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DATED

1 JUNE 2012

**(1) the Scottish Ministers
- and -
(2) Serco Ltd**

VOLUME 1

**CONTRACT AGREEMENT AND
SCHEDULE 1**

TS/FER/SER/2011/02

**relating to
NORTHERN ISLES FERRY SERVICE
PROVISION OF PUBLIC SERVICES**

Serco in Confidence

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Public Service Contract

Between

The Scottish Ministers

And

Serco Ltd

Dated: 1 JUNE 2012

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PUBLIC SERVICE CONTRACT

BETWEEN:

THE SCOTTISH MINISTERS, Victoria Quay, Edinburgh, EH6 6QQ (who and whose successors are referred to as the **Scottish Ministers**)

and

SERCO LIMITED incorporated in England (Company No. 00242246) and having its registered office at Serco House, 16 Bartley Wood Business Park, Bartley Way, Hook, Hampshire, RG27 9UY (who and whose permitted assignees are referred to as **the Operator**)

WHEREAS

- A. The Scottish Ministers wish to continue to support ferry links to the Northern Isles for the purpose of securing access to the Northern Isles by public transport links providing a continuing, safe, stable and affordable regime for users;
- B. The Scottish Ministers may in terms of section 70 of the Transport (Scotland) Act 2001 make grants on such conditions as they determine;
- C. Life-line ferry services to the Northern Isles are currently provided by NorthLink Ferries Limited in accordance with a Grant Agreement dated 6 July 2006;
- D. NorthLink Ferries Limited will cease to provide these ferry services when that Grant Agreement terminates at 2 pm on 5 July 2012 and thereafter the Services will be provided by the Operator in accordance with this Agreement;
- E. Following an open, transparent and non-discriminatory public tender process conducted in accordance with the Public Contracts (Scotland) Regulations 2006, the Scottish Ministers have entrusted public service obligations in relation to the provision of ferry services to the Northern Isles to the Operator and agreed to compensate the Operator for the Services on the terms and conditions set out in this Agreement.

SECTION A: INTRODUCTORY PROVISIONS

1. Definitions and Interpretation

In this Contract, words and expressions, except where the context otherwise requires, will have the meanings assigned to them in paragraph 1 of Schedule 1 and paragraph 2 of Schedule 1 applies to the interpretation of this Contract.

2. Conditions Precedent

2.1 Subject to clause 2.4, this Contract is conditional upon:

- (i) the Operator and Royal Bank Leasing Limited executing the Ship Charters and the Common Terms Agreement;
- (ii) the Scottish Ministers, Royal Bank Leasing Limited and the Operator executing the Tripartite Agreement; and
- (iii) the Scottish Ministers, Royal Bank Leasing Limited and the Operator satisfying any conditions required by any of the agreements referred to in (i) and (ii) above,

in each case, by no later than 5 July 2012 (together "the Conditions").

2.2 The Operator and the Scottish Ministers shall use their respective best endeavours to fulfil the Conditions for which they have responsibility. The Operator shall not be required to accept (a) any unduly onerous or unusual terms or excessive payments which a reasonable and prudent Operator would not accept, (b) any terms which would not give effect to the commercial intention of the Parties, or (c) any terms which would prevent or prejudice the Operator from fulfilling any of its obligations under the Contract.

2.3 In the event that the terms and conditions of the Ship Charters, the Common Terms Agreement or the Tripartite Agreements are inconsistent with the Contract, the Operator and the Scottish Ministers shall consult with each other and shall take such action as may be required to amend the Contract in accordance with clause 47 so as to address or accommodate any such inconsistency.

2.4 This Clause 2 and the following parts of the Contract shall come into full force and effect on 1 June 2012 and shall not be subject to the purification of the Conditions:-

- a) clause 7: Start Up Plan
- b) Schedule 6: Start Up Plan

2.5 If the Conditions are not purified by 5th July 2012 (or such later date as may be agreed by the Parties) then

- a) this Contract shall not come into full effect;
- b) clause 7 and Schedule 6 shall cease to have effect;
- c) neither Party shall have any obligations to the other under the Contract outwith this Clause 2; and
- d) neither Party shall be liable to the other Party whether under the Contract, under statute, the law of contract, delict or otherwise except that the Scottish Ministers shall be liable to pay such reasonable proportion of the start up costs, as set out in the Start-up Plan, which directly relate to the start up activities actually carried out by the Operator in accordance with the Start-up Plan up until the 5th July 2012, provided that the Operator has complied with clause 2.2.

2.6 The obligation of the Scottish Ministers to pay the Grant or any Monthly Instalment under this Contract is subject to the condition that the Scottish Ministers have received all of the documents and other evidence listed in Schedule 2 all in the form and substance satisfactory to the Scottish Ministers

3. Contract period

3.1. The Contract takes effect on 1 June 2012 (the "Mobilisation Date") and the Services will commence on 5 July 2012 at 14.00 hours (the "Commencement Date"). The Contract expires on 25 April 2018 at 14.00 hours (the "Expiry Date"), unless it is terminated earlier under Clause 52.

SECTION B: SERVICES

4. Services

4.1. Subject to Clause 6, the Operator must employ the Vessels to provide the Services in accordance with the Timetable throughout the Grant Period.

4.2. The Operator must ensure that the Services are provided throughout the Grant Period in accordance with:

- 4.2.1.** Applicable Law including but not limited to all Applicable Law relating to the Vessels, their registration, operation and maintenance, all vessel and crew safety requirements and all relevant health and safety requirements;
 - 4.2.2.** The Operator's Vessel Obligations; and
 - 4.2.3.** The Performance Regime.
- 4.3.** The obligation on the Operator in Clause 4.1 to provide the Services does not preclude the Operator from using the Vessels for any other purpose, subject to the terms of Clause 45, provided that the obligation to provide the Services has been and continues to be satisfied in accordance with this Contract. The Operator must consult with the Scottish Ministers and obtain their consent to use the Vessels for any purpose which has the potential to impact upon the Services or the Grant.
- 4.4.** If at any time any Vessel is unable to undertake or complete a voyage for any reason, the Operator is entitled to provide the Services employing a vessel or vessels other than the Vessels provided that any such substitute vessel(s) meets all relevant regulatory requirements and is insured by the Operator to a level at least equivalent to that required for the Vessel which is being replaced (or such other level as may be appropriate having regard to the specification of the vessel in question). As soon as reasonably practicable after the need to employ a replacement or substitute vessel arises, the Operator must provide the Scottish Ministers with all of the following documents in relation to that substitute vessel, all in form and substance satisfactory to the Scottish Ministers:
 - 4.4.1.** a charterparty or other evidence of the Operator's entitlement to the employment of such vessel as contemplated;
 - 4.4.2.** evidence of insurance at least equivalent to that required for the Vessel which is being replaced;
 - 4.4.3.** all certificates required by the MCA or other relevant regulatory body; and
 - 4.4.4.** such other information as the Scottish Ministers may reasonably require to satisfy themselves that the proposed vessel is capable of providing the Services.

- 4.5. The Scottish Ministers may require the Operator to explain any default or failure (including any default or failure attributable to a Relief Event) in the provision of the Services and such explanation must be given in any manner, in such detail and within any reasonable timescale specified by the Scottish Ministers.
- 4.6. The Scottish Ministers may at any time contact any of the Ports to obtain information about or relating to the Services and the Operator must sign such documents and carry out such acts as required to facilitate the provision of such information by the relevant Port and will use its reasonable endeavours to procure that any relevant Port complies with such a request.
- 4.7. During periods of Scheduled Unavailability and/or in the event of a Relief Event the Operator must:
- 4.7.1. use all reasonable endeavours to minimise the disruption to the Services; and
 - 4.7.2. provide reasonable notice and reasonable assistance to users of the Services to minimise the disruption suffered by them.
- 4.8. The Operator must advise the Scottish Ministers in writing of any events or circumstances which it claims constitute a Relief Event and must do so as soon as reasonably practicable after becoming aware of any such events or circumstances and, in any event, within 5 Business Days after the end of the relevant month. Failure to so advise the Scottish Ministers will prevent the Operator from claiming that the relevant events or circumstances constitute a Relief Event.
- 4.9. During periods of Scheduled Unavailability, the Operator must comply with the Scheduled Maintenance Programme and the Performance Regime.

5. Fares

- 5.1. The Operator must, throughout the Grant Period, publish the tariff scheme for the Services (the **Published Tariff Scheme**) which will apply for each Calendar Year, and must not, without the consent of the Scottish Ministers charge rates in excess of the Published Tariff Scheme.

- 5.2.** The Published Tariff Scheme for the period from the Commencement Date to 31 December 2012 (the Initial Calendar Year) will be the Tariff scheme agreed by Scottish Ministers and applied to the Contract awarded to Northlink Ferries Limited in relation to the Grant Agreement terminating on 5 July 2012. The Tariff from 1 January 2013 to 31 December 2013 shall, subject to the consent of the Scottish Ministers, be the Tariff set out in Schedule 4 and Tariff Index Linked and the Published Tariff Scheme for each successive Calendar Year, subject to the consent of the Scottish Ministers, will be the Published Tariff Scheme for the immediately preceding Calendar Year, which must be Tariff Index Linked. Where Tariffs are Tariff Index Linked they shall be rounded in accordance with Clause 5.9 prior to adoption as the new Published Tariff Scheme. Where the Tariff index for any year is lower than that of the preceding year, the Operator must not reduce the Published Tariff Scheme for that year.
- 5.3.** The Operator must seek the consent of the Scottish Ministers to the proposed Published Tariff Scheme for each Calendar Year no later than 31 July prior to the relevant Calendar Year and the Scottish Ministers will be deemed to have refused consent to any proposed increase, in accordance with Tariff Index Linking, in the Published Tariff Scheme unless they have consented within 30 Business Days of the receipt by the Scottish Ministers of the application for consent.
- 5.4.** If the Operator wishes to adjust the Published Tariff Scheme by any amount other than by Tariff Index Linking the preceding Calendar Year's Published Tariff Scheme the Operator must seek the consent of the Scottish Ministers to the proposed increase or decrease no later than 31 July prior to the relevant Calendar Year and the Scottish Ministers will be deemed to have refused consent to any proposed increase or decrease in the Published Tariff Scheme unless they have consented within 30 Business Days of the receipt by the Scottish Ministers of the application for consent.
- 5.5.** The Operator may not increase the Published Tariff Scheme for any Calendar Year by an amount more than would arise from Tariff Index Linking, subject always to Clauses 5.4, 5.7 and 5.9.
- 5.6.** The Operator must not offer or vary preferential tariffs or discounts to achieve the effect of reducing the Published Tariff Scheme without the consent of the Scottish Ministers and the Scottish Ministers will be deemed to have refused consent to any such variation unless they have consented within 30 Business Days of the receipt by the Scottish Ministers of the application for consent.

