service Provider shall input the results of all Safety Inspections into the relevant part of the Management Information System in accordance with part 8 of schedule 2 (*Output Specification*).
- 6.2.3 No later than four (4) Months prior to the commencement of each Contract Year following the first Contract Year, the Service Provider shall submit to the Authority a revised Safety Inspection Strategy pursuant to the Review Procedure and provide to the Authority a copy of any risk assessments used in the development of each revised Safety Inspection Strategy.
- 6.2.4 Subject to the provisions of this clause 6 (*Surveys and Inspections*), the Service Provider shall ensure that each Safety Inspection Strategy and all Safety Inspections shall comply with the recommendations of the Highways Maintenance Code, the Highway Structures Code and the Highways Lighting Code (as appropriate).
- 6.2.5 The Service Provider shall ensure that each Safety Inspection Strategy shall include, in respect of each forthcoming Contract Year:
- 6.2.5.1 the frequency (including the time and date) and location of all Safety Inspections to be carried out in respect of Project Roads provided that such Safety Inspections shall not be carried out any less frequently than as set out in Table 1 (*Project Road Safety Inspection Frequency*) below:

**Table 1 Project Road Safety Inspection Frequency**

Service Delivery Output Element	Project Road Hierarchy	Category	Frequency of Safety Inspections
Carriageway	Strategic Routes	2	Monthly
	Main Distributor Routes	3(a)	Monthly
	Secondary Distributor Routes	3(b)	Monthly
	Link Routes	4(a)	3 Monthly
	Local Access Routes	4(b)	6 Monthly
Footpaths and Footways	Prestige Walking Routes	1(a)	Monthly
	Primary Walking Routes	1	Monthly
	Secondary Walking Routes	2	3 Monthly
	Link Walking Routes	3	6 Monthly
	Local Access Walking Routes	4	6 Monthly
Cycle Tracks	Cycle Tracks	B	6 Monthly
	Cycle Tracks	C	6 Monthly
Privately Maintainable Public Rights of Way	All	All	6 Monthly

6.2.5.2 the frequency (including the time and date) and location of Safety Inspections to be undertaken to those Project Network Parts other than Project Roads (provided that the frequency of such Safety Inspections shall not be less than the frequency required pursuant to the Highway Structures Code, Highways Maintenance Code and/or the Highway Lighting Code);

6.2.5.3 the method(s) of each Safety Inspection to be undertaken which shall include, without limitation, the following requirements:

- (a) any Safety Inspection undertaken in relation to Footpaths, Footways and Cycle Tracks shall not be carried out by an inspector from a vehicle;
- (b) any Safety Inspection undertaken in relation to Carriageways may be carried out by an inspector from a vehicle or otherwise;
- (c) where Carriageways intersect with Footpaths, Footways and/or Cycle Tracks, Safety Inspections shall not be carried out by an inspector from a vehicle; and
- (d) how the results of Safety Inspections and actions to be taken following a Safety Inspection are to be recorded on the Management Information System.

### **6.3 Condition Surveys**

- 6.3.1 The Service Provider shall carry out Condition Surveys on all Project Roads annually for the duration of the Contract Term in accordance with this clause 6 (*Surveys and Inspections*) and any applicable Highways Standards.
- 6.3.2 The Service Provider shall ensure that Condition Surveys necessary in order to comply with N1 168 and N1 169 (or such replacement or successor local government performance indicators) are undertaken in accordance with the guidance in respect of such NIs issued by the DfT from time to time.
- 6.3.3 The Service Provider shall carry out Deflectograph Surveys (or surveys which provide the same type of structural data provided such alternative surveys have been agreed in writing by the Authority in advance of the Service Provider carrying out such surveys) on the Strategic Route and Main Distributor Network (save in respect of newly resurfaced Carriageways) annually during the Core Investment Period.
- 6.3.4 Following completion of the Core Investment Period, the Service Provider shall carry out Deflectograph Surveys (or such alternative surveys as have been agreed between the Parties pursuant to clause 6.3.3 above) on one third of the Strategic Route and Main Distributor Network annually (so that all of

the Strategic Route and Main Distributor Network is surveyed every three (3) years).

6.3.5 The Service Provider shall ensure that the Deflectograph Surveys required to be carried out in accordance with clauses 6.3.3 and 6.3.4 are carried out in sufficient time (and in any event at least by 1 October each Contract Year) so that the data is available to be used by the Service Provider to calculate the NCI using the Pavement Management Model and in accordance with the NCI Calculation Methodology on 1 November in each Contract Year.

6.3.6 The Service Provider shall carry out DVI on a half of all:

6.3.6.1 Carriageways;

6.3.6.2 Footpaths;

6.3.6.3 Kerbs; and

6.3.6.4 Verges,

within the Project Network annually (so that a DVI is carried out on all Carriageways, Footpaths, Kerbs and Verges every two (2) years).

#### **6.4 Skid Resistance Strategy and Skid Resistance Surveys**

6.4.1 The Service Provider shall carry out all Skid Resistance Surveys in accordance with this clause 6 (*Surveys and Inspections*) and the Skid Resistance Strategy for the relevant Contract Year.

6.4.2 The Service Provider shall document the results of each Skid Resistance Survey and input such results into the relevant part of the Management Information System in accordance with part 8 of schedule 2 (*Output Specification*).

6.4.3 No later than four (4) Months prior to the commencement of each Contract Year following the first Contract Year, the Service Provider shall submit to the Authority a revised Skid Resistance Strategy pursuant to the Review Procedure and provide to the Authority a copy of any risk assessments used in the development of each revised Skid Resistance Strategy.



- 6.4.4 The Service Provider shall ensure that each Skid Resistance Strategy shall, as a minimum:
- 6.4.4.1 set out all details of how the Service Provider shall comply with the requirements of HD28/04 (and the County Surveyor's Society Guidance on the application of HD28/04) and IAN 49/03;
  - 6.4.4.2 apply to the whole Project Network with due regard to the hierarchy of all Carriageways, surfacing materials, traffic flow, characteristics of the geometry of the Carriageways and accident risk (taking into account the history of accidents);
  - 6.4.4.3 identify the equipment to be used in order to carry out all actions set out in the Skid Resistance Strategy (including the type of machinery to be used for Carriageway testing and localised investigation);
  - 6.4.4.4 set out quality assurance procedures for data collection;
  - 6.4.4.5 set out the approach to setting Investigatory Levels, including the range of Investigatory Levels which are to be used for different categories of Carriageway in accordance with the recommendations of HD28/04;
  - 6.4.4.6 set out the frequency for re-assessment of Investigatory Levels;
  - 6.4.4.7 list the staff authorised to act on or approve Investigatory Levels and provide evidence to the Authority that they are appropriately qualified;
  - 6.4.4.8 provide all details of the approach (including the frequency) to be taken in respect of site investigation, including prioritisation of investigation and staff authorised to undertake site investigations;
  - 6.4.4.9 provide all details of how remedial works will be programmed in order to meet the requirements of schedule 2 (*Output Specification*);

- 6.4.4.10 provide details of all documents to be retained by the Service Provider to enable implementation of the Skid Resistance Strategy to be demonstrated to the reasonable satisfaction of the Authority; and
- 6.4.4.11 identify the sites on which the Service Provider proposes to carry out the Benchmark Testing for the forthcoming Contract Year.
- 6.4.5 The Service Provider shall demonstrate to the reasonable satisfaction of the Authority that the Skid Resistance Strategy has been fully implemented.
- 6.4.6 The Service Provider shall use the Annual Survey With Benchmark Method in order to derive the Characteristic Scrim Co-efficient.
- 6.4.7 The Authority shall notify the Service Provider in writing if the Authority requires an alternative site to that identified pursuant to clause 6.4.4.11. If the Service Provider does not agree to the alternative site(s) proposed by the Authority, the Parties shall act reasonably in agreeing which site shall be used for Benchmark Testing. If the Parties fail to agree an alternative site then either Party may refer the matter to Dispute Resolution.
- 6.4.8 The Service Provider shall undertake the Benchmark Testing three (3) times during the period between June and September inclusive in each Contract Year and such tests shall be at least one (1) Month apart. The Service Provider shall use the results of the Benchmark Testing each Contract Year to produce an average variation factor which shall be based on the methodology contained within HD 28/04 and IAN 49/03.
- 6.4.9 The Service Provider shall not undertake any Benchmark Testing on any Carriageways where works and/or any part of the Services (except those Services relating to surveys, inspections, tests and/or assessments required pursuant to this clause 6 (*Surveys and Inspections*)) are being undertaken.
- 6.4.10 The Service Provider shall ensure that Skid Resistance Surveys are completed each year in sufficient time so (and in any event by 1 October of each Contract Year) that the resultant data is available to calculate the NCI using the Pavement Management Model and in accordance with the NCI Calculation Methodology on 1 November in each Contract Year.

## **6.5 Expiry Condition A Requirements**

The Service Provider shall ensure that all Condition Surveys undertaken from the commencement of the twenty third (23rd) Contract Year ("**Year 23**") until the Expiry Date include an assessment of whether all Project Roads comply with the Expiry Condition A Requirements and the Service Provider shall provide to the Authority a written report detailing such assessments.

## **6.6 Service Inspections**

6.6.1 The Service Provider shall carry out Service Inspections of all Project Network Parts in accordance with the Highways Maintenance Code, the Highway Structures Code and the Highways Lighting Code but, in any event, not less than once annually for the duration of the Contract Term.

6.6.2 The Service Provider may carry out Service Inspections at the same time as Safety Inspections where appropriate and as set out in the relevant Annual Programme.

6.6.3 The Service Provider shall ensure that the Final Service Inspection shall include an assessment of whether all Project Network Parts comply with the Expiry Condition B Requirements and the Service Provider shall provide to the Authority a written report detailing such assessments.

## **6.7 Electrical Safety Inspection and Testing**

6.7.1 The Service Provider shall carry out electrical testing and inspection of all Powered Apparatus and associated electrical equipment and installations (including power supplies) in accordance with paragraph 4.6 and Appendix D of the Highways Lighting Code, the Highways Maintenance Code and the Highway Structures Code (as amended or replaced from time to time) but notwithstanding any changes to such codes at least every six (6) years.

6.7.2 The Service Provider shall procure that an inspection certificate is issued in respect of each item of Powered Apparatus in accordance with the provisions of the Highways Lighting Code and shall record the inspection certificate on the Management Information System.

## **6.8 Structural Inspection and Testing of Powered Apparatus**

The Service Provider shall carry out structural testing of poles and columns supporting Powered Apparatus in accordance with section 4.7.3 of the Highways Lighting Code.

## **6.9 Night-time Inspection of illuminated Powered Apparatus**

The Service Provider shall carry out night time inspections of each item of Powered Apparatus which should be illuminated (excluding Traffic Signals) on the Project Network in accordance with the relevant requirements of schedule 2 (*Output Specification*) and the Method Statements. For the avoidance of doubt, the Service Provider shall inspect Traffic Signals in accordance with clause 6.6 (*Service Inspections*).

## **6.10 Network Integrity Inspection**

The Service Provider shall carry out surveys, inspections, tests and assessments in accordance with this clause 6 (*Surveys and Inspections*) to ensure that there is an annual Network Integrity Inspection in accordance with paragraphs 2.14 and 3 of part 7 of schedule 2 (*Output Specification*).

## **6.11 Network Safety Improvement Assessments**

The Service Provider shall carry out surveys, inspections, tests and assessments in accordance with this clause 6 (*Surveys and Inspections*) to ensure that there is an annual Network Safety Improvement Assessment in accordance with part 6 of schedule 2 (*Output Specification*).

## **6.12 Road Maintenance Condition Surveys**

The Service Provider shall submit NRMCS data or such other data as is required by the UK Road Board to the UK Road Board from time to time as requested by the Authority.

## **6.13 Arboricultural Inspection**

The Service Provider shall undertake an arboricultural inspection of each Highway Tree every five (5) years.

## 6.14 General Inspections

- 6.14.1 The Service Provider shall ensure that all General Inspection Programmes include (as a minimum) the details (including the date, time and location) of the General Inspections to be undertaken by the Service Provider to all Structures (excluding Minor Structures), Bridges and Tunnels in the forthcoming two (2) Contract Years.
- 6.14.2 The Service Provider shall carry out all General Inspections in accordance with this clause 6 (*Surveys and Inspections*), the Highway Structures Code and the General Inspection Programme for the relevant Contract Year.
- 6.14.3 No later than four (4) months prior to the commencement of each Contract Year following the first Contract Year, the Service Provider shall submit to the Authority a revised General Inspection Programme pursuant to the Review Procedure and a copy of any risk assessments used in the development of all revised General Inspection Programmes.
- 6.14.4 The Service Provider shall carry out a General Inspection on each Structure (excluding Minor Structures), Bridge and Tunnel once every two (2) years for the duration of the Contract Term unless a Principal Inspection in respect of such Structure (excluding Minor Structures), Bridge and/or Tunnel is due to occur in the same year in accordance with clause 6.15 (*Principal Inspections*), in which case the Service Provider shall not be obliged to undertake a General Inspection in that year.
- 6.14.5 The Service Provider shall ensure that all inspectors carrying out General Inspections pursuant to this clause 6.14 (*General Inspections*) comply with the Highway Structures Code, the guidance set out in CSS Bridge Conditions Indicators Volume 2: Guidance Note on Bridge Inspection Reporting (1) and the Addendum to CSS Bridge Condition Indicator Volume (2) as such documents are amended, updated or replaced from time to time, during the Contract Term.
- 6.14.6 The Service Provider shall ensure that all General Inspections undertaken from the commencement of the nineteenth (19th) Contract Year ("**Year 19**") until the Expiry Date shall include an assessment of whether the Structures, Bridges and Tunnels comply with the Expiry Condition A Requirements and

the Service Provider shall provide to the Authority a written report detailing such assessments.

## **6.15 Principal Inspections**

6.15.1 The Service Provider shall ensure that all Principal Inspection Programmes include (as a minimum) the details (including the date, time and location) of the Principal Inspections to be undertaken by the Service Provider of all Structures (excluding Minor Structures), Bridges and Tunnels in the forthcoming six (6) Contract Years.

6.15.2 The Service Provider shall carry out all Principal Inspections in accordance with this clause 6 (*Surveys and Inspections*), the Highway Structures Code and the Principal Inspection Programme for the relevant Contract Year.

6.15.3 No later than four (4) Months prior to the commencement of each Contract Year following the first Contract Year, the Service Provider shall submit to the Authority a revised Principal Inspection Programme pursuant to the Review Procedure and a copy of any risk assessments used in the development of all Principal Inspection Programmes.

6.15.4 The Service Provider shall carry out a Principal Inspection on each Structure (excluding Minor Structures), Bridge or Tunnel once every six (6) years for the duration of the Contract Term.

6.15.5 The Service Provider shall procure that a Principal Inspection is of sufficient scope and quality to determine:

6.15.5.1 the condition of all parts of the Structure (excluding Minor Structures), Bridge or Tunnel (including the stability of the Structure (excluding Minor Structures), Bridge or Tunnel); and

6.15.5.2 the extent of any significant change or deterioration to each such Structure (excluding Minor Structures), Bridge or Tunnel since the last Principal Inspection.

6.15.6 The Service Provider shall ensure that a Principal Inspection shall establish:

- 6.15.6.1 the scope and urgency of any remedial or other actions required before the next Principal Inspection;
  - 6.15.6.2 the need for a Special Inspection and/or additional investigations; and
  - 6.15.6.3 the accuracy of the main information on the Structure (excluding Minor Structures), Bridge or Tunnel held in its Structures Files and the Management Information System.
- 6.15.7 The Service Provider shall ensure that all Principal Inspections undertaken from the commencement of Year 19 until the Expiry Date shall include an assessment of whether the Structures (excluding Minor Structures), Bridges and/or Tunnels (to which the Principal Inspections relate) comply with the Expiry Condition A Requirements and the Service Provider shall provide to the Authority a written report detailing such assessments.

## **6.16 Special Inspections**

- 6.16.1 The Service Provider shall carry out all Special Inspections in accordance with this clause 6 (*Surveys and Inspections*), the Highway Structures Code and the Special Inspection Strategy for the relevant Contract Year (to which the Special Inspection relates).
- 6.16.2 No later than four (4) months prior to the commencement of each Contract Year following the first Contract Year, the Service Provider shall submit to the Authority a revised Special Inspection Strategy pursuant to the Review Procedure and a copy of any risk assessments used in the development of the revised Special Inspection Strategy.
- 6.16.3 The Service Provider shall comply with the guidance on Special Inspections provided in BD 63/07 Inspection of Highway Structures when developing each Special Inspection Strategy.
- 6.16.4 The Service Provider shall carry out a Special Inspection as required to comply with clause 6.16.3 but always in the following circumstances:
- 6.16.4.1 when a particular problem is detected during a Principal Inspection or General Inspection of the Structure (excluding

Minor Structures), Bridge or Tunnel or of a Structure, Bridge or Tunnel of a similar construction type;

- 6.16.4.2 on particular structural forms or types, such as cast iron Structures (excluding Minor Structures) or Bridges, post tensioned Structures or Bridges, or Structures strengthened with bonded plates;
- 6.16.4.3 on Bridges that have loading or other forms of restrictions on use such as the restriction of traffic on Bridges;
- 6.16.4.4 when the necessary frequency or access arrangements for a particular part of the Structure (excluding Minor Structures), Bridge or Tunnel are beyond those available for General Inspections or Principal Inspections;
- 6.16.4.5 on, during and after the passage of an Abnormal Load over a Bridge;
- 6.16.4.6 following the collision of a vehicle with a Structure (excluding Minor Structures), Bridge or Tunnel;
- 6.16.4.7 following a flood or high river flow in order to check for scour or other damage;
- 6.16.4.8 to check for specific concerns, including concerns over the quality of previously used batches of rebar or concrete; and
- 6.16.4.9 where a post tensioned Bridge has a regime of Special Inspections implemented as a result of an earlier investigation or a Special Inspection is required in accordance with BA 50/93 (Post-tensioned Concrete Bridges, Planning, organisation and methods for carrying out Special Inspections (3)).

6.16.5 The Service Provider shall ensure that all Special Inspections undertaken from the commencement of Year 19 until the Expiry Date shall include an assessment of whether the Structures (excluding Minor Structures), Bridges and/or Tunnels (to which the Special Inspections relate) comply with the



Expiry Condition A Requirements and the Service Provider shall provide to the Authority a written report detailing such assessments.

## **6.17 Risk Assessments**

6.17.1 The Service Provider shall carry out risk assessments on each Structure, Bridge and Tunnel (or group of similar Structures (excluding Minor Structures) or Bridges) in order to assess:

6.17.1.1 the likelihood of rapid deterioration or other incidents; and

6.17.1.2 the consequence of unchecked deterioration or other incidents.

6.17.2 The Service Provider shall ensure that the assessment of the likelihood of rapid deterioration to all Structures (excluding Minor Structures), Bridges and Tunnels shall include the criteria set out in section 6.4.31 of the Highway Structures Code as that provision is amended from time to time.

6.17.3 The Service Provider shall ensure that the assessment of unchecked deterioration and other incidents shall include the criteria set out in section 6.4.32 of the Highways Structures Code (as amended or replaced from time to time).

6.17.4 The Service Provider shall ensure that details of each risk assessment are recorded in the Structure File.

6.17.5 The Service Provider shall ensure that the validity of each Structure (excluding Minor Structures), Bridge or Tunnel's risk assessment shall be re-confirmed and recorded in the Structure File after each Principal Inspection or when any other significant change in the Structure (excluding Minor Structures), Bridge or Tunnel becomes apparent.

## **6.18 Pre and Post Inspection Process for Structures, Bridges and Tunnels**

6.18.1 The Service Provider shall, prior to carrying out a General Inspection, Principal Inspection or Special Inspection:

- 6.18.1.1 obtain and review the Structure File and Health and Safety File of the Structure (excluding Minor Structures), Bridge or Tunnel in order to establish any specific issues with the Structure (excluding Minor Structures), Bridge or Tunnel;
  - 6.18.1.2 carry out a desk top survey and reconnaissance of the Structure, Bridge or Tunnel; and
  - 6.18.1.3 prepare a method statement which includes (as a minimum) all the information set out in sections 6.5.5.1 to 6.5.5.12 (inclusive) of the Highway Structures Code (as amended or replaced from time to time) and add such method statement to the Structure, Bridge or Tunnel's Health and Safety File.
- 6.18.2 The Service Provider shall procure that when undertaking a General Inspection, Principal Inspection or a Special Inspection of a Structure (excluding Minor Structures), Bridge or Tunnel the inspector complies with the Bridge Inspection Guide (8) and all relevant provisions of the Highway Structures Code including, in particular, Appendix L thereof (except where different to the requirements set out in this clause 6 (*Surveys and Inspections*)).
- 6.18.3 The Service Provider shall procure that:
- 6.18.3.1 data from General Inspections, Principal Inspections and Service Inspections and any reports and assessments arising from such General Inspections, Principal Inspections and Service Inspections shall be entered on the relevant Structure File and recorded and reported in accordance with the provisions of sections 6.5.9 and 6.5.10 of the Highway Structures Code (as amended or replaced from time to time);
  - 6.18.3.2 the element condition rating procedure in the CSS Guidance Documents is used for all Structures (excluding Minor Structures), Bridges and Tunnels;

- 6.18.3.3 a CSS inspection pro forma (1 and 2) (or equivalent pro forma) is completed following a General Inspection, Principal Inspection or Special Inspection;
  - 6.18.3.4 element condition data is captured in accordance with section 6.5.17 of the Highways Structures Code (as amended or replaced from time to time); and
  - 6.18.3.5 inspection reports are produced following each General Inspection, Principal Inspection and Special Inspection in accordance with the provisions of sections 6.5.20 to 6.5.22 (inclusive) of the Highway Structures Code (as amended or replaced from time to time) and recorded on the relevant Structures File.
- 6.18.4 The Service Provider shall evaluate the results of a General Inspection, Principal Inspection and Special Inspection within two (2) months of the completion of such inspections to:
- 6.18.4.1 determine whether a Structure (excluding Minor Structures), Bridge or Tunnel is fit for purpose and safe for use; and
  - 6.18.4.2 determine whether an urgent amendment to the Annual Programme is required; and
  - 6.18.4.3 identify and estimate the cost of Routine Maintenance and Programmed Maintenance in relation to the Structure, Bridge or Tunnel and when that work will be carried out.
- 6.18.5 If the need for testing of a Structure, Bridge or Tunnel is identified during the course of a General Inspection, Principal Inspection or Special Inspection, the Service Provider shall comply with section 6.6 of the Highway Structures Code (as amended or replaced from time to time).

## **6.19 Assessment of Structures, Bridges and Tunnels**

- 6.19.1 No later than one (1) month prior to the Planned Service Commencement Date, the Service Provider shall submit to the Authority the Structural Assessment Strategy pursuant to the Review Procedure.

- 6.19.2 The Service Provider shall carry out a Structural Review of a Structure (excluding Minor Structures), Bridge or Tunnel when one or more of the conditions set out in section 7.4.1 of the Highway Structures Code (as amended or replaced from time to time) occurs.
- 6.19.3 No later than one (1) month prior to the commencement of each Contract Year following the first Contract Year, the Service Provider shall submit to the Authority a revised Structural Assessment Strategy pursuant to the Review Procedure.
- 6.19.4 The Service Provider shall carry out all Structural Assessments in accordance with the Structural Assessment Strategy.
- 6.19.5 If a Structural Review indicates that a Structural Assessment is required the Service Provider shall procure that a Structural Assessment is carried out in accordance with the process recommended in section 7.5 of the Highway Structures Code.
- 6.19.6 The Service Provider shall ensure that all Structural Assessments undertaken from the commencement of Year 19 until the Expiry Date shall include an assessment of whether the Structures (excluding Minor Structures), Bridges and/or Tunnels (to which the Structural Assessments relate) comply with Expiry Condition A Requirements and the Service Provider shall provide to the Authority a written report detailing such assessments.

## **6.20 Recording of Structural Assessment Results**

- 6.20.1 The Service Provider shall record promptly the results of a Structural Assessment in a report (the "**Structural Assessment Report**") and shall ensure that the Structural Assessment Reports include (as a minimum) the information listed in section 7.6.1 of the Highway Structures Code and in respect of a Critical Structure the additional information listed in section 7.6.7 of the Highways Structures Code.
- 6.20.2 The Service Provider shall record all Structural Assessment Reports in the relevant Structure File.

### **6.20A Commissioning of surveys etc**

The Service Provider shall, by no later than its relevant Required Commissioning Date, commission, or otherwise make arrangements for the carrying out of, each inspection, survey, test and assessment that it is obliged to carry out pursuant to this clause 6 (*Surveys and Inspections*).

## **6.21 Authority Surveys**

6.21.1 The Service Provider shall notify the Authority of the date, time and location of all inspections, surveys, tests and assessments that it is obliged to carry out pursuant to this clause 6 (*Surveys and Inspections*) together with the identity of the relevant inspector or surveyor (as the case may be) no later than two (2) months prior to the date on which each such inspection, survey, test and/or assessment is to take place in accordance with this clause 6 (*Surveys and Inspections*).

6.21.2 If:

6.21.2.1 the Service Provider is in breach of any of its obligations under this clause 6 (*Surveys and Inspections*) other than clauses 6.20A, 6.21.1 and 6.21.7; and/or

6.21.2.2 the Service Provider has failed to carry out the surveys, inspections, tests and/or assessments in accordance with the relevant Annual Programme; and/or

6.21.2.3 the Service Provider is in breach of any of its obligations under clause 6.20A; and/or

6.21.2.4 the Service Provider has failed to notify the Authority of the matters referred to in clause 6.21.1 by the date for notification required pursuant to that clause and the Service Provider fails to provide such notification within ten (10) Business Days of the Authority's written request to the Service Provider made at any time following the date for notification pursuant to clause 6.21.1,

then (without prejudice to the provisions of clause 6.1 (*General*) and clause 60 (*Step-in*)), the Authority may:

6.21.2.5 where clause 6.21.2.1 or clause 6.21.2.2 applies, if the Service Provider fails to rectify any failure or breach:

- (a) of clauses 6.1.2, 6.2.1, 6.16.4.5, 6.16.4.6, 6.16.4.7 (*Special Inspections*) or 6.19.2 (*Assessment of Structures, Bridges and Tunnels*) (in relation to paragraph 7.4.1.7 of the Highway Structure Code) within twenty four (24) hours following notice of such failure or breach by the Authority to the Service Provider;
- (b) in relation to any other failure or breach referred to in clause 6.21.2.1 or 6.21.2.2 (other than as provided for in clause 6.21.2.5(c)) within twenty (20) Business Days following notice of such failure or breach by the Authority to the Service Provider; or
- (c) in relation to any failure or breach which constitutes a Survey Breach within ten (10) Business Days following notice of such failure or breach by the Authority to the Service Provider,

carry out (or procure to be carried out) the relevant inspection, survey, test and/or assessment as the Service Provider has (in the Authority's reasonable opinion) failed to carry out pursuant to this clause 6 (*Surveys and Inspections*), provided that this right may not be exercised more often than the minimum frequency with which the Service Provider is obliged to carry out such inspections, surveys, tests and/or assessments in accordance with this clause 6 (*Surveys and Inspections*); or

6.21.2.6 where clause 6.21.2.3 or clause 6.21.2.4 applies, commission, or otherwise make arrangements for the carrying out of, the relevant inspection, survey, test or assessment, provided that this right may not be exercised more often than the minimum frequency with which the Service Provider is obliged to commission, or otherwise make arrangements for the carrying out of, the relevant inspection, survey, test or assessment pursuant to this clause 6 (*Surveys and Inspections*).

- 6.21.3 The Authority shall consider in good faith any reasonable request by the Service Provider for the inspection, survey, test and/or assessment to be carried out on a different date to that notified in accordance with clause 6.21.1 if such request is made at least fifteen (15) Business Days prior to such notified date.
- 6.21.4 If the Authority exercises its rights pursuant to this clause 6.21 (*Authority Surveys*), the Service Provider shall give the Authority (free of charge) any reasonable assistance required by the Authority during the carrying out of any such inspections, surveys, tests and/or assessments.
- 6.21.5 If the Authority exercises its rights pursuant to this clause 6.21 (*Authority Surveys*), it shall be entitled to be reimbursed by the Service Provider for the cost of such inspections, surveys, tests and/or assessments as are carried out by or on behalf of the Authority and such reimbursement shall be made by way of adjustment to the Monthly Payment in accordance with the provisions of schedule 4 (*Payment Mechanism*).
- 6.21.6 When carrying out any inspection, survey, test and/or assessment pursuant to this clause 6.21 (*Authority Surveys*), the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Service Provider.
- 6.21.7 Where the Authority carries out any inspection, survey, test and/or assessment pursuant to this clause 6.21 (*Authority Surveys*), it shall provide the Service Provider, as soon as reasonably practicable, with all unprocessed data, reports and results generated following such inspection, survey, test and/or assessment and the Service Provider shall, within twenty (20) Business Days of receipt of such reports and results, prepare and submit to the Authority (at its own cost) such revised Service Provider Programmes as it considers necessary (having regard to its obligations in clause 20 (*Obligation to provide the Services and Performance Standards*)) in accordance with the relevant provisions of clause 11 (*Service Provider Programmes*) and submit the same to the Authority pursuant to the Review Procedure.
- 6.21.8 In the event that the Service Provider fails to submit revised Service Provider Programmes in accordance with clause 6.21.7 the Authority may, if the

Service Provider fails to rectify the relevant failure within twenty (20) Business Days following notice of such failure by the Authority to the Service Provider, carry out any rectification and/or maintenance work which the results of the relevant inspection, survey, test or assessment carried out by the Authority identify as being necessary to comply with schedule 2 (*Output Specification*) and may recover the cost of such rectification and maintenance work from the Service Provider by way of an adjustment to the Monthly Payment pursuant to the provisions of schedule 4 (*Payment Mechanism*) where the Adjustments the Authority may be entitled to make in respect of the same are insufficient to cover the cost of such rectification and/or maintenance work.

6.21.9 If the Service Provider fails in any Contract Year (the "**Relevant Contract Year**") to carry out any surveys required for the NCI Calculation Methodology then where the Authority pursuant to clause 6.21.2 does not commission or otherwise procure such survey(s):

6.21.9.1 the Service Provider shall estimate the relevant NCI value (the PCI, the SCI and/or the SRI) ("**NCI Value Estimate**") by applying the NCI Data Deterioration Methodology and such NCI Value Estimate shall be used for the purposes of calculating the NCI value and for the purposes of developing the Service Provider Programmes for the following Contract Year; and

6.21.9.2 the Authority shall be entitled to recover any saving made by the Service Provider from failing to carry out any such inspection, survey, test or assessment through an adjustment to the Monthly Payment.

## 7. LATENT DEFECTS

### 7.1 Latent Defect Notice

7.1.1 The Service Provider shall notify the Authority, in writing, ("**Latent Defect Notice**") as soon as reasonably practicable after it becomes aware of an occurrence of any Latent Defect and such notice shall contain the following information (to the extent such information is available to the Service Provider):



- 7.1.1.1 the type of the Latent Defect, including details of the affected Structure (excluding Minor Structures), Tunnel or Bridge and the affected parts thereof (and whether such Structure, Tunnel or Bridge is a Key Structure);
- 7.1.1.2 any further inspections, tests, surveys and/or assessments necessary to assess the affected Structure (excluding Minor Structures), Tunnel or Bridge and any inspections, tests, surveys and/or assessments necessary to assess any similar Structure (excluding Minor Structures), Tunnel or Bridge that may be affected by a similar Latent Defect;
- 7.1.1.3 any measures adopted by the Service Provider in order to prevent the Latent Defect from deteriorating in the period before rectification and/or management work (if relevant) commences;
- 7.1.1.4 an estimate of the likely LD Direct Costs and an estimate of the time frame for rectification of the Latent Defect and in particular whether such LD Direct Costs are likely to exceed the Annual LD Direct Costs Cap for the relevant Contract Year;
- 7.1.1.5 traffic management measures, including road closures, diversions, restricted access to roads and any closure or restrictions on pedestrian thoroughfares, that the Service Provider has taken, or intends to take, before the issue of the Latent Defect Report, together with an estimate of the LD Traffic Management Costs expected to arise from the Latent Defect;
- 7.1.1.6 any further measures that the Service Provider has taken, or intends to take, before the issue of the Latent Defect Report, in order to manage any immediate or potential health and safety risk to the public;
- 7.1.1.7 whether or not Latent Defects have occurred previously in the affected Structure (excluding Minor Structures), Bridge or Tunnel and if so, giving full details of the amount of LD Direct Costs incurred to date pursuant to this clause 7 (*Latent Defects*) ("**Individual LD Direct Costs**") and any Estimated LD Direct

Costs remaining to be expended in respect of such Structure, Bridge or Tunnel; and

7.1.1.8 details (which may be provided in the form of a copy of the then current version of the Latent Defects Log as maintained in accordance with clause 7.13.1) of all previous LD Direct Costs in respect of all occurrences of Latent Defects in any Structure (excluding Minor Structures), Bridge or Tunnel ("**Project LD Direct Costs**").

7.1.2 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 under this clause 7 (*Latent Defects*) changes in any material way, then the Service Provider shall notify the Authority of such changes as soon as reasonably practicable after the Service Provider becomes aware of them.

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

## **7.2 Latent Defect Report**

The Service Provider (at the Service Provider's own expense) shall, in writing, provide to the Authority within one hundred and twenty (120) Business Days of the date of the Latent Defect Notice a report (the "**Latent Defect Report**"), which shall contain:

7.2.1 updated and more detailed information in respect of those matters contained in the Latent Defect Notice;

7.2.2 a full and detailed explanation of the impact of the rectification and/or management of the Latent Defect on the performance of the Services by the Service Provider in accordance with the provisions of this Contract (other than this clause 7.2 (*Latent Defect Report*)) and whether the Service Provider reasonably believes that management of the Latent Defect would be a more appropriate solution;

7.2.3 a full and detailed explanation of how the Service Provider has made the affected Structure, Tunnel or Bridge and its surroundings safe to the public

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

7.2.4 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 Latent Defect);

7.2.5 a full and detailed explanation of how the Latent Defect is to be rectified and/or managed;

7.2.6 the Estimated LD Direct Costs in respect of the Latent Defect;

7.2.7 full details (if applicable) of the amount by which such Estimated LD Direct Costs:

7.2.7.1 would exceed any of:

- (a) the applicable Individual LD Direct Costs Cap;
- (b) the applicable Individual KS LD Direct Costs Cap;
- (c) the applicable Individual Annual KS LD Direct Costs Cap;
- (d) the Annual LD Direct Costs Cap; and
- (e) the Project LD Direct Costs Cap;

7.2.7.2 when taken in aggregate (but without double-counting) with all other Individual LD Direct Costs, Estimated LD Direct Costs and Increased Estimated LD Direct Costs (as the case may be) in respect of all other Latent Defects in the relevant Structure (excluding Minor Structures), Bridge or Tunnel would exceed any of:

- (a) the applicable Individual LD Direct Costs Cap;
- (b) the applicable Individual KS LD Direct Costs Cap; and
- (c) the applicable Individual Annual KS LD Direct Costs Cap; and

7.2.7.3 when taken in aggregate (but without double-counting) with all other Individual LD Direct Costs, Estimated LD Direct Costs and Increased Estimated LD Direct Costs incurred or to be incurred in respect of Latent Defects in a Contract Year, would exceed the Annual LD Direct Costs Cap for that Contract Year; and

7.2.7.4 when taken in aggregate (but without double-counting) with all other Individual LD Direct Costs, Estimated LD Direct Costs and Increased Estimated LD Direct Costs incurred or to be incurred in respect of Latent Defects, would exceed the Project LD Direct Costs Cap; and

7.2.8 where the Service Provider considers (acting reasonably) that such Estimated LD Direct Costs shall exceed the Annual LD Direct Costs Cap for the Contract Year in which the relevant Latent Defect is notified in accordance with clause 7.1.1, a full and detailed explanation of how the Service Provider proposes (without prejudice to any applicable LD Direct Costs Cap in respect of that Latent Defect) to efficiently programme the rectification and/or management of the Latent Defect by programming the rectification and/or management of the Latent Defect over more than one Contract Year, where the Service Provider considers (acting reasonably) that it is practicable and efficient to do so,

save that, where all applicable LD Direct Costs Caps have been exceeded on the date of the Latent Defect Notice, the Latent Defect Report shall not be required to contain the information required pursuant to clauses 7.2.6 and 7.2.7, and provided that if the Authority disputes any of the contents of the Latent Defect Notice and/or the Latent Defect Report, such Dispute shall be determined in accordance with the provisions of clause 70 (*Dispute Resolution*) and the Service Provider, while such Dispute is ongoing, shall comply with any reasonable instructions given by the Authority (save that where the Dispute is in respect of any matter referred to in clauses 7.2.6 or 7.2.7 then the Authority shall indemnify the Service Provider in respect of any costs incurred by the Service Provider in properly complying with such instructions which are determined to exceed the applicable LD Direct Costs Caps).

7.3 The Service Provider shall, at the same time as issuing the Latent Defect Report, amend and submit to the Authority pursuant to the Review Procedure any Service

Provider Programmes affected by the rectification and/or management of the Latent Defect.

7.4 The Service Provider shall notify the Authority once a Month of any updates to the information provided in the Latent Defect Report until the Latent Defect has been rectified and/or managed.

7.5 The Service Provider shall update the Latent Defects Report Monthly and provide a copy of the updated report to the Authority within five (5) Business Days of the end of each Month.

**7.6 Authority's Response to Latent Defect Report**

7.6.1 Where the Service Provider would otherwise be required to carry out such matters, the Authority shall notify the Service Provider, in writing, if it does not require the Service Provider to carry out any further rectification and/or management (including, for the avoidance of doubt, any associated traffic management) pursuant to this clause 7 (*Latent Defects*) in respect of an occurrence of a Latent Defect (in which case clause 7.12.2 shall apply).

