

# Aberdeen Western Peripheral Route / Balmedie - Tipperty

Design, Build, Finance and Operation Agreement

709/ACP/600

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**DESIGN, BUILD, FINANCE & OPERATE AGREEMENT****BETWEEN:**

- (1) **ABERDEEN CITY COUNCIL**, a local council constituted under the Local Government etc (Scotland) Act 1994 acting in its capacity as agent for the Scottish Ministers pursuant to section 4 of the Roads (Scotland) Act 1984 and having its principal offices at The Town House, Broad Street, Aberdeen AB10 1AQ (who and whose successors are referred to as **the Contracting Authority**);

and

- (2) **ABERDEEN ROADS LIMITED**, a company registered in Scotland under the Companies Act 2006 having registered number SC489636 and whose registered address is at Dean House, 24 Ravelston Terrace, Edinburgh EH4 3TP (the **Company**).

**WHEREAS:**

- A. The Scottish Ministers wish to procure the design, build, finance and operation, including management and maintenance, of the Project Roads and other works by a non-profit distributing public private partnership.
- B. The Scottish Ministers and the Contracting Authority have agreed by virtue of the Agency Agreement that the Contracting Authority shall carry out certain functions as agent for the Scottish Ministers pursuant to section 4 of the Roads (Scotland) Act 1984.
- C. In accordance with PFI/PPP the Contracting Authority invited interested parties in the private sector to tender for a contract to implement a scheme to design, build, finance and operate, manage and maintain the Project Roads and other works.
- D. Following a tendering process in accordance with the provisions of the Public Contracts (Scotland) Regulations 2012, the Contracting Authority (acting as agent on behalf of the Scottish Ministers) and the Company have reached agreement for the provision of the New Works and the O&M Works.

**NOW IT IS AGREED as follows:****1. DEFINITIONS AND INTERPRETATION****1.1 Definitions**

In this Agreement, unless the context otherwise requires:

**1991 Act** means the New Roads and Street Works Act 1991, including any Regulations and Codes of Practice made thereunder;

**Access Rights** means the rights granted to the Company and those authorised by it under **Clause 6** (Access to and Occupation of the Sites);

**Accommodation Works** means those parts of the New Works specified in Appendix 1/15 to Part 4 of Schedule 2 (New Works Requirements);

**Accommodation Works Access Tracks** means those access tracks described as **accommodation** works within Appendix 1/15 to Part 2 of Schedule 2 (New Works Requirements);

**Accommodation Works Site** means any areas of land outwith the New Works Site that the Company reasonably requires to occupy to construct the Accommodation Works;

**Additional Permitted Borrowing** means on any date, the amount equal to any amount of **principal** outstanding under the Senior Financing Agreements (as the same may from time to time be amended, whether or not with the approval of the Contracting Authority) in excess of the amount of principal scheduled under the Senior Financing Agreements at Financial Close to be outstanding at that date,

but only to the extent that:

- a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- b) in respect of any Additional Permitted Borrowing the Intercreditor Agent is not in material breach of its obligations under clause 9.4.3 of the Direct Agreement as it applies to such Additional Permitted Borrowing,

and provided further that any such excess amount of principal which is (i) invested as part of any **Qualifying** Variation or (ii) outstanding from time to time as a result of any drawing under the Senior Financing Agreements as entered into at the Date of this Agreement, disregarding any subsequent amendment or (iii) outstanding from time to time as a result of any amendment to the Senior Financing Agreements in respect of which the Contracting Authority has agreed that its liabilities on a termination may be increased pursuant to Clause 5.3 (Changes to Financing Agreements and Refinancing), shall not be counted as Additional Permitted Borrowing;

**Additional Permitted Borrowings Limit** means an amount equal to:

- a) [REDACTED]% of the Original Senior Commitment for any Additional Permitted Borrowing subsisting in the period from the Effective Date to the date on which the amount

outstanding under the Senior Financing Agreements is reduced to [REDACTED] of the Original Senior Commitment; and thereafter:

- b) the higher of:
  - i) [REDACTED]% of the Original Senior Commitment; and
  - ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in (a);