- 5.7.** The Scottish Ministers are entitled to require the Operator to increase or reduce the Published Tariff Scheme in whole or in part at any time by issuing to the Operator a Revised Tariff Structure. The Revised Tariff Structure will come into effect as the Published Tariff Scheme for all purposes on the date or dates specified by the Scottish Ministers which date or dates must not be less than two months after the date of issue of the Revised Tariff Structure. The Scottish Ministers are entitled to specify that different parts of the Revised Tariff Structure will come into effect as the Published Tariff Scheme on different dates.
- 5.8.** The deemed refusal of consent under clause 5.3 above, an adjustment by an amount other than Tariff Index Linking under clause 5.4 or a Revised Tariff Structure will be deemed to be a Contract Variation to which Clause 11 applies.
- 5.9.** The amounts calculated by applying the Tariff Index Linking to the previous Calendar Year's Published Tariff Scheme must be rounded as follows:
- (a) for amounts which are less than £25.00, round up to the next £0.05;
 - (b) for amounts which are greater than £25.01 but less than £50.00, round up to the next £0.50; and
 - (c) for amounts which are greater than £50.01, round up to the next £1.00.

provided that for the purposes of calculating the Published Tariff Scheme the figures to be Tariff Index Linked are the unrounded figures from the previous Calendar Year (excluding any element of the tariff which is set by a third party) and those unrounded figures, Tariff Indexed Linked, must (together with any element of the tariff which is set by a third party) then be rounded as set out above.

6. Timetable

- 6.1.** The Operator must publish the Timetable for the Services, in accordance with Schedule 3.

- 6.2.** The Operator must provide the Services in accordance with the Timetable except in the event of a Relief Event, or during any period of Scheduled Unavailability.
- 6.3.** The Operator is entitled with the consent of the Scottish Ministers to make permanent changes to the departure and arrival times of any sailing set out in the Timetable provided that all necessary consultation has been carried out pursuant to Clause 38 prior to the Operator seeking to make any such changes. The Operator must give the Scottish Ministers not less than 45 Business Days notice of the coming in to effect of any proposed alterations to the Timetable and the Scottish Ministers will be deemed to have refused consent to any such changes unless consent is given within 15 Business Days of the receipt by the Scottish Ministers of the application for consent. For the avoidance of doubt, any such proposal will not have the effect of materially altering the Services.
- 6.4.** On making changes in accordance with Clause 6.3, the Operator must publish a new Timetable.
- 6.5.** The Operator is entitled with the consent of the Scottish ministers to provide sailings additional to those specified in the Timetable on such occasions as the Operator considers to be appropriate and to meet seasonal demand. The Operator must give the Scottish Ministers not less than 20 Business Days notice of any proposed additional sailings and the Scottish Ministers' consent will be deemed to have been refused unless given within 10 Business Days and if the Scottish Ministers grant consent they will be entitled to impose such conditions as they in their sole discretion consider to be necessary or desirable.

7. Start-up Plan

- 7.1.** The Operator must develop and thereafter implement the Start-Up Plan in accordance with Schedule 6, and to the satisfaction of the Scottish Ministers.
- 7.2.** The Start-Up Plan must be produced and agreed with the Scottish Ministers within 14 days of the Mobilisation Date.
- 7.3.** The Operator must provide the Scottish Ministers with weekly reports as to the performance of and progress under the Start-Up Plan and notify the Scottish Ministers of and permit them, or their representatives, to attend meetings with third parties

whose participation or cooperation is required to achieve completion of the Start-Up Plan.

- 7.4.** The activities other than those which are identified as being Post Commencement Activities in the Start-Up Plan must be fully implemented prior to the Commencement Date.

8. Marketing Plan

- 8.1.** The Operator must implement the Marketing Plan in accordance with Schedule 7, and to the satisfaction of the Scottish Ministers.

- 8.2.** The Operator must market the Services in accordance with the Marketing Plan and review the Marketing Plan from time to time or when so requested by the Scottish Ministers, and must update the Marketing Plan as appropriate.

9. Health and Safety Plan

- 9.1.** The Operator must implement the Health & Safety Plan in accordance with Schedule 8 and to the satisfaction of the Scottish Ministers.

- 9.2.** The Operator must provide the Services in accordance with the Health and Safety Plan and review the Health and Safety Plan from time to time or when so required by any change of circumstance or when so requested by the Scottish Ministers, and must update the Health and Safety Plan as appropriate.

10. Environmental Management Plan

- 10.1.** The Operator must implement the Environmental Management Plan in accordance with Schedule 9 and to the satisfaction of the Scottish Ministers.

- 10.2.** The Operator must provide the Services in accordance with the Environmental Management Plan and review the Environmental Management Plan from time to time or when so required by any change of circumstance or when so requested by the Scottish Ministers, and must update the Environmental Management Plan as appropriate.

11. Variations to the Services

- 11.1. The Scottish Ministers may from time to time issue a **Variation Notice** to the Operator in respect of any part of the Services (including the Tariff or to extend the Expiry Date) if the Scottish Ministers have concluded that the Services are, or are about to become, inadequate or inappropriate for any reason including advice from the Operator about how the Services and Vessels could be changed to improve economy, efficiency or effectiveness.
- 11.2. The Variation Notice must specify the additional, reduced, or altered Services that the Scottish Ministers, acting reasonably, consider to be necessary to restore or maintain adequate or appropriate transport links to the Northern Isles and may extend the Expiry Date by up to 3 months (the **Variation**).
- 11.3. On receipt of a Variation Notice, issued in accordance with Clause 11.1 and 11.2 above and/or any requirement to implement a Revised Tariff Structure pursuant to Clause 5.7 , the Operator must deliver to the Scottish Ministers a written evaluation (the **Evaluation**) of the Variation within such time as the Variation Notice may stipulate. The Evaluation must include details of any effects the Variation may have on Operating Costs, Revenue, Operator's Return, the Fuel Management Programme or the Services and will be considered by the Scottish Ministers, who must take all of the facts into account (including such supporting information as may be provided by the Operator) and may authorise such alterations to the Base Case and/or the Monthly Instalment to be paid to the Operator in accordance with the provisions of the Contract as are, in the Scottish Ministers' sole opinion, appropriate and reasonable in the circumstances and will result in the Operator being in no better or worse than it was prior to the Variation being implemented other than in relation to any alteration to the Operator's Return which may be reasonable to compensate the Operator for any increased risk, effort or capital required in respect of the operation of the Services as Varied.
- 11.4. The Operator is entitled to issue an Evaluation to the Scottish Ministers, at any time, in respect of any Variations which it wishes to propose in respect of this Contract.
- 11.5. As soon as reasonably practicable after the Scottish Ministers receive an Evaluation from the Operator, either pursuant to Clause 11.3 or 11.4, the Parties must discuss and identify the issues set out or inferred in the Evaluation.

- 11.6.** Where changes to the Evaluation are agreed to be required pursuant to Clause 11.5, the Operator must provide a revised Evaluation, including revisions to the estimated cost of the Variation and any other relevant details, within a timescale stipulated by the Scottish Ministers.
- 11.7.** As soon as reasonably practicable after the contents of the Evaluation have been finalised the Scottish Ministers must confirm in writing whether or not they wish (at their sole discretion) to accept the Variation.
- 11.8.** In the event that a Variation has been confirmed by Ministers in accordance with Clause 11.7:
- 11.8.1.** the Scottish Ministers must issue a Contract Variation Form to be signed by the Operator;
 - 11.8.2.** the Contract will be adjusted in accordance with the Contract Variation Form; and
 - 11.8.3.** the Operator must implement the Variation in accordance with this Contract, as subsequently adjusted.
- 11.9.** The Operator will not be required to implement any Contract Variation which would cause the Operator to breach Applicable Law.

12. Pre-Expiry

- 12.1.** The Operator must, upon the request of the Scottish Ministers made at any time during the last 18 Months of the Grant Period (or if the Scottish Ministers shall have given notice under Clause 52 at any time after the date of such notice), supply the Scottish Ministers with all such information regarding the Vessels and their operation, employees, passenger numbers and other matters (including the like information as regards key sub-contractors) which the Scottish Ministers may require (of which the Scottish Ministers will be the sole judges) for all purposes connected with the inviting of tenders from persons interested in becoming the Incoming Operator and for the purposes of evaluating any such tender.
- 12.2.** For the avoidance of doubt, any request made for the purposes described in Clause 12.1 must be complied with within any such timescale as the Scottish Ministers may specify upon request, and may not only require the provision of data or information

which is held by the Operator in the format requested, but also the collection and collation of that information or data where considered necessary by the Scottish Ministers. A non-exhaustive list of information which is likely to be sought under Clause 12.1 is set out at Schedule 14.

- 12.3.** Where the Scottish Ministers have appointed an Incoming Operator, the Operator must cooperate with the Scottish Ministers and the Incoming Operator to ensure smooth handover and uninterrupted provision of the Services and must procure the assignation or novation to the Incoming Operator of all Intellectual Property Rights which are, in the reasonable opinion of the Scottish Ministers, essential to the uninterrupted provision of the Services. The Scottish Ministers will be entitled to require the Operator to transfer the trade mark or trade name under which the Services are operated or marketed and all association rights to an Incoming Operator for no consideration.
- 12.4.** The Operator must produce, not less than 3 months prior to the Expiry Date, a Handover Assistance Plan which must be agreed by the Scottish Ministers. In the event that the Scottish Ministers are not satisfied that the handover is being conducted as envisaged in the Handover Assistance Plan they are entitled to appoint (or require the Operator to appoint) a project manager to ensure handover occurs in accordance with and as envisaged in the Handover Assistance Plan.

SECTION C: GRANT

13. Purpose of Grant

- 13.1.** The Scottish Ministers will make advances by way of grant (the **Grant**) to the Operator towards provision of the Services during the Grant Period calculated in accordance with this Contract.
- 13.2.** The Grant must be used solely to meet part of the costs and expenses of provision of the Services in accordance with this Contract and for no other purpose whatsoever.
- 13.3.** For the avoidance of doubt it is specifically declared that the Grant is a subsidy only and not a payment for services provided or to be provided to the Scottish Ministers. Accordingly, any payment made by the Scottish Ministers to the Operator

under this Contract does not represent consideration for a taxable supply for VAT purposes and so VAT will not be payable in respect of any such payment.

13.4. If it is determined by HM Revenue and Customs that the Operator is liable to account for VAT in respect of any payment made by the Scottish Ministers to the Operator, the Scottish Ministers must pay VAT in addition to such payment within 14 days after delivery of:

13.4.1. written evidence of such determination;

13.4.2. a valid VAT invoice; and

13.4.3. an undertaking from the Operator:

13.4.3.1. promptly to refund to the Scottish Ministers such VAT if it is determined not to be chargeable; and

13.4.3.2. to make (at the expense of the Scottish Ministers) such representations and appeals as the Scottish Ministers may reasonably request in respect of such determination.

14. Calculation of Grant

14.1. The Grant must not be revised except in accordance with Clauses 14 -18.

14.2. The Base Case will show the projected cumulative difference between Operating Costs and Revenue for each Service Year, plus the Operator's Return.

14.3. The Fuel Management Programme will be submitted by the Operator to the Scottish Ministers not less than 30 Business Days before the Commencement Date and before the commencement of each Service Year thereafter. The Fuel Management Programme will show the Projected Fuel Liability for the next Service Year, by Month and by Vessel as calculated in accordance with the Base Case. If during the year to which the Fuel Management Programme relates the price of fuel increases, then the Fuel Management Plan may be revised to reflect only the higher price of fuel not less than 30 Business Days prior to the end of each 3 month period following the start of the Service Year. A revised Fuel Management Plan must be submitted on a similar basis where the price of fuel reduces by 10% or more.

14.4. The Grant for each Service Year will be:

(a) the projected cumulative difference between Operating Costs and Revenue, plus the Operator's Return for that Service Year shown in the Base Case, or a subsequently agreed Revised Base Case, together with

(b) the Projected Fuel Liability, as shown in the Fuel Management Programme; or if higher

(c) the aggregate amount of Charter Portions in that Service Year.