7.6.2 The Service Provider shall comply with the notice issued by the Authority in accordance with clause 7.6.1 (*Authority's Response to Latent Defect Report*) until such time as otherwise notified by the Authority.

7.6.3 The Service Provider shall not dispute the Authority's decision made pursuant to clause 7.6.1 (*Authority's Response to Latent Defect Report*).

7.6.4 At no stage shall this clause 7.6 (*Authority's Response to Latent Defect Report*) operate to relieve the Service Provider from its obligations under this Contract (other than pursuant to or as provided for in this clause 7 (*Latent Defects*)).

7.6.5 Where the Latent Defect Notice and/or Latent Defect Report states pursuant to clause 7.1.1.4 and/or 7.2.7 that the Annual LD Direct Costs Cap for a Contract Year would be exceeded, and provided no other applicable LD Direct Costs Cap would be exceeded, the Authority may notify the Service Provider that it intends to procure the additional funding required over and above the Annual LD Direct Costs Cap for the rectification and/or

management of the Latent Defect ("**Additional LD Funding**") so that the rectification and/or management may take place in that Contract Year.

7.6.6 The Authority shall notify the Service Provider as soon as reasonably practicable to confirm whether it has procured the Additional LD Funding and the amount of such funding.

7.6.7 Where the Service Provider is notified pursuant to clause 7.6.6 that the Authority has procured Additional LD Funding, the Service Provider shall continue to rectify and/or manage the relevant Latent Defect after the relevant Annual LD Direct Costs Cap has expired, but only to the extent that (i) the costs incurred or to be incurred by the Service Provider in respect of such rectification and/or management do not or will not exceed the amount of the Additional LD Funding, (ii) the Parties have agreed the basis on which the Additional LD Funding will be paid to the Service Provider by the Authority and (iii) the Authority makes payment of the Additional LD Funding in accordance with that agreement.

7.6.8 The Service Provider shall, to the extent that Additional LD Funding is received from the Authority pursuant to clause 7.6.7, reimburse to the Authority an amount equal to the Additional LD Funding (subject to any other applicable LD Direct Costs Caps (and for these purposes the amount to be reimbursed shall be treated as LD Direct Costs)) in the Contract Year(s) immediately following the later of (i) the Contract Year in which the Additional LD Funding was received by the Service Provider and (ii) the Contract Year in which the relevant rectification and/or management of the Latent Defect took place, and such amount shall count towards any applicable LD Direct Costs Caps for those following Contract Years or otherwise.

## **7.7 Treatment of Latent Defects**

7.7.1 Subject to the Authority's notification made pursuant to clause 7.6.1, the Service Provider shall, provided no applicable LD Direct Costs Cap has been, is or would as a result be exceeded, rectify and/or manage the occurrence of a Latent Defect in a Structure (excluding Minor Structures), Bridge or Tunnel and such rectification and/or management shall be carried out in accordance with the relevant Service Provider Programmes.

7.7.2 The Service Provider shall not be obliged to carry out any further rectification and/or management of a Latent Defect where any applicable LD Direct Costs Cap has been, is or would as a result be exceeded.

## 7.8 Increased Estimated LD Direct Costs

7.8.1 Where the Service Provider is obliged to rectify and/or manage a Latent Defect in accordance with this clause 7 (*Latent Defects*) and the Service Provider (acting reasonably) considers that the relevant Estimated LD Direct Costs shall be exceeded, the Service Provider shall notify the Authority, in writing, of the same ("**Increased Estimated LD Direct Costs Notice**") as soon as reasonably practicable after it becomes apparent to the Service Provider that the relevant Estimated LD Direct Costs will be exceeded ("**Estimated LD Direct Costs Increase Date**") and such notice shall provide:

7.8.1.1 a full and detailed explanation of why the relevant Estimated LD Direct Costs are insufficient to rectify and/or manage the Latent Defect; or

7.8.1.2 a full and detailed explanation of (including revised Service Provider Programmes) what works of rectification and/or management will be outstanding on the Estimated LD Direct Costs Increase Date and the further Estimated LD Direct Costs of such outstanding work ("**Increased Estimated LD Direct Costs**"); and

7.8.1.3 whether or not any LD Direct Costs Cap will be exceeded if the Service Provider incurs the Increased Estimated LD Direct Costs.

7.8.2 The Authority shall, within thirty (30) Business Days of receipt of the Increased Estimated LD Direct Costs Notice, notify the Service Provider, in writing, that:

7.8.2.1 it agrees with the amount of and/or contents of Increased Estimated LD Direct Costs Service Provider shall continue with such rectification and/or management unless any LD Direct

Costs Cap would be exceeded if the Service Provider were to incur the Increased Estimated LD Direct Costs; or

7.8.2.2 it disagrees with the amount of and/or contents of the Increased Estimated LD Direct Costs, giving reasons for such disagreement; or

7.8.2.3 it does not require the Service Provider to carry out any further rectification and/or management of the Latent Defect (in which case clause 7.11 (*Service Provider not required to Rectify and/or Manage*) applies).

7.8.3 Where clause 7.8.2.2 applies, the Authority and the Service Provider shall meet to agree such Increased Estimated LD Direct Costs within a further twenty (20) Business Days of the date of issue of the notice given to the Service Provider pursuant to clause 7.8.2.

7.8.4 If no agreement is reached pursuant to clause 7.8.3, either Party may refer the matter to Dispute Resolution.

7.8.5 The Service Provider shall, following agreement or determination of the Increased Estimated LD Direct Costs, continue to rectify and/or manage the Latent Defect, until such Latent Defect is rectified and/or managed provided that:

7.8.5.1 any LD Direct Costs Cap would not be exceeded if the Service Provider were to incur the Increased Estimated LD Direct Costs; and

7.8.5.2 clause 7.8.2.3 does not apply.

7.8.6 The provisions of this clause 7.8 (*Increased Estimated LD Direct Costs*) shall apply mutatis mutandis where the Service Provider (acting reasonably) considers that the Increased Estimated LD Direct Costs are insufficient, until the earlier to occur of either:

7.8.6.1 the date on which any LD Direct Costs Cap would be exceeded were the Service Provider to incur the Increased Estimated LD Direct Costs, in which case, the Service Provider shall not be



obliged to carry out any further rectification and/or management of the Latent Defect; and

7.8.6.2 the date on which the Latent Defect is rectified.

## **7.9 Cap Expiry**

7.9.1 Where the Service Provider is obliged to rectify and/or manage a Latent Defect in accordance with this clause 7 (*Latent Defects*) and the Service Provider (acting reasonably) considers that any LD Direct Costs Cap shall be exceeded, the Service Provider shall notify the Authority, in writing, of the same as soon as reasonably practicable after it becomes apparent to the Service Provider that such LD Direct Costs Cap will or is likely to be exceeded ("**Cap Expiry Date**") and this notice shall provide a full and detailed explanation of why the Service Provider considers that such LD Direct Costs Cap will be exceeded.

7.9.2 The Service Provider shall, following the service of the notice pursuant to clause 7.9.1, continue to rectify and/or manage the Latent Defect in accordance with this clause 7 (*Latent Defects*) until the relevant Cap Expiry Date following which, the Service Provider shall no longer be required to rectify and/or manage the relevant Latent Defect.

7.9.3 Where clause 7.9.1 applies, the Authority may issue a notice to the Service Provider and the Parties shall meet to agree:

7.9.3.1 whether the Authority requires the Service Provider to continue to rectify and/or manage any Latent Defects (at the Authority's cost); and

7.9.3.2 the Authority's programming requirements in respect of any rectification and/or management required pursuant to clause 7.9.3.1 and proposals submitted by the Service Provider pursuant to clause 7.2.8.

7.9.4 If, pursuant to clause 7.9.3, the Authority instructs the Service Provider to undertake any rectification and/or management (at the Authority's cost), the Service Provider shall be obliged to comply with such instructions and the Authority shall be obliged to pay the Service Provider for the Service

Provider's reasonably and properly incurred costs in undertaking such rectification and/or management.

## **7.10 LD Direct Costs Reconciliation**

7.10.1 Where the Service Provider has incurred LD Direct Costs pursuant to this clause 7 (*Latent Defects*), the Service Provider shall, within thirty (30) Business Days of the date on which the final part of the LD Direct Costs was incurred, notify the Authority in writing of the following:

7.10.1.1 the full amount of the LD Direct Costs; and

7.10.1.2 a calculation showing the difference (if any) between the LD Direct Costs and the Estimated LD Direct Costs or Increased Estimated LD Direct Costs (as the case may be).

7.10.2 Where, pursuant to clause 7.10.1 the notice identifies that the LD Direct Costs are:

7.10.2.1 more than the Estimated LD Direct Costs (or the Increased Estimated LD Direct Costs (as the case may be)), then the LD Direct Costs shall be applied to and count towards the accumulation of any LD Direct Costs Cap; and

7.10.2.2 less than the Estimated LD Direct Costs (or the Increased Estimated LD Direct Costs (as the case may be)), then the LD Direct Costs shall be applied and count towards the accumulation of any LD Direct Costs Cap.

## **7.11 Service Provider not required to Rectify and/or Manage**

7.11.1 Where the Service Provider is advised that it is not obliged to rectify and/or manage a Latent Defect pursuant to this clause 7 (*Latent Defects*) the Authority may require the Service Provider to pay an amount equivalent to the Estimated LD Direct Costs (less any LD Direct Costs already incurred by the Service Provider in rectifying and/or managing 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 sum in excess of the relevant LD Direct Costs Cap.

## 7.12 General

7.12.1 The Service Provider shall ensure that all amounts in respect of LD Direct Costs incurred by the Service Provider in accordance with this clause 7 (*Latent Defects*) are reasonably and properly incurred and provide such information as the Authority requires on those costs on an open book basis.

7.12.2 Nothing in this clause 7 (*Latent Defects*) shall prevent the Authority from issuing an Authority Change in respect of any Structure (excluding Minor Structures), Bridge or Tunnel affected by a Latent Defect, in which case the provisions of schedule 18 (*Change Protocol*) shall apply.

7.12.3 Where, as a result of 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 then the Service Provider shall be entitled to an Excusing Cause in accordance with clause 33.3 (*Excusing Causes*).

7.12.4



## 7.13 Latent Defects Log

7.13.1 The Service Provider shall maintain a record (the "Latent Defects Log") of:

7.13.1.1 each Latent Defect notified under clause 7.1;

7.13.1.2 all Estimated LD Direct Costs and Increased Estimated LD Direct Costs (as applicable) agreed or determined in accordance with this clause 7 (*Latent Defects*), and all LD Direct Costs incurred, in respect of that Latent Defect; and

7.13.1.3 any other matters relevant to determining whether or not any applicable LD Direct Costs Cap in respect of that Latent Defect is, will or is likely to be exceeded.

7.13.2 The Service Provider shall provide a copy of the Latent Defects Log to the Authority as soon as reasonably practicable following request.

7.13.3 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.

**7.14 TVV/ARNF**

[REDACTED]

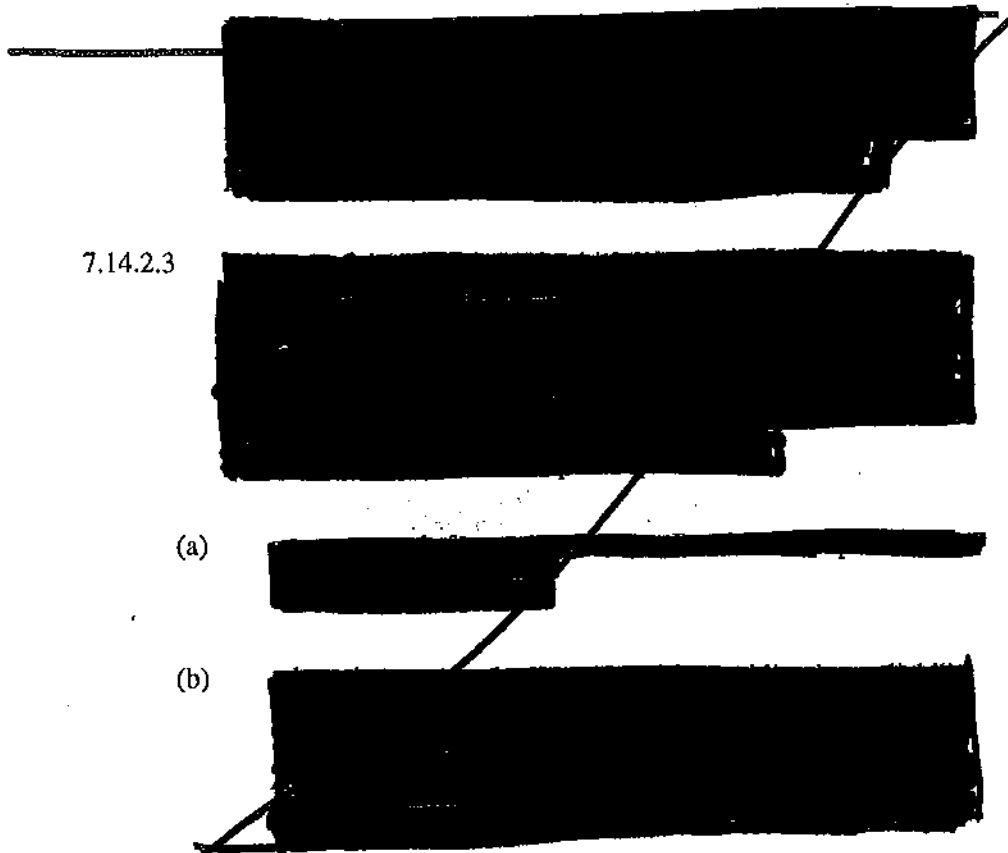
7.14.1.1 [REDACTED]

7.14.1.2 [REDACTED]

7.14.2 [REDACTED]

7.14.2.1 [REDACTED]

7.14.2.2 [REDACTED]



**8. 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 in respect of:

- 8.1 Deemed to Comply Structures, Bridges and Tunnels the Service Provider shall not be required to:
  - 8.1.1 refurbish the Structure, Bridge or Tunnel to meet the 40 tonnes Assessment Live Loading in accordance with BD21/01 of the DMRB if the Structure, Bridge or Tunnel is set out in Table 1 of schedule 16 (*Deemed to Comply*);
  - 8.1.2 change the height of the Structure, Bridge or Tunnel if it was subject to any Height Restriction at the Date of this Contract as set out in Table 2 of schedule 16 (*Deemed to Comply*);
  - 8.1.3 change the width of the Structure, Bridge or Tunnel if it was subject to any Width Restriction as set out in Table 5 of schedule 16 (*Deemed to Comply*); and/or



## 9. MILESTONES

9.1 The Service Provider shall achieve Milestone Completion by the relevant Planned Milestone Completion Date. The Milestones and their respective Planned Milestone Completion Dates are set out in the table below:

<b>Milestone</b>	<b>Planned Milestone Completion Date</b>
1	6 Months after the Service Commencement Date.
2	12 Months after the Service Commencement Date.

<b>Milestone</b>	<b>Planned Milestone Completion Date</b>
3	18 Months after the Service Commencement Date.
4	24 Months after the Service Commencement Date.
5	30 Months after the Service Commencement Date.
6	36 Months after the Service Commencement Date.
7	42 Months after the Service Commencement Date.
8	48 Months after the Service Commencement Date.
9	54 Months after the Service Commencement Date.
10	60 Months after the Service Commencement Date.

## **9.2 Unitary Charge Adjustment - Certificate of Completion**

Where the Independent Certifier has issued a Certificate of Completion in respect of a Milestone pursuant to the provisions of clause 13 (*Certification*) that Milestone shall, from the relevant Milestone Completion Date, be taken into account for the purposes of calculating the Monthly Unitary Charge in accordance with paragraph 1.4 of the Payment Mechanism.

## **9.3 Unitary Charge Adjustment - Certificate of Partial Completion**

Where the Independent Certifier has issued a Certificate of Partial Completion in respect of a Milestone pursuant to the provisions of clause 13 (*Certification*), those PFI Districts in respect of which the Service Provider has achieved Milestone Completion (as set out in the relevant Certificate of Partial Completion) shall, from the relevant Partial Milestone Completion Date, be taken into account for the purposes of calculating the Monthly Unitary Charge in accordance with paragraph 1.4 of the Payment Mechanism.

## **9.4 Inability to complete Milestone**

9.4.1 If the Service Provider, despite having used all reasonable endeavours, considers that it is unlikely to be able to achieve Milestone Completion in a particular PFI District as a direct result of a Relief Event or Excusing Cause, it shall notify the Authority as soon as it becomes aware of such fact, specifying:



- 9.4.1.1 the Milestone Completion Criteria it considers it will fail to achieve ("**Specified Criteria**");
- 9.4.1.2 the reason for such failure;
- 9.4.1.3 the Services that will be affected by such failure ("**Deferred Services**");
- 9.4.1.4 the measures it has taken or proposes to take to minimise the impact of the Relief Event or Excusing Cause; and
- 9.4.1.5 the amendments it proposes to the Annual Programme setting out:
  - (a) (in respect of Milestones 1 to 9 only) the Alternative Services it intends to provide, or the Alternative Scheme it proposes to use to provide such Alternative Services, and where it proposes to carry out such Alternative Services in another PFI District evidence that it cannot carry out such services within the relevant PFI District; and
  - (b) in respect of the Project Network Parts referred to in clause 9.4.7.1 and Standard Street Lighting in relation to Milestone 10 only, the Alternative Services it intends to provide, or the Alternative Scheme it proposes to use to provide such Alternative Services and when it proposes to carry out such Alternative Services in another PFI District evidence that it cannot carry out such services within the relevant PFI District; and
  - (c) when it proposes to undertake the Deferred Services, which in respect of Milestones 1 to 9 only, must be at such a time as to ensure that the Service Provider will achieve the Specified Criteria prior to the next following Planned Milestone Completion Date.

- 9.4.2 Where clause 9.4.1.5(b) applies, the Service Provider shall ensure that:
- 9.4.2.1 the proposed date for completion of the Alternative Services is as near as reasonably practicable to the date originally set for completion of the Deferred Services, as programmed prior to the circumstances giving rise to the relevant Relief Event or Excusing Cause occurring; and
  - 9.4.2.2 the Deferred Services are completed no later than the date originally set for completion of the Alternative Services, as programmed prior to the circumstances giving rise to the relevant Relief Event or Excusing Cause occurring.
- 9.4.3 The Authority shall, as soon as reasonably practicable after receipt of such notification, confirm to the Service Provider whether or not it accepts (acting reasonably) that the Service Provider's failure (or likely failure) to achieve the specified Milestone Completion Criteria results directly from the Relief Event or Excusing Cause.
- 9.4.4 In respect of Milestones 1 to 9, if the Service Provider fails to achieve the Specified Criteria and:
- 9.4.4.1 the Authority accepts (or has accepted) (acting reasonably) that such failure resulted directly from the Relief Event or Excusing Cause;
  - 9.4.4.2 the Service Provider has undertaken the relevant Alternative Services notified in accordance with clause 9.4.1.5(a); and
  - 9.4.4.3 the Service Provider updates the Annual Programme pursuant to the Review Procedure,
- the Service Provider shall be deemed to have achieved Milestone Completion in the relevant PFI District.
- 9.4.5 Where clause 9.4.4 does not apply, the Service Provider shall not achieve Milestone Completion in the relevant PFI District (and either Party may refer any dispute for resolution pursuant to Dispute Resolution).

9.4.6 Without prejudice to clause 9.4.1, and in respect of Milestones 1 to 9 only, where the Service Provider is deemed, pursuant to clause 9.4.4, to have achieved Milestone Completion in a PFI District notwithstanding that it has failed to achieve all the Milestone Completion Criteria, achievement of the Specified Criteria shall be considered an additional Milestone Completion Criterion for the next-following Milestone, such that failure by the Service Provider to achieve the Specified Criteria shall mean it does not achieve Milestone Completion in respect of the relevant PFI District for that next-following Milestone unless the relevant Relief Event or Excusing Cause is continuing at that next-following Milestone in which case:

9.4.6.1 the Specified Criteria shall be considered a Milestone Completion Criterion for the Milestone after which the relevant Relief Event or Excusing Cause ceases to subsist; or

9.4.6.2 where the relevant Relief Event or Excusing Cause is continuing at the Planned Milestone Completion Date for Milestone 10, the provisions of clause 9.4.7 shall apply.

9.4.7 In respect of Milestone 10, if the Service Provider fails to achieve the Specified Criteria then to the extent the Specified Criteria:

9.4.7.1 include the Milestone Completion Criteria which relate to anything other than Failed RSLs, Poor or Failed FSLs, Poor or Failed VGSLs, Poor or Failed KBSLs, Poor or Failed CTSLs, Traffic Signal Controllers, Pumping Stations, Non-Standard Street Lighting, Standard Street Lighting, Structures, Bridges and Tunnels, and the Service Provider has not complied with clause 9.4.1.5(b) and/or clause 9.4.2.1, then the Service Provider shall not have achieved Milestone Completion in the relevant PFI District; or

9.4.7.2 include the Milestone Completion Criteria which relate to Failed RSLs, Poor or Failed FSLs, Poor or Failed VGSLs, Poor or Failed KBSLs, Poor or Failed CTSLs or Traffic Signal Controllers, Pumping Stations, Standard Street Lighting, Structures, Bridges and Non-Standard Street Lighting, and:

- (a) the Authority accepts (or has accepted) (acting reasonably) that such failure resulted directly from the Relief Event or Excusing Cause;
- (b) the Service Provider has undertaken the relevant Alternative Services notified in accordance with clause 9.4.1.5(b);
- (c) the Service Provider has complied with clause 9.4.2.1; and
- (d) the Service Provider updates the Annual Programme in accordance with the Review Procedure,

the Service Provider shall be deemed to have achieved Milestone Completion in the relevant PFI District, and clauses 9.4.9 and 9.4.10 shall apply; or

9.4.7.3 include the Milestone Completion Criteria which relate to Tunnels, and:

- (a) the Authority accepts (or has accepted) (acting reasonably) that such failure resulted directly from the Relief Event or Excusing Cause; and
- (b) the Service Provider updates the Annual Programme in accordance with the Review Procedure,

the Service Provider shall be deemed to have achieved Milestone Completion in the relevant PFI District, and clauses 9.4.9 and 9.4.11 shall apply.

9.4.8 Where clause 9.4.7 does not apply, the Service Provider shall not achieve Milestone Completion in the relevant PFI District (and either Party may refer any dispute for resolution pursuant to Dispute Resolution).

9.4.9 In the circumstances referred to in clause 9.4.7, the Service Provider shall provide the Deferred Services in accordance with the updated Annual

Programme. The Service Provider shall notify the Authority as soon as the Service Provider considers that it has achieved the Specified Criteria.

9.4.10 In the circumstances referred to in clause 9.4.7.2, from the date of issue of the relevant Certificate of Completion or Certificate of Partial Completion (as appropriate) until the date the Service Provider has provided the Deferred Services and achieved the Specified Criteria, the Authority shall be entitled to withhold from the Monthly Unitary Charge an amount which it reasonably determines to represent the value of the Deferred Services taking into account any analogous X values or Y values or rates included in the Catalogue or part 2.1 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) and otherwise reflecting rates which are fair and reasonable and reflect market rates and, in the case of Standard Street Lighting, the value of Alternative Services in respect of Deemed to Comply Street Lighting undertaken by the Service Provider in lieu of the Deferred Services.

9.4.11 In the circumstances referred to in clause 9.4.7.3:

9.4.11.1 clause 13.2 (*Certification of Milestones*) shall apply to the Deferred Services; and

9.4.11.2 from the date of issue of the relevant Certificate of Completion or Certificate of Partial Completion (as appropriate) until the date the Service Provider has provided the Deferred Services and obtained a Certificate of Completion pursuant to clause 13.2 (*Certification of Milestones*) demonstrating that it has achieved the Specified Criteria, the Authority shall be entitled to withhold an element of the Monthly Unitary Charge reasonably reflecting those elements of the Services relating to the Tunnels which remain outstanding which shall be equal to the withholding calculated in respect of Milestone 10 pursuant to schedule 4 (*Payment Mechanism*) save where the Authority (acting reasonably) determines that such withholding would not reflect the value of the Deferred Services.

9.4.12 If the circumstances in clause 9.4.10 or clause 9.4.11 apply and the Service Provider has not completed the relevant Deferred Services by the date that is eighteen (18) Months after the date on which relevant Excusing Cause or

Relief Event (as applicable) has ceased to subsist, the Authority shall be entitled to use the relevant amounts withheld from the Monthly Unitary Charge to procure the Deferred Services from a replacement contractor and the Authority shall not be obliged to pay the Service Provider any amount in relation to the relevant Deferred Services.

9.4.13 Failure to complete a Milestone within (18) eighteen Months

9.4.13.1 If, in respect of a Milestone, on the date that is eighteen (18) Months from the applicable Planned Milestone Completion Date a Certificate of Completion has not been issued then the Authority shall notify the Service Provider of the same and in such notice award the Service Provider one (1) Milestone Default Termination Point which the Service Provider shall retain until the date on which such Certificate of Completion has been issued (save where the sole reason for such Certificate of Completion not being issued is failure to achieve Milestone Completion Criteria relating to Tunnels, in which case no Milestone Default Termination Point shall be awarded).

9.4.13.2 Without prejudice to any other right, remedy, recourse or entitlement of the Authority under this Contract the Service Provider shall, within ten (10) Business Days of each notification made in accordance with clause 9.4.13.1 submit to the Authority a remedial plan and revised Service Provider Programmes to reflect the implementation of such remedial plan for review in accordance with schedule 21 (*Review Procedure*).

Each remedial plan and revised Service Provider Programmes produced pursuant to clause 9.4.13.2 shall be prepared in accordance with clause 11 (*Service Provider Programmes*) and shall contain such detailed information as is necessary:

9.4.13.3 to allow the Authority to monitor the progress and likely future progress of the actions of the Service Provider in accordance with the remedial plan and revised Service Provider Programmes; and

- 9.4.13.4 to demonstrate to the Authority that all outstanding Milestones and the Core Investment Period Programme shall be completed on or prior to the Planned Core Investment Period Completion Date.
- 9.4.13.5 For the avoidance of doubt, where a Certificate of Completion in respect of a Milestone has been issued, any Milestone Default Termination Point issued in respect of such Milestone shall be cancelled and for the purposes of clause 62.2 shall be deemed as if such Milestone Termination Point had not been issued.

## **9.5 DNO Non-Performance**

- 9.5.1 Where the reason specified by the Service Provider pursuant to clause 9.4.1.2 for failure to achieve a Milestone in any PFI District is that in respect of any Services related to Street Lighting such failure was directly caused by the failure of a DNO to perform its obligations in respect of Non-Contestable Works then the Service Provider shall be entitled to an Excusing Cause only where it demonstrates to the reasonable satisfaction of the Authority that:
- 9.5.1.1 all such works and/or services which the DNO has failed to provide (and which were the cause of the failure to achieve the Milestone) ("DNO Works") were Non-Contestable Works and, subject to clause 9.5.1.3, could not reasonably have been performed by any party other than a DNO;
- 9.5.1.2 the Five Year Indicative Programme, Core Investment Period Programme and Annual Programme relevant to the DNO Works had fully taken into account all reasonable requirements of the DNO and any information provided by the DNO in respect of its ability to carry out the DNO Works as set out in such programmes;
- 9.5.1.3 the Service Provider had mitigated the effects of any non-performance of DNO Works by seeking to ensure (so far as reasonably practicable and taking into account the Service Provider's obligations under this Agreement) that works and services relating to such Street Lighting were Contestable Works;

9.5.1.4 Alternative Services shall be provided in accordance with clause 9.5.2.

9.5.2 Where, pursuant to clause 9.5.1 the Service Provider is entitled to an Excusing Cause, Alternative Services shall be provided which relate to Contestable Works, set out in the Core Investment Programme and such Services shall either be carried out in the same PFI District as the DNO Works or where no relevant Contestable Works can be carried out in such PFI District, in another PFI District.

## 10. ACCELERATION

10.1 The Service Provider shall be permitted to accelerate items of Core Investment Works set out in the relevant Core Investment Period Programme or the Annual Programme or the Two Year Programme.

10.2 Where the acceleration of Core Investment Works occurs pursuant to clause 10.1:

10.2.1 the Authority shall not be obliged to:

10.2.1.1 take any action to facilitate or enable any such acceleration; and

10.2.1.2 pay the Service Provider any amounts (including the Annual Unitary Charge) in excess of that which the Authority would have been obliged to pay on the relevant Milestone Completion Date; and

10.2.2 the Service Provider shall revise the relevant Core Investment Period Programme, the Annual Programme and/or the Two Year Programme to reflect all details of such acceleration (and these revised programmes shall be compliant with clause 11 (*Service Provider Programmes*)) and be submitted for review in accordance with schedule 21 (*Review Procedure*), unless it is not reasonably practicable for the Service Provider to revise such programmes prior to implementing such acceleration, in which case the Service Provider shall provide the Authority and the relevant Constituency Committees with reasonable written notice of the details of such acceleration.



**PART D - SERVICE PROVIDER PROGRAMMES and SERVICE PROVIDER REPORTS**

**11. SERVICE PROVIDER PROGRAMMES**

11.1 The Service Provider shall produce, revise and provide to the Authority the Service Provider Programmes in accordance with the provisions of this clause 11 (*Service Provider Programmes*):

11.1.1 The Full Term Indicative Programme shall contain, without limitation, the following information:

11.1.1.1 high level details of the Programmed Maintenance that is to be carried out by the Service Provider to the Project Network in respect of each Contract Year during the Contract Term in order to comply with the requirements of this Contract;

11.1.1.2 the rolling programme of General Inspections, Principal Inspections and Structural Assessments of Structures, Tunnels and Bridges on the Project Network to be carried out during the Contract Term; and

11.1.1.3 details of the predicted NCI<sub>link</sub>, NCI<sub>local</sub>, NCI<sub>main</sub> and NIC<sub>sec</sub> profiles that will be achieved for each PFI District in each Contract Year after the first Contract Year ("Year 1") during the Contract Term.

11.1.2 The Five Year Indicative Programme shall contain, without limitation, the following information:

11.1.2.1 details of the Programmed Maintenance to be carried out by the Service Provider to the Project Network in respect of the forthcoming five (5) Contract Years in order to comply with the requirements of this Contract and each item of Programmed Maintenance Work shall be listed separately and shall include:

(a) the location at which each item of the Programmed Maintenance Work shall take place (street name, postcode and PFI District);

- (b) the type of Programmed Maintenance Work;
- (c) the type of materials to be used for each item of Programmed Maintenance Work;
- (d) the anticipated duration of each item of Programmed Maintenance Work;
- (e) the extent to which the Programmed Maintenance Work necessitates a Road Closure; and

11.1.2.2 the Five Year Tree Replacement Programme,

11.1.3 The Core Investment Period Programme shall contain, without limitation, the following information:

- 11.1.3.1 a detailed plan on a PFI District by PFI District and street by street basis of each item of Core Investment Works that are to be carried out by the Service Provider to the Project Network in order to comply with the requirements of this Contract in respect of the forthcoming Contract Year and how, having made due enquiry, such Core Investment Works will be managed and/or co-ordinated in the context of other works being carried out on the relevant areas of the Project Network by the Authority (as Highway Authority), Statutory Undertakers or third parties in respect of the same period;
- 11.1.3.2 a detailed plan, on a PFI District by PFI District and street by street basis, of the all the surveys, inspections and tests (including timings and locations of such surveys, inspections tests and assessments) to be carried out on the Project Network pursuant to the provisions of clause 6 (*Surveys and Inspections*) which relate to the Core Investment Works in respect of the forthcoming Contract Year;
- 11.1.3.3 a strategic plan on a PFI District by PFI District basis for the remainder of the Core Investment Period setting out:

- (a) the Core Investment Works to be carried out to meet each Milestone and the requirements of part 1 of schedule 2 (*Output Specification*);
- (b) the NCI<sub>link</sub>, NCI<sub>local</sub>, NCI<sub>main</sub> and NCI<sub>sec</sub> profiles for the Project Roads in a graphical or tabular format demonstrating the relevant NCI profile for each PFI District for each Month during the Core Investment Period;
- (c) details of all surveys, inspections and tests (including timing and location of such surveys, inspections and tests) to be carried out in accordance with the provisions of clause 6 (*Surveys and Inspections*) which relate to the Core Investment Works;
- (d) the extent to which the Core Investment Works necessitate a Road Closure;
- (e) the extent to which the Core Investment Works require the assistance of a DNO; and

11.1.3.4 such further supporting, incidental or supplementary information as the Authority may reasonably request from time to time;

11.1.4 the UTMC Development Plan in accordance with Appendix E of part 1B of schedule 2 (*Output Specification*);

11.1.5 The Annual Programme shall contain, without limitation, the following information in respect of the forthcoming Contract Year:

11.1.5.1 details of the Programmed Maintenance to be carried out by the Service Provider to the Project Network in order to comply with the requirements of this Contract and each item of Programmed Maintenance Work shall be listed separately and shall include:

- (a) in respect of Milestone 1 and Milestone 2 only, the Service Provider's proposals for:

- (i) delivering the Programme of Surfacing Works for Year 1;
  - (ii) additional works in respect of Project Roads that the Service Provider proposes to conduct;
- (b) the location of the Programmed Maintenance Work (street name, postcode and PFI District);
  - (c) the nature of the Programmed Maintenance Work in question;
  - (d) the type of materials to be used for the Programmed Maintenance Work in question;
  - (e) the anticipated duration of each item of Programmed Maintenance Work;
  - (f) the extent to which the Programmed Maintenance Work necessitates a Road Closure; and
  - (g) the details of those Performance Targets that in the reasonable opinion of the Service Provider should not apply to the location of such Programmed Maintenance Work together with all evidence as to why such Performance Targets should not apply;
- 11.1.5.2 details of all the inspections, surveys, tests and assessments (including the timings and locations of all inspections, surveys, tests and assessments) referred to in clause 6 (*Surveys and Inspections*);
- 11.1.5.3 the Annual Weed Control Programme;
- 11.1.5.4 the Annual Winter Maintenance Services Operational Plan;
- 11.1.5.5 the Service Provider's Annual Highway Emergency Plan and the Service Provider's Civil Emergency Plan;

- 11.1.5.6 details of all proposed Special Events and consequent Special Event Closures of which the Service Provider is made aware;
- 11.1.5.7 the Tunnel Refurbishment Programme;
- 11.1.5.8 the Annual Tree Management Programme;
- 11.1.5.9 having made due enquiry, how such Programmed Maintenance Works, and Core Investment Works are to be managed and/or coordinated with the activities of the Authority (as Highway Authority), Statutory Undertakers and, subject to clause 15.2.7, Third Parties in order to:
  - (a) avoid unnecessary Road Closures; and
  - (b) minimise disruption to the Project Network,
  - (c) and how the Service Provider intends to manage the performance of the same against the timetable which has been agreed by the Traffic Manager for carrying out such activities on the Project Network;
- 11.1.5.10 the details relating to the Core Investment Works required in accordance with clause 11.1.3 (save for clause 11.1.3.3(b)) for the forthcoming Contract Year; and
- 11.1.5.11 such further supporting, incidental or supplementary information as the Authority may from time to time reasonably request;
- 11.1.5.12 the Road Closure Programme;
- 11.1.5.13 the Footways Works Programme;
- 11.1.5.14 any number of alternate programmes of work as may be considered necessary by the Service Provider (i) to enable it to achieve Milestone Completion should it be prevented, or have the reasonable belief that it will be prevented, as the result of the occurrence of an Excusing Cause or Relief Event by the relevant Planned Milestone Completion Date or (ii) to indicate alternative work which could be carried out by the Service Provider in the

event that for any reason any planned work could not be carried out in any of the locations its Annual Programme anticipates ("Alternative Schemes") which shall contain the following information:

- (a) the location of the Alternative Scheme (street name, postcode and PFI District);
- (b) the nature of the Alternative Scheme in question;
- (c) the principal materials to be used for the Alternative Scheme in question;
- (d) the anticipated duration of the Alternative Scheme;
- (e) the extent to which the Alternative Scheme necessitates a Road Closure; and

the Authority may acting reasonably request such other information as it requires to enable it to assess the Alternative Scheme taking into account the information provided by the Service Provider pursuant to clause 11.1.5.14 as soon as reasonably practicable after the date the information was provided by the Service Provider. The Service Provider shall provide such information as soon as is reasonably practicable (considering the nature of the information requested) following the date of such request and the Service Provider shall notify the Authority of any updates and/or changes to such information provided in respect of any Alternative Scheme as soon as is reasonably practicable after the date on which it became aware of such change and/or update;

11.1.6 the Two Year Programme which shall contain, without limitation, all the information set out in clause 11.1.5 in respect of the Contract Year immediately following the forthcoming Contract Year (in respect of which the relevant Annual Programme shall apply), but such information shall be in outline and indicative form and not be as detailed as the information in the relevant Annual Programme,

provided that the above requirements of this clause 11.1 as to the contents of the Service Provider Programmes shall not (other than as specified in clauses 11.1.5.14) apply in respect of any Alternative Schemes.

11.1.A Subject to clause 11.1B below:

11.1.A.1 in respect of the period commencing on the Service Commencement Date and ending on the date that is six (6) Months after the Service Commencement Date, the above requirements of this clause 11.1 as to the contents of Service Provider Programmes shall be deemed for all purposes to be satisfied in full by the Initial Service Provider Programmes; and

11.1.A.2 in respect of the period commencing on the date that is three (3) Months after the Service Commencement Date and ending on the date that is six (6) Months after the Service Commencement Date, the Service Provider shall use reasonable endeavours to procure that the Initial Service Provider Programmes are updated in accordance with this Contract.

11.1.B Where there is a requirement under this Contract to update the Service Provider Programmes other than in the circumstances set out in clause 11.1 above, clause 11.1.A shall not apply and the Service Provider shall update the Service Provider Programmes as required by the terms of this Contract.