**Adjudicator** has the meaning given to that term in paragraph 2.2 of Schedule 7 (Dispute Resolution Procedure);

**Adjusted Estimated Fair Value** means the Estimated Fair Value, less (without any double-counting) an amount equal to the aggregate of:

- a) the total Post Termination Service Amounts paid by the Contracting Authority hereunder (if a positive number);
- b) the Tender Costs; and
- c) amounts which the Contracting Authority is entitled to set off or deduct under this Agreement,

plus an amount equal to the aggregate of:

- i) all credit balances on any bank accounts held by or on behalf of the Company, Holdco or the Issuer (but excluding the Surplus Account) on the date that the Estimated Fair Value is calculated;
- ii) any insurance proceeds and other amounts owing to the Company, Holdco or the Issuer (and which the Company, Holdco or the Issuer are entitled under this Agreement to retain), to the extent not included in (i) above; and
- iii) any Post Termination Service Amounts (if a negative number) which have not been set off in accordance with paragraph 3.8 of Part 4 of Schedule 11 (Termination Compensation) prior to the Compensation Date;

to the extent that:

- a) (i), (ii) and (iii) have not been directly taken into account when calculating the Estimated Fair Value; and

- b) in relation to (i) and (ii) the Contracting Authority has received such amounts in accordance with the Agreement or such amounts are standing to the credit of the Joint Insurance Account;

**Adjusted Highest Compliant Tender Price** means the Highest Compliant Tender Price less (without **any** double-counting) the aggregate of:

- a) any Post Termination Service Amounts paid to the Company to date; and
- b) the Tender Costs; and
- c) amounts that the Contracting Authority is entitled to set off or deduct under this Agreement;

**plus** an amount equal to the aggregate of:

- i) all credit balances on any bank accounts held by or on behalf of the Company, Holdco or the Issuer (but excluding the Surplus Account) on the date that the highest priced Compliant Tender is received; and
- ii) any insurance proceeds and other amounts owing to the Company, Holdco or the Issuer (and which the Company, Holdco or the Issuer are entitled under this Agreement to retain) to the extent not included in (i) above; and
- iii) any Post Termination Service Amounts (if a negative number);

to the extent that:

- a) (i), (ii) and (iii) have not been directly taken into account in that Compliant Tender; and
- b) in relation to (i) and (ii), the Contracting Authority has received such amounts in accordance with the Agreement or such amounts are standing to the credit of the Joint Insurance Account;

**Affected Party** shall have the meaning given within the definition of **Force Majeure Event** in this **Clause 1.1**;

**Affiliate** means in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company and **holding company** and **subsidiary** shall have the **meaning** given to them in Section 1159 of the Companies Act 2006 and in the case of the Company shall include Holdco and each of the Shareholders;

**Agency Agreement** means the agreement between the Scottish Ministers and the Contracting Authority dated 4th and 6th November 2003 as varied (i) on 5 and 8 September 2008, (ii) 29 November and 6 December 2012, (iii) 28 June and 8 July 2013 and (iv) 4 and 5 December 2014;

**Agreed Departures** means the agreed departures set out in Schedule 3 Part 1 (Company's Design) as at the Date of this Agreement;

**Agreed Form** has the meaning ascribed to it in Clause 1.2.1(f);

**Agreed Order of Priorities** has the meaning given in the Articles of Association;

**Agreement** means this agreement (including its Schedules);

**Ancillary Documents** means the New Works Agreement, the O&M Works Agreement and the Performance Guarantees, all as the same may be amended or replaced from time to time;

**APB Distribution** means, for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period;

**Apparatus** means all apparatus (including apparatus as defined in the 1991 Act and including privately owned apparatus) located in, on, under, over, across or adjacent to the Sites;

**Articles of Association** means the Company's articles of association and the term Articles shall be construed accordingly;

**Assets** means all assets and rights to enable the Contracting Authority or a successor contractor to own, operate and maintain the Project in accordance with this Agreement, including:

- a) the Project Roads;
- b) any land or buildings;
- c) any equipment;
- d) any books and records (including operating and maintenance manuals, health and safety manuals and other know-how);