14.5. The Grant will be paid by Monthly Instalments in accordance with Schedule 13.

14.6. The Monthly Instalment for any Month will be:

(a) one twelfth of the projected difference between Operating Costs and Revenue (if a negative figure) plus one twelfth of the Operator's Return for the relevant Service Year (save for Service Year 1 when Monthly Instalments will include one twelfth of the projected difference between Operating Costs less start up costs and Revenue (if a negative figure) plus one twelfth of the Operator's Return for the first Service Year and the first instalment will additionally include all start up costs incurred prior to the Commencement Date and subsequent instalments will additionally include any remaining start up costs as set out in the Start Up Plan which are incurred in the Month to which the Monthly Instalment relates), all as shown in the applicable Base Case; together with

(b) the Projected Fuel Liability for that Month, as shown in the Fuel Management Programme.

15. Annual Grant Reconciliations

An annual reconciliation of the Grant paid by Monthly Instalments in respect of each Service Year (or part thereof if the final service period is less than 12 months) will be undertaken in accordance with the provisions of Schedule 13, Paragraphs 3 and 4.

16. Grant Adjustment: Revised Base Case

If any of the events set out in Schedule 13, Paragraph 2, occur, the Operator may submit a proposal for a Revised Base Case Calculation in accordance with that paragraph.

17. Grant Adjustment: Changes in Applicable Law

In the event that there is a Change in Applicable Law such that as a consequence of such change the Operator incurs an unavoidable material change in Operating Costs or is reasonably likely to suffer an unavoidable material change in revenue then the Operator must advise the Scottish Ministers and either party will be entitled to request a Grant Adjustment in accordance with Schedule 13, Paragraphs 2.9 – 2.11.

18. Performance Deductions

Without prejudice to and in addition to the rights of the Scottish Ministers under any other provisions of this Contract, where the Operator has failed to meet any of the Performance Measures, the Scottish Ministers may make deductions (**Performance Deductions**) from Monthly Instalments in accordance with the provisions of Schedule 13, Paragraphs 4.11 - 4.15.

19. Resolution of Grant Disputes

If the Scottish Ministers and the Operator do not agree any items relating to a requested Grant Adjustment within 30 days of submission, in relation to the draft Actual Outcome Statement within 10 days of submission, or in relation to the draft Annual Fuel Statement, then either party may refer any disputed item to the Expert in accordance with Schedule 13, Paragraph 5. The Monthly Instalments will be adjusted by the net effects of such amounts as are not in dispute pending the Expert's determination.

20. Capital Supplements

The Scottish Ministers may, in accordance with Schedule 13, Paragraph 6 make advances by way of grant to the Operator towards the provision of Funded Assets.

21. Public Sector Contributions

21.1. If the Operator receives any contribution in connection with the Services (except the Grant) either in cash or in kind from any public sector body (including any government body, institution or fund of the European Union, local authority, statutory undertaking or other body wholly or substantially funded by public money) the Scottish Ministers are entitled to reduce the Grant by the amount of such contribution (**Public Sector Contribution**).

21.2. The Operator must notify the Scottish Ministers immediately if:

21.2.1. the Operator makes an application for any Public Sector Contribution in connection with the Services;

21.2.2. the Operator receives notification that it will receive, or will receive an offer of, any Public Sector Contribution in connection with the Services; or

21.2.3. the Operator receives any Public Sector Contribution in connection with the Services,

and any such notification must give full details of the Public Sector Contribution applied for, offered or received as the case may be.

22. State Aid Determinations: Recovery of Grant

22.1. The Scottish Ministers may withhold payment of the Grant or any part of it (other than Charter Portion) or reclaim the Grant or any part of it (other than Charter Portion) and the Operator must repay any such sum within 20 Business Days together with interest (as determined by the European Commission in accordance with Article 10 of Commission Regulation (EC) No 794/2004 (OJL 140, 30.4.2004, p.1) and the Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997 p. 3)) if required to do so by the European Commission, the European Court of Justice or any court in Scotland pursuant to Article 107 of the Treaty on the Functioning of the European Union and/or Applicable Law. The Scottish Ministers must use reasonable endeavours (subject to any objection of confidentiality imposed) to advise the Operator in the event that the Scottish Ministers receive any notification which will or may lead to a request to reclaim the Grant and, if so authorised by the European Commission, provide copies of any such notification and relevant communications.

- 22.2.** In the event of any determination by the European Commission, European Court of Justice or any Scottish Court requires repayment of the Grant or any part of it (other than Charter Portion) then the provisions of Clause 52 will apply.

SECTION D: STAFF INVOLVED IN THE PROVISION OF THE SERVICES

23. Transfer of Staff at Commencement

- 23.1.** In the event that the Operator (or an Associated Company or sub-contractor of the Operator) becomes liable for any Inherited Employment Liabilities which relate to or arise out of any event or occurrence in each case before the Commencement Date in respect of any Employees the Scottish Ministers must reimburse the Operator for all amounts paid by way of additional grant provided always that no additional grant will be paid in relation to Inherited Employment Liabilities which
- (i) the Operator was aware of or could reasonably be expected to be aware of having made enquiries that a prudent operator in the Operator's position ought to have made prior to the Commencement Date, or
 - (ii) relate to or arise from the actions or omissions of the Operator (or its associated companies or its sub-contractors), or
 - (iii) relate to or arise from claims which have been notified to the Scottish Ministers after the period of 3 months from the Commencement Date, or
 - (iv) relate to or arise from a breach of regulations 13 and 14 of TUPE by the Operator.
- 23.2.** The Operator must, and must ensure that any Associated Company or subcontractor of the Operator must comply with its or their obligations under regulations 13 and 14 of TUPE in relation to the commencement of the Services and must indemnify and keep indemnified the Scottish Ministers and/or, on demand by the Scottish Ministers, any third party from and against any costs, claims, liabilities and expenses (including reasonable legal expenses) arising out of any failure to so comply.
- 23.3.** The Parties acknowledge that TUPE may apply to transfer the employment of those employees of the Operator (or an Associated Company or sub-contractor of the Operator) who are wholly or mainly assigned to the Services immediately prior to the Expiry or Termination of this Agreement (**Transferring Employees**) to an Incoming Operator. In the event that TUPE does so apply, Clauses 23.4 to 24.2 shall apply.

- 23.4.** The Operator must, and must ensure that any Associated Company or sub-contractor of the Operator must, comply with its or their obligations under regulations 11, 13 and 14 of TUPE and must indemnify and keep indemnified the Scottish Ministers and on demand by the Scottish Ministers, any third party from and against any costs, claims liabilities, expenses (including reasonable legal expenses) arising out of any failure to so comply.

24. Transfer of Staff on Expiry or Termination

- 24.1.** In the event that there is a New Agreement, the Operator agrees that remuneration and benefits of any kind due to Transferring Employees in respect of the period up to the Expiry or Termination of this Contract must be paid or settled in full by or on behalf of the Operator.

The Operator hereby undertakes to indemnify and keep indemnified on demand the Scottish Ministers and/or, on demand by the Scottish Ministers, any Incoming operator from and against any Operator Employment Liabilities which relate to or arise out of any act or omission by the Operator or any Associated Company or subcontractor of the Operator or any other event or occurrence in the period up to and including the Expiry Date or Termination Date of this Contract for which the Scottish Ministers and/or any Incoming Operator is or becomes liable by reason of TUPE.

- 24.2.** The Operator acknowledges that the Scottish Ministers may grant an indemnity to any Incoming Operator or third party to the same extent that the Scottish Ministers are indemnified in terms of Clauses 23.4 and 24.1 and agrees that in the event of a claim for loss incurred by the Scottish Ministers, that loss shall include the amount, if any, which the Scottish Ministers are required to pay by virtue of any indemnity granted by the Scottish Ministers in accordance the provisions of this Clause 24.2.

25. Pensions

- 25.1.** The Operator must comply with its obligations under sections 257 and 258 of the Pensions Act 2004, to the extent that TUPE applies to the Employees.

26. Information about Operator's Employees

- 26.1.** During the Transfer Assistance Period the Operator must, within 5 Business Days of its receipt of a request by the Scottish Ministers, supply in writing to the Scottish Ministers or to its nominee:
- 26.1.1.** full, complete and accurate information as to the terms and conditions of employment of all employees wholly or partly assigned to the Services during the Transfer Assistance Period (**Assigned Employees**);
 - 26.1.2.** the job title, role, length of service and date of birth of all Assigned Employees;
 - 26.1.3.** details of any outstanding disputes or litigation between the Operator and any of the Assigned Employees; and
 - 26.1.4.** such other information relating to such Assigned Employees as the Scottish Ministers may reasonably require.
- 26.2.** During the Grant Period the Operator must maintain complete and accurate personnel records and must deliver such records to the Scottish Ministers on or prior to the Expiry Date.
- 26.3.** If the Operator becomes aware that any information provided pursuant to clause 26.1 has become untrue, inaccurate or misleading, it must notify the Scottish Ministers and provide the up to date information to them.
- 26.4.** The Operator undertakes to the Scottish Ministers that, during the Transfer Assistance Period it must not (and must ensure that any sub-contractor must not) without the prior consent of the Scottish Ministers:
- 26.4.1.** amend or vary (or purport or promise to amend or vary) the terms and conditions of employment or engagement (including, for the avoidance of doubt, pay) of any Assigned Employee, other than where such amendment or variation has previously been agreed between the Operator and the Assigned Employee(s) in the normal course of business, and where any such

amendment or variation is not in any way related to the transfer of the Services;

26.4.2. terminate or give notice to terminate the employment or engagement of any Assigned Employee, other than in circumstances in which the termination is for reasons of misconduct or lack of capability;

26.4.3. transfer away, remove, reduce or vary the involvement of any of the Assigned Employees from or in the provision of the Services, other than where such transfer or removal:

26.4.3.1. was planned as part of the individual's career development;

26.4.3.2. takes place in the normal course of business; and

26.4.3.3. will not have any adverse impact upon the delivery of the Services by the Operator, provided that any such transfer, removal, reduction or variation is not in anyway related to the transfer of the Services;

26.4.3.4. recruit or bring in any new or additional individuals to provide the Services who were not already involved in providing the Services prior to the Transfer Assistance Period.

SECTION E: INFORMATION AND INTELLECTUAL PROPERTY

27. Data Protection

27.1. The Operator will be a Data Controller in respect of any Personal Data it obtains through the operation of this Contract.