11.2 No later than 1 March in each Contract Year following the first Contract Year, the Service Provider shall submit to the Authority a revised version of the Service Provider Programmes prepared in accordance with the requirements of clause 11.12 pursuant to the Review Procedure.

11.3 The Service Provider shall submit to the Authority a revised version of each of the Service Provider Programmes pursuant to the Review Procedure on 1 June, 1 September and 1 December in each Contract Year.

11.4 The Service Provider shall submit to the Authority all amendments to the Service Provider Programmes pursuant to the Review Procedure.

11.5

11.5.1 Subject to clause 11.5.2, where any provision of this Contract states that the Service Provider is obliged to revise any or all of the Service Provider Programmes, such Service Provider Programmes shall be revised by the Service Provider in accordance with clauses 11.6, 11.7, 11.10 and 11.12 (*Service Provider Programmes*) and submitted to the Authority pursuant to the Review Procedure, provided that this clause 11.5.1 and clauses 11.6, 11.7, 11.10 and 11.12 shall not apply and the Service Provider shall not be obliged to revise the Service Provider Programmes as a pre-condition to undertaking Minor Works and that the programme implications of such Minor Works shall instead be dealt with in accordance with clause 11.5.3.

11.5.2 The Service Provider shall notify the Authority that it intends to place a notice on the Street Works Register in respect of any Minor Works together with a copy of the notice two (2) Business Days before the date such notice must be placed on the Street Works Register.

11.5.3 The Service Provider shall submit all consequential amendments required to the Service Provider Programmes as a result of the completion of the Minor Works to the Authority pursuant to the Review Procedure.

11.6 On the occurrence of:

11.6.1 a Relief Event;

11.6.2 a Compensation Event;

11.6.3 an Excusing Cause; or

11.6.4 a Force Majeure Event,

the Service Provider shall revise the Service Provider Programmes to take into account any effects that any such event has on the provision of the Services as is agreed between the Parties pursuant to clause 33 (*Relief Events, Compensation Events and Excusing Causes*) and/or clause 65 (*Termination following a Force Majeure Event*) and submit the same to the Authority's Representative within ten (10) Business Days of the date of such agreement for review in accordance with schedule 21 (*Review Procedure*).



11.7 Prior to the submission of the Service Provider Programmes to the Authority in accordance with this clause 11 (*Service Provider Programmes*), the Service Provider shall, during the preparation and development of the same, consult and liaise with each Constituency Committee in order to give each Constituency Committee the opportunity to:

11.7.1 comment on the provision of the Services in its PFI District by the Service Provider as shown in the Service Provider Programmes; and/or

11.7.2 inform the Service Provider of any Project Network Parts situated in its PFI Districts that it requires to be replaced or upgraded to an Enhanced Standard (together with all details of such replacement or upgrade) and request that the Service Provider provides a detailed analysis of the additional cost that would be incurred in respect of such replacement or upgrade over and above those costs included in the relevant Monthly Payment, including details of any additional lifecycle and maintenance costs; and/or

11.7.3 comment on the use of any Substitute Footway Material Schemes proposed in its PFI District as shown in the Service Provider Programmes and request that any such Substitute Footway Material Schemes are not included in the relevant Service Provider Programme.

11.8 If:

11.8.1 a Constituency Committee makes comments on a Service Provider Programme in accordance with clause 11.7.1, the Service Provider shall have all due regard to such comments and shall incorporate the same into the Service Provider Programmes unless such comments if incorporated would:

11.8.1.1 have a material adverse impact on the Service Provider; and/or

11.8.1.2 be inconsistent with the requirements of schedule 2 (*Output Specification*);

11.8.2 a Constituency Committee makes a request in accordance with clause 11.7.2, the Service Provider shall, as soon as reasonably practicable, and in any event not later than twenty (20) Business Days after the date of such request, provide a detailed response to the relevant Constituency Committee with a copy to the Authority; and

11.8.3 a Constituency Committee requests that any Proposed Substitute Footway Materials Schemes for its PFI District are not included in the Service Provider Programmes in accordance with 11.7.3, the Service Provider shall notify the Authority in writing as soon as reasonably practicable and in any event within five (5) Business Days. The Authority shall then notify the Service Provider within ten (10) Business Days of receipt of such notification from the Service Provider that:

11.8.3.1the Service Provider shall include the Substitute Footway Materials Scheme in the Service Provider Programmes for the forthcoming Contract Year; or

11.8.3.2the Service Provider shall not include the Substitute Footways Materials Scheme in the Service Provider Programmes for the forthcoming Contract Year; and

11.8.3.3the Service Provider shall include an alternative Substitute Footway Materials Scheme in the Service Provider Programmes for the forthcoming Contract Year.

The Service Provider shall include Substitute Footway Materials Schemes in the Service Provider Programmes for the forthcoming Contract Year unless a Constituency Committee requests that a Substitute Footway Material Scheme shall not be used in its PFI District.

11.9 The Service Provider shall not proceed with any replacements or upgrades to an Enhanced Standard at the request of a Constituency Committee unless the Authority has confirmed in writing to the Service Provider within ten (10) Business Days of receipt of the Service Provider's detailed response that such enhanced replacements or upgrades are permitted.

11.10 If the Authority issues such confirmation in accordance with clause 11.9 the provisions of paragraph 6 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) shall apply and the Service Provider shall include any associated works within any relevant Service Provider Programmes.

11.10A No later than 1 January in each Contract Year (except the first Contract Year, in which proposals shall be submitted to the Authority by the Service Commencement

Date as an amendment to the Service Provider's Programmes) and prior to commencement of consultation with Constituency Committees pursuant to clause 11.7, the Service Provider shall submit to the Authority its draft proposals in respect of its programme of works in relation to Footways, Footpaths and Cycle Tracks for the Annual Programme ("**Footways Works Programme**") for the forthcoming Contract Year which shall include:

11.10A.1 on a scheme by scheme basis, the total area (in square metres) of proposed works for Footways, Footpaths and Cycle Tracks to be included in the Annual Programme for the forthcoming Contract Year, including the current material or predominant material of such areas;

11.10A.2 on a scheme by scheme basis, the Service Provider's recommendation to the Authority of areas where the Service Provider considers (acting reasonably) that it would be appropriate to use Substitute Footway Materials in the works in relation to Footways, Footpaths and Cycle Tracks ("**Substitute Footway Materials Schemes**") identified in clause 11.10A.1, the aggregate area of such recommended schemes to total in area no less than one hundred and fifty percent (150%) of the relevant Target FMA Area for the forthcoming Contract Year, or such other total area as agreed between the Parties, (acting reasonably); and

11.10A.3 for clauses 11.10A.1 and 11.10A.2, a breakdown of the total area (in square metres) by PFI District of such works in relation to Footways, Footpaths and Cycle Tracks.

11.10B The Service Provider shall use all reasonable endeavours to ensure that the aggregate area of all Substitute Footway Material Schemes proposed in the Footways Works Programme is apportioned equally across all PFI Districts, with regard to the proportion of existing Footway materials in each PFI District.

11.10C The Authority shall notify the Service Provider in writing within twenty (20) Business Days of the date of receipt of the Footway Works Programme of:

11.10C.1 the Substitute Footway Materials Schemes to which the Authority consents to the use of Substitute Footway Materials,

11.10C.2 alternative Substitute Footway Materials Schemes to enable the Service Provider to complete works (as described in clause 11.1.5.13), and

11.10C.3 Substitute Footway Materials Schemes proposed by the Authority,

upon which the Service Provider shall consult upon with the Constituency Committees pursuant to clause 11.7.

## **11.11 Routine Maintenance Programme**

11.11.1 The Service Provider shall carry out Service Inspections and Safety Inspections on the Project Network to identify the Routine Maintenance Works and shall use the information from those inspections to develop a Routine Maintenance Programme every Month.

11.11.2 The Routine Maintenance Programme shall identify those Routine Maintenance Works which are necessary to enable the Service Provider to comply with its obligations under this Contract.

11.11.3 The Service Provider shall deliver to the Authority a copy of the Routine Maintenance Programme every Month.

11.12 The Service Provider Programmes submitted to the Authority in accordance with this clause 11 (*Service Provider Programmes*) shall be prepared and developed in order to meet the requirements of:

11.12.1 schedule 2 (*Output Specification*);

11.12.2 this clause 11 (*Service Provider Programmes*);

11.12.3 Good Industry Practice; and

11.12.4 any other provisions of this Contract,

and, in addition to the requirements set out above, in respect of the Annual Programme, the Routine Maintenance Programme and the UTMC Development Plan, contain sufficient detail so that the Authority is able (acting reasonably) to appropriately allocate staff and resources to the management of the Authority's obligations under this Contract.

## **11.13 The Traffic Manager and Road Closures**

11.13.1 The Service Provider shall liaise with the Traffic Manager during the creation and amendment of the Service Provider Programmes to:

11.13.1.1 seek to ensure that the Road Closures are minimised in respect of occurrence, duration, disruption and impact on the Project Network and are stated clearly in the Annual Programme (other than in respect of Alternative Schemes);

11.13.1.2 seek to ensure that the expeditious movement of traffic is facilitated pursuant to the obligation in clause 35.16.3 and that the works proposed within the Annual Programme do not contravene and comply with the Authority's Voluntary Code of Practice for the Co-ordination of Streetworks in Birmingham;

11.13.1.3 ensure that the Annual Programme takes into account any New Build, Third Party Works, Major HWA Works, Standard HWA Works, Small HWA Works or Special Events that are to occur on the Project Network in the forthcoming Contract Year which the Service Provider is aware of; and

and in any event that (other than in respect of Alternative Schemes) Road Closures arising as a result of Programmed Maintenance, Core Investment Works, a Special Event, or as a result of planned works by a Street Works Promoter in the forthcoming Contract Year do not exceed the number or duration of Road Closures as set out in the applicable Road Closure Programme.

11.13.2 Notwithstanding the requirements of clause 11.13.1 above, the Service Provider shall ensure that:

11.13.2.1 Project Roads which are paired in appendix 2 (Pairing of Streets) of the Voluntary Code of Practice (Co-ordination of Streetworks in Birmingham) are not the subject of Road Closures simultaneously at any time (other than as a result of a Highway Emergency), irrespective of whether the Road Closure is as a result of the provision of the Services or not;

- 11.13.2.2 to the extent the Service Provider intends to carry out Core Investment Works and/or Programmed Maintenance on a Blue Carriageway Route that will result in a Road Closure, it shall consult with the Emergency Services during the development of the relevant Service Provider Programmes and take into account any objections as to timing and/or duration the Emergency Services may have when finalising such Service Provider Programmes;
- 11.13.2.3 to the extent the Service Provider intends to carry out Core Investment Works and/or Programmed Maintenance on a Strategic Traffic Route, it shall, during the development of the Service Provider Programmes, seek the Authority's prior written consent as to the timing and/or duration of such Core Investment Works and/or Programmed Maintenance;
- 11.13.2.4 subject to paragraph 2.7.2 of Part 2 and paragraph 2.2 of Part 5 of schedule 2 (*Output Specification*), Road Closures on an RSL running through or on the immediate approach to a Tunnel shall not take place between 6.00am and 10.00pm Monday to Friday (inclusive), 8.00am and 10.00pm Saturday (inclusive) and 10.00am and 6.00pm Sunday (inclusive) unless agreed otherwise with the Authority; and
- 11.13.2.5 Road Closures shall not take place on those areas of the Project Network identified in the Authority's City Centre Working Restrictions Plan between the last Saturday in October and the third Saturday in January (inclusive) each year.

## **11.14 Disputes**

- 11.14.1 If, in accordance with the provisions of schedule 21 (*Review Procedure*), the Parties are unable to agree the contents of the Service Provider Programmes or any part thereof, the matter shall be referred to Dispute Resolution.

11.14.2 Until such time as the disputed matter is agreed or determined in accordance with Dispute Resolution, the Service Provider shall comply with:

11.14.2.1 the undisputed contents of the Service Provider Programmes; and

11.14.2.2 the instructions of the Authority in respect of the disputed contents of the relevant part of the Service Provider Programmes, provided that the Service Provider shall not be required to act in accordance with any instructions that are not compliant with Law.

## 12. SERVICE PROVIDER REPORTS

12.1 The Service Provider shall provide to the Authority an electronic and hard copy of the:

12.1.1 Annual Winter Maintenance Services Operational Report in accordance with paragraph 2.9 of part 4 of schedule 2 (*Output Specification*);

12.1.2 Annual Service Report in accordance with paragraph 2.1 of part 8 of schedule 2 (*Output Specification*);

12.1.3 outcome of any Customer Satisfaction Survey in accordance with the provisions of clause 32.3 (*Best Value and Continuing Value for Money*);

12.1.4 Network Integrity Report in accordance with the provisions of paragraph 2.14.2 of part 7 of schedule 2 (*Output Specification*); and

12.1.5 Network Safety Improvement Assessment Report in accordance with the provisions of paragraph 2.1.2 of part 6 of schedule 2 (*Output Specification*).

12.2 The Service Provider shall submit a report to the Authority on the first (1st) Business Day of July in each Contract Year which shall set out all details relating to the provision of the Services in relation to part 1 of schedule 2 (*Output Specification*) in respect of the preceding twelve (12) Months (the "**PS1 Annual Survey Report**").

12.3 The Authority shall be entitled to review the Network Integrity Report and the Network Safety Improvement Assessment Report submitted by the Service Provider pursuant to clause 12.1 and request that the Service Provider supply, within twenty (20) Business Days of such request, a cost estimate in respect of any works identified

in such reports together with an updated version of the current Annual Programme and Two Year Programme (and the Core Investment Period Programme if the Core Investment Period has not expired) in order for the Authority to determine the impact of such works on Programmed Maintenance and/or the Core Investment Works (if applicable).

- 12.4 If the Authority requires the Service Provider to carry out any additional works to the Project Network as a result of the information provided by the Service Provider in accordance with clause 12.3 (and where such works are not necessary to ensure that the Service Provider complies with its obligations under clause 20 (*Obligation to provide the Services and Performance Standards*)) the Authority shall issue an Authority Change Notice in respect of the same and the provisions of schedule 18 (*Change Protocol*) shall apply.

## **PART E - CERTIFICATION, INSPECTION AND AUTHORITY ACCESS**

### **13. CERTIFICATION**

#### **13.1 Tests and inspections prior to Certification of Milestones**

13.1.1 The Service Provider shall grant the Independent Certifier and the Authority's Representative access at all times (on giving reasonable notice) to the site of any Services being undertaken by the Service Provider in relation to the Core Investment Works in order to enable each of them to assess whether such Services comply with the Milestone Completion Criteria, provided always that the Authority and the Independent Certifier shall use reasonable endeavours to minimise any disruption caused to the relevant Services.

13.1.2 The provisions of schedule 15 (*Milestone Completion Criteria*) shall apply in respect of those inquiries, tests, investigations, surveys and/or inspections required to be undertaken and/or observed, as the case may be, by the Independent Certifier in connection with the certification of Milestones pursuant to clause 13.2 (*Certification of Milestones*).

13.1.3 The Authority's Representative (or any person nominated by the Authority), the Service Provider and the relevant Sub-Contractors shall be entitled to attend any inquiry, test, investigation, survey or inspection contemplated by this clause 13.1 (*Tests and inspections prior to Certification of Milestones*)



and shall be entitled to make representations to the Independent Certifier as to whether the Milestone Completion Criteria have been satisfied.

## **13.2 Certification of Milestones**

13.2.1 The Service Provider shall notify the Independent Certifier and the Authority five (5) Business Days before the date upon which the Service Provider requires the Independent Certifier to assess whether it has achieved Milestone Completion or Partial Milestone Completion in respect of each Milestone.

13.2.2 Following notification pursuant to clause 13.2.1 above, the Independent Certifier shall assess whether Milestone Completion or Partial Milestone Completion has been achieved by the Service Provider, and shall, within ten (10) Business Days of the date of the assessment referred to in clause 13.2.1, issue to the Service Provider (with a copy to the Authority):

13.2.2.1 a Certificate of Completion; or

13.2.2.2 a Certificate of Partial Completion, in which case the certificate shall:

(a) identify those PFI District(s) in respect of which Milestone Completion has been achieved; and

(b) in respect of the remaining PFI District(s), specify the outstanding matters that must be attended to before a Certificate of Completion can be issued; or

13.2.2.3 a Certificate of Non-Completion, in which case the certificate shall specify the outstanding matters that must be attended to before a Certificate of Completion or a Certificate of Partial Completion can be issued.

13.2.3 If, in respect of a Milestone, the Independent Certifier has issued either a Certificate of Partial Completion or a Certificate of Non-Completion, the Service Provider shall:

13.2.3.1 attend to all outstanding matters specified in the Certificate of Partial Completion or Certificate of Non-Completion (as relevant) as expeditiously as possible; and

13.2.3.2 notify the Independent Certifier and the Authority five (5) Business Days before the date upon which the Service Provider requires the Independent Certifier to assess whether it has achieved Milestone Completion or Partial Milestone Completion, in which case,

the provisions of this clause 13.2 (*Certification of Milestones*) shall repeat and apply to the extent relevant until such time as a Certificate of Completion has been issued.

### **13.3 Minor Snagging Items**

In the event that a Certificate of Completion or Certificate of Partial Completion is expressed to be subject to Minor Snagging Items:

13.3.1 the Independent Certifier shall within five (5) Business Days of the issue of the relevant Certificate of Completion or Certificate of Partial Completion issue to the Service Provider and the Authority a list of the relevant Minor Snagging Items ("**Snagging List**");

13.3.2 within five (5) Business Days of receipt from the Independent Certifier of the Snagging List the Service Provider shall provide to the Authority and the Independent Certifier a programme for making good each Minor Snagging Item set out in the Snagging List, provided that such programme shall require that each Minor Snagging Item shall be made good within twenty (20) Business Days of the date of provision of that programme or within such time as is reasonably practicable;

13.3.3 the Parties shall seek to agree such programme and in default of agreement shall refer the matter for determination under Dispute Resolution, and the programme agreed or determined in accordance with this clause 13.3 (*Minor Snagging Items*) shall be known as the "**Snagging Programme**"; and

13.3.4 the Service Provider shall procure that each Minor Snagging Item is made good in accordance with the Snagging Programme to the satisfaction of the

Independent Certifier, provided that if any Minor Snagging Item has not been rectified by the date set out in the Snagging Programme then the Authority shall be entitled to effect such repairs as may be necessary and the Service Provider shall pay the Authority's costs and expenses reasonably and properly incurred in the carrying out of such repairs within twenty (20) Business Days of receipt of an invoice from the Authority.

For the avoidance of doubt, nothing in this clause 13.3 (*Minor Snagging Items*) shall limit or reduce any remedies or recourse of the Authority pursuant to the provisions of schedule 4 (*Payment Mechanism*) arising out of or consequent upon the existence of any such Minor Snagging Items and/or arising out of or consequent upon any steps taken by the Service Provider to attend to any such Minor Snagging Items.

#### **13.4 Dates on which Milestone Completion can occur**

13.4.1 In respect of each Milestone:

13.4.1.1 the Milestone Completion Date shall be the date upon which the Certificate of Completion is issued for that Milestone, provided that if a Certificate of Completion is issued before the relevant Planned Milestone Completion Date, the Milestone Completion Date shall be the same as the Planned Milestone Completion Date; and

13.4.1.2 each Partial Milestone Completion Date (if any) shall be the date upon which the relevant Certificate of Partial Completion is issued, provided that if a Certificate of Partial Completion is issued in respect of a Milestone before the relevant Planned Milestone Completion Date, the Partial Milestone Completion Date shall be the same as the Planned Milestone Completion Date.

#### **13.5 Effect of Issue of Certificates of Completion etc**

13.5.1 As between the Parties the decision of the Independent Certifier to issue any Certificate of Completion, Certificate of Partial Completion or Certificate of Non-Completion at any time shall, in the absence of fraud or manifest error,

be final and binding on the Parties but without prejudice to the right of either Party to make a claim under the Independent Certifier's Appointment.

13.5.2 The issue of any Certificate of Completion or any Certificate of Partial Completion shall in no way affect the obligations of the Service Provider under this Contract (including without limitation in respect of any failure by the Service Provider to meet the requirements of schedule 2 (*Output Specification*)).

### **13.6 Inspections in relation to Powered Apparatus**

13.6.1 Following the Core Investment Period:

13.6.1.1 the Service Provider shall self-certify all units of Powered Apparatus being installed by the Service Provider in any particular Month in accordance with Method Statement 2 and Method Statement 3; and

13.6.1.2 the Authority (by itself or through the Authority's Representative or any Authority Party having the relevant technical expertise) shall be entitled to inspect, comment upon, or object to at any stage of the installation process (and for a period of two (2) Months thereafter) up to one hundred per cent (100%) of the units of Powered Apparatus being certified by the Service Provider as being installed in that particular Month; and

13.6.1.3 the provisions of clauses 13.6.2 to 13.6.4 (inclusive) shall apply.

13.6.2 The Service Provider shall give at least five (5) Business Days' notice in writing to the Authority on each occasion that the Service Provider intends to carry out commissioning tests (for the purposes of final assessment and issue of a Certificate of Compliance) of the relevant Powered Apparatus. Such notice shall specify the location and time at which the commissioning tests are to be carried out.

13.6.3 If the Authority wishes to attend the Service Provider's commissioning tests, the Authority shall notify the Service Provider that the Authority's Representative and/or any Authority Party who has the relevant technical expertise shall attend the Service Provider's commissioning tests and carry

out such assessments or inspections to satisfy himself or themselves that the Service Provider has carried out the commissioning in accordance with Method Statement 2 and Method Statement 3 and met the requirements of this Contract, including without limitation any requirements set out in schedule 2 (*Output Specification*) (subject to any Minor Snagging Items). The Authority shall use reasonable endeavours to procure that the person(s) attending any assessments or inspections shall not adversely affect the Service Provider's ability to perform its obligations under this Contract.

13.6.4 The Service Provider shall, within two (2) Business Days of completion of the relevant commissioning tests, confirm to the Authority in writing, whether or not it is of the view that the relevant item of Powered Apparatus complies with the requirements of this Contract (including schedule 2 (*Output Specification*) subject to any Minor Snagging Items) and, if applicable, submit to the Authority a draft list of the relevant Minor Snagging Items ("**Service Provider's Snagging List**").

13.6.5 If the Authority does not agree with the Service Provider's written confirmation issued pursuant to clause 13.6.4 then the Authority shall, within five (5) Business Days of receipt, notify the Service Provider accordingly, giving details of the affected Powered Apparatus and the grounds of non-compliance (which, to the extent considered appropriate by the Authority, may include information relating to inspections carried out by the Authority during the installation of the Powered Apparatus). Following any such notification, the Service Provider shall, as soon as possible, consider the details of the notification and confirm whether or not it agrees with the Authority's notification.

13.6.6 Where the Service Provider agrees with the Authority's notification given pursuant to clause 13.6.5, the Service Provider shall as soon as practicable, take such steps as it considers necessary to ensure that the relevant new Powered Apparatus complies with the requirements of this Contract (including schedule 2 (*Output Specification*) (subject to any Minor Snagging Items). The Service Provider shall notify the Authority on completion of the relevant steps and the provisions of clauses 13.6.3 to 13.6.5 (inclusive) shall apply until the Authority accepts the Service Provider's written confirmation or the matter is referred to Dispute Resolution.

- 13.6.7 Where the Authority has served notice pursuant to clause 13.6.5 but the Service Provider does not agree with the Authority's notification, the Parties shall use their reasonable endeavours in good faith to reach agreement by discussion, but if no agreement is reached either Party may refer the matter to Dispute Resolution.
- 13.6.8 Where the Authority has served notice pursuant to clause 13.6.5 and either the Service Provider agrees with the Authority's notification or a dispute is in progress, the relevant Powered Apparatus shall not be treated as being installed for the purposes of this Contract (and no Certificate of Compliance shall be issued) until such date that it is agreed or determined that the relevant Powered Apparatus complies with the requirements of this Contract (including schedule 2 (*Output Specification*)) (subject to any Minor Snagging Items).
- 13.6.9 When it is agreed or determined between the Authority and the Service Provider that the relevant Powered Apparatus complies with the requirements of this Contract (including schedule 2 (*Output Specification*)) (subject to any Minor Snagging), the Service Provider shall issue to the Authority a Certificate of Compliance pursuant to Method Statement 2 and Method Statement 3 together with a Service Provider's Snagging List.
- 13.6.10 Where a Service Provider's Snagging List has been issued the Service Provider shall rectify the Minor Snagging Items within twenty (20) Business Days of the date of issue of the Service Provider's Snagging List.
- 13.6.11 Failure to Complete Snagging
- 13.6.11.1 Where the Service Provider fails to rectify the Minor Snagging Items in accordance with the provisions of clause 13.6.10, then the Authority shall be entitled to serve written notice on the Service Provider requiring such works to be carried out within twenty (20) Business Days of receipt of such notice, failing which the Authority shall be entitled to carry out necessary works to rectify the Minor Snagging Items and the Service Provider shall pay the Authority's costs and expenses reasonably and properly incurred in the carrying out of such works within

twenty (20) Business Days of receipt of an invoice from the Authority.

13.6.11.2 For the avoidance of doubt, nothing in this clause 13.6 (*Inspections in relation to Powered Apparatus*) shall limit or reduce any remedies or recourse of the Authority pursuant to the provisions of schedule 4 (*Payment Mechanism*) arising out of or consequent upon the existence of any Minor Snagging Items and/or arising out of or consequent upon any steps taken by the Service Provider to attend to any such Minor Snagging Items.

### **13.7 Inspections in relation to Enhanced Standards**

#### **13.7.1 Inspections during the Core Investment Period**

During the Core Investment Period:

13.7.1.1 the Authority (or the Authority's Representative) and the Independent Certifier may attend the installation of the Enhanced Project Network Part(s) by the Service Provider or Sub-Contractor pursuant to paragraph 6.2 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) and the Service Provider shall comply with paragraph 6.3 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*);

13.7.1.2 the Independent Certifier shall within five (5) Business Days of an Enhancement Notice, carry out the tests and/or inspections it reasonably requires to satisfy itself that the Enhanced Project Network Part(s) meets the Enhanced Standard and (to the extent the Enhanced Standard does not relate to schedule 2 (*Output Specification*)) the requirements of schedule 2 (*Output Specification*) (in each case notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract;

13.7.1.3 the Authority (or the Authority's Representative) shall be entitled to attend any test and/or inspection pursuant to clause 13.7.1.2 and shall be entitled to make representations to the Independent Certifier as to whether the Enhanced Project Network Part(s)

meets the Enhanced Standard and (to the extent the Enhanced Standard does not relate to schedule 2 (*Output Specification*)) the requirements of schedule 2 (*Output Specification*) (in each case notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract;

13.7.1.4 where the Independent Certifier carries out the tests and/or inspections pursuant to clause 13.7.1.2, the Independent Certifier and the Authority (or the Authority's Representative) shall use reasonable endeavours to ensure that such tests and/or inspections do not delay or adversely affect the Service Provider's ability to perform its obligations under this Contract;

13.7.1.5 if the Independent Certifier:

(a) having reviewed the information contained in the Enhancement Notice; and

(b) having reviewed the information generated from any tests and/or inspections carried out pursuant to clause 13.7.1.2,

is of the view that:

(c) the Enhanced Project Network Part(s) meets the Enhanced Standard and the requirements of schedule 2 (*Output Specification*) (notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract; or

(d) the Enhanced Project Network Part(s) does not meet the Enhanced Standard and the requirements of schedule 2 (*Output Specification*) (notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract,

then it shall notify the Authority and the Service Provider of the same within ten (10) Business Days of the date of the tests and/or



inspections carried out by the Independent Certifier pursuant to clause 13.7.1.2;

- 13.7.1.6 where the Independent Certifier has served a notice pursuant to clause 13.7.1.5(d), the Service Provider shall take such actions as it considers necessary to ensure that the relevant Enhanced Project Network Part(s) have been installed and meet the relevant Enhanced Standards and the requirements of schedule 2 (*Output Specification*) and any other relevant provisions of this Contract as soon as possible;
- 13.7.1.7 following the completion of any necessary actions undertaken by the Service Provider in accordance with clause 13.7.1.6, the Service Provider shall notify the Authority and the Independent Certifier accordingly in writing and the foregoing provisions of this clause 13.7.1 (*Inspections during the Core Investment Period*) shall apply until such time as the Independent Certifier issues a notice pursuant to clause 13.7.1.5(c);
- 13.7.1.8 where the Independent Certifier issues a notice pursuant to clause 13.7.1.5(c) the Independent Certifier may notify the Service Provider and the Authority of any Minor Snagging Items pursuant to the provisions of clause 13.3 (*Minor Snagging Items*) which shall apply to such rectification mutatis mutandis and where such notice is issued, the Service Provider shall rectify the same in accordance with the provisions of clause 13.3 (*Minor Snagging Items*) which shall apply mutatis mutandis;
- 13.7.1.9 as between the Parties, the decision of the Independent Certifier as to whether any Enhanced Project Network Part(s) meets the Enhanced Standard pursuant to this clause 13.7 (*Inspections in relation to Enhanced Standards*) shall, in the absence of fraud or manifest error, be final and binding on the Parties but without prejudice to the rights of either Party to make a claim under the Independent Certifier's Appointment.

#### 13.7.2 Inspections following completion of the Core Investment Period

Following completion of the Core Investment Period:

- 13.7.2.1 the Authority (or the Authority's Representative or a third party appointed by the Authority or the Districts) may attend the installation of the Enhanced Project Network Part(s) by the Service Provider or Sub-Contractor pursuant to paragraph 6.2 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) and the Service Provider shall comply with paragraph 6.3 of schedule 19 (*Accruals and De-Accrual of Project Network Parts*);
- 13.7.2.2 the Authority (or the Authority's Representative or a third party appointed by the Authority or the Districts) shall within fifteen (15) Business Days of an Enhancement Notice, carry out the tests and/or inspections it reasonably requires to satisfy itself that the Enhanced Project Network Part(s) meets the Enhanced Standard and (to the extent the Enhanced Standard does not relate to schedule 2 (*Output Specification*)) the requirements of schedule 2 (*Output Specification*) (in each case notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract;
- 13.7.2.3 where the Authority (or the Authority's Representative or a third party appointed by the Authority or the Districts) carries out the tests and/or inspections pursuant to clause 13.7.2.2, the Authority (or the Authority's Representative or a third party appointed by the Authority or the Districts) shall use reasonable endeavours to ensure that such tests and/or inspections do not delay or adversely affect the Service Provider's ability to perform its obligations under this Contract;
- 13.7.2.4 if the Authority (or the Authority's Representative or a third party appointed by the Authority or the Districts):
  - (a) having reviewed the information contained in the Enhancement Notice; and

- (b) having reviewed the information generated from any tests and/or inspections carried out pursuant to clause 13.7.2.2,

is of the view that:

- (c) the Enhanced Project Network Part(s) meets the Enhanced Standard and the requirements of schedule 2 (*Output Specification*) (notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract; or
- (d) the Enhanced Project Network Part(s) does not meet the Enhanced Standard and the requirements of schedule 2 (*Output Specification*) (notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract,

then the Authority (or the Authority's Representative or a third party appointed by the Authority or the Districts) shall notify the Service Provider of the same within five (5) Business Days of the date of the tests and/or inspections carried out pursuant to clause 13.7.2.2;

13.7.2.5 without prejudice to clause 13.7.2.7 where the Authority (or the Authority's Representative or a third party appointed by the Authority or the Districts) has served a notice pursuant to clause 13.7.2.4(d), the Service Provider shall take such actions as it considers necessary to ensure that the relevant Enhanced Project Network Part(s) have been installed and meet the relevant Enhanced Standards and the requirements of schedule 2 (*Output Specification*) and any other relevant provisions of this Contract as soon as possible;

13.7.2.6 following the completion of any necessary actions undertaken by the Service Provider pursuant to clause 13.7.2.5, the Service Provider shall notify the Authority (or the Authority's Representative or a third party appointed by the Authority or the

Districts) accordingly in writing and the foregoing provisions of this clause 13.7.2 (*Inspections following completion of the Core Investment Period*) shall apply until such time as the Authority (or the Authority's Representative or a third party appointed by the Authority or the Districts) issues a notice in accordance with clause 13.7.2.4(c);

13.7.2.7 where the Authority (or the Authority's Representative or a third party appointed by the Authority or the Districts) has issued a notice pursuant to clause 13.7.2.4(d) and the Service Provider disagrees with the same, the relevant Enhanced Project Network Part shall not be compliant for the purposes of this Contract and the Parties shall endeavour in good faith to settle such dispute as soon as reasonably practicable. In the event that such dispute is not settled within twenty (20) Business Days, either Party may refer the matter to Dispute Resolution;

13.7.2.8 where:

- (a) the Authority issues a notice pursuant to clause 13.7.2.4(c); or
- (b) upon the agreement or determination of a dispute arising pursuant to clause 13.7.2.7,

the Authority (or the Authority's Representative or a third party appointed by the Authority or the Districts) shall issue a list of Minor Snagging Items;

13.7.2.9 where any Minor Snagging Items have been identified on the snagging list issued pursuant to clause 13.7.2.8, the Service Provider shall rectify the same within twenty (20) Business Days of the date of issue of the snagging list.

## **13.8 Inspections in relation to Structures, Bridges and Tunnels**

13.8.1 If the Service Provider carries out or procures the carrying out of any works to Structures (excluding Minor Structures), Bridges or Tunnels following the Core Investment Period, the Service Provider shall:

- 13.8.1.1 notify the Authority as soon as reasonably practicable of the date on which the works are due to commence and provide the Authority with all relevant documentation and comply with the procedure set out in BD 2/05 Technical Approval of Highway Structures (excluding Minor Structures); and
  - 13.8.1.2 provide the Authority with a copy of the Approval in Principle and procure that the Authority may attend any inspection the Authority considers necessary during the works and upon the certification of such works.
- 13.8.2 The Service Provider shall procure for the Authority as soon as reasonably practicable:
- 13.8.2.1 the signed assessment certificate (where relevant);
  - 13.8.2.2 the relevant CAT Check Certificate in accordance with BD 2/05 Technical Approval of Highways Structures;
  - 13.8.2.3 the signed construction certificate; and
  - 13.8.2.4 any as built drawings and design drawings as soon as these become available to the Service Provider.
- 13.8.3 The Authority may:
- 13.8.3.1 attend the Service Provider's inspections and/or tests in relation to such Structure (excluding Minor Structures), Bridge or Tunnel; and/or
  - 13.8.3.2 carry out, or procure to be carried out, any additional inspections and/or tests it reasonably requires to satisfy itself that the works carried out to the Structure (excluding Minor Structures), Bridge or Tunnel meet the requirements of schedule 2 (*Output Specification*) (notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract.
- 13.8.4 Where the Authority carries out (or procures the carrying out of) additional inspections in accordance with 13.8.3.2, the Authority shall use reasonable

endeavours to ensure that it, or any third party carrying out additional inspections on its behalf, does not delay or adversely affect the Service Provider's ability to perform its obligations under this Contract.

13.8.5 Subject to clause 13.8.4, following completion of the inspections, the Service Provider shall, within two (2) Business Days following the date of inspections, notify the Authority in writing whether or not it believes that the relevant works carried out to the Structure (excluding Minor Structures), Bridge or Tunnel so inspected by the Service Provider have met the requirements of schedule 2 (*Output Specification*) (notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract setting out all reasonable supporting information.

13.8.6 If the Authority:

13.8.6.1 having received the information contained in the notice served in accordance with clause 13.8.5; and

13.8.6.2 having reviewed the information generated from any additional inspections carried out in accordance with clause 13.8.3.2,

is of the view that:

13.8.6.3 the works carried out to the Structure (excluding Minor Structures), Bridge or Tunnel meets the requirements of schedule 2 (*Output Specification*) (notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract; or

13.8.6.4 the works carried out to the Structure (excluding Minor Structures), Bridge or Tunnel do not meet the requirements of schedule 2 (*Output Specification*) (notwithstanding any Minor Snagging Items) and any other relevant provisions of this Contract,

then it shall notify the Service Provider of the same within ten (10) Business Days of the date of receipt of the notice served in accordance with clause 13.8.5.

13.8.7 Without prejudice to clause 13.8.9 where the Authority has served a notice in accordance with clause 13.8.6.4, the Service Provider shall take such actions as it considers necessary to ensure that the relevant works carried out to the Structure (excluding Minor Structures), Bridge or Tunnel meets the requirements of schedule 2 (*Output Specification*) and any other relevant provisions of this Contract as soon as possible.

13.8.8 Following the completion of any necessary actions undertaken by the Service Provider in accordance with clause 13.8.7, the Service Provider shall notify the Authority accordingly in writing and the foregoing provisions of clause 13.8 (*Inspections in relation to Structures, Bridges and Tunnels*) shall apply until such time as the Authority issues a notice in accordance with clause 13.8.6.3.

13.8.9 Where the Authority has issued a notice in accordance with clause 13.8.6.4 and the Service Provider disagrees with the same, the relevant Structure (excluding Minor Structures), Bridge or Tunnel shall not be compliant for the purposes of this Contract and the Parties shall endeavour in good faith to settle such dispute as soon as reasonably practicable. In the event that such dispute is not settled within twenty (20) Business Days, either Party may refer the matter to Dispute Resolution.

13.8.10 Where:

13.8.10.1 the Authority issues a notice in accordance with clause 13.8.6.3;  
or

13.8.10.2 upon the agreement or determination of a Dispute arising pursuant to clause 13.8.9,

the Service Provider shall issue a list of Minor Snagging Items (if any).

13.8.11 Where any Minor Snagging Items have been identified on the list of Minor Snagging Items issued in accordance with clause 13.8.10, the Service Provider shall rectify the same within twenty (20) Business Days of the date of issue of the list of Minor Snagging Items.