- e) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);
- f) any revenues and any other contractual rights; and
- g) any Intellectual Property Rights,

but excluding any assets and rights in respect of which the Contracting Authority is full legal and beneficial owner;

**Assigned Employees** means employees assigned to any extent to the Operations, or, in the case of partial cessation of performance of the Operations by the Company, that part of the Operations which is to cease to be performed at the end of the Transfer Assistance Period;

**Associated Company** means in respect of a relevant company, a company which is a subsidiary, a Holding Company or a company that is a subsidiary of the ultimate Holding Company of that relevant company, and in the case of the Company, Holdco or the Issuer shall include the Company, Holdco and/or the Issuer (as applicable) and each of the Shareholders;

**Authority** means any person from whom authority or approval or consent is or may be required for the carrying out of all or any of the Operations;

**Availability Failure Deductions** has the meaning given in Part 1 of Schedule 6 (Payment Mechanism);

**Base Case** means the financial model agreed between the Parties prior to the Date of this Agreement in the Agreed Form;

**Base Senior Debt Termination Amount** means, subject to Clause 5.3 (Changes to Financing Agreements and Refinancing):

- a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, and which are payable by the Company, Holdco or the Issuer under the Senior Financing Agreements in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing); and
- b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs (including, for the avoidance of doubt, any Make-Whole Payment and any prepayment breakage costs payable under the EIB Finance Contract), payable by the Company, Holdco or the Issuer to the Senior

Lenders as a result of a prepayment in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing) and/or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement, subject to the Company, Holdco, the Issuer and the Senior Lenders mitigating all such costs to the extent reasonably possible (unless the amount, or the formula for determining the amount, of such costs is fixed in advance under the terms of the relevant Senior Financing Agreements),

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below):

- i) all credit balances on any bank accounts (but excluding the Joint Insurance Account) held by or on behalf of the Company, Holdco and/or the Issuer on the Termination Date;
- ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Company, Holdco and/or the Issuer as a result of prepayment of amounts outstanding in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing), or, in the case of early termination of interest rate hedging arrangements only, as a result of early termination of this Agreement; and
- iv) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Contracting Authority to the Company as a result of enforcing any other rights it may have;

**Bond Margin** means the rate of interest on the Bonds less the yield on the relevant reference gilt in place on issue of the Bonds;

**Bonds** means the Settled Bonds and the Forward Purchase Bonds;

**BP** means BP Exploration Operating Company Limited, a company incorporated under the laws of England and Wales (company number 00305943) and having its registered office at

Chertsey Road, Sunbury on Thames, Middlesex TW16 7BP and its successors, assignees and transferees;

**Business Day** means a day (other than a Saturday, Sunday or public holiday) on which banks are open for domestic business in the city of London;

**Business Interruption Insurance** shall bear the meaning ascribed to it in Schedule 10 (Required Insurances);

**Capital Expenditure** means any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in the United Kingdom from time to time;

**Capital Sum** means the capital sum offered by each Compliant Tenderer under the Tender Process or the capital sum which the New Contractor is to pay to the Contracting Authority, in each case in consideration for the Contracting Authority entering into the New Contract, as the context permits or requires;

**CDM Regulations** means the Construction (Design and Management) Regulations 2007;

**Certification Procedure** means either or both of the certification procedures set out in Part 5 of Schedule 2 (New Works Requirements) and Part 6 of Schedule 4 (O&M Works Requirements);

**Change** means a Contracting Authority Change, a Company Change or a Qualifying Change in Law;

**Change in Law** means the coming into effect after the Date of this Agreement of:

- a) Legislation, other than any Legislation which on the Date of this Agreement has been published:
  - i) in a draft Bill as part of a Government Departmental Consultation Paper;
  - ii) in a Bill;
  - iii) in a draft statutory instrument; or
  - iv) as a proposal in the Official Journal of the European Union;
- b) any Guidance; or

- c) any applicable judgment of a relevant court of law which changes a binding precedent;