27.2. The Operator must comply at all times with the requirements of the Data Protection Act 1998.

28. Freedom of Information

28.1. The Operator must do all things necessary to facilitate the Scottish Ministers' compliance with the Freedom of Information (Scotland) Act 2002 which will include but may not be limited to:

- 28.1.1.** transferring all requests for information which it receives regarding the Services to the Scottish Ministers within 2 Business Days of receipt; and
- 28.1.2.** where the Scottish Ministers receive a request for information in relation to Information that the Operator is holding on their behalf and which the Scottish Ministers do not hold themselves the Scottish Ministers shall refer to the Operator such request for information that they receive as soon as reasonably practicable and in any event within 5 Business Days of receiving a request for information and the Operator must provide the Scottish Ministers with a copy of all such information in the form that the Scottish Ministers require as soon as practicable and in any event within 10 Business Days (or such other period as the Scottish Ministers acting reasonably may specify) of the Scottish Ministers' request.
- 28.2.** The Operator may make representations to the Scottish Ministers as to whether or not or on what basis information requested should be disclosed.
- 29. Confidentiality**
- 29.1.** The Operator must keep secret and not disclose (and procure that the Operator's employees keep secret and do not disclose) any information of a confidential nature obtained by the Operator by reason of this Contract except information which is in the public domain otherwise than by reason of a breach of this provision. Notwithstanding the foregoing, the Operator must, unless otherwise directed by the Scottish Ministers, acknowledge in all promotional and publicity material relating to the Services the financial support given to the provision of the Services through the Grant.
- 29.2.** The Scottish Ministers may publish or disclose this Contract or any part of it, any information concerning the Contract or matters arising out of or in connection with it, the performance of the Operator under the Contract and any other information as it may deem appropriate from time to time. The Scottish Ministers must use their best endeavours to notify the Operator prior to publishing or disclosing any such information directly relating to the Operator, and must take account of any representations which the Operator may make in connection herewith.
- 29.3.** Notwithstanding any of the foregoing provisions of this Clause 0, or any other provision of this Contract either party may disclose any information:

- 29.3.1.** as required by law or judicial order to be disclosed;
- 29.3.2.** to its professional advisers provided always that the recipient of the information is subject to the same obligation of confidentiality as that contained herein.
- 29.4.** The Operator must not, and must ensure and procure that its agents, employees, representatives and sub-contractors do not, except with the prior approval of the Scottish Ministers (which may be granted subject to such conditions as the Scottish Ministers see fit):
- 29.4.1.** communicate with representatives of the press, television, radio or other communications media on any matter concerning the Contract; or
- 29.4.2.** disclose to third parties any information obtained by it from the Scottish Ministers under or in connection with the Contract.
- 29.5.** The provisions of this Clause will not apply to any information which may reasonably be required to be disclosed to any party by the Scottish Ministers for the purposes of seeking an Incoming Operator, including any information requested by the Scottish Ministers in accordance with Clause 12.
- 29.6.** The obligations imposed by this Clause will continue to apply after the expiry or termination of this Contract.

30. Intellectual Property Rights

The Operator must ensure that nothing contained in any materials produced or submitted to the Scottish Ministers by the Operator or anyone acting on its behalf nor the reproduction of such materials, constitutes an infringement of any third party copyright or intellectual property right and must indemnify the Scottish Ministers against all actions, proceedings, claims and demands made by reason of any such infringement.

SECTION F: OPERATOR CONDUCT

31. Compliance with the Law

31.1. In providing the Services and otherwise when performing the Contract, the Operator must comply in all respects with the Applicable Law.

32. Bribery and Corruption

32.1. The Operator must not commit or attempt to commit any offence in its activities relating to the Contract:

32.1.1. under the Bribery Act 2010; or

32.1.2. of fraud, uttering, or embezzlement at common law.

32.2. Breach of Clause 32.1 will be treated as a material breach for the purposes of Clause 50.1.8.

33. Discrimination

The Operator must not unlawfully discriminate against any person in breach of the Equality Act 2010 in its activities relating to the Contract.

34. Operational Management

The Operator must provide the Services in accordance with the Operational Management Systems and the Customer Complaints Process. These must be reviewed from time to time and in the first instance before the Commencement Date or when so required by any change of circumstance or when so requested by the Scottish Ministers, and must be updated as appropriate. Any amendment so requested by the Scottish Ministers will be a variation to which Clause 11 shall apply.

35. Bookings and Ticketing

35.1. The Operator must ensure that all bookings and reservations are dealt with on a first come first served basis.

- 35.2.** There must be no discrimination between one ferry user and other.
- 35.3.** The Operator must honour all pre-existing tickets (for all categories of passenger, vehicle and or freight) sold by the incumbent operator prior to the Commencement Date.

SECTION G: GENERAL PROVISIONS

36. Operator's Status

- 36.1.** At all times during the Grant Period the Operator will act as an independent Operator and nothing in the Contract establishes a contract of employment, a relationship of agency or partnership, or a joint venture between the Parties or between the Scottish Ministers and the Operator's Representative. Accordingly, neither Party is authorised to act in the name of, or on behalf of, or otherwise bind the other Party save as expressly permitted by the terms of the Contract.
- 36.2.** The Operator must not say or do anything that might lead any other person to believe that the Operator is acting as the agent of the Scottish Ministers.

37. Operational Undertakings

- 37.1.** The Operator undertakes at all times during the Grant Period:

- 37.1.1.** to remain a Community shipowner;
- 37.1.2.** to furnish the Scottish Ministers promptly with all such information as they may from time to time require regarding the business and affairs of the Operator and of any Associated Company of the Operator employed as a sub-contractor in the provision of the Services, the provision of the Services, and any other matters connected with or affecting the foregoing or the performance by the Operator of its obligations under this Contract or the performance by the relevant parties of their obligations under the agreements set out in Schedule 2;
- 37.1.3.** to keep a Funded Assets Register, and to maintain, repair or replace such Funded Assets unless otherwise directed by the Scottish Ministers. The Funded Assets must be presented in Good Working Order and (other than

those Funded Assets owned by the Lessor which shall be returned to the Lessor on termination or expiry of the Ship Charters) returned to the Scottish Ministers, or transferred to an Incoming Operator as required at the Expiry Date;

- 37.1.4.** to publish and make available to ferry users a summary of performance statistics, and produce and publish a more detailed annual report;
- 37.1.5.** to allow the Scottish Ministers and persons appointed by them access to the premises, the Vessels and the employees of the Operator and all records and books of account of the Operator and must procure that any Associated Company with which the Operator has contracted for purposes connected with this Contract or the Services must allow similar access;
- 37.1.6.** immediately to notify the Scottish Ministers of the commencement of any procedure for the winding up of the Operator or for the appointment of a liquidator, receiver, judicial factor, administrator or administrative receiver to the Operator or of analogous proceedings in any jurisdiction, and to provide the Scottish Ministers with copies of all communications that are dispatched to the Operator's creditors pursuant to or in contemplation of any of the foregoing;
- 37.1.7.** to send to the Scottish Ministers, at the same time as they are dispatched, copies of all communications that are dispatched to the Operator's shareholders to the extent that such communications are related to or relevant in the context of this Contract or the Services;
- 37.1.8.** to provide to the Scottish Ministers details of any legal or regulatory action involving the Operator or the Vessels as soon as such action is instituted unless such legal or regulatory action is not material in the context of this Contract and the Services.

38. Consultation

- 38.1.** The Parties, acting reasonably, must consult with each other in good faith throughout the Grant Period, and in any event not less than once every 6 months, in relation to all matters relevant to both the Services and this Contract, in order to facilitate the continued provision of the Services.

- 38.2.** The Operator must take part in shipping services consultation meetings with the representatives of the relevant Regional Transport Partnerships, Orkney Islands Council, Shetland Islands Council, Highland Council, Aberdeenshire Council and Aberdeen City Council from time to time throughout the Grant Period as required by the Scottish Ministers and/or the relevant Regional Transport Partnership and/or Council.
- 38.3.** As and when requested by the Scottish Ministers and as otherwise required under this Contract, the Operator must take part in local community liaison throughout the Grant Period with representatives of users of the Services and the public and must provide the Scottish Ministers with copies of minutes of such meetings. The Scottish Ministers are entitled to be represented at such meetings and their representatives entitled to speak at such meetings.

39. Notices

- 39.1.** Any notice, or other communication, which is to be given by one Party to the other under this Contract must be:

39.1.1. given in writing;

39.1.2. addressed in accordance with Clause 39.3; and

39.1.3. Sent by letter (delivered by hand, first class post or by recorded delivery or special delivery), fax or e-mail.

- 39.2.** Provided the relevant communication is not returned or rejected as undelivered, the notice or communication is deemed to have been given:

39.2.1. 2 Business Days after the day on which the letter was posted; or

39.2.2. 4 Business Hours, in the case of a fax or an e-mail.

- 39.3.** For the purposes of this Clause the address of each Party is:

The Scottish Ministers
Transport Scotland

Aviation, Maritime, Freight and Canals Division

Victoria Quay

Edinburgh EH6 6QQ; and

Serco Limited

Serco House

16 Bartley Wood Business Park

Bartley Way

Hook

Hampshire RG27 9UY

39.4. Either Party may change its address details by serving a notice in accordance with this Clause.

39.5. Notices under Clause 51 may be sent to the Operator's trustee, receiver, liquidator or administrator, as appropriate.

40. Payment

40.1. Subject to Clause 22, each Party must pay all sums due to the other within 20 Business Days of receipt of a valid invoice.

40.2. The Operator must supply such other documentation as reasonably required by the Scottish Ministers to substantiate any invoice.

40.3. Interest is payable on the late payment of any undisputed sums of money at the rate of statutory interest (as set in accordance with section 6 of the Late Payment of Commercial Debts (Interest) Act 1998) applying during the period of non-payment.

41. Recovery of Sums Due

41.1. Wherever under the Contract any sum of money is recoverable from or payable by the Operator, the Scottish Ministers may deduct that sum from any sum due to the Operator whether under the Contract or otherwise.

41.2. The Operator must make any payments due to the Scottish Ministers without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise

unless the Operator has a valid court order requiring an amount equal to such deduction to be paid by the Scottish Ministers to the Operator.

41.3. If the payment or deduction of any amount referred to in Clause 41.2 above is disputed then any undisputed element of that amount must be paid and the disputed element must be dealt with in accordance with either Clause 19 or Clause 49 as appropriate in the circumstances.

42. Waiver

42.1. No waiver is effective unless it is expressly stated to be a waiver and communicated to the other Party in writing in accordance with Clause 39.

42.2. No failure or delay by either Party to enforce any provision of the Contract, will prejudice or restrict the rights or remedies of that Party, nor will any waiver by any party of any of the requirements of this Contract, or any of its rights or remedies under this Contract or at law release either Party from full performance of their other obligations under this Contract.

42.3. No failure or delay by either Party to enforce any provision of the Contract will be deemed to result in that party affirming this Contract (unless that party makes such an affirmation in writing in accordance with Clause 39).

42.4. No single or partial exercise of any right or remedy under this Contract or at law will prevent any further exercise of the same right or remedy or any other right or remedy under this Contract or at law.

42.5. A waiver given pursuant to Clause 42.1 of a breach of any of the terms of this Contract will not constitute a waiver of any other breach and will not affect the other terms of this Contract.

42.6. A waiver given pursuant to Clause 42.1 of a breach of any of the terms of this Contract will only apply in the particular circumstances for which it is given and will not prevent the party giving it from subsequently relying on the relevant provision in other circumstances or on another occasion.

42.7. A waiver in respect of any Event of Default is not a waiver of any subsequent Event of Default.

42.8. The rights and remedies provided by this Contract are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy is not to be deemed an election of such remedy to the exclusion of other remedies. The rights and remedies provided by this Contract are not exclusive of any rights or remedies provided by law.

43. Severability

If any provision of the Contract is held to be invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision is severed and the remainder of the provisions of the Contract continue in full force and effect as if the Contract had been executed with the invalid, illegal or unenforceable provision eliminated.

44. Jus Quaesitum Tertio

It is expressly declared that no rights are conferred under or arising out of this Contract upon any person other than the Scottish Ministers and the Operator (and their permitted successors and assignees) and, without prejudice to the foregoing, there will not in any circumstances be created by this Contract a jus quaesitum tertio in favour of any other person whatsoever.

SECTION H: CONTRACT GOVERNANCE

45. Audit, Expenditure and Accountability

45.1. The Operator must ensure and procure that adequate internal expenditure controls are in place and that all resources are used economically, effectively and efficiently so as to comply with the terms of this Contract.

45.2. The Operator must ensure that there is no cross-subsidisation between the Services and any other service run by or activities of the Operator or between the Operator and any other Associated Company and that all transactions with any Associated Company are conducted on an arms length basis and are so identified in all records and books of accounts.