## 14. AUTHORITY ACCESS

- 14.1 The Authority or a representative of the Authority may enter upon any property used by the Service Provider to perform the Services, to inspect the Service Provider's arrangements for providing the Services and to monitor compliance by the Service Provider with its obligations.
- 14.2 The Authority and a representative of the Authority may at all times enter upon any property used by the Service Provider as training or workshop facilities and places where work is being prepared or materials being obtained for the Project.
- 14.3 The Service Provider shall procure that satisfactory facilities are made available to the Authority and any representative of the Authority and that reasonable assistance is given for the purposes of clauses 14.1 and 14.2, subject to the Service Provider's and Sub-Contractor's operational requirements not being adversely affected and to reimbursement of any reasonable costs or expenses of the Service Provider.
- 14.4 The Authority and its representative shall at all times comply with any health and safety requirements when exercising its rights under this clause 14 (*Authority Access*).
- 14.5 If the Authority or its representative causes material damage to any asset in exercising any right under this clause 14 (*Authority Access*), the Authority shall be liable to the Service Provider for the reasonable costs directly caused by such damage.
- 14.6 For the avoidance of doubt, the Service Provider shall procure that:
- 14.6.1 the Authority's Representative shall have five (5) Business Days' written notice of the time, date and location of and have the right to attend Monthly site and other similar progress meetings held by the Service Provider and/or any Sub-Contractor;
- 14.6.2 one (1) copy of all drawings and specifications for construction are kept at the Service Provider's Head Office, and that the same shall at all reasonable times be available for inspection and use by the Authority's Representative and by any other person authorised by the Authority's Representative;
- 14.6.3 the Authority and any contractor or other designee of the Authority has unrestricted access to the Work Sites at all reasonable times throughout the Contract Term in order:



- 14.6.3.1 to perform any obligations or exercise any rights of the Authority under this Contract; or
- 14.6.3.2 to fulfil any statutory functions of the Authority; or
- 14.6.3.3 without limitation to clauses 14.3, 14.4 and 14.5, to conduct any study or trial for the purposes of research initiated by the Authority, provided that any such study or trial shall be conducted in accordance with the provisions of clause 14.7 (*Trials*),

provided that subject to compliance with the relevant provisions of clause 14.4, nothing in this clause 14 (*Authority Access*) shall be taken to imply that there is any restriction at any time on the Authority's Representative or the Authority having access to the Project Facilities.

## **14.7 Trials**

- 14.7.1 Any study or trial referred to in clause 14.6.3.3 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 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 and shall not give rise to any Adjustments to the Annual Unitary Charge.
- 14.7.2 The Service Provider shall procure that all Relevant Authorities have access to all Work Sites throughout the Contract Term in order to carry out any work (including surveys and inspections) in accordance with any Law or to exercise any right, power or duty of such Relevant Authority under any Law, subject, other than in the case of an emergency, to reasonable notice being given. Whenever consistent with the requirements of the Relevant Authority in carrying out such work, such access shall be limited so as not unnecessarily to impede or restrict traffic flows or any works being carried out by the Service Provider.

## 14.8 Authority monitoring of maintenance obligations

14.8.1 Without prejudice to the provisions of clause 6 (*Surveys and Inspections*), clause 60 (*Step in*) and schedule 4 (*Payment Mechanism*), if:

14.8.1.1 the Authority reasonably believes that the Service Provider is in breach of its obligations to undertake Reactive Maintenance, Routine Maintenance or Programmed Maintenance; and/or

14.8.1.2 the Authority considers that the Service Provider is performing its activities in material non-compliance with the Annual Programme, schedule 2 (*Output Specification*) and/or the Method Statements,

then the Authority:

14.8.1.3 may, where any breach of the Service Provider's obligations to undertake Reactive Maintenance, Routine Maintenance and/or Programmed Maintenance is readily identifiable and/or presents a health and safety risk, exercise its rights under clause 14.8.8; or

14.8.1.4 shall have the right to carry out, or procure the carrying out of, such inspections, surveys or tests as it considers necessary in order to assess the extent of the Service Provider's breach and further assess what action may be necessary to remedy such breach.

14.8.2 The Authority shall notify the Service Provider in writing a minimum of ten (10) Business Days in advance of the date on which it wishes to carry out any inspection, survey or test pursuant to this clause 0 (

14.8.3

14.8.4 *Authority monitoring of maintenance obligations*) save in respect of Reactive Maintenance where the Authority shall have the right to carry out an inspection or survey forthwith. Save in respect of Reactive Maintenance the Authority shall consider in good faith any reasonable request by the Service Provider for the inspection, survey or test to be carried out on a different date if such request is made at least five (5) Business Days prior to the notified

date and the Service Provider (acting reasonably) is able to demonstrate that carrying out the inspection, survey or test on the notified date would materially prejudice the Service Provider's ability to provide the Services.

14.8.5 If the Authority exercises its rights pursuant to this clause 0 (

14.8.6

14.8.7 *Authority monitoring of maintenance obligations*), the Service Provider shall give the Authority (free of charge) any reasonable assistance required by the Authority during the carrying out of any such inspections, surveys or tests.

14.8.8 If the Authority exercises its rights pursuant to this clause 0 (

14.8.9

14.8.10 *Authority monitoring of maintenance obligations*), and either the Service Provider is found to be in breach of its obligations to undertake Reactive Maintenance, Routine Maintenance and/or Programmed Maintenance or the Service Provider is found to be performing its activities in material non-compliance with the Annual Programme, schedule 2 (*Output Specification*) and/or the Method Statements, the Authority shall be entitled to be reimbursed by the Service Provider for its reasonable cost of such inspections, surveys or tests as are carried out by or on behalf of the Authority.

14.8.11 When carrying out (or procuring the carrying out of) inspections, surveys or tests or pursuant to this clause 0 (

14.8.12

14.8.13 *Authority monitoring of maintenance obligations*), the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Service Provider by itself or any third party carrying out the inspections, surveys or tests on its behalf.

14.8.14 Without prejudice to the provisions of clause 14.8.3, if clause 14.8.1.3 applies or where any inspection, survey or test undertaken pursuant to clause 14.8.1.4 shows that the Service Provider is in breach of its obligations to undertake

Reactive Maintenance, Routine Maintenance and/or Programmed Maintenance the Authority shall:

14.8.14.1 notify the Service Provider of the standard that the condition of the Project Network should be in to comply with its obligations under clause 20 (*Obligation to provide the Services and Performance Standards*); and

14.8.14.2 specify a reasonable period within which the Service Provider must carry out any necessary rectification and/or maintenance work.

14.8.15 The Service Provider shall carry out such rectification and/or maintenance work within the period specified and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense.

14.8.16 In the event that the Service Provider fails to carry out such rectification and/or maintenance work as required by clause 14.8.15 and/or such rectification and/or maintenance work is not carried out to the standard specified in clause 14.8.14, the Authority may itself carry out such rectification and/or maintenance work at the cost of the Service Provider.

14.8.17 Where this clause 0 (

14.8.18

14.8.19 *Authority monitoring of maintenance obligations*) has established that the Service Provider is in breach of its Reactive Maintenance, Routine Maintenance and/or Programmed Maintenance obligations, the Service Provider shall, as soon as reasonably practicable prepare such revised Service Provider Programmes as it considers necessary (having regard to its obligation in clause 20 (*Obligation to provide the Services and Performance Standards*)) in accordance with the provisions of clause 11 (*Service Provider Programmes*) for submission to the Authority via the Review Procedure.

14.8.20 The Authority may not exercise its rights under this clause 0 (

14.8.21

14.8.22 *Authority monitoring of maintenance obligations*) unless and until the expiry of the Rectification Period pertaining to those obligations of the Service Provider to undertake Reactive Maintenance, Routine Maintenance and/or Programmed Maintenance that have been breached.

## **PART F - PROPERTY**

### **15. OWNERSHIP OF APPARATUS AND ACCESS TO THE PROJECT NETWORK**

#### **15.1 Ownership and Access**

15.1.1 All New Apparatus shall become part of the Project Network and the property of the Authority upon the date when such New Apparatus is installed or on the Project Network.

15.1.2 The Service Provider warrants that all Apparatus (including materials) installed by or on behalf of the Service Provider will at the time of installation be free from any Third Party interest or right and any encumbrances, liens and charges whatsoever.

15.1.3 Save where expressly authorised by the Authority, the Service Provider shall not acquire any Land Right other than an Apparatus Licence.

#### **15.2 Permission**

The Authority shall, from the Service Commencement Date until the end of the Contract Term, permit the Service Provider and any Service Provider Party to carry out the Services on the Project Network subject to:

15.2.1 any Land Rights;

15.2.2 the rights of access referred to in clause 14 (*Authority Access*);

15.2.3 the provisions of clause 18.1 (*Security of Project Network and UTC Centre*);

15.2.4 the provisions of schedule 20 (*Land*) relating to Reserved Areas;

15.2.5 the Apparatus Licence set out in clause 15.8 (*Terms of the Apparatus Licence*);

15.2.6 any requirement for planning consent under the Town and Country Planning Act 1990 (as amended); and

15.2.7 any rights of Third Parties granted to such Third Parties from time to time by or on behalf of the Authority of which the Authority has provided notice to the Service Provider including Specified Licences or otherwise.

15.3 For the avoidance of doubt, the Authority will have no liability to the Service Provider if the Service Provider is prevented from performing its obligations under this Contract as a direct result of any of the matters described in clause 15.2, provided always that nothing in this clause 15.3 shall act to preclude the Service Provider from exercising its rights under clause 33 (*Relief Events, Compensation Events and Excusing Causes*) and clause 36 (*Authority Statutory Powers*).

15.4 The Service Provider shall use land forming part of the Project Network which has been acquired by the Authority either using compulsory purchase powers or by voluntary acquisition for a specified purpose, only for activities which are necessary for the achievement of such specified purpose and the permission granted by the Authority in respect of such land shall be limited accordingly.

### **15.5 Additional Access**

15.5.1 Whenever the due performance of the Services necessitates the Service Provider entering land which is outside the control of the Authority, the Service Provider shall use all reasonable endeavours to secure lawful access to such land for the Authority and the Service Provider for such period as may be required by either of the Parties to facilitate the due performance of this Contract (and such endeavours shall include the exercise by the Service Provider (at its own cost) of any relevant Authorised Functions which it has power to exercise).

15.5.2 Where the Service Provider is unable to gain access as required by clause 15.5.1:

15.5.2.1 the Service Provider shall use all reasonable endeavours to identify an alternative access, an alternative location or, if possible, an alternative solution as soon as reasonably practicable; and

15.5.2.2 if the Service Provider is unable to identify an alternative access, location or solution it shall notify the Authority in writing as soon as reasonably practicable of the Service Provider's inability to obtain the required access to such land and such notice shall include all relevant details of the land, the access required, the reason for the access, the duration for which such access is

required together with documentary evidence of the reasonable endeavours taken by the Service Provider to obtain such access and/or identify an alternative access, location or solution.

15.5.3 Upon receipt by the Authority of a notice served pursuant to clause 15.5.2.2:

15.5.3.1 the Authority shall, where it reasonably considers that the Service Provider has not complied with clause 15.5.2.1, inform the Service Provider what further steps it requires the Service Provider to take in order to comply with clause 15.5.2.1 and the Service Provider shall either take such steps or refer the matter to Dispute Resolution; or

15.5.3.2 where the Authority is satisfied that the Service Provider has complied with clause 15.5.2.1, the Parties shall meet within ten (10) Business Days of the date of the notice served by the Service Provider pursuant to clause 15.5.2.2 to discuss the matter and the taking of appropriate action. At or following such meeting, the Authority may in its absolute discretion exercise in respect of any land any contractual right or any power under any Law (to the extent that the exercise of such power is essential to enable the Service Provider to perform its obligations under this Contract) in accordance with clause 36 (*Authority Statutory Powers*) that may assist the Service Provider in performing its obligations.

15.5.4 If an alternative location, access or solution has not been identified or obtained within twenty (20) Business Days of a meeting pursuant to clause 15.5.3.2 then clause 15.5.5 shall apply.

15.5.5 From the date twenty (20) Business Days after the meeting referred to in clause 15.5.3.2 until the earlier of:

15.5.5.1 the Authority obtaining the required access for the benefit of the Service Provider;

15.5.5.2 the Parties agreeing an alternative location or solution whereby access to Third Party land is no longer required;



15.5.5.3 an Authority Change being implemented in accordance with schedule 18 (*Change Protocol*),

such failure shall constitute an Excusing Cause.

15.5.6 The Service Provider shall bear all costs and charges (including in respect of Claims by Third Parties) arising from its compliance with clauses 15.5.1 and 15.5.2 and/or arising from the Authority's exercise of any power pursuant to clause 15.5.3.2.

## **15.6 Observance by Service Provider of Land Rights**

15.6.1 Subject to clause 15.6.2 but without prejudice to clause 15.5 (*Additional Access*), the Service Provider shall, in providing the Services, observe and comply with the terms and conditions of all Land Rights.

15.6.2 If any Land Right, other than an Ascertained Land Right, prevents the Service Provider from performing the Services or any of its obligations under this Contract, the Service Provider shall as soon as reasonably practicable notify the Authority, such notice to include details of:

15.6.2.1 the Land Right in question; and

15.6.2.2 those Services or other obligations whose performance is affected by such Land Right,

and the Parties shall meet within ten (10) Business Days of the Service Provider's notice to discuss the matter and agree an appropriate course of action in order to facilitate the performance of the Services or obligations.

15.6.3 From the date of the meeting referred to in clause 15.6.2 until the earlier of:

15.6.3.1 the Authority (acting reasonably and having regard to the Service Provider's obligations hereunder) notifying the Service Provider of a solution not involving material increased cost or loss of revenue to the Service Provider that does not necessitate the issue of an Authority Change in respect of the Land Rights referred to in clause 15.6.2 so that the Service Provider is no longer prevented from performing the Services; or

15.6.3.2 an Authority Change being implemented and concluded in accordance with schedule 18 (*Change Protocol*) such that the Service Provider is no longer prevented from performing the Services,

the Service Provider shall be entitled to an Excusing Cause.

## **15.7 Apparatus Licence to the Service Provider**

15.7.1 The Authority shall licence the Existing Apparatus to the Service Provider with effect from the Service Commencement Date on the terms of the Apparatus Licence set out in clause 15.8 (*Terms of the Apparatus Licence*).

15.7.2 With effect from the date that title in the New Apparatus passes to the Authority pursuant to clause 15.1.1, the Authority shall licence the New Apparatus to the Service Provider on the terms of the Apparatus Licence set out in clause 15.8 (*Terms of the Apparatus Licence*).

## **15.8 Terms of the Apparatus Licence**

15.8.1 The Authority grants to the Service Provider a licence ("Apparatus Licence") on the following terms:

15.8.1.1 the Apparatus Licence shall permit the Service Provider to:

- (a) install Apparatus; and/or
- (b) use, manage, work on, remove, maintain, clean, refurbish and repair the Apparatus; and/or
- (c) affix or remove Attachments to or from the Apparatus;
- (d) grant a sub-licence (and such sub-licence shall include the right to grant sub-sub-licences) to a Service Provider Party to:
  - (i) install Apparatus; and/or
  - (ii) use, manage, work on, remove, refurbish, maintain, clean and repair the Apparatus; and/or

- (iii) affix or remove Attachments to or from the Apparatus,

in each case in connection with and only insofar as such installation, use, management, work, removal, maintenance, refurbishment, cleaning, repair, affixing and removal is necessary or expedient for the performance of the Service Provider's obligations or the exercise of the Service Provider's rights under this Contract;

15.8.1.2 the Apparatus Licence shall commence:

- (a) in respect of the Existing Apparatus as set out in clause 15.7.1 (*Apparatus Licence to the Service Provider*); and
- (b) in respect of the New Apparatus as set out in clause 15.7.2 (*Apparatus Licence to the Service Provider*),

and the Apparatus Licence shall terminate on the Expiry Date or, if earlier, the Termination Date;

15.8.1.3 in the exercise of the Apparatus Licence the Service Provider shall:

- (a) use reasonable endeavours not to cause any nuisance;
- (b) at all times comply with Good Industry Practice;
- (c) without prejudice to the generality of clause 0 (
- (d)
- (e) *Change of Law*), comply with all relevant Legislation, Guidance and Codes of Practice relating to the carrying out of the Services;
- (f) obtain all Consents; and

- (g) subject to any express term of this Contract, make good any damage to any Project Network Part, Authority Property or Asset as soon as reasonably practicable but only insofar as the same arises from or in connection with the Project.

## **15.9 Extent of Permission**

15.9.1 For the avoidance of doubt and subject to the provisions of clause 35 (*Delegation of Statutory Functions*), the permission to carry out the Services on the Project Network and the Apparatus Licence are not licences under NRSWA and are granted subject and without prejudice to:

15.9.1.1 any right of the Authority pursuant to clause 60 (*Step in*) and/or any other express provision of this Contract to provide the Services;

15.9.1.2 the Authority's rights, powers, duties generally and the exercise of its rights, functions and performance of its obligations in accordance with this Contract; and

15.9.1.3 the rights of agents of the Authority, Statutory Undertakers and holders of licences under NRSWA (or any agents of the same).

15.9.2 For the avoidance of doubt, the permission to carry out the Services on the Project Network and the Apparatus Licence are not leases of any part of the Project Network and the Parties do not intend to transfer any real property from the Authority to the Service Provider or grant to the Service Provider any interest in any part of the Project Network.

15.9.3 The Parties acknowledge and agree that the Authority in granting the Apparatus Licence has not granted and does not purport to grant any additional or implied rights which the Service Provider requires in order to perform the Services.

15.9.4 For the avoidance of doubt, the Service Provider shall not (subject to the provisions of schedule 7 (*Attachments and Advertising*), with which the Parties hereby agree to comply) erect or authorise to be erected:

15.9.4.1 any advertisements on any Project Network Part or notices or signs save in order to provide the Services;

15.9.4.2 any aerials, masts or telecommunications equipment save as required by law.

## **16. AFFIXING AND REMOVAL OF PROJECT NETWORK PARTS**

### **16.1 Consents**

The Service Provider shall, subject to schedule 7 (*Attachments and Advertising*), obtain such Consents as are required to carry out the Services and the Service Provider shall not do anything, or permit anything to be done, in relation to the Services which will cause a Consent to be breached or revoked.

### **16.2 Consents for fixing Project Network Parts**

The Service Provider may, in the course of providing the Services, be required to affix Project Network Parts to structures (which for the avoidance of doubt are not Project Network Parts) or buildings and the Service Provider shall:

16.2.1 where Consents do not exist, diligently and without delay and, to the extent that it is lawfully entitled to do so, comply with the provisions of schedule 36 (*Clause 16 Protocol*) in order to obtain Consents from Owners of the structure or building to which it is proposed the Project Network Part will be attached;

16.2.2 keep the Authority informed of progress on a continuing basis at all reasonable times, and upon reasonable request by the Authority;

16.2.3 where the Service Provider, having complied with clause 16.2.1 and schedule 36 (*Clause 16 Protocol*), has been unable to obtain Consent from an Owner, give written notice to the Authority informing the Authority that the Service Provider has been unable to obtain such Consent and such notice shall set out:

16.2.3.1 details of the relevant Project Network Part, structure or building and Owner;

16.2.3.2 documentary evidence of the reasonable endeavours taken by the Service Provider to secure such Consents; and

16.2.3.3 proposed alternative design solutions whereby the relevant Project Network Part could be affixed in another location or to another structure (or another Project Network Part), which design solutions shall be the minimum departure from the Highway Standards.

### **16.3 Process to be followed where Consent is not obtained**

Upon receipt by the Authority of a notice served pursuant to clause 16.2.3, and in any event no later than twenty (20) Business Days following the date of such notice:

16.3.1 where the Authority reasonably believes that the Service Provider has not complied with clause 16.2.3, the Authority shall inform the Service Provider what further steps it wishes the Service Provider to take (which may include the submission of further design solutions) to comply with clause 16.2.3 and the Service Provider shall either take such steps or refer the matter to Dispute Resolution; or

16.3.2 where the Authority is satisfied that the Service Provider has complied with clause 16.2.3, the Parties shall meet to discuss the means by which the failure to obtain the Consent to affix the Project Network Part to structures or building can be overcome and the continued performance of this Contract can be facilitated. Such steps may include the Authority seeking to obtain the Consent and/or the Authority agreeing to a departure from a Highway Standard and/or the Project Network Part being affixed in an alternative location as directed by the Authority.

### **16.4 Excusing Cause**

From the earlier of the date on which the period referred to in clause 16.3 (*Process to be followed where Consent is not obtained*) expires and the date on which is [REDACTED] [REDACTED] after the date on which the Authority first meets with the Service Provider pursuant to clause 16.3 (*Process to be followed where Consent is not obtained*) until the earlier of:

- 16.4.1 the Service Provider or the Authority obtains the Consent to affix the Project Network Part;
- 16.4.2 the Project Network Part is installed in another location in accordance with schedule 2 (*Output Specification*);
- 16.4.3 a Design Variation Approval Notice is issued;
- 16.4.4 the relevant Project Network Part is De-Accrued in accordance with schedule 19 (*Accrual and De-Accrual of Project Network Parts*); or
- 16.4.5 an Authority Change is implemented in accordance with schedule 18 (*Change Protocol*),

any failure to obtain a Consent to affix a Project Network Part to a structure or building other than other Project Network Part shall constitute an Excusing Cause.

#### **16.5 Removal of Project Network Parts**

The Service Provider shall be responsible (at the Service Provider's cost) for dealing with, in accordance with the Public Health Act 1961 and any other applicable Legislation, any requests from Owners to:

- 16.5.1 remove a Project Network Part from buildings temporarily during periods of repair or reconstruction; and/or
- 16.5.2 remove a Project Network Part from buildings permanently.

#### **16.6 Owner's request to remove Project Network Parts Temporarily**

In the event that a request is made by an Owner to remove the Project Network Part from a building pursuant to clause 16.5.1 the Service Provider shall remove and refix the relevant Project Network Part and during the period of removal take such alternative measures as are necessary to ensure schedule 2 (*Output Specification*) is complied with.

#### **16.7 Owners request to remove Project Network Parts Permanently**

In the event that a request is made by the Owner to remove a Project Network Part from buildings pursuant to clause 16.5.2 the Service Provider shall inform the Authority in writing forthwith and comply with schedule 36 (*Clause 16 Protocol*).

#### **16.8 Court Proceedings to remove Project Network Parts**

The Authority may at its discretion commence proceedings under the Public Health Act 1961 (or other applicable Legislation) so that a court can determine whether an Owner is obliged to allow or entitled to disallow the Project Network Part to be fixed to the relevant building.

#### **16.9 Service Provider to take Proceedings**

Where required by the Authority and at the Service Provider's cost the Service Provider shall:

16.9.1 in the name of the Authority, diligently and without delay prosecute and prepare paperwork in respect of proceedings which must be commenced so that a court can order that the request to remove such Project Network Part from such building is unreasonable and should be disallowed, and when requested by the Authority attend such proceedings; and

16.9.2 keep the Authority informed of progress on a continuing basis at all reasonable times, and upon reasonable request by the Authority,

provided that:

16.9.3 the Authority shall, as soon as practicable following a reasonable request from the Service Provider, sign any necessary documentation and take such other necessary steps, or steps reasonably required by the Service Provider, which only the Authority is able to take relating to such proceedings; and

16.9.4 if either Party becomes aware that the Authority is not entitled pursuant to any Law, to delegate responsibility under this clause 16.9 (*Service Provider to take Proceedings*) to the Service Provider, that Party shall inform the other Party of that fact and as soon as reasonably practicable thereafter the Parties shall meet to discuss alternative arrangements to facilitate the effective provision of the Services and the Authority and/or the Service Provider shall take such steps as are necessary to ensure compliance with the relevant Law.



16.10 Where as a result of clauses 16.9.3 or 16.9.4, and pursuant to clause 33.3, the Service Provider is entitled to an Excusing Cause, the Parties agree and acknowledge that the Excusing Cause shall (without prejudice to clause 33.3 (*Excusing Causes*)) cease to subsist where:

16.10.1 the Service Provider or the Authority obtains the Consent to affix the Project Network Part;

16.10.2 the Project Network Part is installed in another location in accordance with schedule 2 (*Output Specification*);

16.10.3 a Design Variation Approval Notice is issued;

16.10.4 the relevant Project Network Part is De-Accrued in accordance with schedule 19 (*Accrual and De-Accrual of Project Network Parts*);

16.10.5 an Authority Change is implemented in accordance with schedule 18 (*Change Protocol*); or

16.10.6 the circumstances giving rise to the Excusing Cause cease to subsist.

16.11 For the avoidance of doubt, there shall be no adjustment to the Annual Unitary Charge following the removal of a Project Network Part under this clause 16 (*Affixing and Removal of Project Network Parts*).

16.12 Where the Service Provider affixes, removes and maintains a Project Network Part to a structure or building (whether permanently or temporarily), the Service Provider shall rectify any damage caused to the structure, building or surrounding property of the Owner as a result of the works to affix, remove and maintain such Project Network Part within ten (10) Business Days of the date such works were completed.

## **17. USE AND DISPOSAL OF THE PROJECT NETWORK**

17.1 The Service Provider shall not use any part of the Project Network for any purpose other than in respect of the performance of the Service Provider's obligations under this Contract.

17.2 Subject to clause 17.3 (*Use and Disposal of Project Network Parts*) and without prejudice to clause 72 (*Assignment and sub-contracting*), the Service Provider undertakes to the Authority that it shall not sell, lease, transfer, grant rights over or

otherwise dispose of or part with possession of any interest in any Project Network Part and/or any of the Project Assets (or purport to do any of the foregoing) without first obtaining the prior written consent of the Authority.

### **17.3 Use and Disposal of Project Network Parts**

17.3.1 The Service Provider may sell, transfer, grant rights over or otherwise dispose of or part with possession of any materials forming part of a Project Network Part to the extent that such disposal is of a material which is of a waste or scrap nature (with the exception of Highway Trees which must be disposed of in accordance with paragraph 2.5 of part 3B of schedule 2 (*Output Specification*)) and provided that the Service Provider has first replaced such Project Network Part in accordance with the standard required under schedule 2 (*Output Specification*).

17.3.2 Any sale, transfer, grant or other disposal pursuant to this clause 17 (*Use and Disposal of the Project Network*) is made without any warranties as to the condition or any other matter whatsoever being given by or on behalf of the Authority.

### **17.4 Disposal of Materials**

17.4.1 The Service Provider may only excavate, extract, dispose of, exploit or otherwise deal with any materials, including any soil, aggregates, rocks, coal, minerals or other deposits, excavated, arising out of or produced in connection with the carrying out of the Services on the Project Network (together "**Project Network Materials**"):

17.4.1.1 if and to the extent that the Authority has the right to do so by Law or pursuant to the terms of any agreement;

17.4.1.2 if and to the extent that, in the case of excavation or extraction of Project Network Materials, such excavation or extraction is necessary for the purpose of carrying out the Services in accordance with schedule 2 (*Output Specification*);

17.4.1.3 subject to the rights of any Third Party, whether being rights in or to the Project Network Materials, Land Rights or otherwise;

- 17.4.1.4 subject to any limitation, restriction or condition, whether pursuant to any Law or otherwise, applying to or affecting the right of the Authority to undertake any excavation, extraction, disposal, exploitation or other dealing;
- 17.4.1.5 subject to the granting of any Consents; and
- 17.4.1.6 subject to the provisions of clause 17.8 (*Project Network Discoveries*).

## **17.5 Removal of obstructions on the Project Network**

Without prejudice to clause 6.1.2, the Service Provider shall give written notice ("**Warning Notice**") to the Authority as soon as reasonably practicable and in any event within five (5) Business Days following it becoming aware that:

- 17.5.1 any hedge, Highway Tree, Tree or shrub (including vegetation of any description):
  - 17.5.1.1 overhangs any Project Road so as to endanger or obstruct the passage of vehicles or pedestrians;
  - 17.5.1.2 obstructs or interferes with the view of drivers of vehicles or the light from any Street Lighting;
  - 17.5.1.3 overhangs a Project Road so as to endanger or obstruct the passage of horse riders; or
  - 17.5.1.4 is dead, diseased, damaged or insecurely rooted and by reason of such condition it (or part of it) is likely to cause danger by falling on any Project Road; or
- 17.5.2 it is necessary for the prevention of danger arising from obstruction to the view of persons using a Carriageway to impose restrictions in respect of any land at or near any corner or bend in such Carriageway or any junction of such Carriageway with any other Carriageway, that any wall (other than a wall forming part of the structure of a permanent edifice), fence, hoarding, paling, Tree, Highway Tree, shrub or other vegetation be altered or that any owner, lessee or occupier of such land be restrained from erecting or planting

any building, wall, fence, hoarding, paling, Tree, Highway Tree, shrub or other vegetation.

17.6 The Warning Notice shall contain sufficient information to enable the Authority to issue a notice pursuant to section 154 of the 1980 Act (where the Warning Notice relates to a circumstance set out in clause 17.5.1 above) or section 79 of the 1980 Act (where the Warning Notice relates to a circumstance set out in clause 17.5.2 above), provided that the Authority shall have discretion to determine whether or not to issue any such notice.

17.7 If following receipt by the Authority of a Warning Notice the Authority issues a notice under either section 154 or section 79 of the 1980 Act, it shall send a copy of such notice to the Service Provider within five (5) Business Days of its issue.

## **17.8 Project Network Discoveries**

17.8.1 As between the Parties, all fossils, antiquities and other objects having artistic, historic or monetary value and all human remains ("**Project Network Discovery**") which may be found on or at the Work Sites are or shall become, upon discovery, the absolute property of the Authority.

17.8.2 Upon the discovery of any Project Network Discovery during the performance of the Services, the Service Provider shall:

17.8.2.1 immediately give written notice to the Authority's Representative of such discovery;

17.8.2.2 take all steps not to disturb the Project Network Discovery and, if necessary, cease the performance of the Services in so far as the carrying out of such Services would endanger the Project Network Discovery or prevent or impede its excavation; and

17.8.2.3 take all necessary steps to preserve the Project Network Discovery in the same condition in which it was found.

17.8.3 The Authority shall procure that the Authority's Representative promptly, and in any event within ten (10) Business Days, issues an instruction to the Service Provider specifying what action the Authority's Representative requires to be taken in relation to such Project Network Discovery, provided



## **18.2 Service Provider to Bear Loss**

Nothing in this clause 18 (*Security of Project Network and UTC Centre*) shall affect:

18.2.1 the Authority's entitlement to make or recover pursuant to any Claim against any Protestor or Trespasser for damage suffered by the Authority, its agents or contractors (other than the Service Provider) or sub-contractors of any tier or any employees of any of them; or

18.2.2 the Service Provider's entitlement to make or recover pursuant to any Claim against any Protestor or Trespasser for damage suffered by the Service Provider, its agents, contractors or sub-contractors of any tier or any employees of any of them.

## **18.3 No Payments to Protestors**

The Service Provider shall not give directly or indirectly to any Protestor or Trespasser any inducement (monetary or otherwise) with a view to avoiding, limiting or influencing the manner of protest activities carried on by that Protestor or Trespasser or by other Protestors or Trespassers.

## **18.4 Gypsies and Travellers**

18.4.1 The Service Provider shall at all times treat gypsies and travellers with courtesy and respect and in a humane and compassionate manner.

18.4.2 The Service Provider shall not take any action in relation to gypsies and travellers other than in accordance with the Authority's Policy on Unauthorised Encampment from time to time in effect, or after prior consultation with the Authority.

18.4.3 The Service Provider shall not make any provision on the Project Facilities or Project Network for any temporary or permanent site for gypsies or travellers.

18.4.4 The Service Provider shall notify the Authority by telephone as soon as reasonably practicable and in any event within two (2) hours of the Service Provider becoming aware (or should have been aware had the Service Provider been complying with the provisions of this Contract) of the presence of any gypsies, travellers or any other unauthorised occupation on the Project

Facilities or Project Network and the actions which the Service Provider is taking in relation to them (and shall provide notice in writing (which may be by electronic mail) as soon as reasonably practicable thereafter).

18.4.5 If the Authority determines to seek possession of any part of the Project Facilities or Project Network which is subject to an unauthorised encampment, the Service Provider shall provide the Authority with assistance in providing detailed information so that the Authority may serve any notice that may be required, providing witness statements and the attendance at court by witness for the purpose of giving evidence but excluding the provision of legal advice and representation.

18.4.6 From the date on which the Service Provider notifies the Authority in accordance with clause 18.4.4 until the earlier of:

18.4.6.1 a successful action for possession being brought under clause 18.4.5; or

18.4.6.2 an Authority Change being implemented in accordance with schedule 18 (*Change Protocol*),

the acts (or presence) of gypsies and travellers shall constitute an Excusing Cause save to the extent arising (or persisting) by reason of the Service Provider's failure to take such steps in relation to them as are required by this clause 18.4 (*Gypsies and Travellers*).

## **19. MANAGEMENT INFORMATION SYSTEM AND PROJECT NETWORK MODEL**

### **19.1 Management Information System**

19.1.1 The Parties agree and acknowledge that, on or before the date of this Contract, the Authority has provided to the Service Provider all the data it holds on Confirm and BMX to enable the Service Provider to develop a Management Information System.

19.1.2 The Service Provider shall, from the Service Commencement Date until the MIS Upgrade Date, provide a Management Information System in accordance with the provisions of Table 8.1 in part 8 of schedule 2 (*Output Specification*).

19.1.3 Subject to paragraph 2.2 of part 8 of schedule 2 (*Output Specification*), with effect from the MIS Upgrade Date, the Service Provider shall procure that there is a Management Information System which complies with the provisions of column 5 of Table 8.1 in part 8 of schedule 2 (*Output Specification*) that is fully operational in place for use in relation to the Project which shall:

19.1.3.1 accurately identify all of the Project Network Parts on the Project Network Inventory, the Powered Apparatus Inventory and the Underground Apparatus Inventory:

- (a) by use of a simple and unique labelling system;
- (b) by use of a Geographical Information System which shall include digital mapping data from the Ordnance Survey;
- (c) by incorporating the relevant street reference from the Street Gazetteer; and

19.1.3.2 comprise of the following systems:

- (a) Project Network Inventory;
- (b) Powered Apparatus Inventory;
- (c) Underground Apparatus Inventory;
- (d) Routine Maintenance Management System;
- (e) Bridge Management System;
- (f) Tunnel Management System;
- (g) Structure Management System;
- (h) Street Lighting Management System;
- (i) Tree Management System;
- (j) Customer Care Management System; and



(k) Street Works Management System; and

19.1.3.3 comply with the requirements of schedule 2 (*Output Specification*).

19.1.4 The Service Provider shall procure that:

19.1.4.1 the Management Information System shall be capable of being accessed by the Authority on-line at all times (and for the avoidance of doubt on the basis of 24 hours a day and 365 (or, in the case of a leap year, 366) days a year);

19.1.4.2 the Authority shall at all times have the facility of being able to generate reports in a form to be agreed by the Parties on any aspect of the Management Information System; and

19.1.4.3 the Management Information System is maintained and operated in accordance with the requirements of schedule 2 (*Output Specification*).

19.1.5 Upon any request by the Authority, the Service Provider shall provide to the Authority hard copies of all or any part of the information contained in the Management Information System. The cost and expense of providing such copies to the Authority shall be borne by the Authority save in circumstances where the Authority is unable to access copies of the Management Information System on-line pursuant to clause 19.1.4.1 by reason of any fault or problem relating to the Service Provider's information technology systems, in which case all of the cost and expense of providing such copies shall be borne by the Service Provider.

## **19.2 Project Network Model**

19.2.1 From the Service Commencement Date the Service Provider shall accurately update the Project Network Model in accordance with Performance Standard 8 of schedule 2 (*Output Specification*) and shall ensure that the information contained in it is up to date at all times.

19.2.2 The Authority shall, from time to time and at the reasonable request of the Service Provider, provide any necessary information reasonably required to update the Project Network Model.

## **PART G - THE SERVICES**

### **20. OBLIGATION TO PROVIDE THE SERVICES AND PERFORMANCE STANDARDS**

#### **20.1 Commencement of the Services**

The Service Provider shall commence delivery of the Services from the Service Commencement Date and shall provide the Services for the remainder of the Contract Term in accordance with the terms of this Contract.

#### **20.2 Standards to which the Services must be provided**

The Service Provider shall supply the Services continuously throughout the Contract Term:

20.2.1 in order to comply fully with schedule 2 (*Output Specification*);

20.2.2 in accordance with Highway Standards and Relevant Lighting Standards save as expressly permitted or required to do otherwise in accordance with this Contract;

20.2.3 subject to clause 20.6, in accordance with the Method Statements;

20.2.4 in accordance with Good Industry Practice;

20.2.5 in accordance with the Service Provider Programmes or, in the case of Minor Works, as permitted in accordance with clause 11.5, or, where clause 11.14.2.2 applies, as instructed by the Authority;

20.2.6 in accordance with all Consents;

20.2.7 without prejudice to the generality of clause 0 (

20.2.8

20.2.9 *Change of Law*), in accordance with all Law;

20.2.10 in accordance with the Service Provider's duty of co-ordination as set out in clause 35 (*Delegation of Statutory Functions*); and

20.2.11 in accordance with the other provisions of this Contract.

### 20.3 Major MS Breaches

20.3.1 Without prejudice to clause 20.2 (*Standards to which the Services must be provided*), if the Service Provider breaches any provision of the Method Statements which breach falls within limbs (b), (f), or (l) of the definition of the Major MS Breach then the Authority shall be entitled to exercise its rights to pursue any or all remedies available for breach of Contract pursuant to this Contract.