**Change of Ownership** means:

- a) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares in the Company, the Issuer and/or Holdco (including the control over exercise of voting rights conferred on those shares, control over the right to appoint or remove directors or the rights to dividends); and/or
- b) any other arrangements that have or may have or which result in the same effect as paragraph (a) above;

**Clarifications** means the clarifications contained in Schedule 3 Part 3 (Clarifications);

**Codes of Practice** means the codes of practice issued from time to time pursuant to Part IV of the 1991 Act together with the Code of Considerate Practice operated by the Considerate Constructors Scheme;

**Commercial Term Loan Facility Agreement** has the meaning given to it in the Common Terms Agreement;

**Commercially Sensitive Information** means the subset of Confidential Information listed in Schedule 17 (Commercially Sensitive Information) of this Agreement in each case for the period specified in that Schedule 17;

**Common Terms Agreement** means the common terms agreement dated on or about the Date of this Agreement between, amongst others, the Company, the Issuer, Holdco, the Intercreditor Agent and European Investment Bank (each as more particularly referred to and defined therein);

**Company Change** means a change proposed by the Company in accordance with Clause 35;

**Company Default** means one of the following events:

- a) a breach by the Company of any of its obligations under this Agreement which materially and adversely affects the performance of the O&M Works;
- b) a Persistent Breach;

- c) a court makes an order that the Company, the Issuer or Holdco be wound up or a resolution for a voluntary winding-up of the Company, the Issuer or Holdco is passed;
- d) any receiver, administrator or administrative receiver in respect of the Company, the Issuer or Holdco is appointed or possession is taken by or on behalf of any creditor of any property that is the subject of a charge;
- e) any voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 in respect of the Company, the Issuer or Holdco;
- f) an administration order is made, or an administrator is appointed in respect of the Company, the Issuer or Holdco;
- g) a breach by the Company of Clause 64 (Assignment and Sub-Contracting) occurs;
- h) a breach of Clause 66.2 (No Change of Ownership) or 66.3 (Change of Ownership) occurs;
- i) the abandonment of the Agreement by the Company;
- j) a failure to achieve the Full Services Commencement Date by the Long-Stop Date;
- k) a breach by the Company of its obligation to take out and maintain Required Insurances;
- l) a failure to commence substantially the New Works in accordance with the Construction Programme;
- m) the Company incurring Availability Failure Deductions and/or Service Shortfall Deductions in excess of the following average monthly amounts:
  - i) [REDACTED]% of the Monthly Availability Payment for any three (3) Payment Months in any rolling period of twelve (12) months;
  - ii) [REDACTED]% of the Monthly Availability Payment for any six (6) Payment Months in any rolling period of twenty four (24) months,

and in calculating the average monthly amounts account may be taken of a month where no Availability Failure Deductions and or Service Shortfall Deductions have been made;

**Company Default Termination Sum** means the sum determined in accordance with Part 4 (Termination for Company Default) of Schedule 11 (Termination Compensation);

**Company Notice of Change** is the notice referred to in Clause 35.1;

**Company Related Party** means:

- a) an officer, servant or agent of the Company, or any Affiliate of the Company and any officer, servant or agent of such a person;
- b) any sub-contractor of the Company and any of its officers, servants or agents; and
- c) any person on or at any of the Sites at the express or implied invitation of the Company or its sub-contractors other than the Contracting Authority or Users;

**Company's Conditions Precedent** means those obligations of the Company set out in Part 2 of Schedule 1;

**Company's Design** means the drawings, specifications and other documents (including the Agreed Departures) as set out in Schedule 3 Part 1 (Company's Design);

**Company's Representative** means Alan Gibson appointed by the Company in accordance with Clause 16;

**Compensation Date** means either:

- a) if paragraph 3 (Retendering) of Part 4 of Schedule 11 (Termination Compensation) applies, the earlier of
  - i) the date that the New Contract is entered into; and
  - ii) the date on which the Contracting Authority pays the Adjusted Highest Compliant Tender Price to the Company; or
- b) if paragraph 4 (No Retendering) of Part 4 of Schedule 11 (Termination Compensation) applies, the date on which the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;