- 45.3.** The Operator must have clear, separate and transparent accounting systems for the financing and operating of the Services (in accordance with the Financial Transparency (EC Directive) Regulations 2009/2331) to ensure that the Grant is only used for the Services and not for any other activity of the Operator and shall deal with the Scottish Ministers on an open book basis.
- 45.4.** The Operator must ensure that, in the event that it operates any other service or carries out any other activities, a cost allocation mechanism is in place such that costs which are common to the Services and those other services and/or activities are correctly allocated and recorded in accordance with clearly established, consistently applied and objectively justifiable cost accounting principles.
- 45.5.** The Operator must ensure that, in the event that it operates any other service or carries out any other activities, a revenue allocation mechanism is in place such that revenues which are common to the Services and those other services and/or activities are correctly allocated and recorded in accordance with clearly established, consistently applied and objectively justifiable cost accounting principles.
- 45.6.** The Operator must keep and maintain throughout the Grant Period and thereafter, until 5 years after the final payment by the Scottish Ministers to the Operator pursuant to this Contract, adequate and proper records of and books of accounts recording the financial affairs of the Operator, the provision of the Services and all receipts and expenditures of monies advanced to the Operator by the Scottish Ministers by way of the Grant.
- 45.7.** The Operator must throughout the duration of the Grant Period and for a period of 5 years after the final payment has been made to the Operator by the Scottish Ministers pursuant to this Contract provide the Auditor General for Scotland access at all reasonable times and on reasonable notice to its books and records for the purposes of carrying out any audit or examination which he is empowered to carry out pursuant to the Public Finance and Accountability (Scotland) Act 2000 or any other Legislation.
- 45.8.** The Operator must throughout the Grant Period and at its own cost present to the Scottish Ministers:
- 45.8.1.** not later than 6 Months after the end of every accounting reference period of the Operator, a copy of the audited financial statements of the Operator and

the audited consolidated financial statements of any Group of which the Operator forms part for that accounting reference period;

45.8.2. as soon as reasonably practicable after the end of any period notified by the Scottish Ministers (but not more than once in any Service Year) a confirmation by the auditors of the Operator in such form as may be agreed between the Scottish Ministers, the Operator and the auditors containing information to confirm that the Grant paid to the Operator has been applied by the Operator in accordance with Clauses 13 - 21; and

45.8.3. the information required under the Performance Regime.

45.9. The Operator must provide to the Scottish Ministers (or any other person appointed by the Scottish Ministers) such information as they may reasonably require from time to time, including access to and/or copies of all records maintained by the Operator, concerning any of the Services and the Scottish Ministers must reimburse to the Operator its reasonable costs incurred in complying with this Clause 45.9.

46. Assignment and Sub-Contracting

46.1. The Operator must not assign any portion of the Contract or sub-contract any material portion of the Contract without the prior written consent of the Scottish Ministers except for assignments in security. Sub-contracting any part of the Contract will not relieve the Operator of any obligation or duty (or part thereof) attributable to the Operator under the Contract.

46.2. The Operator must provide the Scottish Ministers with a copy of the deed or document formally recording any assignment of this Contract.

46.3. Where the Scottish Ministers have consented to the placing of sub-contracts, copies of each sub-contract shall be sent by the Operator to the Scottish Ministers immediately after they are issued.

46.4. Where the Operator enters an assignment or a sub-contract with an assignee or contractor for the purpose of performing this Contract, the Operator must ensure a term is included in such assignment or sub-contract which:

46.4.1. requires payment to be made to the assignee, or contractor within a specified period not exceeding 30 days from receipt of a valid invoice from the assignee, or contractor as defined by the sub-contract or assignment requirements and provides that, where the Scottish Ministers have made payment to the Operator in respect of the Services and the assignee, or contractor's invoice relates to such Services then, to that extent, the invoice must be treated as valid and, provided the Operator is not exercising a right of retention or set-off in respect of a breach of contract by the assignee, or contractor, or in respect of a sum otherwise due by the assignee, or contractor to the Operator, payment must be made to the assignee, or contractor without deduction;

46.4.2. notifies the assignee, or contractor that the sub-contract or assignment forms part of a larger contract for the benefit of the Scottish Ministers and that should the assignee, or contractor have any difficulty in securing the timely payment of an invoice, that matter may be referred by the assignee, or contractor to the Scottish Ministers; and

46.4.3. is in the same terms as that set out in this Clause 46.4 (including for the avoidance of doubt this Clause 46.4.3) subject only to modification to refer to the correct designation of the equivalent party as the Scottish Ministers and assignee, or contractor, as the case may be.

47. Contract Amendments

47.1. Amendments to this Contract or variations of its terms will only be effective where constituted in writing and signed by or on behalf of each of the Parties. Nothing in this Contract will entitle the Scottish Ministers to issue a Contract amendment or variation which purports to vary the terms of this Contract relating to its obligations in respect of the Charter Portion.

47.2. Clause 11 will apply in relation to any proposed amendments which constitute a Variation to the Services.

48. Benchmarking

The Operator must comply with Schedule 17 in respect of Benchmarking.

49. Dispute Resolution Procedure

- 49.1.** All disputes, differences or questions arising out of this Contract with respect to any matter or thing arising out of or relating to the Contract (**a Dispute**), except to the extent to which provision for reference to an Expert is made elsewhere in the Contract, must in the first instance be referred to the Operator's Representative and the Scottish Ministers' Representative (or a representative of the same with appropriate delegated responsibility) who must attempt to settle the Dispute by negotiation. If the Dispute cannot be resolved to the satisfaction of both Parties within 28 Business Days of such a referral, it must be escalated to the Senior Representatives' Board, which will comprise the Senior Operator's Representative and the Senior Scottish Ministers' Representative, for resolution. The Parties' obligations under the Contract will not be affected by entering into this procedure.
- 49.2.** If the Senior Representatives' Board is unable to resolve any Dispute, referred to it within 28 Business Days then the matter may be referred by either party to a single arbiter mutually chosen by the parties, or failing agreement, nominated by the President of the Law Society of Scotland for the time being on the application of either party. Any such reference to arbitration will be seated in Scotland and conducted in accordance with the Scottish Arbitration Rules, as set out in schedule 1 of the Arbitration (Scotland) Act 2010.

SECTION I: DEFAULT, CURE AND TERMINATION

50. Events of Default

- 50.1.** The occurrence of any of the following circumstances or events constitute an Event of Default:
- 50.1.1.** the Operator knowingly and deliberately giving any fraudulent written information to the Scottish Ministers or giving any other written information to the Scottish Ministers which read as a whole is incorrect or misleading, in a material respect;
 - 50.1.2.** the Operator being unable to pay its debts as they fall due, suspending making payments on any of its debts or commencing negotiations with one or more of its creditors with a view to rescheduling any of its indebtedness;

- 50.1.3.** the passing of a resolution that the Operator be wound up, or a court making an order that the Operator be wound up or that a liquidator (whether provisional, interim or otherwise) be appointed or any equivalent or analogous step is taken in any jurisdiction and such order not being recalled or discharged within 28 days, in any case otherwise than for the purposes of a solvent reconstruction or amalgamation previously sanctioned by the Scottish Ministers;
- 50.1.4.** a receiver, manager, judicial factor, administrator or administrative receiver being appointed to the Operator or over all or any substantial part of the property which may from time to time be comprised in the property and undertaking of the Operator or any equivalent or analogous appointment is made in any jurisdiction and such appointment not being discharged within 28 days;
- 50.1.5.** the Operator ceasing or threatening to cease to carry on business or to provide the Services or any part of them;
- 50.1.6.** the occurrence of any event which allows or which with the lapse of time would allow any party to any of the agreements set out in Schedule 2 to terminate the relevant agreement before its natural expiry date;
- 50.1.7.** the arrest or detention of any Vessel unless the Vessel or Vessels in question is free from arrest or detention within 7 days;
- 50.1.8.** the Operator committing a material breach of any provision of this Contract which if capable of remedy has not been remedied within 7 days of the Scottish Ministers notifying the Operator of such breach;
- 50.1.9.** any authorisation, approval, consent, licence, exemption, filing, registration or notarisation or other requirement necessary to enable the Operator to comply with any of its obligations hereunder which are material (as determined by the Scottish Ministers) and which the Operator is responsible for procuring and/or maintaining, being modified, revoked or withheld or ceasing to remain in full force and effect and not being reinstated in full force and effect or replaced by an equivalent, unless lack of the same does not affect the provision of the

Services and said reinstatement or replacement is achieved with 7 Business Days;

50.1.10.there is any Change in Control of the Operator after the date of this Contract except in circumstances where its holding company is listed on the London Stock Exchange and the Change in Control occurs as a result of a public offer (unless the Scottish Ministers have given their prior consent, which must not be unreasonably withheld or delayed if there is no Event of Default then subsisting);

50.1.11.if, the Scottish Ministers having issued a Cure Notice, the terms of the Cure Plan have not been agreed within the period stated in the Cure Notice or if the actions specified in the Cure Plan to be taken by the Operator have not been taken and the matters referred to in the Cure Notice have not been otherwise resolved to the satisfaction of the Scottish Ministers within the period specified in the Cure Plan; or

50.1.12.if, the Scottish Ministers having issued a Cure Notice, the actions specified in the Cure Plan to be taken by the parties other than the Operator have not been taken and the matters referred to in the Cure Notice have not been otherwise resolved to the satisfaction of the Scottish Ministers within the period specified in the Cure Plan.

51. Remedies

51.1. If the Scottish Ministers become aware of the occurrence of an Event of Default, the Scottish Ministers may, without prejudice to any other rights, at any time exercise all or any of the following remedies:

51.1.1. by notice to the Operator terminate this Contract with immediate effect or on such date as the Scottish Ministers in their sole discretion stipulate in the notice;

51.1.2. in relation to any of the Events of Default set out in Clauses 50.1.2 to 50.1.5 by notice to the Operator require that an amount equal to the sum paid to the Operator as the Operator's Return (including any Varied Reward) is immediately due and payable to the Scottish Ministers; and/or

51.1.3. issue a Cure Notice.

51.2. In the event of this Contract being terminated as a consequence of an Event of Default, the Operator must pay to the Scottish Ministers the amount of any costs and expenses properly and reasonably incurred by the Scottish Ministers in connection with the Scottish Ministers re-tendering the Services.

51.3. Without prejudice to any entitlement of the Operator to seek specific implement of any obligation under this Contract or to any interdict or interim relief, and other than the Operator's express right of termination in the circumstances set out in Clause 52.2, in the event of a failure by the Scottish Ministers to implement any of their obligations under this Contract the sole remedy of the Operator will be to rescind and to recover from the Scottish Ministers any financial losses suffered by the Operator as a direct consequence of such failure.

52. Termination

52.1. This Contract may be terminated at any time by agreement between the Scottish Ministers and the Operator. In the event of such termination, the Operator is entitled to all its proper and reasonable costs, losses or expenses (evidenced on an open book basis) arising as a direct result of such termination.

52.2. This Contract may be terminated by either the Scottish Ministers or the Operator in the event of a determination by the European Commission, European Court of Justice or any Scottish Court requiring either repayment of the Grant in full, or repayment of an amount equal to or exceeding the sum paid to the Operator as the Operator's Return (including any Varied Reward).

52.3. This Contract may be terminated by the Scottish Ministers in the event of the termination of the chartering of the Vessels under the Ship Charters following the issue of termination notices thereunder.