20.3.2 If the Service Provider breaches any provision of the Method Statements which falls within limbs (of the definition of Major MS Breach) (c), (e), (g), (h), (i), (j), (k), (m), (n) or (o), then the Authority shall serve a notice on the Service Provider specifying reasonable particulars of the acts, omissions or other circumstances giving rise to the relevant Major MS Breach (the "**Major MS Breach Circumstances**") (the "**Major MS Breach Notice**"); and

20.3.3 the Service Provider shall, within fifteen (15) Business Days of receipt of the Major MS Breach Notice, remedy or, if not remediable, use reasonable endeavours to mitigate the consequences of the relevant Major MS Breach;

20.3.4 if sixteen (16) Business Days after the receipt by the Service Provider of the Major MS Breach Notice, the relevant Major MS Breach is continuing or has not been remedied or reasonable endeavours have not been taken to mitigate the consequences of the relevant Major MS Breach, the Authority may, in respect of the relevant Major MS Breach Circumstances, notify the Service Provider that the relevant Major MS Breach is a breach to which clause 62.8.1 (*Persistent Breach*) applies (subject always to the requirements of clause 62.8.1 (*Persistent Breach*) that relate to the circumstances in which the Authority may serve a notice under that clause first being met).

### 20.4 Minor MS Breaches

20.4.1 If the Authority considers in its opinion (acting reasonably) that, at any time after the expiry of the MS Mobilisation Period, a Minor MS Breach has

occurred or is continuing which is likely to trigger the provisions of clause 62.8 (*Persistent Breach*) then the Authority shall serve a notice (the "**Initial Minor MS Breach Notice**") on the Service Provider advising it that a Minor MS Breach has occurred (giving reasonable particulars of the acts, omissions or other circumstances giving rise to the relevant Minor MS Breach (the "**Minor MS Breach Circumstances**").

20.4.2 Within 20 Business Days after receipt by the Service Provider of the Initial Minor Breach Notice, the Service Provider shall remedy or, if not remediable, use reasonable endeavours to mitigate the consequences of the Minor MS Breach that is the subject of the Initial Minor MS Breach Notice (the "**Initial Minor MS Breach**").

20.4.3 If within the period of twenty (20) Business Days expiring on the 40<sup>th</sup> Business Day after the date on which the Service Provider receives the Initial Minor MS Breach Notice in respect of the relevant Initial Minor MS Breach, a Minor MS Breach (a "**Further Minor MS Breach**") that is the same type as the Initial Minor MS Breach occurs as a result of Minor MS Breach Circumstances connected with the Minor MS Breach Circumstances referred to in the Initial Minor MS Breach Notice, then the Authority shall serve a notice (the "**Final Minor MS Breach Notice**") on the Service Provider advising it that the Further Minor MS Breach has occurred (giving reasonable particulars of the relevant Minor MS Breach Circumstances) (the "**Further Minor MS Breach Circumstances**") that have recurred and stating on its face that it is a Final Minor MS Breach Notice.

20.4.4 Within ten (10) Business Days after receipt by the Service Provider of a Final Minor MS Breach Notice, the Service Provider shall remedy, or, if not remediable, use reasonable endeavours to mitigate the consequences of the Further Minor MS Breach.

20.4.5 If, within seventy (70) Business Days after the date on which Service Provider receives the Final Minor MS Breach Notice in respect of the relevant Final Minor MS Breach, a Minor MS Breach that is the same type as the Further Minor MS Breach occurs as a result of Minor MS Breach Circumstances connected with the Minor MS Breach Circumstances referred to in the Final Minor MS Breach Notice then the Authority may, in respect of

the relevant Final Minor MS Breach Circumstances, notify the Service Provider that the further Minor MS Breach is a breach to which clause 62.8.1 applies (subject always to the requirements of clause 62.8.1 that relate to the circumstances in which the Authority may serve a notice under that clause first being met).

20.4.6 For the purposes of this clause 20.4, an occurrence of Minor MS Breach Circumstances (the “**Subsequent Minor MS Breach Circumstances**”) shall be treated as connected with an earlier separate occurrence of Minor MS Breach Circumstances (the “**Previous Minor MS Breach Circumstances**”) only if:

20.4.6.1 the Subsequent Minor MS Breach Circumstances and the Previous Minor MS Breach Circumstances each give rise to a breach of the same obligation contained in the Method Statements and either:

- (a) the Subsequent Minor MS Breach Circumstances and the Previous Minor MS Breach Circumstances are instances of the same type of act, omission or other circumstances; or
- (b) the Subsequent Minor MS Breach Circumstances and the Previous Minor MS Breach Circumstances are caused by the same act, omission or other circumstances; or
- (c) the Subsequent Minor MS Breach Circumstances and the Previous Minor MS Breach Circumstances are caused by the same Notified Minor MS Breach Common Cause.

## **20.5 Necessity to depart from Method Statements**

If the Service Provider considers (acting reasonably) that it is unable to comply with any Method Statement due to unforeseen circumstances and an immediate solution is required to enable the Service Provider to comply with schedule 2 (*Output Specification*) and/or other provisions of this Contract, then provided that the proposed departure is a Permissible Method Statement Change, the Service Provider may notify the Authority's Representative or the Authority's Out of Hours Duty

Officer by telephone immediately (and shall provide written notice (which may be by electronic mail) as soon as reasonably practicable thereafter) of the details of:

- 20.5.1 the provisions of the Method Statement(s) which it is unable to comply with;
- 20.5.2 the unforeseen circumstances which are the cause of the Service Provider's inability to comply with such Method Statement(s);
- 20.5.3 the alternative process the Service Provider intends to implement to perform the Services in accordance with schedule 2 (*Output Specification*) and all other relevant provisions of the Contract,

and the Service Provider shall follow such alternative process to perform the Services in these circumstances only.

20.6 The Authority shall not exercise its rights pursuant to clause 62.8 (*Persistent Breach*) in respect of any breach of the Method Statements:

20.6.1 in respect of any breach of any Method Statement that occurs during the MS Mobilisation Period (excluding Method Statement 1 (*Mobilisation Plan*)); or

20.6.2 if the Service Provider has complied with the requirements of:

20.6.2.1 clause 20.3.3 (*Major MS Breaches*), provided that the relevant Major MS Breach has not occurred previously in the past nine (9) Months as a result of Major MS Breach Circumstances that are connected with the Major MS Breach Circumstances giving rise to the relevant Major MS Breach (ignoring three other occurrences where it was remedied, or, if not remediable, in respect of which reasonable endeavours to mitigate its consequences were used, within five (5) Business Days after the relevant occurrence) and in such case the Authority may, in respect of the relevant Major MS Breach Circumstances, notify the Service Provider that the relevant Major MS Breach is a breach to which clause 62.8.1 applies (subject always to the requirements of clause 62.8.1 that relate to the circumstances in which the Authority may serve a notice under that clause first being met);

20.6.2.2 clause 20.4 (*Minor MS Breaches*); or

20.6.2.3 clause 20.5 (*Necessity to depart from Method Statements*).

20.6.3 that is an MS Structural Breach occurring:

20.6.3.1 in respect of TVV, or in respect of Services being performed in relation to TVV, prior to the TVV Strengthening Conditions Satisfaction Date; or

20.6.3.2 in respect of ARNF, or in respect of Services being performed in relation to ARNF, prior to the ARNF Strengthening Conditions Satisfaction Date.

20.7 The following provisions shall apply in respect of any Major MS Breach Common Cause:

20.7.1 if the Authority believes that any Major MS Breach Circumstances have been caused by a Major MS Breach Common Cause, it shall notify the Service Provider to that effect, giving reasonable particulars as to the reasons why the Authority believes this to be so, and the matter shall be added to the agenda for the next Monthly Project Meeting occurring not less than five (5) Business Days after the date of the notification;

20.7.2 the Parties shall discuss the Authority's notification under clause 20.7.1 at the Monthly Project Meeting referred to in that clause and, within five (5) Business Days following that meeting the Service Provider shall notify the Authority whether or not the Service Provider agrees that the relevant Major MS Breach Circumstances have been caused by the Major MS Breach Common Cause referred to in the Authority's notification and, where the Service Provider does not so agree, the Service Provider shall provide detailed reasons as to why the Service Provider believes that the relevant Major MS Breach Circumstances were not caused by the Major MS Breach Common Cause referred to in the Authority's notification;

20.7.3 if the Service Provider notifies the Authority under clause 20.7.2 that it does not agree that the relevant Major MS Breach Circumstances have been caused by the Major MS Breach Common Cause referred to in the Authority's notification under that clause, either Party may refer the matter for determination under clause 70 (*Dispute Resolution*);

- 20.7.4 if it is agreed under clause 20.7.2, or determined in accordance with clause 20.7.3, that the relevant Major MS Breach Circumstances have been caused by the Major MS Breach Common Cause referred to in the Authority's notification under clause 20.7.2, the Service Provider shall remedy or, if not remediable, use reasonable endeavours to mitigate the consequences of the relevant Major MS Breach Common Cause before the Monthly Project Meeting following the Monthly Project Meeting referred to in clause 20.7.1;
- 20.7.5 if the Service Provider fails to remedy or use reasonable endeavours in accordance with clause 20.7.4, the Authority may by notice to the Service Provider designate the relevant Major MS Breach Common Cause as such for the purpose of clause 20.6.2.1, in which event, any instances of Major MS Breach Circumstances that occur after the date of that designation shall be treated as connected with each other (but not with any occurring prior to such date) for the purposes of clause 20.6.2.1 if they are caused by the Major MS Breach Common Cause so designated; and
- 20.7.6 for the purposes of this clause 20.7, references to Monthly Project Meeting shall be deemed to exclude any additional meetings required by the Authority in accordance with clause 44.5.1.
- 20.8 For the purposes of clause 20.6, an occurrence of Major MS Breach Circumstances (the "**Subsequent Major MS Breach Circumstances**") shall be treated as connected with an earlier separate occurrence of Major MS Breach Circumstances (the "**Previous Major MS Breach Circumstances**") only if:
- 20.8.1 the Subsequent Major MS Breach Circumstances and the Previous Major MS Breach Circumstances each give rise to a breach of the same obligation contained in the Method Statements and either:
- 20.8.1.1 the Subsequent Major MS Breach Circumstances and the Previous Major MS Breach Circumstances are instances of the same type of act, omission or other circumstances; or
- 20.8.1.2 the Subsequent Major MS Breach Circumstances and the Previous Major MS Breach Circumstances are caused by the same act, omission or other circumstances; or



20.8.1.3 the Subsequent Major MS Breach Circumstances and the Previous Major MS Breach Circumstances are caused by a Major MS Breach Common Cause designated in accordance with clause 20.7.5.

20.9 If the Service Provider considers it necessary (acting reasonably) to perform the Services in accordance with the process notified pursuant to clause 0 after the unforeseen circumstances and immediate requirement for a solution cease to subsist the Service Provider must submit the proposed amendments to the relevant Method Statement(s) to the Review Procedure.

## **20.A MOBILISATION BREACHES**

20.A.1 If the Service Provider commits a Mobilisation Breach then the Authority shall serve a notice on the Service Provider specifying reasonable particulars of the acts, omissions or other circumstances giving rise to the relevant Mobilisation Breach (the "**Mobilisation Breach Circumstances**") (the "**Mobilisation Breach Notice**").

20.A.2 In the case of a Mobilisation Breach which:

- (a) has an adverse effect on the carrying out of the Authority's statutory duties or statutory functions;
- (b) has an adverse effect on the ability of the Authority to perform its obligations under the Contract;
- (c) has an adverse effect on the health and safety of any persons (whether or not users of the Project Network); or
- (d) causes a breach of any Law,

the Service Provider shall, within one (1) Business Day of receipt of the Mobilisation Breach Notice pursuant to clause 20.A.1, remedy or, if not remediable, use reasonable endeavours to mitigate the consequences of the relevant Mobilisation Breach.

20.A.3 In the case of any Mobilisation Breach other than any Mobilisation Breaches set out in clause 20.A.1, the Service Provider shall, within fifteen (15) Business Days of receipt of the Mobilisation Breach Notice pursuant to clause 20.A.1, remedy or, if not

remediable, use reasonable endeavours to mitigate the consequences of the relevant Mobilisation Breach.

20.A.4 If:

- (a) in the case of any Mobilisation Breach detailed pursuant to clause 20.A.1, two (2) Business Days; or
- (b) in the case of any other Mobilisation Breach, sixteen (16) Business Days,

after the receipt by the Service Provider of the Mobilisation Breach Notice, the relevant Mobilisation Breach is continuing or has not been remedied or reasonable endeavours have not been taken to mitigate the consequences of the relevant Mobilisation Breach, the Authority may, in respect of the relevant Mobilisation Breach Circumstances, notify the Service Provider that the relevant Mobilisation Breach is a breach to which clause 62.8.1 applies (subject always to the requirements of clause 62.8.1 that relate to the circumstances in which the Authority may serve a notice under that clause first being met).

20A.5 The Authority shall not exercise its rights pursuant to clause 62.8 (*Persistent Breach*) in respect of any Mobilisation Breach if the Service Provider has complied with the requirements of clause 20A.2 or 20A.3.

## **21. INCONSISTENCIES RELATING TO THE PROVISION OF THE SERVICES**

### **21.1 Independent obligations**

The obligations in clauses 20.2.1 to 20.2.11 (inclusive) (*Standards to which the Services must be provided*) are independent obligations and:

- 21.1.1 the fact that the Service Provider has complied with the Method Statements (or any part thereof) shall not be a defence to an allegation that the Service Provider has not satisfied or complied with the Output Specification; and
- 21.1.2 the fact that the Service Provider has satisfied and complied with the Output Specification shall not be a defence to an allegation that the Service Provider has failed to comply with the Method Statements (or any part thereof).

## 21.2 Resolving the inconsistency

If at any time it becomes apparent that there is an inconsistency within the terms of the Output Specification, either Party shall, as soon as may be practicable following such inconsistency becoming known to that Party:

21.2.1 consider what amendments are necessary to make the Output Specification consistent;

21.2.2 inform the other Party in writing of its proposed amendments to remove the inconsistency; and

21.2.3 if the other Party agrees in writing to the proposed amendments, amend the Output Specification without any adjustment of the Annual Unitary Charge.

21.3 Subject to clause 0 (

21.4

21.5 *Change of Law*), if there is an inconsistency between the Output Specification and any Law in force at the date of this Contract:

21.5.1 either Party shall, as soon as practicable following such inconsistency becoming known to that Party, and with the other Party's agreement, amend the Output Specification to comply with such Law;

21.5.2 any such amendment shall not be deemed to be a Change; and

21.5.3 the Service Provider shall not be entitled to any additional monies or adjustment of the Annual Unitary Charge in respect of any Loss incurred as a result of such inconsistency or its adjustment (and accordingly the risk of there being any such inconsistency shall be borne by the Service Provider).

21.6 If at any time it becomes apparent that there is an inconsistency within the requirements set out in clause 20.2.1 to 20.2.11 (*Standards to which the Services must be provided*) inclusive, and the manner of resolving such inconsistency is not addressed by clauses 21.2 to 21.3 (inclusive) or by clause 38.2 (*Amendments to the Method Statements*), either Party shall, as soon as may be practicable following such inconsistency becoming known, give notice of the same to the other Party, and the Service Provider shall:

21.6.1 consider what amendments are necessary to make the requirements consistent;

21.6.2 inform the Authority in writing of its proposed amendments to remove the inconsistency; and

21.6.3 subject to clause 21.7 if the Authority agrees in writing to the proposed amendments, amend the requirements without any adjustment of the Annual Unitary Charge.

### **21.7 Failure to agree**

The Parties agree that the Party making the proposed amendments in accordance with clauses 21.2.2 or 21.6.2 shall only be entitled to propose such amendments as are reasonable in order to deal with any inconsistency and the other Party shall not be entitled to unreasonably withhold or delay its approval of such amendments. If the other Party does not agree to any amendment proposed by the proposing Party pursuant to clause 21.2.2 or clause 21.6.2 in accordance with this clause 21.7 (*Failure to agree*) then the matter shall be referred to Dispute Resolution.

### **21.8 Compliance with inconsistent document**

Upon a Party becoming aware of the inconsistency as described in clauses 21.1 to 21.6 (inclusive) it shall notify the other Party and both Parties shall use reasonable endeavours to agree the requirements with which the Service Provider shall comply until the inconsistent requirements have been amended and the Service Provider shall comply with such agreed requirements and the Service Provider shall be deemed not to be in breach of any provision of this Contract that may occur as a result of such compliance.

## **22. REPRESENTATIVES**

### **22.1 Service Provider's Representative**

The Service Provider shall employ a representative (the "**Service Provider's Representative**"), the identity of whom will be subject to the prior approval of the Authority (such approval not to be unreasonably withheld or delayed), to act as the Service Provider's representative in connection with the Service Provider's obligations under this Contract. The Contact Details of the Service Provider's Representative

shall, at all times, be made known to the Authority by the Service Provider and shall include a telephone number on which the Service Provider's Representative or his delegate can be contacted twenty four (24) hours a day. The Service Provider's Representative shall have the appropriate training and skills to co-ordinate and ensure the Service Provider's proper discharge of its obligations under schedule 10 (*Civil Emergency Planning*).

## **22.2 Authority of Service Provider's Representative**

The Service Provider's Representative shall have full authority to act on behalf of the Service Provider for all purposes of this Contract. The Authority and the Authority's Representative shall be entitled to treat any act of the Service Provider's Representative in connection with this Contract as being expressly authorised by the Service Provider (save where the Service Provider has notified the Authority in writing that such authority has been revoked) and the Authority shall not be required to determine whether any express authority has in fact been given.

## **22.3 Appointment of Successor**

The Service Provider may at any time terminate the appointment of the Service Provider's Representative and shall appoint a successor subject to the provisions of clause 22.1 (*Service Provider's Representative*).

## **22.4 Service Provider's Alternate Representatives**

22.4.1 The Service Provider shall appoint two (2) alternate representatives (the "**Service Provider's First Alternate Representative**" and the "**Service Provider's Second Alternate Representative**").

22.4.2 In the event that an Authority Party is unable to make immediate contact with the Service Provider's Representative (provided that the Authority Party has used the relevant Contact Details) or the Service Provider's Representative states that he is unable to deal with a matter and/or directs that either the Service Provider's First Alternate Representative or the Service Provider's Second Alternate Representative is contacted, the Authority shall be entitled to contact the Service Provider's First Alternate Representative and/or the Service Provider's Second Alternate Representative (as the case may be), and the provisions of this Contract dealing with the Service Provider's

Representative shall apply, mutatis mutandis, to the Service Provider's First Alternate Representative and/or the Service Provider's Second Alternate Representative (as the case may be).

#### **22.5 Authority's Representative**

The Authority shall appoint (and may replace from time to time) an individual to be the Authority's Representative in connection with the Authority's obligations under this Contract. The Authority's Representative shall liaise with the Service Provider's Representative, and shall keep the Service Provider informed of the identity and Contact Details from time to time of the Authority's Representative.

#### **22.6 Authority of Authority's Representative**

The Authority's Representative shall have full authority to act on behalf of the Authority for all purposes of this Contract. The Service Provider shall be entitled to treat any act of the Authority's Representative in connection with this Contract as being expressly authorised by the Authority (save where the Authority has notified the Service Provider that such authority has been revoked) and the Service Provider shall not be required to determine whether any express authority has in fact been given.

#### **22.7 Authority's Alternate Representatives**

22.7.1 The Authority shall appoint two (2) alternate representatives ("**Authority's First Alternate Representative**" and the "**Authority's Second Alternate Representative**").

22.7.2 In the event that the Service Provider is unable to make immediate contact with the Authority's Representative (provided the Service Provider has used the relevant Contact Details) or the Authority's Representative states that he is unable to deal with a matter and/or directs that either the Authority's First Alternate Representative or the Authority's Second Alternate Representative is contacted, the Service Provider shall be entitled to contact the Authority's First Alternate Representative and/or the Authority's Second Alternate Representative (as the case may be), and the provisions of this Contract dealing with the Authority's Representative shall apply, mutatis mutandis, to

the Authority's First Alternate Representative and/or the Authority's Second Alternate Representative (as the case may be).

## **22.8 Notices**

22.8.1 Subject to clause 89 (*Notices*), any notice, information, instructions or public communication given to:

22.8.1.1 the Service Provider's Representative shall be given in writing and shall be deemed to have been given to the Service Provider; and

22.8.1.2 the Authority's Representative shall be given in writing and shall be deemed to have been given to the Authority.

22.8.2 The Authority shall not be responsible for and the Service Provider shall not be entitled to rely on and shall not do so or claim relief, additional time, Losses, expenses, damages, costs or other liabilities should the Service Provider act on or fail to act on any notice, communication or other purported instruction given by a person alleging to act for and on behalf of the Authority unless such person was the Authority's Representative or, subject to the provisions of schedule 10 (*Civil Emergency Planning*), the Development Directorate's Emergency Planning Representative.

## **22.9 Monthly Project Meetings**

The Authority and the Service Provider shall ensure that the Authority's Representative and the Service Provider's Representative attend the Monthly Project Meetings in accordance with clause 44.5 (*Monthly Project Meetings*).

## **23. DESIGN**

23.1 The Service Provider shall ensure that all works carried out in the performance of the Services shall be designed in accordance with those requirements set out in clause 20.2 (*Standards to which the Services must be provided*).

23.2 All Reviewable Design Data in respect of the Services shall constitute a Reviewable Item for the purposes of schedule 21 (*Review Procedure*), and that schedule shall apply in relation to the Authority's right to comment upon such matters.

23.3 The Service Provider shall, on request from the Authority, make available to the Authority such Reviewable Design Data as may be required.

## 24. QUALITY MANAGEMENT

### 24.1 Quality Management Systems and the Service Quality Plan

24.1.1 The Service Provider shall procure that the provision of the Services is the subject of a Quality Management System and that the Service Provider shall obtain a specific quality management accreditation under ISO 9001:2000 in respect of this Project on or prior to the date that falls on the first anniversary of the Service Commencement Date.

24.1.2 The Quality Management System shall be reflected in a Quality Plan, the standard of which shall be consistent with ISO EN 10005:1995 or any equivalent standard which is generally recognised as having replaced it.

24.1.3 The Service Provider shall procure that the Services are carried out in compliance with the Quality Plan. The Service Provider shall submit to the Authority (as soon as practicable (and in any event not more than five (5) Business Days following receipt of a written request for the same)) a copy of the Quality Plan for review pursuant to and in accordance with the Review Procedure.

24.1.4 Where more than one Service Provider Party performs any aspect of the Services, then the provisions of this clause 24.1.4 (in so far as relevant or appropriate to the activities such Service Provider Party shall perform) shall apply in respect of each such Service Provider Party (and the Service Provider shall procure that such Service Provider Party shall comply with the same), and references in this clause 24.1.4 to the "**Service Provider**" shall be construed accordingly (provided that, for the avoidance of doubt, this clause 24.1.4 shall not be construed as requiring any Service Provider Party to have their own Quality Plans but only to comply with the relevant aspects of the relevant Quality Plan).

24.1.5 The Service Provider shall submit to the Authority's Representative pursuant to the Review Procedure any changes the Service Provider proposes to make to the Quality Plan.



## 24.2 Quality Manual and Procedures

24.2.1 The Service Provider shall produce a Quality Manual in accordance with BN ISO 9001:2000 which shall include, but not be limited to, details of the following:

24.2.1.1 quality policy;

24.2.1.2 resource management;

24.2.1.3 structure of Quality Management System;

24.2.1.4 project management, system management and general management of the Quality Management System;

24.2.1.5 control of documents;

24.2.1.6 control of records; and

24.2.1.7 management responsibility, commitment and communication.

24.2.2 The Quality Manual or the relevant parts of it shall be submitted to the Authority's Representative at the same time that such Quality Plan or part of (or change to) the same is submitted in accordance with the Review Procedure, and the contents of such Quality Manual shall be taken into account in the consideration of the relevant Quality Plan or part of (or change to) the same in accordance with the Review Procedure.

## 24.3 Quality Manager

24.3.1 On or before the Planned Service Commencement Date, the Service Provider shall appoint (or shall procure the appointment of) a person to act as a quality manager ("**Quality Manager**"), to assist the Service Provider in the performance of its obligations under this clause 24 (*Quality Management*).

24.3.2 The identity of the Quality Manager (and any replacement) shall be subject to the approval of the Authority's Representative (such approval not to be unreasonably withheld or delayed).

24.3.3 The Service Provider shall ensure that, without limitation, the terms and conditions of employment of the Quality Manager shall require him to:

24.3.3.1 ensure the effective operation of the Quality Management System;

24.3.3.2 audit the Quality Management System at regular intervals and report the findings of such audit to the Authority's Representative;

24.3.3.3 review all Quality Management Systems at intervals agreed with the Authority's Representative to ensure their continued suitability and effectiveness;

24.3.3.4 liaise with the Authority's Representative on all matters relating to the Quality Management System; and

24.3.3.5 report to the Service Provider.

#### **24.4 Quality Director**

24.4.1 The Service Provider shall appoint and ensure that it employs at all times during the Contract Term a person to act as a quality director ("**Quality Director**").

24.4.2 The Service Provider shall procure that notwithstanding any other duties he may perform by virtue of his employment with any Service Provider Party, the Quality Director shall:

24.4.2.1 have the authority to carry out quality audits on any of the Services provided under this Contract and in any premises where such work is undertaken;

24.4.2.2 ensure the effective maintenance and operation of the Quality Management System;

24.4.2.3 prepare and maintain a programme of internal audits of the Quality Management System such that the interval between audits shall not exceed sixty (60) Business Days;

- 24.4.2.4 carry out effective audits of the Quality Management System in accordance with the programme of internal audits;
- 24.4.2.5 report the findings of internal audits in writing to the Service Provider's Representative and the Authority's Representative within one (1) week of such audit;
- 24.4.2.6 carry out such follow-up audits as may be required as a result of the findings of internal audits; and
- 24.4.2.7 attend Project Board Meetings as required to report on all matters relating to the Quality Management System and on quality management in general.

## **25. SERVICE PROVIDER'S PERSONNEL**

25.1 Subject to clause 25.7 (*Transferring Employees*) below, the Service Provider shall, and shall procure that any Sub-Contractor or Sub-subcontractor shall, only engage Personnel in the provision of the Services who are:

25.1.1 appropriately skilled and competent; and

25.1.2 appropriately trained and qualified.

25.2 Subject to clause 25.7 (*Transferring Employees*) below, the Service Provider shall procure that sufficient numbers of properly trained and competent Personnel are at all times engaged in providing the Services.

### **25.3 Personnel information to be provided to Authority**

Without prejudice to any other obligations of the Service Provider in this Contract, and to the extent permitted by Legislation, the Service Provider shall within five (5) Business Days (or such other reasonable period agreed between the Parties) of any request by the Authority provide to the Authority, to the extent permitted by Law, all information (including any documents) reasonably requested by the Authority relating to Personnel including information (and any documents) regarding numbers of Personnel employed or engaged and the terms and conditions of employment or engagement of such Personnel, provided that the Service Provider shall not (other than pursuant to clause 57 (*Employment Matters - TUPE*)) be required to provide

details of the remuneration of any Personnel to the Authority. The Authority shall, upon making a request pursuant to this clause 25.3 (*Personnel information to be provided to Authority*), explain to the Service Provider the reason for such request.

**25.4 Training record for each member of Personnel**

The Service Provider shall maintain, and shall procure that any Sub-Contractor and Sub-subcontractor maintains, an accurate and up to date training record for each member of its Personnel and shall, to the extent permitted by Legislation, procure that the same are available for inspection by the Authority or by the Authority's Representative at such times as the Authority shall reasonably request.

**25.5 Service Provider responsibility for employment, conditions and service of its Personnel**

Save as expressly provided in this Contract, the Service Provider shall be entirely responsible for the employment and conditions and service of its Personnel and shall procure that any Sub-Contractor and Sub-subcontractor is likewise responsible for its Personnel. The Service Provider shall carry out such checks as may be required in order to comply with section 8 of the Asylum and Immigration Act 1996.

25.6 The Authority shall exercise the rights contained within this clause 25 (*Service Provider's Personnel*), such rights being exercised reasonably and not arbitrarily, vexatiously or capriciously.

**25.7 Transferring Employees**

The obligations in clause 25.1 shall not apply in relation to any Transferring Employees during the twelve (12) Month period beginning on the Service Commencement Date and during such period, each Transferring Employee shall be deemed to be properly trained and competent.

**25.8 Unsuitable Persons**

25.8.1 The Service Provider using reasonable endeavours and to the extent permitted by Law:

- 25.8.1.1 shall procure that all employees or prospective employees of the Operating Sub-Contractor (other than Transferring Employees) are required to disclose any Convictions; and
- 25.8.1.2 shall procure that, where any person discloses any Convictions, or is found to have any Convictions, the same shall be immediately notified to the Authority; and
- 25.8.1.3 shall immediately notify the Authority in writing upon the Service Provider becoming aware of any Personnel;
  - (a) who, subsequent to his/her commencement of employment with the Service Provider or Sub-Contractor or any Sub-subcontractor in the provision of the Services, receives a Conviction; or
  - (b) whose previous Convictions become known to the Service Provider (or any Service Provider Party involved in the provision of the Services).

25.8.2 The Authority may by notice in writing, if it has reasonable grounds for believing that any person employed or engaged or to be employed or engaged by the Service Provider or any Sub-Contractor or Sub-subcontractor in or in connection with the provision of the Services is or would be an Unsuitable Person, if so employed or engaged in or in connection with the provision of any of the Services and provided that the Authority is acting in a reasonable and proportionate manner having regard to such matters as the role undertaken by the relevant person, require the Service Provider to procure that such person is not engaged or employed directly or indirectly in or in connection with the provision of the Services or any part of the Services at the Service Provider's own cost and expense. The Service Provider shall not be obliged to dismiss or procure the dismissal of any person in respect of whom a notice has been issued pursuant to clause 25.8.1.3, but shall immediately transfer or procure the immediate transfer of any such person to the performance of duties other than in connection with the Authority in any way.

25.8.3 Any dispute arising under clause 25.8.1 or clause 25.8.2 shall be referred to Dispute Resolution pursuant to clause 70 (*Dispute Resolution*).

## 26. HEALTH AND SAFETY

### 26.1 Service Provider's health and safety responsibilities

The Service Provider shall be responsible for the observance by itself, its Personnel and its Operating Sub-Contractor, and shall use reasonable endeavours to procure the observance by its other Sub-Contractors and Sub-subcontractors and any other persons engaged by it or them in relation to its obligations under this Contract (any or all of them "**Appropriate Persons**") for the purposes of this clause 26.1) of all applicable health and safety precautions necessary (whether required by Legislation or not) for the protection of Appropriate Persons.

26.2 The Service Provider shall procure that:

26.2.1 when on the Authority's property (except for the UTC Centre and the Depot after Service Commencement), all Appropriate Persons are aware of, and at all times comply with, the Authority's Health and Safety Policy;

26.2.2 when on a Service Provider's or a Service Provider Party's work site, all Appropriate Persons are aware of, and at all times comply with the Service Provider's Health & Safety Policy;

26.2.3 when on a site for the purposes of clause 5 (*Condition of the Project Network*), clause 34 (*Highway Works Authority*), clause 31 (*Maintainability Assessment Service*) or schedule 19 (*Accrual and De-Accrual of Project Network Parts*) all Appropriate Persons are aware of, and at all times comply with the health and safety policy applicable to that site;

26.2.4 all Appropriate Persons observe all applicable rules, regulations and requirements of statutory or regulatory authorities concerning building works and fire prevention; and

26.2.5 accidents to Personnel which ordinarily require reporting in accordance with the Health and Safety at Work etc Act 1974 shall also be reported as soon as practicable to the Authority and in any event within five (5) Business Days.

26.3 The Service Provider shall comply with, and shall procure that all Appropriate Persons comply with:

26.3.1 all reasonable instructions the Authority shall give to it, subject to clause 26.4.1; and

26.3.2 all instructions police and/or fire officers shall give to it,

concerning health and safety matters arising out of this Contract and that represent a danger to persons or property.

#### **26.4 Service Provider's Health & Safety Policy**

26.4.1 The Service Provider shall:

26.4.1.1 comply in all respects with the Service Provider's Health & Safety Policy and shall not be obliged to comply with any instruction of the Authority if it is likely, in the reasonable opinion of the Service Provider, to give rise to a breach of such policy or a breach of health and safety Legislation;

26.4.1.2 immediately provide the Authority with full details of why such breach would occur; and

26.4.1.3 promptly, upon it becoming so aware, provide the Authority with full details of any significant health and safety issues or incidents which relate in any way to the Services.

26.4.2 The Service Provider shall ensure that the Service Provider's Health & Safety Policy is updated from time to time in accordance with Law and Good Industry Practice, subject to the provisions of clause 0 (

26.4.3

26.4.4 *Change of Law*). For the avoidance of doubt, a change to the Service Provider's Health & Safety Policy in accordance with Good Industry Practice shall be implemented by the Service Provider without any adjustment to the Annual Unitary Charge.

#### **26.5 Authority's health and safety responsibilities**

26.5.1 The Authority shall be responsible for the observance by itself and all Authority Parties of all applicable health and safety precautions necessary (whether required by Legislation or not) for the protection of such parties and/or Appropriate Persons.

26.5.2 When on a site at which the Service Provider is undertaking works as part of the performance of the Services for the purpose of this Contract, the Authority shall comply with, and shall procure that any attending Authority Party complies with the Service Provider's Health & Safety Policy.

## **27. CDM REGULATIONS**

### **27.1 Responsibility for Design**

As between the Service Provider and the Authority, the Service Provider shall be entirely responsible for the safety of any design which the Service Provider utilises as part of the Services (and works associated thereof) and for the adequacy, stability and safety of all site operations and methods of construction.

### **27.2 Service Provider as Client**

27.2.1 In accordance with Regulation 8 of the CDM Regulations, the Service Provider hereby elects to be treated as the only client in respect of the Project for all purposes of the CDM Regulations save on or after termination of this Contract, and the Authority agrees to such election.

27.2.2 The parties hereby elect for the purposes of the CDM Regulations that the Service Provider shall be treated as the only client in respect of the Project pursuant to Regulation 8 of the CDM Regulations.

27.2.3 The Service Provider shall ensure that notice of the appointment of the CDM Co-ordinator is served on the Health & Safety Executive by the CDM Co-ordinator engaged by the Service Provider in connection with the Project as part of its project notification duties pursuant to Regulation 21 of the CDM Regulations in the form (if any) required by Regulation 21 of the CDM Regulations ("**Notice of Election**").



- 27.2.4 The Service Provider shall within five (5) Business Days of service of the Notice of Election send a copy of the notification made by the CDM Co-ordinator pursuant to Regulation 21 to the Authority.
- 27.2.5 The Service Provider shall ensure that the Sub-Contractors are aware of the Service Provider's election pursuant to clause 27.2.1 and shall not, prior to the Expiry Date or the Termination Date (whichever is the earlier) seek to withdraw, terminate or in any manner derogate from the Service Provider's election that the Service Provider will act as, and accepts all responsibilities as the client in relation to the Services.
- 27.2.6 During the Service Period the Service Provider shall, as and when required, ensure that such further appointments under Regulation 21 of the CDM Regulations are made and any notices are served upon the Health & Safety Executive as required under Regulation 21 of the CDM Regulations.

### **27.3 Duties under CDM Regulations**

The Service Provider shall:

- 27.3.1 observe, perform and discharge and/or shall procure the observance, performance and discharge of all the obligations, requirements and duties of the client arising under the CDM Regulations in connection with the Services;
- 27.3.2 prior to the commencement of any Core Investment Works in respect of each Milestone, to the extent that the same has not already been provided to the Authority as part of Method Statement 14 and/or the Core Investment Period Programme, provide a certified copy of the relevant construction plan to the Authority;
- 27.3.3 prior to the Planned Milestone Completion Date, provide a certified copy of the final draft Health and Safety File (as such term is defined in the CDM Regulations) for the relevant Milestone to the Authority; and
- 27.3.4 within thirty (30) Business Days of the issue of a Certificate of Completion in respect of a Milestone, provide to the Authority a certified copy of the full and complete Health and Safety File for the relevant Milestone.

#### **27.4 Authority to Provide Information**

At the Service Provider's reasonable request, the Authority shall provide to the Service Provider such information and documents that are in the Authority's possession or which the Authority may reasonably obtain which may be required by the Service Provider to fulfil its duties as client for all the purposes of the CDM Regulations.

#### **28. CIVIL EMERGENCY PLANNING**

The Parties shall comply with the provisions of schedule 10 (*Civil Emergency Planning*).

#### **29. ADMINISTRATION OF HIGHWAY CLAIMS**

The Parties shall comply with and implement the provisions of schedule 27 (*Administration of Third Party Claims*).

#### **30. THIRD PARTY UNDERTAKINGS AND AGREEMENTS**

##### **30.1 Authority subcontracts Third Party Undertakings to Service Provider**

With effect from the Service Commencement Date, the Authority hereby subcontracts to the Service Provider the obligation to observe and perform all obligations of the Authority under the Third Party Undertakings (other than the Retained Obligations) arising after the Service Commencement Date and the Service Provider shall observe and perform the same and (subject to clause 55.2 (*Exclusions*)) indemnify and hold the Authority harmless from and against:

30.1.1 all Indemnified Liabilities arising out of or in relation to the Delegated Obligations or the performance, defective performance or failure to perform the Delegated Obligations to the extent due for performance after the Service Commencement Date; and

30.1.2 any additional costs, claims, demands, Losses, liabilities or expenses incurred by the Authority as a result of:

30.1.2.1 the defective performance of the Service Provider or the failure of the Service Provider to observe or perform the Delegated Obligations including the Authority's internal costs of satisfying the Delegated Obligations in place of the Service Provider

(where, following such failure or defective performance and in its absolute discretion it elects to do so) and a fair apportionment of the cost of any employees or other resources committed to so doing; and

30.1.2.2 the inability of the Authority to observe or perform the Retained Obligations or to exercise the Retained Rights, or any increase in the costs or expenses incurred in observing or performing the Retained Obligations, to the extent arising from the failure of the Service Provider to observe and perform the Delegated Obligations in accordance with their terms to the extent due for performance after the Service Commencement Date.