**Compensation Event** means:

- a) a breach by the Contracting Authority of any of its obligations under this Agreement;  
or

- b) any suspension or restriction of the Access Rights under Clause 7.4 of this Agreement; or
- c) any breach of the Pipeline Agreements by any of the parties to those agreements other than to the extent caused by any breach or wilful act or default of the Company or any of its Sub-Contractors; or
- d) any delays in any approvals, authorisations or consents referred to in the BP Agreement or the Shell Agreement, other than (i) arising pursuant to limb (c) above and/or (ii) to the extent caused by any breach or wilful act or default of the Company or any of its Sub-Contractors, and in each case provided always that the Company has complied with all other requirements and/or processes relating to such approvals, authorisations or consents which it may be required to do pursuant to the relevant Pipeline Agreement;
- e) a failure by any of BP, Shell or Esso (as the context requires) to perform the BP Works or the Pipeline Operator Works (each as defined in the relevant Pipeline Agreement) for which it is responsible under the relevant Pipeline Agreement in accordance with the agreed timings set out in or to be agreed pursuant to the relevant Pipeline Agreement, other than to the extent caused by any breach or wilful act or default of the Company or any of its Sub-Contractors; or
- f) any failure by BP to act in accordance with the standard of a Reasonable and Prudent Operator (as that expression is defined in the BP Agreement) other than to the extent caused by any breach or wilful act or default of the Company or any of its Sub-Contractors and provided always that the Company has complied with all requirements and/or processes pursuant to Clause 12.4.12 (in so far as they relate to the BP Agreement) so as not to have caused such failure;

**Compliant Tender** means any tender which meets the Qualification Criteria;

**Compliant Tenderer** means a Suitable Substitute Contractor who submits a Compliant Tender;

**Conditions Precedent** means the Contracting Authority's Conditions Precedent and the Company's Conditions Precedent;

**Confidential Information** means:

- a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or

would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1998; and

- b) Commercially Sensitive Information;

**Consents** means all permissions, consents, approvals, certificates, permits, licences and authorisations of any Authority or Relevant Authority required for the performance of any of the Company's obligations under this Agreement;

**Constructional Plant** means all appliances or things of whatsoever nature required in or about the performance of the Operations but does not include materials or other things intended to form or forming part of the New Works;

**Construction Act** means the Housing Grants, Construction and Regeneration Act 1996;

**Construction Programme** means the construction programme contained in Schedule 3 Part 2 setting out the Company's programme for the New Works as may be amended in accordance with Clause 14 (Construction Programme);

**Contingent Funding Liabilities** means the higher of A and B where:

**A** is the contingent or future liabilities to subscribe for equity or subordinated debt (if any) at the relevant time of:

- a) the Shareholders; and/or
- b) the Subordinated Lenders; and/or
- c) any other parties providing equity or subordinated debt,

owed under any of the Financing Agreements to the Company, the Issuer, Holdco and/or the Senior Lenders (or to any agent and/or trustee on their behalf) together with, without double counting, the contingent or future liabilities:

- x) of each provider of a letter of credit in support of the obligations of any Shareholder, Subordinated Lender and/or other party providing equity or subordinated debt whether provided pursuant to the provisions of the Shareholder Support Agreement or otherwise howsoever; and
  - y) under any other security (by way of letter of credit, guarantee or otherwise howsoever) for those liabilities; and
-



**B** is the aggregate amount of the Subordinated Debt for the Project contemplated by the Base Case less any principal amounts of such Subordinated Debt which have been advanced and applied in permanent reduction of amounts which would otherwise have been due and payable in respect of the Equity Bridge Loan Facility pursuant to Part 11 of the Schedule;

**Contract Month** means a calendar month occurring during the Contract Period;

**Contract Period** means the period commencing on the Effective Date and ending on the earlier of the Expiry Date and the Termination Date;

**Contract Year** means each period of twelve (12) calendar months during the Contract Period beginning on the 1 April provided that the first Contract Year, shall commence on the Effective Date and end on the next 31 March and the final Contract Year shall commence on the 1 April immediately preceding the last day of the Contract Period and end on the last day of the Contract Period;