52.4. Notwithstanding the provisions of Clause 51.1.1 and this Clause 52, Clauses 1 (Definitions and Interpretations), 45 (Audit, Expenditure and Accountability), 0 (Bribery and Corruption), 55 (Indemnity), 0 (Confidentiality), 28 (Freedom of Information), 27 (Data Protection), 51.2, 51.3, 12 (Transition Obligations), 49 (Dispute Resolution Procedure), 59 (Governing Law), 23 (Transfer of Staff at Serco in Confidence)⁴²

Commencement), 24 (Transfer of Staff on Expiry or Termination), 26 (Information about Operator's Employees), 42 (Waiver), 43 (Severability) and Schedule 13, Paragraph 4.9. will survive termination of this Contract along with any other Clauses or Schedules necessary to give effect to those provisions. Termination will not prejudice or affect any right of action or remedy which has accrued or accrues to either Party.

53. Cure

53.1. The Scottish Ministers may at any time issue a Cure Notice if:

53.1.1. the Operator fails to meet the Performance Measure for Reliability on 3 or more occasions in any 3 month period;

53.1.2. the Operator fails to meet the Performance Measure for Punctuality (Connectivity) on 3 or more occasions in any 3 month period;

53.1.3. the Operator fails to comply with any of its obligations under this Contract;

53.1.4. a Material Reduction in Revenue has occurred, irrespective of whether either Party has exercised its rights under Clause 16;

53.1.5. Clause 51.1.3 applies; or

53.1.6. one or more Relief Events prevent the provision by the Operator of the Services for a continuous period of 5 Business Days or for a cumulative period of 20 Business Days in any 12 consecutive months.

53.2. The Operator is required, within 14 days of receipt of a Cure Notice, to submit a programme of action (a Cure Plan) which will, if performed, cure or remedy the matters referred to in the notice to the satisfaction of the Scottish Ministers within a period acceptable to the Scottish Ministers.

53.3. When the Cure Plan has been approved by the Scottish Ministers the Operator will implement the Cure Plan to the satisfaction of the Scottish Ministers.

53.4. If at any time the Scottish Ministers are not satisfied with the progress being achieved by the Operator in relation to the Cure Plan, then the Scottish Ministers may by notice
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to the Operator declare that the payment of the Grant will be suspended whereupon the liability of the Scottish Ministers in respect of the Grant will be suspended immediately. The liability of the Scottish Ministers in respect of the Grant, if suspended, will be reinstated upon the implementation of the Cure Plan to the satisfaction of the Scottish Ministers or otherwise as the Scottish Ministers may decide.

53.5. If:

53.5.1. the terms of the Cure Plan have not been agreed;

53.5.2. the actions specified in the Cure Plan to be taken by the Operator or otherwise have been taken; and/or

53.5.3. the matter(s) referred to in the Cure Notice have not otherwise been resolved to the satisfaction of the Scottish Ministers;

each or any within the periods specified in the Cure Plan, an Event of Default will be deemed to have occurred and the provisions of Clauses, 51.1, 51.2, 51.3, and 52.1 will apply.

SECTION J: FINAL PROVISIONS

54. Warranties

54.1. The Operator warrants and undertakes to the Scottish Ministers that as at the Mobilisation Date:

54.1.1. it is a limited liability company, duly incorporated and validly existing and not in liquidation or apparently insolvent under the laws of Scotland or any jurisdiction outside Scotland;

54.1.2. it has full power and authority to enter into, and to fulfil its obligations under, this Contract and the agreements set out in Schedule 2 (Conditions Precedent) and that the Contract is executed by a duly authorised individual;

- 54.1.3.** all authorisations, approvals, consents, licences, registrations and other matters, official or otherwise, required or advisable in connection with the entry into, performance, validity and enforceability of this Contract and in connection with the operation of the Services have been obtained or effected and are in full force and effect and there are no circumstances which indicate that any of the same are likely to be revoked in whole or in part in the ordinary course of events;
- 54.1.4.** in entering the Contract it has not committed any offence under the Bribery Act 2010 or of fraud or uttering at common law;
- 54.1.5.** as at the Commencement Date, all information contained in the PPQQ and Tender remains true, accurate and not misleading, save as may have been specifically disclosed in writing to the Scottish Ministers prior to execution of the Contract;
- 54.1.6.** no claim is being asserted and no litigation, alternative dispute resolution procedure or administrative proceeding is presently in progress or, to the best of its knowledge and belief, pending or threatened against it or any of its assets which will or might have a material adverse effect on its ability to perform its obligations under the Contract;
- 54.1.7.** it is not subject to any contractual obligation, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under the Contract;
- 54.1.8.** no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, are threatened) for the winding up of the Operator or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, manager, administrator or similar officer in relation to any of the Operator's assets or revenue;
- 54.1.9.** it owns, has obtained or is able to obtain, valid licences for all Intellectual Property Rights that are necessary for the performance of its obligations under the Contract;
- 54.1.10.** in the 3 years prior to the Commencement Date:

54.1.10.1.it has conducted all financial accounting and reporting activities in compliance in all material respects with the generally accepted accounting principles that apply to it in any country where it files accounts;

54.1.10.2.it has been in full compliance with all applicable securities and tax laws and regulations in the jurisdiction in which it is established;

54.1.11.it has not done or omitted to do anything which could have a material adverse effect on its assets, financial condition or position as an ongoing business concern or its ability to fulfil its obligations under the Contract;

54.1.12.there are no actual or potential conflicts between the interests of the Operator and the duties owed to the Scottish Ministers under the Contract, save as may have been specifically disclosed in writing to the Scottish Ministers prior to execution of the Contract.

55. Indemnity

55.1. Without prejudice to any rights or remedies of the Scottish Ministers, the Operator indemnifies the Scottish Ministers against all claims, proceedings, actions, damages, demands, losses, charges, costs, expenses and any other liabilities which the Scottish Ministers may suffer or incur as a result of or in connection with:

55.1.1. any damage to property or in respect of any injury (whether fatal or otherwise) to any person which may result directly or indirectly from any negligent or wrongful act or omission of the Operator; or

55.1.2. any breach of this Contract.

56. Force Majeure

56.1. Each Party is relieved from liability for performance of its obligations under this Contract to the extent that it is not able to perform such obligations due to a Force Majeure Event. If either Party is affected by a Force Majeure Event, it must immediately notify the other Party of the nature and extent of the circumstances in question.

- 56.2.** If at any time the Operator claims a Force Majeure Event in respect of any of its obligations under this Contract, the Scottish Ministers are entitled at their own cost to procure one or more third parties to provide the Services in so far as the Operator is unable to provide the Services or part of them for so long as the Force Majeure Event or its effect continues to prevent the Operator from performing all or any of its obligations under this Contract.
- 56.3.** If the Force Majeure Event in question prevails for a continuous period in excess of 7 days, the Scottish Ministers and the Operator must without prejudice to the rights of the Scottish Ministers under Clause 56.2 enter into bona fide discussions with a view to alleviating the effects of the Force Majeure Event or to agreeing such alternative arrangements as may be fair and reasonable.
- 56.4.** If no such terms are agreed within 6 Months of the commencement of the Force Majeure Event, and at that time such Force Majeure Event is continuing or its consequence remains such that the Operator is unable to comply with its obligations to any material extent, either Party may terminate this Contract by giving 30 Business Days' notice to the other party.
- 56.5.** The Parties must, at all times following the occurrence of a Force Majeure Event, use all reasonable endeavours to prevent and mitigate the effects of such Force Majeure Event on the Services and the Operator must at all times during which a Force Majeure Event is subsisting take all steps to overcome or minimise the consequences of the Force Majeure Event.
- 56.6.** The Party affected by a Force Majeure Event must notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes such Party to be unable to comply with its obligations under this Contract. Following such notification this Contract must continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event, unless the Scottish Ministers have exercised their rights under Clause 11.

57. Euro Compliance

In the event that any currency in which any of the obligations under this Contract are denominated from time to time is changed or replaced at any time after the date of this Contract (whether as a result of the introduction of, changeover to or operation of a single or unified European currency or otherwise) this Contract will be amended to

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the extent that the Scottish Ministers (acting reasonably) consider to be required in order to reflect those circumstances.

58. Entire Agreement

58.1. Except where expressly provided in this Contract, this Contract constitutes the entire agreement between the Parties in respect of all matters dealt with herein. The Contract supersedes all prior negotiations between the Parties and all representations and undertakings made by one Party to the other, whether written or oral regarding any matters dealt with in this Contract., except that this clause does not exclude liability in respect of any misrepresentation (whether in the PQQ or Tender or otherwise).

58.2. The Operator acknowledges that it has entered into this Contract on the basis of its terms only and has not relied upon any statement or representation or warranty or other provision (in any case whether oral, written, express or implied) made or agreed by any person (whether a party to this agreement or not) except those repeated or referred to in this Contract.

58.3. In the event of, and only to the extent of, any conflict between the clauses of the Contract, the Schedules and any document referred to in the Contract, the following order of precedence applies:

58.3.1. the Clauses of the Contract

58.3.2. the Schedules

58.3.3. any other document referred to in the Contract

59. Governing Law

The Contract is governed by and interpreted in accordance with Scots Law and, subject to Clauses 19 and 49 the Parties irrevocably submit to the jurisdiction of the Court of Session.

IN WITNESS WHEREOF this Public Service Contract and the Schedules which are contained in this Volume 1 and in the 5 parts and appendix of Volume 2 signed as being relative thereto have been duly executed by the parties as follows

SIGNED for and on behalf of **THE SCOTTISH MINISTERS**

Signature

Name

Position

Witness

Witness' full name

Witness' address

Date First June 2012

Place (town) Edinburgh

SIGNED for and on behalf of **SERCO LTD**

Signature

Name

Position

Witness

Witness' full name

Witness' address

Date First June 2012

Place (town) Edinburgh

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This is Schedule 1 Referred to in the Foregoing Contract between The Scottish Ministers and Serco Ltd

SCHEDULE 1 – Definitions and Interpretation

1. DEFINITIONS

In this Contract, words and expressions will, except where the context otherwise requires, have the following meanings assigned to them:

Aberdeen City Council means Aberdeen City Council, a local authority constituted and incorporated under the Local Government etc Scotland Act 1994 and having its principle offices at Marischal College, Broad Street, Aberdeen AB10 1AB;

Aberdeenshire Council means Aberdeenshire Council, a local authority constituted and incorporated under the Local Government etc Scotland Act 1994 and having its principle offices at Woodhill House, Westburn Road, Aberdeen, AB16 5GB;

Actual Outcome Statement will be construed in accordance with Schedule 13, Paragraph 3;

AGRS means Average Grant Required per Sailing and will be construed in accordance with Schedule 15, Part 2.

Annual Fuel Reconciliation Payment will be construed in accordance with Schedule 13, Paragraphs 4.5-4.8 and **Annual Fuel Reconciliation** will be construed accordingly;

Annual Fuel Statement will be construed in accordance with Schedule 13, Paragraphs 4.5 and 4.6.