#### **Assignment of benefit of Delegated Rights to the Service Provider**

30.2 The Authority hereby assigns to the Service Provider the benefit of the Delegated Rights, and the Service Provider shall, if requested by the Authority exercise the Delegated Rights, and the Service Provider shall observe the proper exercise of the same and, subject to clause 55.2 (*Exclusions*) indemnify and hold the Authority harmless from and against:

30.2.1 all Indemnified Liabilities arising out of or in relation to improper exercise or a failure to exercise the Delegated Rights; and

30.2.2 any additional costs, claims, demands, losses, liabilities or expenses incurred by the Authority as a result of:

30.2.2.1 the exercise by the Service Provider of the Delegated Rights; and

30.2.2.2 the inability of the Authority to observe or perform the Retained Obligations or to exercise the Retained Rights, or any increase in the costs or expenses incurred in observing or performing the Retained Obligations, to the extent arising from the failure of the Service Provider to exercise the Delegated Obligations in accordance with their terms and having due regard to the respective rights and obligations of the Parties under this Contract.

### **30.3 Retained Obligations and Retained Rights**

The Authority shall observe and perform the Retained Obligations and shall properly exercise the Retained Rights and, subject to clause 30.6 (*Consistency of exercise*), nothing in this Contract shall have the effect of removing or otherwise prejudicing the exercise of the Retained Rights.

### **30.4 Informing other parties**

The Authority shall, within fifteen (15) Business Days of the Service Commencement Date, inform each of the other parties to the Third Party Undertakings in writing that the Service Provider is the assignee of the Delegated Rights and is to perform the Delegated Obligations on behalf of the Authority.

### **30.5 Performance of Delegated Obligations**

The Service Provider may observe and perform the Delegated Obligations through such employees, agents or Sub-Contractors as it reasonably considers appropriate to secure the observance and performance of the same but shall not thereby be released from any obligation to the Authority under this clause 30 (*Third Party Undertakings and Agreements*) or to any other party to the Third Party Undertakings.

### **30.6 Consistency of exercise**

Each Party shall exercise all of its rights and obligations under this Contract, whether related to the Delegated Obligations, the Delegated Rights, the Retained Obligations, the Retained Rights or otherwise, in a manner consistent with the observance and performance of the Delegated Obligations and the Retained Obligations (as appropriate) and so as to avoid putting the other Party in breach of either of the same.

### **30.7 Termination, release, variation etc of Third Party Undertakings**

Neither Party shall without the other Party's prior written approval (such approval not to be unreasonably withheld or delayed):

30.7.1 agree to terminate, give notice to terminate or otherwise take action to terminate, repudiate or discharge or secure the termination of any of the Third Party Undertakings or treat the same as having been terminated, repudiated or otherwise discharged;

30.7.2 release, waive, settle, compromise or otherwise prejudice or vary any rights or claims which the other Party may have under any of the Third Party Undertakings; or

30.7.3 vary or agree or purport to vary the terms of any of the Third Party Undertakings.

### **30.8 New Third Party agreements**

The Service Provider shall not, without the prior written consent of the Authority, enter into with any Third Party any commitment to provide or procure for the benefit of land or buildings or for such Third Party, the provision or procurement of any works relating to the Project Network.

### **30.9 Enforcement of Authority's rights and dispute resolution**

The Authority shall:

30.9.1 subject to clause 30.9.3, at the request of the Service Provider take such steps as the Service Provider may reasonably request to enforce the Authority's rights and powers under the Third Party Undertakings to the extent reasonably required by the Service Provider to perform its obligations under this Contract;

30.9.2 subject to clause 30.8 (*New Third Party agreements*), permit the Service Provider to engage in such negotiations and conduct such disputes with any other party to the Third Party Undertakings as the Service Provider reasonably requires to perform its obligations under this Contract including by conducting such court, arbitration or other proceedings as the Service Provider may reasonably consider necessary for such purpose; and

30.9.3 be indemnified and secured to its reasonable satisfaction by the Service Provider against all Indemnified Liabilities incurred by virtue of or in relation to such matters as are referred to in clauses 30.9.1 and 30.9.2 above, and the Service Provider shall keep the Authority informed of the progress of any such Enforcement Action, negotiations, disputes or proceedings as are referred to in clause 30.9.2.

### 31. MAINTAINABILITY ASSESSMENT SERVICE

31.1 The Authority shall notify the Service Provider in writing in respect of any proposed Additional Works that include proposals for a Proposed Project Network Part or Proposed Project Network Parts, which may result in a change to the Project Network, together with:

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

31.1.2 any relevant documentation detailing the technical proposals in respect of any New Build,

as soon as reasonably practicable after they are made available to the Authority.

31.2 The Service Provider shall, following notice from the Authority pursuant to clause 31.1, in respect of all Proposed Project Network Parts, comply with all the relevant obligations of this clause 31 (*Maintainability Assessment Service*) and provide the Authority with a written commentary on the preliminary design and, when available, the detailed design, and such commentary shall contain the following information:

31.2.1 whether the Proposed Project Network Part or Proposed Project Network Parts meet the relevant requirements of schedule 2 (*Output Specification*);

31.2.2 the net effect on the maintenance costs resulting from the De-Accrual of any Project Network Part or Project Network Parts as part of any Additional Works;

31.2.3 in respect of any works relating to the UTMC which form part of the Additional Works, any issues which will impact on the Service Provider's future ability to maintain the Proposed Project Network Part or Proposed Project Network Parts, if required; and

31.2.4 whether in respect of any Proposed Project Network Part which may be accrued pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*):

31.2.4.1 the Proposed Project Network Part or Proposed Project Network Parts meet the Service Provider's Assumptions; or

- 31.2.4.2 the Proposed Project Network Part or Proposed Project Network Parts do not meet the Service Provider's Assumptions together with an explanation as to why and any relevant supporting documentation;
- 31.2.5 if 31.2.4.2 applies or otherwise in respect of any Proposed Project Part which may be accrued pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*) if there is no applicable Y value for the Proposed Project Network Part or Proposed Project Network Parts:
- 31.2.5.1 the maintenance costs relating to the Proposed Project Network Part or Proposed Project Network Parts and the extent, if any, to which the maintenance costs exceed any relevant Y value as set out in table in part 2.1 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) or otherwise agreed pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*) with an explanation of why any relevant Y value is exceeded;
- 31.2.5.2 whether the maintenance costs relating to the Proposed Project Network Part or Proposed Project Network Parts may, in the reasonable opinion of the Service Provider, be reduced or mitigated; and
- 31.2.6 in respect of a Structure (excluding Minor Structures), Bridge or Tunnel the likely impact on the Annual Unitary Charge as a result of the need to maintain the Structure (excluding Minor Structures), Bridge or Tunnel following a Change,

the written commentary provided pursuant to this clause 31.2 shall be provided as soon as reasonably practicable having regard to the nature and complexity of the relevant Additional Works.

- 31.3 If clause 31.2.4.2 applies, the Authority shall notify the Service Provider in writing within five (5) Business Days that it:

31.3.1 agrees with the Service Provider's analysis that the Service Provider's Assumptions do not apply to the Proposed Project Network Part or Proposed

Project Network Parts and that the Service Provider may take into account the alternative Y value commentary provided under clause 31.2.5; or

31.3.2 disagrees with the Service Provider's analysis and that the Service Provider's Assumptions do apply to the Proposed Project Network Part or Proposed Network Parts and the Service Provider may not take into account any alternative Y value commentary provided under clause 31.2.5.

31.4 If the Service Provider disagrees with the Authority's decision under clause 31.3, the Service Provider may refer the matter to Dispute Resolution.

31.5 The Service Provider may or any Service Provider Party may, in respect of all Additional Works which include a Proposed Project Network Part or Proposed Project Network Parts, attend any pre-start site meeting to familiarise itself with the details and issues concerning such Additional Works (including the materials and methods of construction used in relation to any Proposed Project Network Part or Proposed Project Network Parts) and the Authority shall, if the Service Provider so requests, procure access for the Service Provider or any Service Provider Party to attend any such pre-start site meeting.

31.6 Subject to clause 31.7, the Service Provider or any Service Provider Party may inspect all Proposed Project Network Parts, which form part of the Additional Works, as required by the nature and the complexity of the Proposed Project Network Parts to satisfy itself that the Service Provider's Assumptions have not been affected, or that the alternative Y value commentary has not changed, or the impact on the Annual Unitary Charge has not changed (as applicable) since it provided the Authority with the commentary pursuant to clause 31.2 and the Authority shall, if the Service Provider so requests, procure access for the Service Provider or any Service Provider Party to undertake such inspection.

31.7 In respect of any Proposed Project Network Part which may be accrued pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*), the Service Provider shall or shall ensure that any Service Provider Party shall inspect all Traffic Signal Equipment and/or all works which relate to the UTMC which form part of the Additional Works as follows:

31.7.1 during construction to familiarise itself with the installation of the Traffic Signal Equipment and/or works which relate to the UTMC, particularly any



- relevant pole ducts and underground equipment, and to notify the party carrying out the Additional Works in writing (with a copy of such notice being sent to the Authority) of any issues arising from such inspection; and
- 31.7.2 to attend any Factory Acceptance Tests and/or Site Acceptance Tests and the Authority shall, if the Service Provider so requests, procure access for the Service Provider or any Service Provider Party to undertake such inspection or attend such tests.
- 31.8 The Service Provider shall or shall ensure that a Service Provider Party 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 31.6 or 31.7 that:
- 31.8.1 any Proposed Project Network Part or Proposed Project Network Parts no longer comply with the design on which the Service Provider provided commentary pursuant to clause 31.2; and
- 31.8.2 in respect of any Proposed Project Network Part which may be accrued pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*), the extent, to which (if at all) this affects the Service Provider's Assumptions or the alternative Y value commentary (as applicable) and with an explanation of why this is the case.
- 31.9 The Authority shall notify the Service Provider as soon as reasonably practicable if it has permitted a change to the preliminary or detailed design of a Proposed Project Network Part or Proposed Project Network Parts (together with the relevant documentation) to which the Service Provider has already provided commentary on pursuant to clause 31.2 so that the Service Provider may:
- 31.9.1 reassess such commentary based on the change to the preliminary design or detailed design; and/or
- 31.9.2 make such further inspection of the Proposed Network Part or Proposed Project Network Parts (and the Authority shall, if so requested by the Service Provider, procure access for the Service Provider or any Service Provider Party to undertake such inspection),

as it believes is reasonably required to fully understand any impact on the Service Provider's Assumptions or in respect of any Proposed Project Network Part which may be accrued pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*), whether the alternative Y value commentary has changed (as applicable) since the Service Provider provided the Authority with the commentary pursuant to clause 31.2.5.

31.10 Where clause 31.9 applies (and without prejudice to clause 31.8), the Service Provider shall notify the Authority of any amendments required to the commentary provided pursuant to clause 31.2, particularly in respect of any impact on the alternative Y value commentary provided pursuant to clause 31.2.5, if applicable.

31.11 The Service Provider shall or shall procure that a Service Provider Party shall liaise directly with the Third Party Developer to:

31.11.1 obtain any further documentation or information required to assess the Proposed Project Network Part or Proposed Project Network Parts; and/or

31.11.2 subject to clauses 31.5, 31.6, 31.7.2 and 31.9.2, procure notification, and arrange attendance of:

31.11.2.1 any inspections or pre-start site meetings; and/or

31.11.2.2 in respect of Traffic Signal Equipment, any Factory Acceptance Tests and/or Site Acceptance Tests,

that the Service Provider or any Service Provider Party may wish to review or attend, in respect of any Proposed Project Network Parts forming the Third Party Works, for the purposes of this clause 31 (*Maintainability Assessment Service*).

31.12 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 pursuant to clause 31.11, together with copies of any documentation received from the Third Party Developer, within five (5) Business Days of receipt of such information or documentation.

31.13 The Service Provider shall notify the Authority of any specific further documentation it reasonably believes it requires in order to provide sufficient commentary pursuant

to clause 31.2 and/or 31.8 on any Proposed Project Network Part or Proposed Project Network Parts, which it has not received from the Authority or cannot obtain, having used reasonable endeavours, from the relevant Third Party Developer.

31.14 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 which the Service Provider has requested pursuant to clause 31.13.

31.15 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 31 (*Maintainability Assessment Service*).

31.16 If the Service Provider receives notification pursuant to clause 31.1 and, if relevant, any notification pursuant to clause 31.9 and the Service Provider has had the opportunity to provide commentary and, if required, any revised commentary pursuant to 31.8 or 31.10 on:

31.16.1 whether the Proposed Project Network Part or Proposed Project Network Parts meet the relevant requirements of schedule 2 (*Output Specification*) in accordance with clause 31.2.1; and/or

31.16.2 whether the Service Provider's Assumptions apply; or

31.16.3 if the Service Provider's Assumptions do not apply, in respect of any Proposed Project Network Part which may be accrued pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*), an alternative Y value commentary on whether the maintenance costs of Proposed Project Network Part or Proposed Project Network Parts exceed the relevant Y values and whether these costs may be mitigated in accordance with clause 31.2.5,

and the Service Provider has failed to provide any comments in respect of such, the Service Provider will only be entitled to use the relevant Y value based on the Service Provider's Assumptions for the Proposed Project Network Part or Proposed Project Network Parts and not claim any maintenance costs which exceed the relevant Y values in accordance with schedule 19 (*Accrual and De-Accrual of Project Network*

*Parts*). Any dispute in relation to this clause shall be dealt with in accordance with the provisions of clause 70 (*Dispute Resolution*).

## **32. BEST VALUE AND CONTINUING VALUE FOR MONEY**

### **32.1 Authority's Best Value Duty**

32.1.1 The Service Provider acknowledges that:

32.1.1.1 the Authority is subject to the Best Value Duty; and

32.1.1.2 the provisions of this clause 32 (*Best Value and Continuing Value for Money*) are intended to assist the Authority in discharging the Best Value Duty; and

32.1.1.3 the provisions of this clause 32 (*Best Value and Continuing Value for Money*) shall apply in respect of the obligations of the Service Provider and the Authority concerning the Best Value Duty and the 1999 Act generally

32.1.2 The Service Provider shall, throughout the Contract Term, but only to the extent required in order to assist the Authority in discharging the Best Value Duty, and only to the extent of the Service Provider's obligations under this Contract other than under this clause 32 (*Best Value and Continuing Value for Money*), make arrangements to secure continuous improvement in the way in which the Services are provided, having regard to a combination of economy, efficiency and effectiveness.

32.1.3 The Service Provider shall undertake or refrain from undertaking such actions as the Authority shall reasonably request to enable the Authority to comply with Part I of the 1999 Act in relation to the Services, including:

32.1.3.1 complying with requests for information, data or other assistance made by the Authority in pursuance of its Best Value Duty including:

- (a) assisting the Authority in any Comprehensive Performance Assessment or if applicable the Comprehensive Area Assessment;

- (b) facilitating any inspection undertaken by any Relevant Authority in connection with the Best Value Duty, including any inspection undertaken with a view to verifying the Authority's compliance with the Best Value Duty pursuant to Sections 10 and 11 of the 1999 Act;
- (c) facilitating the Authority preparing any statement, in response to an Authority's auditor's report;
- (d) assisting the Authority in relation to any action taken by the Secretary of State;
- (e) enabling the Authority to comply with any Government Departmental Direction;
- (f) enabling the Authority to report on the National Indicators and Local Performance Indicators including for the avoidance of doubt in respect of any Local Area Agreement;
- (g) complying with all requests by the Authority to procure the attendance of specific officers or employees of the Service Provider or any Service Provider Party at any meetings of the Authority at which the Services are to be discussed including any Overview and Scrutiny Committee meeting and any Constituency Committee meeting (but not, otherwise than in exceptional circumstances, more than six (6) times in any one Contract Year); and
- (h) assisting the Authority in any Comprehensive Area Assessment; and

32.1.3.2 permitting any Best Value Inspector, in connection with the exercise of his statutory powers and duties, at all reasonable times and upon reasonable notice, access to:

- (a) the Project Facilities and Project Network;

- (b) any document or data relating to the Services; and
- (c) any Service Provider Party.

## **32.2 Annual Service Report and Annual Service Plan**

- 32.2.1 The Service Provider shall no later than the Annual Service Report Date at its own cost, provide to the Authority the Annual Service Report.
- 32.2.2 The Service Provider shall upon a written request from the Authority promptly:
  - 32.2.2.1 provide access to such written evidence or other supporting information as the Authority may reasonably require to verify and audit the information and other material contained in the Annual Service Report (including relevant databases and electronically held documents) as well as details of which Service Provider Party contributed to each element of the Annual Service Report; and
  - 32.2.2.2 make available the use of its photocopying facilities to the Authority so that the Authority can copy whatever evidence, information or material it shall reasonably require.
- 32.2.3 If, in the Authority's reasonable opinion, the provision, performance or delivery of the Services (or any part of the Services) may be more effective, efficient and economic having regard to the Annual Service Report, and the Best Value Duty, then the Authority may serve a written notice upon the Service Provider ("**Best Value Service Change Notice**") stating the nature and timing of the changes to the provision, performance or delivery of the Services (or the relevant part of the Services) which the Authority desires.
- 32.2.4 The Service Provider shall, within twenty (20) Business Days of the date of receipt of a Best Value Service Change Notice, provide the Authority at its own cost with a written statement ("**Annual Service Plan**") containing the Service Provider's proposals to achieve the change to the Services (or the relevant part) in accordance with the Best Value Service Change Notice.

- 32.2.5 As soon as practicable after the Authority receives the Annual Service Plan, the Parties shall discuss and agree the issues set out in the Annual Service Plan. In such discussions the Authority may modify the Best Value Service Change Notice, in which case the Service Provider shall, as soon as practicable, and in any event not more than twenty (20) Business Days after the receipt of such modification, notify the Authority of any consequential changes to the Annual Service Plan.
- 32.2.6 If the Parties cannot agree on the contents of the Annual Service Plan then the dispute will be determined in accordance with clause 70 (*Dispute Resolution*).
- 32.2.7 As soon as practicable after the content of the Annual Service Plan has been agreed or otherwise determined pursuant to Dispute Resolution the Authority shall:
- 32.2.7.1 confirm in writing the Annual Service Plan; or
  - 32.2.7.2 withdraw the Best Value Service Change Notice.
- 32.2.8 If the Authority does not confirm the Annual Service Plan within twenty (20) Business Days of the Annual Service Plan having been agreed or otherwise determined pursuant to 70 (*Dispute Resolution*) then the Annual Service Plan shall be deemed to have been withdrawn.
- 32.2.9 If the Authority confirms the Annual Service Plan, the Authority shall propose an Authority Change in accordance with paragraph 1 of schedule 18 (*Change Protocol*).
- 32.2.10 To the extent that the implementation of the proposals in the Annual Service Plan will result in a decrease in the costs of the Service Provider, the Annual Unitary Charge shall be adjusted downwards to reflect an equal sharing in the decrease in costs as to the Authority and Service Provider respectively in accordance with clause 53 (*Financial Adjustments*).
- 32.2.11 To the extent that the implementation of the proposals in the Annual Service Plan will result in an increase in the costs of the Service Provider, the Annual Unitary Charge shall be adjusted upwards in accordance with clause 53 (*Financial Adjustments*).

32.2.12 The Service Provider shall take all reasonable steps to mitigate any costs arising as a consequence of a Best Value Service Change Notice and the Authority Change Notice served pursuant to clause 32.2.9.

### **32.3 Customer satisfaction survey**

32.3.1 The Service Provider shall, on each Customer Satisfaction Survey Date undertake (or procure the undertaking of) a customer satisfaction survey ("**Customer Satisfaction Survey**") the purpose of which shall include:

32.3.1.1 assessing the level of satisfaction among Service Users with the condition of the Project Network (including the way in which the Services are provided, performed and delivered) and, in particular, with the quality, efficiency and effectiveness of the provision of the Services;

32.3.1.2 assisting in the preparation of the Annual Service Plan;

32.3.1.3 monitoring the compliance by the Service Provider with the Output Specification; and

32.3.1.4 assisting the Authority in the preparation of its Best Value Performance Plans and the conduct of its Best Value Reviews.

32.3.2 The Customer Satisfaction Survey shall be undertaken by means of distributing to Service Users within ten (10) Business Days of each Customer Satisfaction Survey Date a questionnaire (or such other survey method as may be agreed between the Parties) in a form to be agreed with the Authority (acting reasonably).

32.3.3 The content of the questionnaire or other material to be used for any other survey method referred to in clause 32.3.2 and the method of undertaking the Customer Satisfaction Survey shall comply with all applicable Legislation and Guidance.

32.3.4 The Authority shall provide reasonable assistance and information (subject to compliance with all Legislation) to the Service Provider to enable the Service Provider to undertake the Customer Satisfaction Survey.



32.3.5 Within twenty (20) Business Days of each Customer Satisfaction Survey Date, the Service Provider shall prepare a summary of the results of the Customer Satisfaction Survey in such form as the Authority shall reasonably require and promptly upon a written request from the Authority provide such further details (including copies of all returned questionnaires and/or any other survey material used by the Service Provider) as the Authority shall reasonably require.

#### **32.4 Comprehensive Area Assessments**

32.4.1 Not less than three (3) Months before the commencement of each Contract Year, the Authority shall notify the Service Provider of the proposed CAA Date for the forthcoming Contract Year.

32.4.2 The Parties agree that any such Comprehensive Area Assessment shall be carried out in accordance with the applicable Legislation.

32.4.3 The Authority shall carry out the Comprehensive Area Assessment at its own cost.

32.4.4 In carrying out the Comprehensive Area Assessment, the Authority may take into account the results of any:

32.4.4.1 Annual Service Reports; and/or

32.4.4.2 Customer Satisfaction Survey; and/or

32.4.4.3 any other factors or documents that the Authority considers relevant,

and shall consult with the Service Provider on any proposals to change the Services to enable the Authority to comply with its Best Value Duty.

32.4.5 If in the Authority's reasonable opinion the results of the Comprehensive Area Assessment disclose that the provision, performance or delivery of the Services (or any part of the Services) may be more efficient, effective or economic having regard to the Best Value Duty, then the Authority may serve a Best Value Service Change Notice on the Service Provider stating the

nature and timing of the changes to the provision, performance or delivery of the Services (or the relevant part of the Services) which the Authority desires.

32.4.6 The Service Provider shall, within twenty (20) Business Days of the date of receipt of a Best Value Service Change Notice, at its own cost provide the Authority with a written statement ("**CAA Plan**") containing the Service Provider's proposals to achieve the change to the Services (or the relevant part) in accordance with the Best Value Service Change Notice.

32.4.7 As soon as practicable after the Authority receives the CAA Plan the Parties shall discuss and agree the issues set out in the CAA Plan. In such discussions the Authority may modify the Best Value Service Change Notice, in which case the Service Provider shall, as soon as practicable, and in any event not more than twenty (20) Business Days after the receipt of such modification, notify the Authority of any consequential changes to the CAA Plan.

32.4.8 If the Parties cannot agree on the contents of the CAA Plan then either party may refer the Dispute to Dispute Resolution.

32.4.9 As soon as practicable after the content of the CAA Plan has been agreed or otherwise determined pursuant to clause 70 (*Dispute Resolution*) the Authority shall:

32.4.9.1 confirm in writing the CAA Plan; or

32.4.9.2 withdraw the Best Value Service Change Notice.

32.4.10 If the Authority does not confirm the CAA Plan within twenty (20) Business Days of the CAA Plan having been agreed or determined in accordance with clause 70 (*Dispute Resolution*) then the Best Value Service Change Notice shall be deemed to have been withdrawn.

32.4.11 If the Authority confirms the CAA Plan the Authority shall propose an Authority Change in accordance with paragraph 1 of schedule 18 (*Change Protocol*).

32.4.12 To the extent that the implementation of the proposals contained in the CAA Plan will result in a decrease in the cost of the Service Provider, the Annual

Unitary Charge shall thereafter be adjusted downwards to reflect an equal sharing in the decrease in costs as to the Authority and Service Provider respectively in accordance with clause 53 (*Financial Adjustments*).

32.4.13 To the extent that the implementation of the proposals contained in the CAA Plan will result in an increase in the costs of the Service Provider, the Annual Unitary Charge shall thereafter be adjusted upwards in accordance with clause 53 (*Financial Adjustments*).

32.4.14 The Service Provider shall take all reasonable steps to mitigate any costs arising as a consequence of a Best Value Service Change Notice and an Authority Change Notice served pursuant to clause 32.4.11.

32.4.15 For the purposes of this clause 32.4 (*Comprehensive Area Assessments*), the terms Comprehensive Performance Assessment and Comprehensive Area Assessment shall be used interchangeably with regard to the regime that is in force at the date of the review of the Best Value Duty in accordance with the provisions of this clause 32 (*Best Value and Continuing Value for Money*).

## **PART H - SUPERVENING EVENTS**

### **33. RELIEF EVENTS, COMPENSATION EVENTS AND EXCUSING CAUSES**

#### **33.1 Relief Events**

33.1.1 If and to the extent that a Relief Event:

33.1.1.1 is the direct cause of a delay in Service Commencement; and/or

33.1.1.2 is the direct cause of a delay in the achievement of a Milestone by the Planned Milestone Completion Date; and/or

33.1.1.3 adversely affects the ability of the Service Provider to perform any of its obligations under this Contract,

then the Service Provider is entitled to apply for relief from any rights of the Authority arising under clause 62 (*Termination by the Authority*).

33.1.2 To obtain relief, the Service Provider must:

- 33.1.2.1 as soon as practicable, and in any event within ten (10) Business Days after it became aware that the Relief Event has caused or is likely to cause a delay in the achievement of Service Commencement or achievement of all Milestones by the Longstop Date and/or of a Milestone by the Planned Milestone Completion Date and/or adversely affect the ability of the Service Provider to perform its other obligations, give to the Authority a notice of its claim for relief from its obligations under this Contract, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;
- 33.1.2.2 within five (5) Business Days of receipt by the Authority of the notice referred to in clause 33.1.2.1 above, give full details of the relief claimed; and
- 33.1.2.3 demonstrate to the reasonable satisfaction of the Authority that:
- (a) the Service Provider and its sub-contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;
  - (b) the Relief Event directly caused the delay to the Planned Service Commencement Date or delay in achieving all Milestones by the Longstop Date or delay in achieving a Milestone by the relevant Planned Milestone Completion Date;
  - (c) the time lost and/or relief from the obligations under this Contract claimed could not reasonably be expected to be mitigated or recovered by the Service Provider acting in accordance with Good Industry Practice, without incurring material expenditure; and
  - (d) the Service Provider is using reasonable endeavours to perform its obligations under this Contract;

- 33.1.2.4 where applicable, not be in material non-compliance with clause 9.4 (*Inability to complete Milestone*), as at the date the relevant relief is applied for.
- 33.1.3 In the event that the Service Provider has complied with its obligations under clause 33.1.2 above, then:
- 33.1.3.1 the Planned Service Commencement Date or, the Longstop Date and/or, the relevant Planned Milestone Completion Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or
- 33.1.3.2 the Authority shall not be entitled to exercise its rights to terminate this Contract under clause 62 (*Termination by the Authority*).
- 33.1.4 Nothing in clause 33.1.3 above shall affect any entitlement to make Adjustments or any Adjustments made as a result of schedule 4 (*Payment Mechanism*) during the period in which the Relief Event is subsisting.
- 33.1.5 In the event that information required by clause 33.1.2 is provided after the dates referred to in that clause, then the Service Provider shall not be entitled to any relief in respect of the period for which the information is delayed.
- 33.1.6 The Service Provider shall notify the Authority if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.
- 33.1.7 If the Parties cannot agree the extent of the relief required, or the Authority disagrees that a Relief Event has occurred or that the Service Provider is entitled to any extension of the Planned Service Commencement Date or the Longstop Date or the relevant Planned Milestone Completion Date, the Parties shall resolve the matter in accordance with clause 70 (*Dispute Resolution*).

## **33.2 Compensation Events**

33.2.1 If, as a direct result of the occurrence of a Compensation Event:

33.2.1.1 the Service Provider is unable to achieve Service Commencement on or before the Planned Service Commencement Date, or achieve completion of all Milestones on or before the Longstop Date and/or achieve a Milestone by the relevant Planned Milestone Completion Date;

33.2.1.2 the Service Provider is unable to comply with its obligations under this Contract; and/or

33.2.1.3 the Service Provider incurs costs or loses revenue,

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

33.2.2 Subject to clause 33.2.4 below, to obtain relief and/or claim compensation the Service Provider must:

33.2.2.1 as soon as practicable, and in any event within fifteen (15) Business Days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Contract and/or the Service Provider to incur costs or lose revenue, give to the Authority a notice of its claim for an extension of time to the Planned Service Commencement Date or to the Longstop Date and/or to the relevant Planned Milestone Completion Date, payment of compensation and/or relief from its obligations under this Contract;

33.2.2.2 within ten (10) Business Days of receipt by the Authority of the notice referred to in clause 33.2.2.1, give full details of the Compensation Event and the extension of time and/or any Estimated Change in Project Costs and/or loss of the revenue claimed; and

33.2.2.3 demonstrate to the reasonable satisfaction of the Authority that:

- (a) the Compensation Event was the direct cause of the Estimated Change in Project Costs and/or loss of revenue and/or any delay in the achievement of Service Commencement by the Planned Service Commencement Date and/or breach of the Service Provider's obligations under this Contract and/or any delay in achieving completion of all Milestones on or before the Longstop Date and/or any delay in the completion of a Milestone by the relevant Planned Milestone Completion Date; and
- (b) the Estimated Change in Project Costs and/or loss of revenue, time lost, and/or relief from the obligations under this Contract claimed, could not reasonably be expected to be mitigated or recovered by the Service Provider acting in accordance with Good Industry Practice.

33.2.3 In the event that the Service Provider has complied with its obligations under clause 33.2.2 then:

33.2.3.1 in the case of a delay, the Planned Service Commencement Date, the Longstop Date, and/or the applicable Planned Milestone Completion Date shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay; and

33.2.3.2 in the case of an additional cost being incurred or revenue being lost by the Service Provider, the Authority shall compensate the Service Provider for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred and, without double counting, for revenue actually lost (to the extent it could not reasonably have been mitigated), within twenty (20) Business Days of receipt of a written demand by the Service Provider supported by all relevant information;

33.2.3.3 in the case of a payment of compensation for the Estimated Change in Project Costs and/or without double counting, loss of revenue that does not result in Capital Expenditure being

incurred by the Service Provider but which reflects a change in the costs being incurred by the Service Provider after the Service Commencement Date, the Authority shall compensate the Service Provider by way of an adjustment to the Annual Unitary Charge in accordance with clause 33.2.6; and/or

33.2.3.4 the Authority shall give the Service Provider such relief from its obligations under this Contract as is reasonable for such a Compensation Event, provided always that (for the avoidance of doubt) the Service Provider shall never be entitled to relief from its obligations in respect of:

- (a) traffic management (as set out in clause 35.16 (*Primary Duty of Co-ordination*));
- (b) Category 1 Defects;
- (c) Highways Emergencies;
- (d) Urgent Faults;
- (e) Civil Emergencies;
- (f) Urgent Aspect Lamp Failures; and
- (g) Performance Standard 4 save to the extent that:
  - (i) the relevant part of the Carriageway and/or Footway is inaccessible to the public in accordance with the provisions of this Contract; and/or
  - (ii) the relevant part of the Carriageway and/or Footway is flooded.

33.2.4 In the event that information is provided after the dates referred to in clause 33.2.2, then the Service Provider shall not be entitled to any extension of time, compensation, or relief from its obligations under this Contract in respect of the period for which the information is delayed.



33.2.5 If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Service Provider's obligations under this Contract, or the Authority disagrees that a Compensation Event has occurred (or as to its consequences), or that the Service Provider is entitled to any relief under this clause 0 (

33.2.6

33.2.7 *Compensation Events*), either Party may refer the matter to Dispute Resolution.

33.2.8 Any payment of compensation referred to in clause 33.2.3 shall be calculated in accordance with clause 53 (*Financial Adjustments*).

33.2.9 Without prejudice to clause 56 (*Insurance*), the Service Provider shall not be entitled to any payment which would not have been due under this Contract but for this clause 0 (

33.2.10

33.2.11 *Compensation Events*) to the extent that the Service Provider is or should be able to recover under any policy of insurance required to be maintained by the Service Provider or any Service Provider Party in accordance with this Contract (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of the Service Provider (or any Service Provider Party), including but not limited to non-disclosure or under-insurance) or any other policy of insurance which the Service Provider has taken out and maintained.

### 33.3 Excusing Causes

33.3.1 If, as a direct result of the occurrence of an Excusing Cause, the Service Provider is unable to provide the Services or perform any of its other obligations under this Contract then, to the extent set out in clause 33.3.2, the Service Provider is entitled:

33.3.1.1 save (in relation to Excusing Cause limbs (a) to (l) and (n) to (z)) where the Excusing Cause has been caused by any act or

omission of the Service Provider or any Service Provider Party;  
and

33.3.1.2 save (in relation to Excusing Cause limb (m)) where the Excusing Cause has been caused by a deliberate act or omission of the Service Provider and such deliberate act or omission would have had the effect of vitiating a material damage policy (including non-vitiation protection in respect of any claim made by the Service Provider), had such a policy been in place in respect of the Project:

to apply for relief from:

- (a) those of its obligations in respect of which the Service Provider is entitled to relief pursuant to clause 33.3.2, provided always that the Service Provider shall never be entitled to relief from its obligations in respect of:
  - (i) traffic management (as set out in clause 35.16 (*Primary Duty of Co-ordination*));
  - (ii) Category 1 Defects;
  - (iii) Highway Emergencies;
  - (iv) Urgent Faults;
  - (v) Civil Emergencies
  - (vi) Urgent Aspect Lamp Failures; and
  - (vii) Performance Standard 4 save to the extent that:
    - (1) the relevant part of the Carriageway and/or Footway is inaccessible to the public in accordance with the provisions of this Contract;
    - (2) the relevant part of the Carriageway and/or Footway is flooded;

- (3) where the circumstances of Excusing Cause limb (o) or (v) exist and the Ice Early Warning System is not operational as a result of such Excusing Cause only relief from paragraphs 2.1.3, 2.1.5 and 2.1.8 of part 4 of schedule 2 (*Output Specification*) will apply; and/or
- (4) where the circumstances of Excusing Cause Limb (aa) exist.

33.3.1.3 Adjustments being made to the Annual Unitary Charge to the extent that the Authority would otherwise have been entitled to make such Adjustments in respect of a failure by the Service Provider to comply with any of those of its obligations from which the Service Provider is entitled to be relieved pursuant to clause 33.3.2.

If the Service Provider or any Service Provider Party has contributed to the Excusing Cause, the Service Provider's entitlement to relief pursuant to this clause 33.3 (*Excusing Causes*) shall be reduced by an amount proportional to such contribution to the Excusing Cause.

33.3.2 Column 1 (headed "Summary of Excusing Cause") of the table set out in clause 33.3.3 sets out a summary of the Excusing Causes. Subject to clause 33.3.1, but without prejudice to clause 33.3.4, where in relation to an Excusing Cause summarised in column 1 of the table:

- 33.3.2.1 the symbol "✓" appears in any column in the same row as the Excusing Cause is listed, then in the event of the occurrence of such Excusing Cause the Service Provider shall be entitled to apply for relief in respect of the relevant obligations contained in the Performance Standard specified at the top of that column; and
- 33.3.2.2 the symbol "-" appears in any column in the same row as the Excusing Cause is listed, then notwithstanding anything to the contrary in this Contract, in the event of the occurrence of such Excusing Cause, the Service Provider shall not be entitled to

apply for relief in respect of the obligations contained in the Performance Standard specified at the top of that column,

and provided always that the information contained in the column headed "Summary of Excusing Cause" is illustrative only and without prejudice to the definition of the term "Excusing Cause" as contained in schedule I (*Definitions, Interpretation and Construction*) or any other provision in this Contract.

33.3.3 Excusing Cause Relief Table

Summary of Excusing Cause	Limb of Excusing Cause Definition	Performance Standard												
		1A	1B	2	3	4	5	6	7	8	9	10		
Breach by the Authority of any express contractual obligation	(a)	-	√	√	√	-	√	√	√	√	√	√	√	√
Where the circumstances set out in clause 7.12.3 ( <i>Latent Defects</i> ) apply	(b)	-	√	√	-	-	-	-	-	-	-	-	-	-
Where the circumstances in clause 15.5.5 ( <i>Additional Access</i> ) apply	(c)	-	√	√	√	-	-	-	√	-	-	-	-	-
When the circumstances in clause 15.6 ( <i>Observance by the Service Provider of Land Rights</i> ) apply	(d)	-	√	√	√	-	-	-	√	-	-	-	-	-
Where the circumstances in clause 16.4 ( <i>Excusing Cause</i> ) apply	(e)	-	-	√	-	-	-	-	-	-	-	-	-	-
Where the circumstances in clauses 16.9.3 or 16.9.4 ( <i>Service Provider to take Proceedings</i> ) apply	(f)	-	-	√	-	-	-	-	-	-	-	-	-	-
Where the presence of a Protestor or Trespasser at the UTC Centre affects the performance of the Services provided that the Service Provider has used all reasonable endeavours to gain access to the UTC Centre	(g)	-	-	√	-	-	-	-	-	-	-	√	-	-
The presence of gypsies or travellers on any part of the Project Network, provided that the Service Provider has complied with clauses 18.4.4 and 18.4.6 ( <i>Gypsies and Travellers</i> )	(h)	-	√	√	√	-	-	-	√	-	√	√	-	-
Where the Authority fails to provide reasonable assistance and information (subject to compliance with all Legislation) to the Service Provider to enable the Service Provider to enable the Service Provider to undertake the Customer Satisfaction Survey pursuant to clause 32.3.4 ( <i>Customer Satisfaction Survey</i> )	(i)	-	-	-	-	-	-	-	-	-	-	-	-	√
Where the circumstances set out in clause 35.21.5 ( <i>Specified Licences</i> ) apply	(j)	-	√	√	√	-	-	-	√	-	√	√	-	-

Summary of Excusing Cause	Limb of Excusing Cause Definition	Performance Standard												
		1A	1B	2	3	4	5	6	7	8	9	10		
Where there is a breach of a Specified Licence by a Specified Licensee or the presence of any unlawful Specified Licence then occurs as set out in clause 35.21.6 ( <i>Specified Licences</i> )	(k)	-	√	√	√	√	-	-	-	-	-	-	-	-
Where the circumstances set out in clause 36.6 ( <i>Refusal or delay by Authority to take requested action</i> ) apply	(l)	-	√	√	√	-	√	√	√	√	√	√	√	√
Where the circumstances set out in clause 56.12.4 ( <i>Reinstatement</i> ) apply	(m)	-	√	√	√	-	√	√	√	√	√	√	√	√
Where the circumstances in paragraph 4.10 of schedule 36 ( <i>Clause 16 Protocol</i> ) apply	(n)	-	-	√	-	-	-	-	-	-	-	-	-	-
A failure in the supply of electricity to any Powered Apparatus (other than the circumstances set out in limb (d) of the definition of Relief Event) to the extent that this is beyond the reasonable control of the Service Provider and Service Provider Parties, provided that relief shall not apply in respect of those items of Powered Apparatus to which the Service Provider is required (pursuant to schedule 2 ( <i>Output Specification</i> )) to ensure the continuous supply of electricity	(o)	-	-	√	-	√	-	√	-	√	-	√	-	-
Where the circumstances in paragraph 2.1.3, part 7 of schedule 2 ( <i>Output Specification</i> ) apply	(p)	-	-	-	-	-	-	-	-	√	-	√	-	-
Where the circumstances in paragraph 2.6.3, part 3B of schedule 2 ( <i>Output Specification</i> ) apply	(q)	-	-	-	√	-	-	-	-	-	-	-	-	-
Where the circumstances in paragraph 5.10 of schedule 7 ( <i>Attachments and Advertising</i> ) apply	(r)	-	√	√	√	-	-	-	-	-	-	-	-	-
The circumstances in which the Service Provider complies with the directions and/or instructions issued by the Authority pursuant to paragraph 2.2 ( <i>Civil Emergency Declaration</i> ) of schedule 10 ( <i>Civil Emergency Planning</i> )	(s)	-	√	√	√	-	√	√	√	√	√	√	√	√

Summary of Excusing Cause	Limb of Excusing Cause Definition	Performance Standard												
		1A	1B	2	3	4	5	6	7	8	9	10		
The circumstances when the Service Provider diverts resources away from achieving Performance Standard 1B, 2 or 3 to attend a Highways Emergency in accordance with paragraph 2.2 ( <i>Highways Emergency</i> ) of part 5 of schedule 2 ( <i>Output Specification</i> )	(t)	-	√	√	√	-	-	-	-	-	-	-	-	-
A failure in the telecommunications network (to the extent that this is beyond the reasonable control of the Service Provider and Service Provider Parties)	(u)	-	-	√	-	-	√	-	-	√	-	-	-	-
Failure or disruption to power occurring in DNO electricity distribution system	(v)	-	√	√	-	√	-	-	√	-	-	-	-	-
Where the Service Provider is unable to comply with its obligations under this Agreement solely as a result of the failure or inadequate capacity of a storm water or sewerage system owned by a third party (where, for the avoidance of doubt, shall exclude any Drainage Structure).	(w)	-	√	√	-	-	-	-	-	-	-	-	-	-
Where the Emergency Services take over the Project Network or part of the Project Network for more than 3 hours and in respect of paragraphs 2.2.3.1 (a), 2.2.3.1 (b), 2.2.4.1, 2.2.4.2, 2.2.5.1, 2.2.5.2, 2.7.9.1 (a)(i) & (ii), 2.7.9.1(b)(i) & (ii), 2.7.15.1(a) & (b), 2.17.13.1 (d), 2.8.1.1, 2.8.1.2 and 2.11.4 of part 2 of schedule 2 ( <i>Output Specification</i> ) less than 3 hours.	(x)	-	√	√	-	-	-	-	-	-	-	-	-	-
Where Statutory Undertakers' emergency works utilise Project Roads and/or Streetscene Land where the Service Provider had planned works	(y)	-	√	√	-	-	-	-	-	-	-	√	-	-
Where the Service Provider fails to achieve a Milestone as a result of the failure by the DNO to perform its obligations in respect of Non-Contestable Works as set out in clause 9.5 ( <i>DNO Non-Performance</i> )	(z)	-	-	-	-	-	-	-	-	-	-	-	-	-
Where the circumstances in paragraph 2.3 of schedule 10 ( <i>Civil Emergency Planning</i> ) apply	(aa)	-	-	-	-	√	-	-	-	-	-	-	-	-

Summary of Excusing Cause	Limb of Excusing Cause Definition	Performance Standard												
		1A	1B	2	3	4	5	6	7	8	9	10		
Where the circumstances in paragraph 1.11 of part 2 of schedule 14 ( <i>Call-Off Agreements</i> ) apply	(bb)	-	√	√	√	-	-	-	-	-	-	-	-	-
Where the circumstances in paragraph of 5.2.4 or 7.3.4 of part 2 ( <i>UTC Centre Lease</i> ) of Annexure 4 ( <i>Leases</i> ) apply	(cc)	-	-	-	-	-	-	-	√	-	-	-	-	-
Where the condition of the Lapal Tunnel has an adverse impact on the Service Provider's ability to perform the Services	(dd)	-	√	√	-	-	-	-	-	-	-	-	-	-
Where Statutory Undertaker works overrun and utilise Project Roads and/or Streetscene Land where the Service Provider has planned works	(ee)	-	√	√	-	-	-	-	-	-	-	√	-	-



33.3.4 Subject to clause 33.3.5, to claim an Excusing Cause the Service Provider shall:

33.3.4.1 as soon as practicable, and in any event not later than ten (10) Business Days after it becomes aware that the Excusing Cause has caused or is likely to adversely affect the ability of the Service Provider to perform its obligations under this Contract, give to the Authority a notice of its claim for relief against Adjustments as appropriate, any extension of time and/or relief from its obligations under this Contract provided that in respect of relevant Performance Standard the Service Provider shall be entitled to relief from the relevant Performance Standard as set out in the Excusing Cause Relief Table at clause 33.3.3;

33.3.4.2 within ten (10) Business Days of receipt by the Authority of the notice referred to in clause 33.3.4.1 give full details of:

- (a) the Excusing Cause;
- (b) any extension of time; or
- (c) the relief against Adjustments claimed or other relief claimed;

33.3.4.3 demonstrate to the reasonable satisfaction of the Authority that:

- (a) the Service Provider or any Service Provider Party could not have avoided such occurrence or consequences by steps which they must reasonably be expected to have taken; and
- (b) the Excusing Cause was the direct cause of the Service Provider being unable to perform the Services or any of its other obligations under this Contract; and
- (c) the relief from the performance of the Services and any of its other obligations under this Contract claimed, where relevant), could not reasonably be expected to be

mitigated by the Service Provider acting in accordance with Good Industry Practice; and

(d) the Service Provider is using reasonable endeavours to perform its obligations under this Contract; and

33.3.4.4 where applicable, not be in material non-compliance with clauses 9.4 (*Inability to complete Milestone*) and 9.5 (*DNO Non-Performance*), as at the date on which the relevant Excusing Cause is claimed.

33.3.5 If the Service Provider has complied with its obligations under clause 33.3.4, then (subject always to clauses 33.3.7, 33.3.9 and 34 (*Highway Works Authority*)):

33.3.5.1 the Planned Service Commencement Date or the relevant Planned Milestone Completion Date and/or, the Long Stop Date shall be postponed by such time as is reasonable for such an Excusing Cause, taking into account the likely effect of the delay;

33.3.5.2 the Authority shall not be entitled to exercise its rights to terminate this Contract under clause 62 (*Termination by the Authority*) to the extent that, but for this clause 33.3 (*Excusing Causes*), such rights would otherwise arise in respect of obligations from which the Service Provider is (pursuant to clauses 33.3.1 and 33.3.2) entitled to relief;

33.3.5.3 the Authority shall not be entitled to make Adjustments under schedule 4 (*Payment Mechanism*) in respect of any failure by the Service Provider to comply with any of those obligations from which the Service Provider is entitled to be relieved pursuant to clause 33.3.2 for the period during which the relevant Excusing Cause is subsisting; and

33.3.5.4 the Authority shall give the Service Provider such relief from obligations as detailed pursuant to clause 33.3.2 and any other relevant provisions of this Contract, as is reasonable for the

relevant Excusing Cause, provided always that the Service Provider shall never be entitled to relief from its obligations in respect of:

- (a) traffic management (as set out in clause 35.16 (*Primary Duty of Co-ordination*));
- (b) Category 1 Defects;
- (c) Highways Emergencies;
- (d) Urgent Faults;
- (e) Civil Emergencies;
- (f) Urgent Aspect Lamp Failures; and
- (g) Performance Standard 4 save to the extent that:
  - (i) the relevant part of the Carriageway and/or Footway is inaccessible to the public in accordance with the provisions of this Contract;
  - (ii) the relevant part of the Carriageway and/or Footway is flooded;
  - (iii) where Excusing Cause limb (o) or (v) exists and the Ice Early Warning System is not operational as a result of such Excusing Cause only relief from paragraphs 2.1.3, 2.1.5 and 2.1.8 of part 4 of schedule 2 (Output Specification) should apply;
  - (iv) where the circumstances of Excusing Cause limb (aa) exist.

33.3.6 In the event that information referred to in clause 33.3.4 is provided after the dates referred to in that clause, then the Service Provider shall not be entitled to any relief in respect of the period for which the information is delayed.

33.3.7 The Service Provider shall notify the Authority if at any time it realises or becomes aware of any information relating to the Excusing Cause giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

33.3.8 If the Parties cannot agree the extent of any relief from the Service Provider's obligations under this Contract or relief from any Adjustments which should or should not be made, or the Authority disagrees that an Excusing Cause has occurred (or as to its consequences), or that the Service Provider is entitled to any relief under this clause 33.3 (*Excusing Causes*) the Parties shall resolve the matter in accordance with clause 70 (*Dispute Resolution*)

33.3.9 Without prejudice to clause 56 (*Insurance*) and notwithstanding the provision of clause 33.3.5, the Authority shall be entitled to:

33.3.9.1 grant no relief to the Service Provider pursuant to clause 33.3.5 (other than relief granted to the Service Provider pursuant to clause 33.3.5.1 and clause 33.3.5.2); and/or

33.3.9.2 make Adjustments under schedule 4 (*Payment Mechanism*) arising as a result of the Excusing Cause,

where and to the extent that the Service Provider is able to recover the loss occasioned to it by such failure to grant relief and/or such Adjustment (as the case may be) under any policy of insurance required to be maintained by the Service Provider or any Service Provider Party in accordance with this Contract (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of the Service Provider (or any Service Provider Party), including but not limited to non-disclosure or under-insurance) or any other policy of insurance which the Service Provider has taken out and maintained.

## **34. HIGHWAY WORKS AUTHORITY**

### **34.1 Major HWA Works, Standard HWA Works, Small HWA Works and Immediate HWA Works**

34.1.1 The Authority shall, when acting in its capacity as a Highway Works Authority, and proposing to undertake or procure the undertaking of any

works and/or management not specifically dealt with by any other express provision of this Contract within or about the Project Network, and the Authority does not (in its discretion) require those Project Network Parts to be De-Accrued pursuant to clause 37 (*Accrual and De-Accrual of Project Network Parts*) and schedule 19 (*Accrual and De-Accrual of Project Network Parts*), register all relevant particulars on the Street Works Register, as required by section 53 of NRSWA as amended by the Traffic Management Act 2004 with the information prescribed in The Street Works (Registers, Notices, Directions and Designations) (England) Regulations 2007, where such works are:

- 34.1.1.1 Small HWA Works, at least three (3) Business Days;
- 34.1.1.2 Standard HWA Works, at least ten (10) Business Days; or
- 34.1.1.3 Major HWA Works, at least three (3) Months,

prior to the date on which the Authority commences the works described in this clause 34 (*Highway Works Authority*) ("**Authority Work Start Date**") or, in the case of Immediate HWA Works, within two (2) hours of the start of the Immediate HWA Works.

34.1.2 The Authority shall (acting reasonably) as soon as practicable after the date on which the relevant works were noted in the Street Works Register and in any event at least two (2) Business Days in respect of Small HWA Works, at least five (5) Business Days in respect of Standard HWA Works and at least ten (10) Business Days in respect of Major HWA Works prior to the Authority Work Start Date notify the Service Provider of the details of any paragraphs of any Parts of the Output Specification and/or any other relevant provisions of this Contract with which the Service Provider shall be deemed to have complied in respect of the Project Network Parts within and/or adjacent to the Work Site for the duration of any Small HWA Works, Standard HWA Works or Major HWA Works (and in the event of any dispute these shall apply from the date on which the relevant works commence).

34.1.3 The Service Provider shall, from the date of registration of the required particulars on the Street Works Register registered pursuant to clause 34.1.1,

comply with the provisions of clause 31 (*Maintainability Assessment Service*).

34.1.4 The Service Provider shall, in response to any entry in the Street Works Register registered pursuant to clause 34.1.1, respond to the Authority where such notice is in respect of:

34.1.4.1 Small HWA Works, within at least one (1) Business Day;

34.1.4.2 Standard HWA Works, within at least three (3) Business Days;  
or

34.1.4.3 Major HWA Works, within at least ten (10) Business Days,

prior to the Authority Work Start Date with a written response ("**Highway Works Authority Works Response**") setting out;

34.1.4.4 any matters which the Authority should have regard to in order to minimise disruption to the Services, provided that the Authority shall not be bound to have regard to such matters;

34.1.4.5 if applicable, any additional paragraphs of schedule 2 (*Output Specification*) and/or any other relevant provisions of this Contract it considers should have been referred to in the notice pursuant to clause 34.1.1; and

34.1.4.6 any other matters which the Service Provider is aware of (or should have been aware of had the Service Provider been complying with the other provisions of the Contract) on the Project Network which may impact on the Small HWA Works or the Standard HWA Works or the Major HWA Works.

34.1.5 Where the Authority receives a response from the Service Provider pursuant to clause 34.1.4 the Authority shall (acting reasonably), as soon as reasonably practicable and, in any event, within ten (10) Business Days notify the Service Provider of whether the Authority considers that the Service Provider shall be deemed to have complied with any additional paragraphs of the Output Specification and/or any other relevant provisions of this Contract (other than those provided pursuant to clause 34.1.2) and notification of such

provisions shall apply retrospectively from the date on which the relevant Small HWA Works, Standard HWA Works or Major HWA Works have prevented compliance with any paragraphs of the Output Specification and/or any other relevant provisions of this Contract.

34.1.6 The Service Provider shall notify the Authority in writing, as soon as reasonably practicable, and in any event, within ten (10) Business Days, if it disagrees with the Authority's view contained in such notice specified in clause 34.1.5, detailing its reasons. The Parties shall use reasonable endeavours to meet within a further ten (10) Business Days to come to an agreement. If no agreement is reached, either Party may refer such matter to Dispute Resolution.

34.1.7 The Service Provider shall, subject to clause 34.1.2, be obliged to continue to comply with the provisions of this Contract for the duration of the Small HWA Works or Standard HWA Works or Major HWA Works (as the case may be) until such time as an alternative agreement is reached or determined.

34.1.8 The Authority shall notify the Service Provider within ten (10) Business Days of the date on which the Small HWA Works or Standard HWA Works or Major HWA Works (as the case may be) have been completed ("**Authority Works End Date**"), and from the Authority Works End Date, the provisions of clause 34.1.2 (or as otherwise agreed or determined in accordance with clause 34.1.6) shall cease to apply and the Service Provider shall provide the Services to all Project Network Parts arising from or subject to the Small HWA Works, Standard HWA Works or Major HWA Works.

34.1.9 The Service Provider shall, within twenty (20) Business Days of the date of receipt by the Service Provider of the notice referred to in clause 34.1.8, notify the Authority in writing of:

34.1.9.1 whether, as a result of the Standard HWA Works or Major HWA Works, the Monthly Unitary Charge should be adjusted upwards or downwards, and detailed reasons as to why the Standard HWA Works or Major HWA Works will cause an increase or decrease in future maintenance costs with reference to any issues the Service Provider raised pursuant to clause 31 (*Maintainability Assessment Service*); and

34.1.9.2 confirmation of whether the Service Provider considers (acting reasonably) that the Proposed Project Network Part or Proposed Project Network Parts within or adjacent to the Work Site in respect of Small HWA Works or Standard HWA Works or Major HWA Works (as the case may be) comply with the Output Specification on the Authority Works End Date provided that the Service Provider shall not be entitled to dispute compliance with schedule 2 (*Output Specification*) if the Service Provider has not raised this issue previously when complying with the requirements of clause 31 (*Maintainability Assessment Service*), save where such issue was as a result of circumstances not reasonably foreseeable by the Service Provider as at the date on which the relevant Y value was originally agreed or determined.

34.1.10 If the Service Provider notifies the Authority that it does not consider that the Proposed Project Network Part or Proposed Project Network Parts within or adjacent to the Work Site in respect of Small HWA Works or Standard HWA Works or Major HWA Works (as the case may be) comply with the Output Specification pursuant to clause 34.1.9.2 and the Authority agrees with the standard and reasons notified to it by the Service Provider, the Authority shall:

34.1.10.1 undertake (or shall procure the undertaking) of the necessary works to the Proposed Project Network Part or Proposed Project Network Parts so that they meet the Output Specification and when the Authority is satisfied that any failures have been rectified, inform the Service Provider of such compliance; or

34.1.10.2 provide a notice requiring the Service Provider to rectify the failure to meet the Output Specification and a reasonable timeframe for undertaking such works; or

34.1.10.3 require such Proposed Project Network Part or Proposed Project Network Parts be deemed to comply with specific paragraphs of the Output Specification for the remainder of the Contract Term or until such time that works are carried out to the Proposed



Project Network Part or Proposed Project Network Parts so that they comply with the Output Specification.

34.1.11 If clause 34.1.10.1 or 34.1.10.2 apply, the Authority shall (acting reasonably) specify to the Service Provider in writing which paragraphs of the Output Specification the Proposed Project Network Part or Proposed Project Network Parts shall be deemed to comply with and whether any relief should be provided from any other obligations on the Service Provider under the Contract until:

34.1.11.1 in respect of works carried out pursuant to clause 34.1.10.1, until the date on which the Authority informs the Service Provider that works are completed; or

34.1.11.2 in respect of works carried out pursuant to clause 34.1.10.2 until the date by which such works are due to be completed.

34.1.12 The Authority shall pay the Service Provider for the works referred to in clause 34.1.10.2 in accordance with the rates set out in the Catalogue of Low Value Changes and, where no applicable rates are included in the Catalogue of Low Value Changes, paragraph 2.3 of part 2 of schedule 18 (*Change Protocol*) (irrespective of whether such payment exceeds the amounts specified in the definition of a Low Value Change. The Service Provider shall, following completion of such works, notify the Authority of the amount calculated in accordance with this clause 34.1.12. The Service Provider shall include such amount in the next Invoice following completion of such works.

34.1.13 If the Authority does not agree with the contents of the notice provided by the Service Provider pursuant to clause 34.1.9.2, the Authority shall, as soon as reasonably practicable, and in any event, within ten (10) Business Days, notify the Service Provider that it does not agree with the contents of the notice, detailing the reasons. The Parties shall use reasonable endeavours to meet within a further ten (10) Business Days to come to an agreement. If no agreement is reached, either Party may refer the matter to Dispute Resolution.

34.1.14 The Authority shall notify the Service Provider at the Monthly Monitoring Meeting in the Month following the Month in which the Service Provider issued its notice pursuant to clause 34.1.9 of whether the Authority agrees

with the proposed adjustment detailed in the Service Provider's notice provided pursuant to clause 34.1.9.1. If the Authority disagrees with the contents of the notice referred to in clause 34.1.9.1, the Authority shall (acting reasonably) take into account the following in determining whether, and to what extent, any adjustment to the Monthly Unitary Charge shall occur (with effect from the Authority Works End Date) as a result of Standard HWA Works or Major HWA Works:

34.1.14.1 any applicable Y values listed in part 2 or part 3 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) or as otherwise agreed or determined pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*) in respect of the relevant Project Network Part or Project Network Parts in existence immediately prior to the Standard HWA Works or Major HWA Works;

34.1.14.2 any applicable Y values in part 2 or part 3 of schedule 19 (*Accrual and De-Accrual of Project Network Parts*) or as otherwise agreed or determined pursuant to schedule 19 (*Accrual and De-Accrual of Project Network Parts*) in respect of the relevant Project Network Part or Project Network Parts in existence immediately following the Standard HWA Works or Major HWA Works;

34.1.14.3 the extent to which the Standard HWA Works or Major HWA Works replace or improve existing Project Network Parts; and

34.1.14.4 any comments made by the Service Provider pursuant to clause 31 (*Maintainability Assessment Service*).

34.1.15 Any adjustments to the Annual Unitary Charge arising from Small HWA Works shall be dealt with pursuant to clause 53.3.5 (*Financial Adjustments*).

34.1.16 The definitions of Project Network 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 this clause 34 (*Highway Works Authority*).

### **34.2 Tame Valley Viaduct ("TVV") and the Aston Road North Flyover ("ARNF")**

- 34.2.1 The Authority shall, when acting in its capacity as a Highway Works Authority, and proposing to undertake or procure the undertaking of the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works, and the Authority does not (in its discretion) require those Project Network Parts to cease to be Project Network Parts by means of an Authority Change pursuant to schedule 18 (*Change Protocol*), register all relevant particulars on the Street Works Register, as required by section 53 of NRSWA as amended by the Traffic Management Act 2004 with the information prescribed in The Street Works (Registers, Notices, Directions and Designations) (England) Regulations 2007, at least three (3) Months prior to the Authority Work Start Date.
- 34.2.2 The Authority shall (acting reasonably) as soon as practicable after the date on which the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works were noted in the Street Works Register, and in any event at least sixty (60) Business Days prior to the Authority Work Start Date notify the Service Provider of the details of any paragraphs of any Parts of schedule 2 (*Output Specification*) and/or any other relevant provisions of this Contract with which the Service Provider shall be deemed to have complied in respect of the Project Network Parts within and/or adjacent to the Work Site for the duration of the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works (and in the event of any dispute such Parts of Schedule 2 (*Output Specification*) or provisions shall apply from the date on which the relevant works commence).
- 34.2.3 If the Authority decides to undertake or procure the undertaking of the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works, the Authority shall, in addition to the obligations contained in clauses 34.2.1 and 34.2.2:
- 34.2.3.1 notify the Service Provider as soon as reasonably practicable of the date on which the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works are due to

commence and provide the Service Provider with a copy of the programme for the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works;

34.2.3.2 provide the Service Provider with a copy of the Approval in Principle process and use reasonable endeavours to procure that the Service Provider may attend any inspection necessary to enable the Service Provider to satisfy itself as to the future maintenance costs of the TVV and/or the ARNF assuming completion of the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works.

34.2.4 Following registration in the Street Works Register of the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works pursuant to clause 34.2.1, the Service Provider shall submit any revisions required to the Annual Programme pursuant to the Review Procedure.

34.2.5 The Service Provider shall, in response to any entry in the Street Works Register registered pursuant to clause 34.2.1, respond to the Authority within at least ten (10) Business Days prior to the Authority Work Start Date with a written response ("**Highway Works Authority Works Response**") setting out:

34.2.5.1 any matters which the Authority should have regard to in order to minimise disruption to the Services, provided that (without prejudice to clause 8.13 (*Compensation Event*)) the Authority shall not be bound to have regard to such matters;

34.2.5.2 if applicable, any additional paragraphs of the Output Specification and/or any other relevant provisions of this Contract it considers should have been referred to in the entry in the notice issued pursuant to clause 34.2.1; and

34.2.5.3 any other matters which the Service Provider is aware of on the Project Network which may impact on the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works.

- 34.2.6 Where the Authority receives a response from the Service Provider pursuant to clause 34.2.5 the Authority shall, as soon as reasonably practicable, notify the Service Provider of whether the Authority considers that the Service Provider shall be deemed to have complied with any additional paragraphs of schedule 2 (*Output Specification*) and/or any other relevant provisions of this Contract (other than those provided pursuant to clause 34.2.2).
- 34.2.7 The Service Provider shall notify the Authority in writing, as soon as reasonably practicable, and in any event, within ten (10) Business Days, if it disagrees with the Authority's view contained in such notice specified in clause 34.2.6, detailing its reasons. The Parties shall use reasonable endeavours to meet within a further ten (10) Business Days to come to an agreement. If no agreement is reached, either Party may refer such matter to Dispute Resolution.
- 34.2.8 The Service Provider shall, subject to clauses 34.2.2 and clauses 8.4 to 8.12 inclusive, be obliged to continue to comply with the provisions of this Contract for the duration of the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works and may attend any pre-start meetings to familiarise itself with the details and issues concerning the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works (including the materials and methods of construction to be used) and the Authority shall, if the Service Provider requests, procure access for the Service Provider to attend such pre-start meetings. The Service Provider may inspect the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works or any part thereof in order to satisfy itself of the effect of such works on future maintenance costs, and the Authority shall, if the Service Provider so requests, procure timely access for the Service Provider to undertake such inspection (but taking into account the need to avoid any delay in such works). The Service Provider shall notify the Authority in writing, as soon as reasonably practicable if the Service Provider discovers upon any inspection made pursuant to this clause 34.2.8 (or otherwise) that the TVV Strengthening Works or (as the case may be) the ARNF

Strengthening Works will either increase or decrease the net future maintenance costs of the TVV or ARNF (as the case may be).

34.2.9 The Authority shall notify the Service Provider within thirty (30) Business Days after the date on which the Authority considers that the TVV Strengthening Conditions or, as the case may be, the ARNF Strengthening Conditions have been satisfied following completion of the TVV Strengthening Works or (as the case may be) the ARNF Strengthening Works.

34.2.10 The Authority shall, as soon as reasonably practicable after the Service Provider's written request for the same (such request to be made not later than ten (10) Business Days after the Authority's notification under clause 34.2.9), provide to the Service Provider such additional information as the Service Provider may request, acting reasonably, regarding the satisfaction of the TVV Strengthening Conditions or, as the case may be, the ARNF Strengthening Conditions.

34.2.11 The Service Provider shall, within twenty (20) Business Days after the Authority's notification under clause 34.2.9 or (if later) the date on which any additional information requested under clause 34.2.10 is provided to the Service Provider, notify the Authority either:

34.2.11.1 that the Service Provider agrees that the TVV Strengthening Conditions or, as the case may be, the ARNF Strengthening Conditions have been satisfied; or

34.2.11.2 that the Service Provider does not agree that the TVV Strengthening Conditions or, as the case may be, the ARNF Strengthening Conditions have been satisfied (together with its reasons for such opinion).

34.2.12 If clause 34.2.11.2 applies, then the Parties shall, for a period of thirty (30) Business Days after the date of the Service Provider's notification under that clause, use their respective reasonable endeavours to reach agreement as to the matters set out in that notification, failing which either Party may refer any Dispute in respect of those matters to Dispute Resolution.

- 34.2.13 From the TVV Strengthening Conditions Satisfaction Date:
- 34.2.13.1 the provisions of clause 34.2.2 (or as otherwise agreed or determined in accordance with clause 34.2.7) shall cease to apply in respect of the TVV Strengthening Works; and
  - 34.2.13.2 TVV shall no longer be part of the Deemed to Comply Structures, Bridges and Tunnels.
- 34.2.14 From the ARNF Strengthening Conditions Satisfaction Date:
- 34.2.14.1 the provisions of clause 34.2.2 (or as otherwise agreed or determined in accordance with clause 34.2.7) shall cease to apply in respect of the ARNF Strengthening Works; and
  - 34.2.14.2 ARNF shall no longer be part of the Deemed to Comply Structures, Bridges and Tunnels.
- 34.2.15 The Authority shall procure from the relevant contractors as soon as reasonably practicable following completion of the TVV Strengthening Works or ARNF Strengthening Works (as the case may be and in the case of any as built drawings and design drawings within two (2) years of the relevant completion):
- 34.2.15.1 the signed assessment certificate;
  - 34.2.15.2 the CAT3 Check Certificate in accordance with BD 2/05 Technical Approval of Highways Structures;
  - 34.2.15.3 the signed design certificate;
  - 34.2.15.4 the signed construction certificate;
  - 34.2.15.5 collateral warranties from the contractor who has carried out the strengthening 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;
  - 34.2.15.6 the assignment of the guarantee period from the strengthening contract to the Service Provider, provided that

the Authority shall not be obliged to use reasonable endeavours where to do so would require the Authority to incur material expenditure;

34.2.15.7 that the relevant contractor updates the TVV and/or ARNF Health and Safety Files to comply with CDM Regulations;

34.2.15.8 the return of the Health and Safety File to the Service Provider; and

34.2.15.9 any as built drawings and design drawings as soon as those become available to the Authority.

34.2.16 The Service Provider shall (acting reasonably), within twenty (20) Business Days of the date of receipt by the Service Provider of the notice referred to in clause 34.2.9, notify the Authority in writing of:

34.2.16.1 whether, as a result of the TVV Strengthening Works or, as the case may be, the ARNF Strengthening Works, the Monthly Unitary Charge should be adjusted so as to ensure that the Service Provider is left in no better and no worse position (as that term is defined in clause 53.3.3), the extent of any adjustment, and detailed reasons as to why the TVV Strengthening Works or, as the case may be, the ARNF Strengthening Works will cause a change in future maintenance costs and taking into account, where relevant, any notification given by, or any information arising from any inspection carried out by, the Service Provider pursuant to clause 34.2.8; and

34.2.16.2 whether the Service Provider considers (acting reasonably) that the Project Network Part or Project Network Parts within or adjacent to the Work Site in respect of TVV Strengthening Works or, as the case may be, the ARNF Strengthening Works comply with schedule 2 (*Output Specification*) and/or any other relevant provisions of this Contract on the TVV Strengthening Conditions Satisfaction Date or, as the case may be, the ARNF Strengthening



Conditions Satisfaction Date, in each case taking into account the condition of such Project Network Part prior to the carrying out of the TVV Strengthening Works or, as the case may be, the ARNF Strengthening Works.

- 34.2.17 If the Authority agrees with the contents of the notification provided by the Service Provider pursuant to clause 34.2.16.1 and/or 34.2.16.2, the Monthly Unitary Charge shall be revised in accordance with clause 53 (*Financial Adjustments*) with effect from the TVV Strengthening Conditions Satisfaction Date or, as the case maybe, the ARNF Strengthening Conditions Satisfaction Date.
- 34.2.18 If the Authority does not agree with the contents of the notification provided by the Service Provider pursuant to clause 34.2.16.1 and/or clause 34.2.16.2, the Authority shall, as soon as reasonably practicable, and in any event, within ten (10) Business Days, notify the Service Provider that it does not agree with the relevant contents of the notification, specifying the reasons. The Parties shall use reasonable endeavours to meet within a further ten (10) Business Days to come to an agreement. If no agreement is reached, either Party may refer the matter to Dispute Resolution.

## **PART I - STATUTORY POWERS**

### **35. DELEGATION OF STATUTORY FUNCTIONS**

#### **35.1 General Delegation**

35.1.1 Subject to the provisions of this clause 35 (*Delegation of Statutory Functions*), clause 23 (*Design*) and the limitations set out in schedule 23 (*Statutory Functions*) the Service Provider is hereby authorised by the Authority as Highway Authority, Street Authority, Bridge Authority, Responsible Authority, Transport Authority and Traffic Authority (each as defined in the 1980 Act and/or NRSWA) for the Contract Term to exercise the Authorised Functions for the purposes of the provision of the Services in the Project Area. The Service Provider in consultation with the Authority shall take such actions as are necessary to effect the efficient exercise of any such Authorised Functions in accordance with this Contract.

35.1.2 Where the Service Provider requires a Service Provider Party to exercise any of the Authorised Functions then the Service Provider shall apply in writing to the Authority setting out the name of the Service Provider Party and the Authorised Functions which the Service Provider Party is to perform. The Service Provider shall also provide such additional information as the Authority may reasonably require in making its decision. The Service Provider's application shall not be deemed successful unless and until the Authority confirms this in writing. A Service Provider Party who is so approved and authorised pursuant to this clause 35.1.2 shall be termed an "Authorised Service Provider Party".

#### **35.2 Date Authorisation Takes Effect**

The authorisation obtained by the Service Provider and/or a Service Provider Party pursuant to clause 35 (*Delegation of Statutory Functions*) shall be effective from the Service Commencement Date.

#### **35.3 Scope of authorisation**

35.3.1 Any authorisation provided pursuant to this clause 35 (*Delegation of Statutory Functions*) in respect of each and every Authorised Function is made on the following terms:

- 35.3.1.1 it shall be non-assignable;
- 35.3.1.2 the Service Provider and any Authorised Service Provider Party shall not be entitled to sub-contract the exercise of any such Authorised Function to Service Provider Parties; and
- 35.3.1.3 in accordance with section 9 of 1997 Act, it shall be for the Contract Term.

#### **35.4 Limits on Authorisation**

Where in paragraphs 1 to 4 of part 1 Section A of schedule 23 (*Statutory Functions*) the exercise of a function is subject to the approval of the Authority, such approval shall be sought from the Authority's Representative and in instances where approval is granted, confirmation shall be in writing from the Authority's Representative.

#### **35.5 Duty**

The Service Provider shall and shall ensure that any Authorised Service Provider Party shall exercise properly, fully and in accordance with Legislation each of the Authorised Functions in respect of the provision of the Services on the Project Network for as long as the authorisation made under this clause 35 (*Delegation of Statutory Functions*) is effective.

#### **35.6 Amendment, Revocation, Suspension or Withdrawal of Authorisation by the Authority**

- 35.6.1 If at any time, for any reason, the Authority considers it necessary to revoke, suspend, amend or withdraw the authorisation granted under this clause 35 (*Delegation of Statutory Functions*) it shall notify the Service Provider who, in turn, will notify any relevant Authorised Service Provider Party of its intention to put its reasons to the Network Board (through its Board Members) in order that the Parties may assess the implications of the Authority's proposals and attempt to agree or avoid such action.
- 35.6.2 If the Network Board is not scheduled to meet or cannot convene a meeting within twenty (20) Business Days of the Authority's notification to the Service Provider under clause 35.6.1, the Authority's Representative shall notify the Service Provider.

- 35.6.3 In the event that the revocation, suspension, amendment or withdrawal of the authorisation is to be implemented by the Authority notwithstanding that the Network Board has been unable to assess and consequently agree or avoid the Authority's proposals or has not met within twenty (20) Business Days of the Authority's notification of its proposals pursuant to clause 35.6.1, the proposals shall constitute an Authority Change.
- 35.6.4 Following the deliberation of the Network Board, or if the Network Board did not or could not meet, following the notification of the Service Provider pursuant to clause 35.6.1, the final decision in respect of the amendment, revocation, suspension or withdrawal of the authorisation in respect of any Authorised Functions shall be made in the absolute discretion of the Authority.
- 35.6.5 Any agreement reached by the Network Board and/or any decision reached by the Authority in respect of any of the Authorised Functions under this clause 35.6 shall not be subject to review under Dispute Resolution.

### **35.7 Effect of Revocation**

Subject to clause 35.9 (*Partial cessation of Orders*) below, if at any time the authorisation under this clause 35 (*Delegation of Statutory Functions*) is revoked by the Authority in respect of any of the Authorised Functions, the Service Provider and any Authorised Service Provider Party shall be released from exercising and shall not exercise the relevant Authorised Function. The revocation of an Authorised Function by the Authority shall constitute an Authority Change provided always that the Authority shall issue an Authority Change Notice in respect of such revocation within fifteen (15) Business Days (or such longer period as the Parties may agree, acting reasonably) of such revocation and the Authority shall not be entitled to withdraw such Change Notice.

#### **35.7.1 Deregulation and Contracting Out Act 1994**

- 35.7.1.1 If the delegation of an Authorised Function under this clause 35 (*Delegation of Statutory Functions*) is revoked by the Authority, or that part of the relevant order that enables the Authority to delegate such Authorised Function is revoked pursuant to Section 70 Deregulation and Contracting Out Act 1994 ("**1994 Act**")

(the "**Revoked Function**") without an equivalent replacement order being made, then clause 35.7.1.2 shall have effect subject to the provisions of clause 35.7.1.3.

35.7.1.2 If clause 35.7.1.1 applies then "relevant contract" for the purposes of section 73 1994 Act shall mean so much of this clause 35 (*Delegation of Statutory Functions*) and schedule 23 (*Statutory Functions*) as relates only to the Revoked Function provided that such provisions shall remain effective in respect of any Authorised Function which are not revoked.

35.7.1.3 For the purposes of this clause 35.7, revocation does not include a temporary suspension or an amendment or a revocation where the Service Provider or an Authorised Service Provider Party has failed to perform the Authorised Function in accordance with this Contract.

### **35.8 Total cessation of Orders**

35.8.1 If the 2009 Order or any replacement order made under Section 77 of the 1994 Act shall cease for whatever reason to be effective, the Service Provider may request the Authority to take such action as necessary to bring into effect a further authorisation in respect of part or all of the functions the subject of the original order and the provisions of clause 36.1 and clause 36.4.2 (*Authority Statutory Powers*) (but for the avoidance of doubt not clause 36.6) shall apply mutatis mutandis to any such request.

35.8.2 The 2009 Order or any replacement order made under Section 77 of the 1994 Act ceasing to be effective without a further authorisation in respect of part or all of the functions the subject of the original order ("**Order Failure**") shall constitute an Authority Change provided always that the Authority shall issue an Authority Change Notice in respect of such Order Failure within fifteen (15) Business Days (or such longer period as the Parties may agree, acting reasonably), of the occurrence of such Order Failure and the Authority shall not be entitled to withdraw any such Authority Change Notice.