Applicable Law means regulation, Legislation, practice or concession or official directive, ruling, request, notice, guideline, statement of policy or practice by any relevant legislative authority, the European Union, any of the official institutions of the European Union, governmental, local, international, national or other competent authority or agency (whether or not having the force of law in respect of which compliance by ship owners and operators is generally customary);

Assigned Employees will be construed in accordance with Clause 26.1.1;

Associated Company has the meaning attributed in Section 449 of the Corporation Tax Act 2010;

Average Price means in relation to the Comparable Services provided by the Comparison Group, the mean average of prices for those Comparable Services as adjusted to produce Equivalent Services Data over the previous 12 month period, or other period as agreed between the Employer and the Operator. (For the avoidance of doubt, the "mean average price" shall be calculated by aggregating the prices derived from Equivalent Services Data for each of the services and dividing the same by the number of instances of Comparable Services);

Base Case means the financial model for the provision of the Services set out in Schedule 12 (the Initial Base Case) and/or Revised Base Case as the context requires and as may be amended by any Grant Adjustment or otherwise in accordance with the terms of this Contract;

Base Case Operator's Return will be construed in accordance with the Base Case;

Benchmarked Services the Operational Services that the Employer elects to include in a Benchmark Review under paragraph 2.2 of Schedule 17;

Benchmarker means the independent third party appointed under paragraph 3.1 of Schedule 17;

Benchmark Report means the report produced by the Benchmarker following the Benchmark Review as further described in paragraph 5 of Schedule 17;

Benchmark Review means a review of the Operational Services carried out in accordance with paragraph 4 of Schedule 17 to determine whether those Operational Services represent Good Value;

Business Day means any weekday during which the Scottish Clearing Banks (or a majority of them) are open for business;

Business Hour means any time between 9:00am and 5:00pm on any Business Day;

Calendar Year means each 12 month period beginning on 1 January and ending on 31 December immediately following, provided that for the purpose of this Contract the first Calendar Year will be deemed to have commenced at 14:00 hours on 5 July 2012 and ends on the 31 December 2012;

Capital Supplement will be construed in accordance with Clause 20;

Change in Control means a person or persons acting in concert (as that term is defined in The City Code on Take-overs and Mergers from time to time) having control of the relevant entity (not being a person having a shareholding in the relevant entity as at the date hereof) who did not have control of the relevant entity at

the date hereof (and control is to be determined in accordance with Sections 450 and 451 of the Corporation Tax Act 2010);

Change in Applicable Law means a change which is specified in terms of its requirements and the date of commencement is intimated after the 5 March 2012. (For the avoidance of doubt a change where the change commences following the 5 March 2012 but is intimated before that date is not a Change in Applicable Law).

Charter Portion means the instalments of Charterhire and all other amounts payable by the Operator to the Lessor under the Ship Charters (save for amounts payable under clauses 7.2.2, 20.2.2, 24.3, 24.4 of each Ship Charter) as shown in the applicable Base Case;

Commencement Date means 5 July 2012;

Common Terms Agreement means the so named Agreement between the Operator and the Lessor related to the Ship Charters;

Community Shipowner has the meaning given in Council Regulation No 3577/92;

Comparable Services means services that are identical or materially similar to the Benchmarked Services (including in terms of scope, specification, volume and quality of performance) provided that if no identical or materially similar services exist in the market, the Benchmarker shall propose an approach for developing a comparable service benchmark;

Comparison Group means a sample group of organisations providing Comparable Services identified by the Benchmarker under paragraph 4.1.7 of Schedule 17 which consists of organisations which are either of similar size to the Operator or which are similarly structured in terms of their business and their service offering so as to be (in the Benchmarker's professional opinion) fair comparators with the Operator or which, in the professional opinion of the Benchmarker, are best practice organisations and that are carrying on at least a significant part of their business within the United Kingdom;

Consumer Prices Index or **CPI** means the Consumer Prices Index as published from time to time by the Office of National Statistics or such index as replaces the same provided always that if the CPI is rebased at any time in the period between the Mobilisation Date and the expiry or termination of this Contract, it shall nonetheless be determined as if such rebasing had not occurred. In the event of the abolition or a fundamental variation in the basis of the said Index (other than rebasing), the manner in which any sums referred to in this Contract which are to be varied by reference to CPI are to be varied will be as agreed between the Scottish

Ministers and the Operator. In the event that such agreement has not been reached by the date on which the Grant next falls to be calculated (or re-calculated) using CPI the manner in which any sums referred to in this Contract are to be varied must be determined in accordance with Clause 49.

Contract means this Contract between the Scottish Ministers and the Operator, including the Schedules, and any agreement which replaces or supersedes any of the foregoing or any part of the foregoing, all as amended, supplemented or varied from time to time;

Contract Variation Form means the form set out in Schedule 16;

Cure Notice means a notice by the Scottish Ministers to the Operator requiring the Operator to submit within 14 days a programme of action which will, if performed, cure or remedy the matters referred to in the notice to the satisfaction of the Scottish Ministers within a period acceptable to the Scottish Ministers;

Cure Plan means the programme of action referred to in the Cure Notice;

Customer Complaint Process will be construed in accordance with Schedule 10;

Data Controller has the meaning given in section 1(1) of the Data Protection Act 1998;

Deduction Regime means the system of deductions set out in Schedule 15, Part 2, for failure by the Operator to meet the Performance Measures;

Dispute will be construed in accordance with Clause 49;

Emergency means any threat to the safety of life or property at sea affecting any person or vessel but not including any threat to a Vessel arising from a failure by the Operator to perform its obligations under this Contract;

Employees means those employees of NorthLink Ferries Ltd (the **Employing Entity**) who are in each case wholly or mainly assigned to the provision of services materially similar to the Services immediately prior to the Commencement Date (save for those who object to the transfer pursuant to regulation 4(7) of TUPE);

Evaluation will be construed in accordance with Clause 11.

Event of Default means the occurrence of any of the events set out in Clause 50.1;

Excess Payment will be construed in accordance with Schedule 13, Paragraph 4.

Expert means the expert appointed in accordance with Clause 19;

Expiry Date means 25 April 2018 and Expiry will be construed accordingly;

Equivalent Services Data means data derived from an analysis of the Comparable Services provided by the Comparison Group as adjusted in accordance with paragraph 4.9 of Schedule 17;

Fleet Vessels means the vessels described in Schedule 5 as such, and leased to the Operator under the Ship Charters;

Force Majeure Event means:

- (a) war, civil war (whether declared or undeclared) or armed conflict;
- (b) nuclear explosion, radioactive, biological or chemical contamination, ionising radiation (but not arising from any act of terrorism); or
- (c) substantial damage arising from the effect of sonic booms,

in each case occurring after the Mobilisation Date;

Fuel Cost will be construed in accordance with Schedule 13, Paragraph 4.6;

Fuel Management Programme will be construed in accordance with Clause 14.3;

Funded Assets means any assets of a capital nature to be or which have been acquired by the Operator pursuant to Clause 20, or which were provided to the Operator by the Scottish Ministers at the Commencement Date, maintained by the Operator in accordance with Clause 37.1.3 and listed under the Funded Asset Register;

Funded Asset Register will be construed in accordance with Clause 37.1.3 and Schedule 5, Part E.

Good Working Order means fully fit to perform the functions for which the asset has been designed and having a residual life expectancy of at least one year or that pertaining when the asset was taken over less the effects of reasonable wear and tear, whichever is greater.

Good Value means the Grant payments attributable to a Benchmarked Service, having taken into account the Service Levels, less than or equal to the Average Price;

Grant will be construed in accordance with Clauses 13 - 19 and Schedule 13, and references to "Grant" include where the context so requires or admits references to Monthly Instalments;

Grant Adjustment means an adjustment to the Grant in accordance with Clause 17 to reflect Changes in Applicable Law, and/or an adjustment to the Grant in accordance with Clause 16 to reflect a Revised Base Case;

Grant Claim Form will be construed in accordance with Schedule 13, Paragraph 1;

Grant Period means the period commencing on the Commencement Date and finishing on the Expiry Date or in the event of early termination the Termination Date;

Group will be construed in accordance with the Companies Act 2006;

Handover Assistance Plan means the timetable and activity plan for handover assistance with respect to the Services, which must include details of all forward bookings and reservations made and deposits received;

Health & Safety Plan will be construed in accordance with Schedule 8;

Highland Council means Highland Council a local authority constituted and incorporated under the Local Government etc Scotland Act 1994 and having its principle offices at Glenurquhart Road, Inverness IV3 5NX;

Incoming Operator means any person other than the Operator with whom the Scottish Ministers enter into a New Contract;

Index Linked to a date in respect of a sum means that the sum is multiplied by the following factor:

$$\frac{\text{CPI [x]c}}{\text{CPI [x]p}}$$

Where:

CPI [x]c is the Consumer Price Index published in the Month of June in the Service Year immediately prior to that in which Index Linking is being applied; and

CPI [x]p is the Consumer Price Index published in the Month of June in the previous Service Year,

and cognate expressions will be construed accordingly;

(e.g. for an Index Linked change to be applied in the Service year 2014/15 then the indices CPI[x]c will be that for June 2014 and CPI[x]p that for June 2013);

Inherited Employment Liabilities means costs, claims, liabilities and expenses (including reasonable legal expenses) relating to or arising out of the employment of the Employees who transfer to the Operator pursuant to TUPE and which relate to the period prior to the Commencement Date for which the Operator or an Associated Company or a sub-contractor of the Operator becomes liable by reason of TUPE including, without prejudice to the foregoing generality, negligence claims by any such employees or any third party, unfair dismissal, redundancy, unlawful discrimination, breach of contract, claims in relation to pension entitlement, unlawful deduction of wages and equal pay;

Insurances means all policies of insurance taken out from time to time in respect of any Vessel throughout the Grant Period, together with all variations, modifications, extensions, or other alterations thereof;

Intellectual Property Rights means the following types of property and/or rights as granted in any jurisdiction (where references to any Scottish legal term for such property/rights will, in respect of any jurisdiction other than Scotland, be deemed to include what most nearly approximates in that jurisdiction to the right/property under English law) : i) patents; ii) petty patents and utility model rights; iii) registered trade marks; iv) registered design rights; v) applications for, and rights to apply for the property rights listed in items i) to v) (inclusive) above; vi) copyrights; vii) database rights; (viii) unregistered design rights; (ix) rights in performances; (x) the moral rights set out in Chapter IV of Part I of the Copyright, Designs and Patents Act 1988 (as amended from time to time); (xi) any rights of action in relation to confidential information; and (xii) any rights of action in relation to trade names, trading styles, product packaging and/or domain names;

Legislation means any Act of Parliament, including any local, personal or private Act of Parliament, any subordinate legislation (as that expression is defined in section 21(1) of the Interpretation Act 1978), any exercise of the Royal Prerogative and any enforceable community right (as that expression is defined in section 2 of the European Communities Act 1972) and any bylaws, statutory instruments, orders, notices, directions, codes of practice, consents or permissions properly and lawfully made or given under any of the foregoing (including for the avoidance of doubt, any legislation enacted by any Scottish Parliament or assembly or similar body and any subordinate or delegated legislation made by the Scottish Ministers or other person deriving authority from such legislation);

Lessor means Royal Bank Leasing Limited as the lessor party to the Ship Charters and will include its successors, permitted assignees or permitted transferees;

Lolo means freight which is lifted on and off the vessel by crane or vessels carrying only that freight, as the context requires.

Lot A means the provision of the Services between Scrabster and Stromness, across the Pentland Firth;

Lot B means the provision of the Services between Aberdeen, Kirkwall (Orkney) and Lerwick (Shetland);

Marketing Plan will be construed in accordance with Schedule 7;

Material Reduction in Revenue means the Revenue from the Services for a relevant Service Year have been established (to the reasonable satisfaction of the Scottish Ministers) to have fallen by at least 20% from the Revenue in the preceding Service Year;

MCA means the Maritime and Coastguard Agency and any successor body or bodies;

Mobilisation Date means 1 June 2012.