### **35.9 Partial cessation of Orders**

35.9.1 Subject to clause 0 (

35.9.2

35.9.3 *Change of Law*), if the 2009 Order or any replacement order shall cease to be effective in respect of one (1) or more of the Authorised Functions then the Service Provider shall perform the corresponding service in respect of such Authorised Function set out in part 3 of schedule 23 (*Statutory Functions*).

35.9.4 If the 2009 Order or any replacement order shall cease to be effective in respect of one (1) or more of the Authorised Functions then such cessation shall constitute an Authority Change.

### **35.10 Termination**

Any authorisation under this clause 35 (*Delegation of Statutory Functions*) shall cease automatically on the Termination Date.

### **35.11 Transfer on Expiry/Revocation**

On the expiry or revocation of an authorisation under this clause 35 (*Delegation of Statutory Functions*), the Service Provider shall and shall ensure that any Authorised Service Provider Party shall take such actions as are reasonably necessary for the efficient transfer of the performance of any such expired or revoked Authorised Function to the Authority or any such persons as the Authority may designate.

### **35.12 Further Authorised Functions**

In the event that any further order under Section 77 of the 1994 Act provides for the exercise of further functions of a Highway Authority, Street Authority, Traffic Authority, Responsible Authority, Transport Authority or Bridge Authority additional to those listed in schedule 23 (*Statutory Functions*) including functions under the Traffic Management Act 2004, and Legislation amended by the Traffic Management Act 2004 then:

35.12.1 the Authority may give notice authorising the Service Provider and/or any Authorised Service Provider Party to exercise any or all such further

functions for the purposes of the provision of the Services on the Project Network; and

35.12.2 the Service Provider and the Authority shall take such actions as are necessary to effect the efficient exercise of any such further functions by the Service Provider and/or any Authorised Service Provider Party; and

35.12.3 the provisions of this clause 35 (*Delegation of Statutory Functions*) shall apply as if such further functions were Authorised Functions, provided however, if the effect of such further authorisation is to materially increase or reduce the costs incurred by the Service Provider in performing the Services the Authority shall instruct an Authority Change and schedule 18 (*Change Protocol*) shall apply.

### **35.13 Public Law Principles**

In exercising the Authorised Functions, the Service Provider shall and shall ensure that any Authorised Service Provider Party shall at all times act in accordance with the principles of administrative law which govern the conduct of the Authority and, without prejudice to the generality of the foregoing, shall:

35.13.1 obey all Legal Requirements and administrative and procedural requirements;

35.13.2 not take any decisions or actions which may be considered perverse or unreasonable or disproportionate and liable to be quashed;

35.13.3 obey the rules of the natural justice; and

35.13.4 take such reasonable actions as are appropriate to minimise the risk of Judicial Review.

### **35.14 Monthly Service Reports**

For so long as and to the extent that any authorisation under this clause 35 (*Delegation of Statutory Functions*) is effective, the Service Provider shall include in the Monthly Service Report details of all actions taken by the Service Provider and any Authorised Service Provider Party pursuant to the Authorised Functions, including details of:

35.14.1 all notices given and received;

35.14.2 all directions and consents given to Statutory Undertakers;

35.14.3 all agreements, commitments or compromise reached with Statutory Undertakers; and

35.14.4 any arbitration proceedings commenced or proposed.

### **35.15 Consents, Directions and Notices**

35.15.1 Without prejudice to the generality of clause 35.14 (*Monthly Service Reports*), the Service Provider shall provide the Authority's Representative with copies of all consents and directions given by the Service Provider and any Authorised Service Provider Party and all notices given and received by the Service Provider and any Authorised Service Provider pursuant to the 1980 Act or NRSWA.

35.15.2 The Service Provider shall maintain all information relating to the performance of the Authorised Functions under NRSWA on the Street Works Management System in accordance with part 8 of schedule 2 (*Output Specification*).

### **35.16 Primary Duty of Co-ordination**

35.16.1 The Service Provider shall use its best endeavours to co-ordinate the execution of the works of all kinds (including works for road purposes and relevant activities as defined by Section 59(6) NRSWA) affecting the Project Network and the surrounding highway network;

35.16.1.1 in the interests of safety;

35.16.1.2 so as to minimise the inconvenience to persons using the Project Network having regard in particular to the needs of people with a disability; and

35.16.1.3 to protect the structure of the Project Road and the integrity of Apparatus in it.

35.16.2 The Service Provider shall carry out the Services (excluding the TMA Service, in which case clause 35.16.3 shall apply) with a view to achieving as far as may reasonably be practicable, the following objectives:



35.16.2.1 securing the expeditious movement of traffic on the Project Network; and

35.16.2.2 facilitating the expeditious movement of traffic on road networks for which another authority is the traffic authority;

and in order to achieve such objectives the Service Provider shall take such action which it considers will contribute to securing:

35.16.2.3 the more efficient use of the Project Network;

35.16.2.4 the avoidance, elimination or reduction of road congestion or other disruption to the movement of traffic on the Project Network or a road network for which another authority is the traffic authority; and

35.16.2.5 the exercise of any power including an Authorised Function to regulate or co-ordinate the use of any Project Network Part.

35.16.3 The Service Provider in performing the Services and in undertaking its obligations under clause 11 (*Service Provider Programmes*) shall:

35.16.3.1 facilitate the expeditious movement of traffic on road networks for which another authority is the traffic authority;

35.16.3.2 ensure that there shall be more efficient use of the Project Network;

35.16.3.3 ensure that there shall be avoidance, elimination or reduction of road congestion or other disruption to the movement of traffic on the Project Network or a road network for which another authority is the traffic authority; and

35.16.3.4 ensure that there shall be regulated and co-ordinated use of the Project Network via the operation of any Authorised Function,

in so far as these obligations may be achieved by the Service Provider complying with the requirements of the TMA Service.

35.16.4 The Service Provider shall comply with such directions as to the co-ordination of works of all kinds including the co-ordination of works on streets outside the Project Network, and the securing of the expeditious movement of traffic on the Project Network as the Authority may give from time to time consistent with Good Industry Practice.

35.16.5 The Service Provider shall take all reasonable steps to ensure that Statutory Undertakers only open the highway relying upon Section 52 of NRSWA where there genuinely is a requirement to carry out "emergency works" as there defined.

35.16.6 The Service Provider shall at all times and on demand be able to demonstrate to the Authority that it has carried out all appropriate monitoring, actions and measures required to ensure compliance with clause 35.16.1 including:

35.16.6.1 sharing of information and consultation between Interested Parties at the earliest opportunity;

35.16.6.2 securing regular input and attendance of relevant persons being those empowered to take decisions at co-ordination meetings;

35.16.6.3 the Service Provider and Statutory Undertakers sharing business development plans and replacement programmes for apparatus;

35.16.6.4 communication of decisions at the earliest opportunity so that plans can be adapted; and

35.16.6.5 cross-boundary co-ordination with neighbouring highway authorities, Statutory Undertakers and others for all planned works and planned maintenance on strategic routes.

## **35.17 NRSWA**

### **35.17.1 Regulatory Compliance**

35.17.1.1 In providing the Services on the Project Network, the Service Provider shall comply with NRSWA, the Regulations, the Codes of Practice and any requirements of Statutory Undertakers

notified to the Service Provider or the Authority pursuant to NRSWA.

35.17.1.2 The Parties agree and acknowledge that all works undertaken by the Service Provider in connection with the carrying out of the Services shall be Works for Road Purposes (as that term is defined in Section 86(2) of NRSWA).

35.17.1.3 To the extent that the same are relevant to the carrying out of the Services:

- (a) the Service Provider shall itself comply with the provisions of NRSWA; and
- (b) the Service Provider shall itself comply with all obligations placed on the Authority pursuant to NRSWA in connection with Works for Road Purposes under (inter alia) Section 83 of NRSWA.

#### 35.17.2 Advance Notice

The Service Provider shall notify the Authority of all proposed Major HWA Works, Diversionary Works and Works for Road Purposes necessary in connection with the Services and shall direct, notify, contract (or procure that the Sub-Contractor contracts), make satisfactory arrangements in respect of such works with Statutory Undertakers and carry out any such works in accordance with NRSWA, the Regulations, the Codes of Practice and the provisions this clause 35 (*Delegation of Statutory Functions*).

#### 35.17.3 Apparatus

The Service Provider shall keep records of the Apparatus as required by the Authority (or such other person nominated by the Authority) and pursuant to NRSWA and shall consult all undertakers' records held pursuant to Section 79 NRSWA prior to commencing any works in connection with the Services.

#### 35.17.4 Payment for Diversionary Works

The Service Provider shall be responsible for all costs of, and shall make all payments due to, Statutory Undertakers in connection with any Diversionary Works.

#### 35.17.5 Financial Provisions

35.17.5.1 Part 4 (NRSWA fees, costs and charges) of schedule 23 (*Statutory Functions*) sets out the statutory basis on which fees, costs, charges, contributions, compensation and indemnities are payable to the Authority under NRSWA and regulations made under NRSWA, all of which financial payments are collectively termed "**NRSWA Payments**".

35.17.5.2 Where part 4 schedule 23 (*Statutory Functions*) NRSWA identifies that the beneficiary of any category of NRSWA Payment is the Service Provider then:

- (a) the Service Provider shall be entitled to retain any such NRSWA Payment;
- (b) the Authority shall pay to the Service Provider any such NRSWA Payment it receives from a Statutory Undertaker within twenty (20) Business Days of the receipt of such payment from the Statutory Undertaker;
- (c) the Service Provider shall be entitled to commence proceedings in the name of the Authority to recover any such NRSWA Payment from the Statutory Undertaker and the Authority shall provide reasonable assistance comprising attendance at meetings reasonably requested by the Service Provider to confirm the position that the Service Provider is acting with the Authority's consent together with any statement, document or information reasonably required by the Service Provider in connection with any such proceedings provided that the

Service Provider shall reimburse the Authority for its reasonable costs of such provision;

- (d) provided also that where the statutory basis is Section 85 NRSWA then the Service Provider shall pay such allowable costs as are due to the Statutory Undertaker and/or the Authority.

35.17.5.3 Where part 4 of schedule 23 (*Statutory Functions*) identifies that the beneficiary of any category of NRSWA Payment is the Authority then:

- (a) the Authority shall be entitled to retain any such NRSWA Payment;
- (b) the Service Provider shall pay to the Authority any such NRSWA Payment it receives from a Statutory Undertaker within twenty (20) Business Days of the receipt of such payment from the Statutory Undertaker;
- (c) the Service Provider shall ensure that the Authority receives in full all NRSWA Payments from which the Authority is the beneficiary pursuant to clause 35.17.5.3; provided that the Service Provider shall be relieved from this obligation in respect of a Statutory Undertaker where within one (1) month of the NRSWA Payment becoming due such Statutory Undertaker shall have sustained an insolvency event within limbs (c) to (f) (inclusive) of the definition of Service Provider Default Event which shall be construed in this context only as if the Statutory Undertaker was the Service Provider;
- (d) the Service Provider shall provide the Authority on demand with full particulars of all records and accounts of any NRSWA Payments that are due to the Authority under clause 35.17.5.3 but have not been paid ("**NRSWA Shortfall**");

- (e) the Authority may deduct the NRSWA Shortfall from any monies due to the Service Provider under this Contract.

35.17.6 The Service Provider shall maintain the Street Works Register in accordance with NRSWA and the Street Works (Registers, Notices, Directions and Designations (England) Regulations 2007 SI2007 No.1951 and any relevant Codes of Practice and:

35.17.6.1 shall record on the Street Works Register:

- (a) such information as may be prescribed pursuant to sections 53 and 54 NRSWA; and
- (b) such other information of which it becomes aware as is eligible for registration in accordance with the Code of Practice; and

35.17.6.2 shall make any payment or payments to such party as may be required pursuant to section 53(5) NRSWA;

35.17.6.3 shall share the information on the Street Works Register with a person appointed to keep a central register which discharges the duty of the Authority as a Street Authority in accordance with section 53(5A) NRSWA.

### **35.18 Street Works Licence**

35.18.1 Subject to the provisions of clause 35.20 (*Authority's Notice to Statutory Undertakers of Delegation*), and section 50 and schedule 3 of NRSWA and part 2 of schedule 23 (*Statutory Functions*), the Authority may (after reasonable and proper consideration), as soon as is reasonably practicable after receiving a request from the Service Provider, grant a Street Works Licence to the Service Provider and the relevant Service Provider Parties in respect of any specified part of the Project Network on the following terms:

35.18.1.1 it shall be non-assignable;

35.18.1.2 it shall not inure beyond the shorter of the Contract Term and the period during which the Authority is Street Authority in respect of the Project Area; and

35.18.1.3 it shall only be exercisable after consultation with any affected Relevant Authority or person owning Apparatus.

#### 35.18.2 Offence

The Service Provider shall notify the Authority of any possible offence committed or likely to be committed by a Statutory Undertaker under NRSWA of which the Service Provider is or should reasonably be aware and shall provide such information relating to such offence as may be specified by the Authority.

#### 35.18.3 Assistance by Service Provider

35.18.3.1 Subject to clause 35.18.3.2, the Service Provider shall at all times take all steps necessary to ensure that the Authority is able to comply with its duties under NRSWA, the Regulations and the Codes of Practice and assist the Authority in carrying out such duties;

35.18.3.2 If at any time a statutory duty under NRSWA or a regulation under the Regulations (in both cases termed the "**Reserved Function**") has not been delegated to the Service Provider, then the Service Provider will at all times take such reasonable steps as may be necessary to ensure that the Authority is able to comply with its duties under the Reserved Function and the Codes of Practice and assist the Authority in carrying out the Reserved Function.

#### 35.18.4 Fixed Penalty Notices

35.18.4.1 The Service Provider may by notice in writing to the Authority request the Authority to issue a fixed penalty notice under schedule 4B NRSWA where the Service Provider is satisfied that a fixed penalty notice offence has been committed by a Statutory Undertaker under Part 3 and schedule 4A NRSWA and the

Service Provider shall include in its notice the following information all in sufficient detail so that the Authority may issue a fixed penalty notice namely to the Statutory Undertaker:

- (a) the name and address of the Statutory Undertaker that has committed the offence;
- (b) the offence code;
- (c) the location of the relevant works;
- (d) the date of the offence; and
- (e) the details of the offence;
- (f) which information shall all be provided to the Authority within one (1) month of the date of the offence to which it relates. The Service Provider shall also promptly provide to the Authority such additional clarification information as may reasonably be requested in writing by the Authority such information to be provided within ten (10) Business Days of a written request from the Authority.

35.18.4.2 The Authority shall determine whether it will issue a fixed penalty notice provided that:

- (a) if it declines to do so it shall set out its reason in writing to the Service Provider within one (1) month of the issue of the Service Provider's notice pursuant to clause 35.18.4.1; and
- (b) if it decides to issue a fixed penalty notice then it shall send a copy of the fixed penalty notice to the Service Provider within five (5) Business Days of its issue.

35.18.4.3 The Service Provider shall provide the Authority with assistance in :



- (a) responding to any representations received from the Statutory Undertaker concerning the fixed penalty notice;
- (b) attending any meeting that the Authority arranges with the Statutory Undertaker; and
- (c) prosecuting the Statutory Undertaker (including providing witness statements and the attendance at court by witnesses for the purpose of giving evidence but excluding the provision of legal advice and representation) if the Statutory Undertaker fails to pay the penalty.

35.18.4.4 The Authority shall be responsible for determining whether:

- (a) the period for paying the penalty is to be extended;
- (b) the Statutory Undertaker in receipt of the fixed penalty notice who does not make payment is to be prosecuted; and
- (c) to withdraw a fixed penalty notice provided that where the Authority determines to withdraw the fixed penalty notice it shall set out its reason in writing to the Service Provider within one (1) month of the withdrawal of the fixed penalty notice;

35.18.4.5 Any penalty paid by the Statutory Undertaker following the issue of a fixed penalty notice shall be due to the Authority and the Service Provider shall forward any penalty it receives from the Statutory Undertaker to the Authority without deduction.

35.18.4.6 If in any case the Authority is obliged to withdraw the fixed penalty notice or is unable to recover the penalty on account of any act or omission of the Service Provider or a Service Provider Party then the Service Provider shall pay the Authority an equivalent sum to the discounted amount of the penalty in order to compensate the Authority for its abortive costs.

35.18.4.7 Where the Authority receives payment of a discounted penalty from the Statutory Undertaker in respect of a fixed penalty notice and no representations have been made to the Authority for consideration by such Statutory Undertaker, the Authority shall pay the Service Provider fifty per cent (50%) of the discounted penalty in respect of the Service Provider's costs in issuing the notice under clause 35.18.4.1.

### **35.19 Services in Relation to the Authority's Functions under NRSWA**

35.19.1 Without prejudice to clause 35.17 (*NRSWA*), the Service Provider shall perform the services set out in part 2 of schedule 23 (*Statutory Functions*) relating to functions of the Authority pursuant to NRSWA.

35.19.2 The decision of the Authority on the merits of any recommendation made by the Service Provider in performance of its services pursuant to clause 35.19.2 shall not be subject to review under Dispute Resolution.

35.19.3 The Service Provider shall take such actions as are appropriate to inform all Interested Parties of its role on behalf of the Authority pursuant to this clause 35.19 (*Services in Relation to the Authority's Functions under NRSWA*).

### **35.20 Authority's Notice to Statutory Undertakers of Delegation**

35.20.1 Without prejudice to the Service Provider's obligations pursuant to clause 35.19.3 the Authority shall:

35.20.1.1 from time to time, at the request of the Service Provider, notify Statutory Undertakers that, subject to the terms and conditions set out in this clause 35 (*Delegation of Statutory Functions*), the Service Provider will be performing the Authorised Functions in Section B of part 1 of schedule 23 (*Statutory Functions*) and the services referred to in clause 35.19 (*Services in Relation to the Authority's Functions under NRSWA*);

35.20.1.2 notify the Service Provider promptly of any Statutory Undertaker's requirements or notices or any notices from Street Authorities for streets outside the Project Network (but which

affect the Project Network) which it receives pursuant to NRSWA, the Regulations or the Codes of Practice; and

35.20.1.3 notify the Statutory Undertakers of the arrangements for making the payment of the NRSWA Payments to facilitate the effective operation of clause 35.17.6.

### **35.21 Specified Licences**

35.21.1 The Service Provider shall not grant or issue in respect of a Project Network Part any of the licences within the classes of licence specified in clause 35.21.7 ("**Specified Licence**").

35.21.2 The Service Provider shall advise and assist the Authority in connection with the granting of such Specified Licences, which shall include without limitation upon request from the Authority:

35.21.2.1 preparing the draft Specified Licence for issue by the Authority (such Specified Licence to be in the applicable agreed form as set out in part 5 of schedule 23 (*Statutory Functions*) and not to inure beyond the Contract Term);

35.21.2.2 a written recommendation as to whether or not the Authority should grant the Specified Licence together with all information required to support and justify such recommendation including the consequences anticipated by the Service Provider should the Authority choose to grant a Specified Licence which has not been recommended by the Service Provider;

35.21.2.3 agree with the Authority the fee to be charged in relation to the issue of a Specified Licence together with any additional charge as may be payable ("**Additional Charge**") as set out in clause 35.21.8 and then assist the Authority in recovering from the licensee the amount of such fee and any Additional Charge as may be payable provided that:

(a) the fee shall be retained by the Authority in respect of any Specified Licence granted pursuant to clauses 35.21.7.1, 35.21.7.3, 35.21.7.4, 35.21.7.7 and 35.21.7.9;

- (b) the fee shall be retained by the Service Provider in respect of any Specified Licence granted pursuant to clauses 35.21.7.2, 35.21.7.5, 35.21.7.6, 35.21.7.8 and 35.21.7.10;
- (c) the Additional Charges payable in respect of any Specified Licence shall be retained by the Service Provider; and
- (d) the Service Provider may agree with the Authority that the fee and any Additional Charge may be increased for a particular class of Specified Licence from the start of each Contract Year provided that it shall not exceed the fee or Additional Charge for the immediately preceding Contract Year as Indexed.

35.21.3 The Service Provider shall comply with clause 35.21.2 within such time as is necessary in order to ensure that the Authority will be able to meet any time periods within which a Specified Licence is to be granted.

35.21.4 The Service Provider shall allow the Authority a minimum of ten (10) Business Days following receipt of the information required under clause 35.21.2 in which to determine whether to grant a Specified Licence.

35.21.5 Where the Authority grants a Specified Licence which has not been recommended by the Service Provider then the grant of the Specified Licence shall constitute an Excusing Cause to the extent that such Specified Licence prevents the Service Provider from performing the Services in accordance with this Contract, provided that the Service Provider has in the reasonable opinion of the Authority justifiable grounds for not recommending such grant.

35.21.6 The Service Provider shall notify the Authority by telephone as soon as reasonably practicable and in any event within two (2) hours of the time (and shall provide written notice (which may be electronic mail) as soon as reasonably practicable thereafter) at which the Service Provider becomes aware of any breach of the terms of a Specified Licence by the relevant Specified Licensee and the breach of such Specified Licence shall constitute

an Excusing Cause (except in the case of any Specified Licence granted to any Service Provider Party to enable the provision of the Services) to the extent and duration that such breach prevents the Service Provider from performing the Services in accordance with this Contract.

35.21.7 The classes of Specified Licenses referred to are:

- 35.21.7.1 licence to plant and maintain tree shrubs and plants and grass in the highway under Section 142 of the 1980 Act;
- 35.21.7.2 licence to construct a building over the highway under Section 177 of the 1980 Act (including oversailing licences);
- 35.21.7.3 permission to operate facilities for recreation or refreshment or both on a highway under Section 115C and 115E of the 1980 Act;
- 35.21.7.4 permission to enhance amenity of highways and its immediate surroundings under Sections 115B and 115E of the 1980 Act;
- 35.21.7.5 licences for scaffolding and other structures under Section 169 of the 1980 Act;
- 35.21.7.6 permit to excavate and deposit materials under Section 171 of the 1980 Act;
- 35.21.7.7 licences under Section 139 1980 Act for the placing of a builder's skip on the highway;
- 35.21.7.8 licences to a Service Provider Party for the purpose of carrying out any Services;
- 35.21.7.9 licence to construct a bridge over the highway under Section 176 of the 1980 Act; and
- 35.21.7.10 carting over permit under Section 184 of the 1980 Act.

35.21.8 The Additional Charges referred to in clause 35.21.2.3 are:

Statutory Provision	Section Heading	Scope of Additional Charge
section 140A 1980 Act	builders' skips: charge for occupation of highway for unreasonable period	charge for the period for which the skip remains in the highway exceeds:  (a) such period as may be prescribed; and  (b) a reasonable period.
section 140B 1980 Act	builders' skips: charges determined by reference to duration of occupation of highways	charge determined by reference to period for which the highway is occupied by the skip.
section 171A 1980 Act	scaffolding, building materials and excavations: charge for occupation of highway for unreasonable period	charge payable for the period for which:  (a) a relevant structure is on or over the highway;  (b) things are deposited in the highway, or (as the case may be);  (c) there is an excavation in the highway,  exceeds both the prescribed period and a reasonable period.
section 171B 1980 Act	scaffolding, building materials and excavations: charge determined by reference to duration of occupation of highway	charge determined by reference to the period for which:  (a) a relevant structure is on or over the highway;  (b) things are deposited in the highway, or (as the case may be);  (c) there is an excavation in the highway.

35.22 Where the Service Provider rectifies any damage to the Project Network which has been caused by a Third Party, the Service Provider shall be entitled to recover and retain the cost of so doing from such third party.

## **36. AUTHORITY STATUTORY POWERS**

### **36.1 Exercise of statutory powers**

36.1.1 Whenever the exercise by the Authority of any statutory power is essential to enable the Service Provider to perform any obligation under this Contract (such that a failure to exercise such statutory power would render impossible, not merely more expensive, the Service Provider's performance of any part of this Contract), the provisions of this clause 36 (*Authority Statutory Powers*) shall apply.

36.1.2 For the avoidance of doubt if the failure of the Authority to exercise any statutory power would directly result in the Service Provider being in breach of any Legislation and such breach is not the result of any other act or omission of the Service Provider and the exercise of such statutory power would result in the Service Provider no longer being in breach of any such Legislation, then the exercise by the Authority of such statutory power shall be treated as being essential to enable the Service Provider to perform the relevant obligation under this Contract.

### **36.2 Service Provider request for Authority to exercise statutory power**

If the Service Provider believes that the exercise by the Authority of any statutory power is essential to enable the Service Provider to perform any obligation under this Contract (such that a failure to exercise such statutory power would render impossible, not merely more expensive, the Service Provider's performance of any part of this Contract), the Service Provider shall give notice to that effect to the Authority.

### **36.3 Matters to be covered in the request**

Any notice given by the Service Provider in accordance with clause 36.2 (*Service Provider request for Authority to exercise statutory power*) shall:

36.3.1 clearly specify the action requested of the Authority, the duty of the Service Provider under this Contract in respect of which such action is requested and the reasons why such action by the Authority is required;

36.3.2 indicate the time by which the requested action is required;

36.3.3 set out any recommendation by the Service Provider in respect of the requested action; and

36.3.4 specify the likely effect upon the performance of the Services if the action requested of the Authority is not agreed to by the Authority.

#### **36.4 Authority's response to request**

36.4.1 Within fifteen (15) Business Days after receipt of a notice given in accordance with clause 36.2 (*Service Provider request for Authority to exercise statutory power*), the Authority shall acknowledge receipt of such notice and shall give its good faith estimate of the date on which it will respond on the merits of the request, provided that no such estimate shall be binding on the Authority.

36.4.2 The Authority shall respond to the merits of the request contained in the notice given in accordance with clause 36.2 (*Service Provider request for Authority to exercise statutory power*), as soon as reasonably practicable in the circumstances, taking into consideration, inter alia, any requirement for consultation with the public or other Interested Parties in connection with such request.

36.4.3 The Authority shall consider on its merits in accordance with its statutory duties and/or powers any request for action contained in a notice given in accordance with clause 36.2 (*Service Provider request for Authority to exercise statutory power*). Without in any way limiting the discretion of the Authority in responding to any such request, the Authority shall, in reaching any such decision, give consideration, inter alia, to the matters set out in clause 36.5. The decision of the Authority on the merits of the request shall not be subject to review under clause 70 (*Dispute Resolution*).

36.5 The considerations referred to in clause 36.4.3 include, but are not limited to:

36.5.1 whether the Authority has the statutory power to take the action requested;

36.5.2 whether there is any alternative course available to the Service Provider which would not require action by the Authority;



- 36.5.3 the effect the requested action would have on the interests of any Third Parties;
- 36.5.4 whether the timing and substance of the request is such as to enable the Authority to consider the merits of the request in accordance with the principles of procedural fairness (taking into account where appropriate the necessity or desirability of consultation with other Interested Parties);
- 36.5.5 whether the action requested would have any implications for the safety, either of any Third Parties or members of the public; and
- 36.5.6 whether the exercise of any other statutory power would be equally or more effective.

**36.6 Refusal or delay by Authority to take requested action**

If:

- 36.6.1 in the exercise of its discretion, the Authority refuses to take the action requested; or
- 36.6.2 the Authority unreasonably delays in taking the action requested (unreasonableness being assessed in the context of the processes which the Authority must properly go through in order to arrive at its decision, including any mandatory or proper discretionary consultation periods and the like; and the burden of proof shall be upon the Service Provider to prove in any dispute under Dispute Resolution that delay has been unreasonable for this purpose);

then such refusal or unreasonable delay shall constitute an Excusing Cause to the extent that by reason of such refusal or delay the Service Provider is not able to perform the obligations identified in the request contained in the notice given in accordance with clause 36.2 (*Service Provider request for Authority to exercise statutory power*).

**36.7 Where a decision by the Secretary of State or Court is required**

- 36.7.1 If any consent, confirmation or order of the Secretaries of State (or any of them) or any order of the Court is required for the exercise by the Authority

of any statutory power requested to be exercised pursuant to this clause 36 (*Authority Statutory Powers*), and the Authority, in the exercise of its discretion, decides that it wishes to seek to exercise such statutory power, then the Authority shall as soon as reasonably practicable in the circumstances apply for such consent, confirmation or order. For the avoidance of doubt, the decision of the Secretaries of State (or any of them) or the Court shall not be subject to review under Dispute Resolution and the Authority shall not be obliged to exercise any right of appeal of such decision.

36.7.2 If the Secretaries of State (or any of them) or the Court refuse to give or make any consent, confirmation or order referred to in clause 36.7.1 (*Where a decision by the Secretary of State or Court is required*), then the provision of clause 36.6 (*Refusal or delay by Authority to take requested action*) shall apply (*mutatis mutandis*).

### **36.8 Exceptions**

36.8.1 Clause 36.1 (*Exercise of statutory powers*) shall not apply to the exercise of any statutory function of the Authority as a planning authority under the Town and Country Planning Act 1990.

36.8.2 Clause 36.1 (*Exercise of statutory powers*) shall not apply to the securing of any acquisition of land by compulsory purchase powers or voluntary agreement.

## **PART J - CHANGE**

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

The Authority may use the provisions of schedule 19 (*Accrual and De-accrual of Project Network Parts*) to Accrue or De-Accrue Project Network Parts except in the case of Structures (excluding Minor Structures for which the provisions of schedule 19 (*Accruals and De-Accruals of Project Network Parts*) shall apply), Bridges and Tunnels in respect of which a Change shall always constitute a High Value Change and be dealt with in accordance with provisions of schedule 18 (*Change Protocol*). The Parties agree and acknowledge that the Authority is not obliged to use the provisions of schedule 19 (*Accrual and De-accrual of*

*Project Network Parts*) and may, if it requires (at its sole discretion) change the Project Network Parts pursuant to schedule 18 (*Change Protocol*).

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

38.1 The provisions of the Review Procedure shall apply to the amendment of all or any of the Method Statements.

38.2 Without prejudice to clauses 38.1, 0 (*Change of Law*) and 41 (*Change in Highways Standards*) the Service Provider shall propose amendments to the Method Statements as are necessary to:

38.2.1 ensure that the Output Specification is satisfied;

38.2.2 ensure that the Method Statements remain compliant with:

38.2.2.1 Good Industry Practice and Law; and

38.2.2.2 (save as expressly permitted or required to do otherwise in accordance with this Contract) Highways Standards;

38.2.3 implement any Service Provider Change;

38.2.4 ensure that the methodologies reflect technological changes introduced by the Service Provider; and

38.2.5 ensure that the Method Statements are consistent with any changes the Service Provider implements to deliver cost savings.

### **39. CHANGES TO THE SERVICE**

Either Party may request a Change in accordance with the provisions of schedule 18 (*Change Protocol*).

39A The Parties shall comply with the provisions of schedule 14 (*Call-off Agreements*) in respect of Special Events, Civil Emergencies (Low Value Change), Trees (additional Highway Trees), Festive Decorations (Authority's Annual Outline Festive Decorations Programme).

## 40. CHANGE OF LAW

### 40.1 Qualifying Change of Law

If a Qualifying Change of 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:

40.1.1 any necessary change to the Services;

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

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

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

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

40.1.6 any Capital Expenditure that is required or no longer required as a result of a Qualifying Change of 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 40.2 (*Parties to discuss*) to 40.6 (*Adjustment to Unitary Charge*).

### 40.2 Parties to discuss

As soon as practicable after receipt of any notice from either Party under clause 40.1 (*Qualifying Change of Law*), the Parties shall discuss and agree the issues referred to in clause 40.1 (*Qualifying Change of Law*), and any ways in which the Service Provider can mitigate the effect of the Qualifying Change of Law, including:

- 40.2.1 providing evidence that the Service Provider has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its sub-contractor(s) to minimise any increase in costs and maximise any reduction in costs;
- 40.2.2 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 of Law at that time have been taken into account by the Service Provider;
- 40.2.3 giving evidence as to how the Qualifying Change of 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
- 40.2.4 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 of Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under clauses 40.1.1, 40.1.5 and/or 40.1.6.

#### **40.3 Funding for Capital Expenditure**

If the Parties agree or it is determined under clause 70 (*Dispute Resolution*) that the Service Provider is required to incur additional Capital Expenditure due to a Qualifying Change of Law (excluding the Service Provider's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change of Law under this clause 0 (

*Change of Law*)), then the Service Provider shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it and the Senior Lenders.

#### **40.4 Party's Share**

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

#### **40.5 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 40.3 (*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 40.3 (*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.

#### **40.6 Adjustment to Unitary Charge**

Any compensation payable under this clause 0 (

*Change of Law*) by means of an adjustment to or reduction in the Annual Unitary Charge shall be calculated in accordance with clause 53 (*Financial Adjustments*).

#### **40.7 Relevant Lighting Standards**

Any change in Relevant Lighting Standards shall not be a Qualifying Change of 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 of Law.

### **41. CHANGE IN HIGHWAYS STANDARDS**

41.1 On the occurrence of, or upon the publication of detailed proposals for, a Change in Highways Standards that do not comprise Guidance, the Service Provider shall within a reasonable time, provide to the Authority, (at the Service Provider's cost), a notice setting out:

41.1.1 what the proposed Change in Highways Standards comprises;

41.1.2 how the proposed Change in Highways Standards shall affect the Project Network;

41.1.3 a plan of how the Service Provider shall implement the proposed Change in Highways Standards;

41.1.4 the cost and/or savings of implementing the proposed Change in Highways Standards including proposals as to how to minimise any cost of the

implementation of a Change in Highways Standards and maximise any savings gained from the implementation;

41.1.5 the net cost (being the cost of implementation less the savings identified pursuant to clause 41.1.4 above) of implementing the proposed Change in Highways Standards;

41.1.6 the Service Provider's opinion on all of the issues set out in paragraph 1.4 of schedule 18 (*Change Protocol*); and

41.1.7 whether or not (in the Service Provider's opinion (acting reasonably)):

41.1.7.1 the net cost of implementing the proposed Change in Highways Standards in the period of twelve (12) consecutive months from the date of implementing such proposed Change in Highways Standards shall exceed two hundred and fifty thousand pounds (£250,000 (Indexed)); and

41.1.7.2 the net cost of implementing such proposed Change in Highways Standards will, when aggregated with all other Changes in Highways Standards, result in the Service Provider incurring an aggregate net cost of implementing proposed Changes in Highways Standards of more than five hundred thousand pounds (£500,000 (Indexed)) in each consecutive period of three (3) Contract Years.

41.2 Where it is identified in the notice referred to in clause 41.1 that the net cost of implementing the proposed Change in Highways Standards does not exceed either of the financial thresholds identified in clause 41.1.7 then, within thirty (30) Business Days of the date of receipt of such notice, the Authority shall notify the Service Provider of whether it requires the Service Provider to implement the proposed Change in Highways Standards.

41.3 If the Authority notifies the Service Provider that it requires the Service Provider to implement the proposed Change in Highways Standards pursuant to clause 41.2, the Service Provider shall implement such Change in Highways Standards at no additional cost to the Authority.

- 41.4 Where it is identified in the notice referred to in clause 41.1 that the net cost of implementing the Change in Highways Standards exceeds either one of the financial thresholds identified in clause 41.1.7, then within thirty (30) Business Days of the date of receipt by the Authority of such notice, the Authority shall notify the Service Provider of whether it requires the Service Provider to implement the proposed Change in Highways Standards.
- 41.5 If the Authority notifies the Service Provider that it requires the Service Provider to implement the proposed Change in Highways Standards pursuant to clause 41.4, the Authority shall issue an Authority Change Notice within twenty (20) Business Days of the date of receipt of the notice referred to in clause 41.4 (to deal with the difference in cost between the relevant financial threshold set out in clause 41.1.7 and the net cost to the Service Provider) and the provisions of paragraph 3 of part 1 of schedule 18 (*Change Protocol*) shall apply.
- 41.6 If the Authority determines that it does not require the Service Provider to implement a proposed Change in Highways Standards (whether pursuant to clause 41.2 or clause 41.4), such proposed Change in Highways Standards shall not be deemed to be a Change in Highway Standards (for the purposes of this Contract) and the Service Provider shall continue, and be entitled to for the purposes of this Contract, to comply with the Highways Standards as if such proposed Change in Highway Standards had not occurred.

## **42. CHANGE IN AUTHORITY POLICIES**

Any change to the Authority Policies and/or the Authority's Working Practices which requires a change to the Services required by the Authority shall be treated as an Authority Change pursuant to schedule 18 (*Change Protocol*) except where such a change to the Authority Policies arises as a result of:

- 42.1 a Change of Law (in which case the provisions of clause 0 (
- 42.2
- 42.3 *Change of Law*) shall apply); or
- 42.4 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).



## **42A. CHANGE REQUIRED BY TUNNEL DESIGN AND SAFETY CONSULTATION GROUP**

To the extent that the Tunnel Design Safety and Consultation Group requires a material alteration to the scope of works set out in the following reports prepared by Atkins, then such material alteration shall be deemed to be an Authority Change:

42A.1 Queensway and St Chad's Tunnel Refurbishment - Feasibility Study by Atkins dated 16 November 2007;

42A.2 3D numerical simulation of smoke spread during and HGV fire in St Chad's Underpass dated October 2008;

42A.3 St Chad's Monitoring Report dated October 2008; and

42A.4 Lancaster Tunnel Feasibility Study dated December 2008.

## **PART K - FINANCIAL**

### **43. MONITORING AND REPORTING**

#### **43.1 General monitoring and reporting obligations**

43.1.1 The Service Provider shall, throughout the Contract Term in accordance with this clause 43 (*Monitoring and Reporting*), (and on a continuing basis):

43.1.1.1 monitor the performance of the Services (and/or procure that each element of the Service is so monitored);

43.1.1.2 maintain and update the Management Information System in accordance with clause 19 (*Management Information System and Project Network Model*) and schedule 2 (*Output Specification*);

43.1.1.3 maintain all relevant records and documentation pursuant to clause 43.4 (*Records and possession of information*); and

43.1.1.4 produce the Draft Monthly Monitoring Report and the Actual Monthly Monitoring Report in accordance with clause 45 (*Payment and financial matters*).

#### **43.2 Appointment of a third party monitor**