Mobilisation Period means the period starting from the Mobilisation Date and ending on the Commencement Date;

Monitoring Procedures means the procedures set out in Schedule 15;

Month means each calendar month during the Grant Period, provided that where the Commencement Date does not fall on the first day of a calendar month that Month shall be deemed for the purposes of this Contract to commence on the Commencement Date and where the Termination Date does not fall on the last day of a calendar month that Month shall be deemed for the purposes of this Agreement to end on the Termination Date;

Monthly Instalments will be construed in accordance with Clauses 14 to 18;

New Contract means any arrangement or contract of whatsoever nature in relation to the provision by the Scottish Ministers of a grant in respect of public transport services by sea to the Northern Isles similar in scope to the Services commencing subsequent to the Expiry or Termination of this Contract;

Northern Isles means Shetland and Orkney;

Operational Management Systems will be construed in accordance with Schedule 14, Part A;

Operating Costs means all proper and reasonable costs incurred during the relevant period by the Operator in order to allow it to provide the Services during that period excluding fuel costs;

Operator Employment Liabilities means costs, claims liabilities and expenses (including reasonable legal expenses) relating to or arising out of the employment of the Transferring Employees in the period from and including the Commencement Date including, without prejudice to the foregoing generality, negligence claims by any of such employees or any third party, unfair dismissal, redundancy, unlawful discrimination, breach of contract, claims in relation to pension entitlement, unlawful deduction of wages and equal pay;

Operator Vessels means the vessels referred to as such in Schedule 5, Part A (*to include only those additional to or in place of any of the Fleet Vessels*);

Operator's Representative means the suitably qualified and competent individual nominated by the Operator to be the main point of contact with the Scottish Ministers during the Contract Period, and for the purposes of Clause 49;

Operator's Return means the Operator's return shown in the Base Case as the Base Case Operator's Return;

Operator's Revenue A Account means the account identified as such and notified by the Operator and the Lessor to the Scottish Ministers;

Operator's Revenue B Account means the account identified as such and notified by the Operator and the Lessor to the Scottish Ministers;

Operator's Vessel Obligations will be construed in accordance with Schedule 5, Part B;

Orkney Islands Council means Orkney Islands Council a local authority constituted and incorporated under the Local Government etc Scotland Act 1994 and having its principle offices at Council Offices, School Place, Kirkwall, Orkney, KW15 1NY;

Outcome Operator's Return means the Operator's Return plus the Contract Adjustments to Base Case Operator's Return;

Party means either of the parties to this Contract;

Performance Deductions will be construed in accordance with Clause 18.

Performance Measures means all or any of the Performance Measures for the Services as set out in Schedule 15, Part 2.;

Performance Regime will be construed in accordance with Schedule 15;

Personal Data has the meaning given in section 1(1) of the Data Protection Act 1998;

Port means the port facilities at each or any of Aberdeen, Kirkwall (Hatston), Lerwick, Scrabster and Stromness;

Port Dues means the dues payable by the Operator for the use of the Ports in connection with the provision of the Services as set out in the Base Case;

Projected Fuel Costs means those costs for each grade of fuel the Operator will use in the provision of the Services, which is estimated in the Fuel Management Programme to be representative for the next Service Year until the Annual Fuel Reconciliation exercise is undertaken;

Projected Fuel Liability means the Projected Fuel Costs for each grade of fuel the Operator will use in that Service Year, multiplied by the Projected Tonnage for each grade of fuel;

Projected Tonnage – means the annual fuel tonnage figure split according to the volume of each grade as appears in the Initial Base Case

Public Sector Contribution will be construed in accordance with Clause 20.

Published Tariff Scheme will be construed in accordance with Clause 5.1;

Quarterly means each period of three months during the Grant Period where the first Quarter commences on the Commencement Date and ends on the preceding day in the third following calendar month or, if the third following calendar month has no numerically preceding day, on the last day of the appropriate calendar month and where the Termination Date does not fall on the last day of a Quarter that Quarter shall be deemed for the purposes of this Contract to have ended on the Termination Date;

Regional Transport Partnership means any such partnership created by the Scottish Ministers pursuant to the Transport (Scotland) Act 2005;

Relief Event means:

- (a) the cancellation of any sailing or the late arrival of any sailing if the cause of the cancellation or lateness is attributable to adverse weather, tidal conditions or any other safety factor (but not the non-attendance of suitably qualified and experienced staff) outwith the Operator's reasonable control which would in the Master's opinion have made the sailing or arrival in accordance with the Timetable unsafe or impractical and where such cancellation or lateness (or the effects thereof) could not have been avoided or mitigated by the exercise of due diligence by the Operator;
- (b) non-availability of, or operational restrictions at, any of the Ports for any reason outwith the Operator's reasonable control including because any facilities at the Ports are being used by vessels other than the Vessels;
- (c) terrorism, piracy or hijacking;
- (d) the occurrence of an Emergency in which any Vessel is or becomes involved;
- (e) the late departure or arrival of any sailing as a result of:

- (i) a departure being held back to await the arrival of a late running scheduled public transport service intended to connect with that sailing; and/or
 - (ii) the knock on effect of an earlier late arrival where the lateness is firstly, not greater than the lateness of the earlier service, and secondly, the lateness could not have been avoided or mitigated by the exercise of due diligence by the Operator.
- (f) Fuel shortages outwith the Operator's reasonable control;
- (g) The non availability of Funded Assets at or, if required, before the Commencement Date: and/ or
- (h) Any act or omission of the Scottish Ministers in breach of the Contract which causes or materially contributes towards the Operator failing to comply with the Performance Regime.

Revenue means the Operator's income from the Services for the relevant period including but not limited to all Public Sector Contributions and reimbursements from Transport Scotland in relation to Concessionary Travel entitlements and all amounts received by the Operator as a result of actual or threatened litigation, arbitration or other proceedings but not including any amounts paid or payable to the Operator by the Scottish Ministers under Clauses 14-17;

Revised Base Case will be construed in accordance with Clause 16;

Revised Base Case Calculation will be construed in accordance with Clause 16;

Revised Tariff Structure will be construed in accordance with Clause 5.7;

Ropax means vessels carrying passengers, cars and other vehicles accessing the vessel by driving on and off.

Roro means freight vehicles and trailers accessing the vessel by being driven or towed on and off or vessels carrying freight vehicles and trailers accessing the vessel by being driven or towed on and off, additional freight loaded onto and lifted from the vessel by other means such as craneage (all including hazardous loads) and passengers (normally lorry drivers) limited in number to 12 as the context applies.

Schedule means one of the Schedules to this Contract;

Scheduled Maintenance Programme means the programme for scheduled maintenance of the Vessels, set out in Schedule 5, Part C.

Scheduled Unavailability means, in respect of each of the Vessels a period during which the Vessel is scheduled to be unavailable to provide the Services whilst

scheduled maintenance is taking place as specified in the Scheduled Maintenance Programme.

Scottish Ministers means the Scottish Ministers and their successors to their interest under this Contract;

Scottish Ministers' Representative means the suitably qualified and competent individual nominated by the Scottish Ministers to be the main point of contact with the Operator during the Contract Period, and for the purposes of Clause 49 (as specified in Schedule 11);

Senior Operator's Representative means the suitably qualified and competent individual nominated by the Operator to be responsible for resolving Disputes in accordance with Clause 49 (as specified in Schedule 11);

Senior Representative's Board will be construed in accordance with Clause 49;

Senior Scottish Ministers' Representative means the suitably qualified and competent individual nominated by the Scottish Ministers to be responsible for resolving Disputes in accordance with Clause 49;

Services means those public transport services as specified in Schedule 3.

Service Year means each period of twelve Months of the Grant Period, the first Service Year commencing on the Commencement Date and each subsequent Service Year commencing on each anniversary of the Commencement Date and in the last Service Year terminating on the Expiry Date or the Termination Date as the case may be;

Shetland Islands Council means Shetland Islands Council a local authority constituted and incorporated under the Local Government etc Scotland Act 1994 and having its principle offices at Town Hall, Upper Hillhead, Lerwick, Shetland, ZE1 0HB, UK;

Ship Charters means the three time Charterparty Agreements by way of demise in respect of the Fleet Vessels between the Operator and the Lessor dated on or about the date hereof;

Start-up Plan will be construed in accordance with Schedule 6;

Tariff will be construed in accordance with Clause 5;

Tariff Index Linking means that the sum (excluding any element of the tariff which is set by a third party) is multiplied by the following factor:-

$$\frac{\text{CPI Jc}}{\text{CPI Jp}}$$

Where **CPI Jc** is the Consumer Price Index published in the Month of June in the Service Year immediately prior to that in which Tariff Index Linking is being applied, and

CPI Jp is the Consumer Price Index published in the Month of June in the previous Service Year,

and cognate expressions will be construed accordingly.

(e.g. for an Index Linked change to be applied in the year January to December 2014 then the indices CPIJc will be that for June 2013 and CPIJp that for June 2012).

Tariff Index Linking will be applied to separately to passengers, vehicles, cabins and freight, but prices within these categories may be varied up or down provided that the balance for each category will reasonably be expected to provide the same average fare within the category (defined as the total yield for each category divided by the number of tickets sold for that category excepting cancellation or booking amendment charges);

Termination Date means the date of termination of this Contract prior to the Expiry Date and Termination will be construed accordingly;

Timetable means the timetable set out in Schedule 3 as the same may be amended from time to time in accordance with this Contract;

Transfer Assistance Period means the period from 12 months prior to the Expiry Date or if earlier, the date that the Operator becomes aware that the provision of the Services is to cease until the Expiry Date;

Transferring Employees will be construed in accordance with Clause 23.3;

Tripartite Agreements means the three tripartite agreements among the Operator, the Scottish Ministers and the Lessor dated on or about the date hereof in respect of the Fleet Vessels;

TUPE means the Transfer of Undertakings (Protection of Employment) Regulations 2006;

Variation Notice will be construed in accordance with Clause 11 and Variation will be construed accordingly;

Varied Reward will be construed in accordance with Schedule 13, Paragraph 4.

Vessels means the Fleet Vessels and the Operator Vessels or such other vessel employed from time to time by the Operator for the provision of all or any part of the Services as has been approved by the Scottish Ministers in accordance with Clause 4.

2. **INTERPRETATION**

In this Contract, except where the context otherwise requires:

- a) all references to Clauses and Schedules are references to Clauses of and Schedules to this Contract and all references to paragraphs are references to paragraphs contained in the Schedules;
- b) words importing the singular include the plural and vice versa;
- c) any reference to any enactment, order, regulation or other similar instrument will be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as from time to time amended, replaced, consolidated, extended or re-enacted;
- d) all references to agreements, documents, or other instruments include a reference to that agreement, document or instrument as amended or supplemented from time to time or to any replacement or superseding agreement, document or instrument;
- e) the headings to the Clauses are inserted for convenience only and shall not affect the interpretation of this Contract;
- f) any notice, instruction, notification, direction, request, consent or approval contemplated herein will be made or given in writing;

- g) anything which may be done by the Scottish Ministers may be done by any person duly authorised by the Scottish Ministers for that purpose;
- h) any reference to us, we or our, Serco, Serco Northlink Ferries or SNF in Schedules 3 to 10, 12 and 14 means the Operator (Serco Ltd); and
- i) any reference to numbering contained within boxed sections within the Schedules relates exclusively to the numbering within the box (unless expressly stated otherwise).

Signed for and on behalf of the Scottish
Ministers

Signed for and on behalf of Serco Ltd

Signature.....

Signature.....