**Contracting Authority Change** means a change to the Contracting Authority's Requirements at any time including arising as a consequence of a Deemed Change as defined in Clause 34.1;

**Contracting Authority Default** means one of the following events:

- a) an expropriation, sequestration or requisition of a material part of the assets and/or shares of the Company, Issuer or Holdco by the Contracting Authority or other Relevant Authority;
- b) a failure by the Contracting Authority to make payment of any amount of money exceeding the amount of the Monthly Unitary Charge from time to time due and payable by the Contracting Authority under this Agreement within thirty (30) days of service of a formal written demand by the Company, where that amount fell due and payable two (2) (or more) months prior to the date of service of the written demand;
- c) a breach by the Contracting Authority of its obligations under this Agreement which substantially frustrates or renders it impossible for the Company to perform its obligations under this Agreement for a continuous period of two (2) months; or
- d) a breach by the Scottish Ministers of Clause 64.1 (Restrictions on Transfer of the Agreement by the Scottish Ministers) occurs;

**Contracting Authority Default Termination Sum** has the meaning given in paragraph 1 of Part 1 (Termination for Contracting Authority Default) of Schedule 11 (Termination Compensation);

**Contracting Authority Direct Agreements** means each of the direct agreements referred to in Clause 18.3;

**Contracting Authority Notice of Change** is the notice referred to in Clause 34.3;

**Contracting Authority Property** has the meaning given in Clause 51.1.2;

**Contracting Authority's Conditions Precedent** means those obligations of the Contracting Authority set out in Part 1 of Schedule 1 (Conditions Precedent);

**Contracting Authority's Representative** means the person authorised as such under **Clause 17** being, as at the Date of this Agreement, Margaret Bochel, Head of Planning & Sustainable Development, Aberdeen City Council;

**Contracting Authority's Requirements** means the **New Works Requirements** and the **O&M Works Requirements**;

**Contracting Authority's Site Representative** means the person authorised as such under Clause 17 being, as at the Date of this Agreement, [REDACTED];

**COSHH Register** means a register setting out the activities of the Company in respect of the **Control** of Substances Hazardous to Health in order to comply with Legislation and the best practice recommendations of the HSE;

**CRIL** means Connect Roads Infrastructure Investments Limited, a company incorporated under **the** laws of England whose registered office is at 350 Euston Road, Regent's Place, London NW1 3AX (company number 07276835);

**Cut-Off Date** means the date which is 10 days after the Date of this Agreement;

**Date of this Agreement** means the last date of execution of this Agreement;

**Deemed New Contract** means an agreement on the same terms and conditions as this **Agreement**, as at the Termination Date, but with the following amendments:

- a) if this Agreement is terminated during the New Works Period, then the Planned Full Services Commencement Date will be extended by a period to allow a New Contractor to achieve completion of the New Works;
- b) any accrued Performance Deductions, Persistent Breach Warning Notices and/or Persistent Breach Final Notices shall be cancelled; and
- c) the term of such agreement shall be for such period as is equal to the term from the Termination Date to and including the Expiry Date;

**Default Interest** means any increased margin that is payable to the Senior Lenders or which accrues as a result of any payment due to the Senior Lenders not being made on the date on which it is due;

**Defects** means any defect howsoever arising including without limitation:

- a) any defect that is the result of defective design or defective materials or defective workmanship;
- b) in the case of the New Works any failure of the New Works to meet, or to continue to meet, the New Works Requirements; and

any damage, destruction or other effect consequential on such defect provided that the foregoing shall not extend to any defect arising from (i) fair wear and tear, and (ii) a failure by the relevant third party to carry out any necessary maintenance in accordance with Good Industry Practice;

**Defects Liability Period** means the periods set out in Clause 12.1.5 during which the Company is responsible for correcting any Defects in the New Works;

**Departure** means one of, or a combination of, the following:

- a) a departure from any of the standards or directives set out in the DMRB;
- b) the use of technical design directives other than those in the DMRB;
- c) the use of technical specifications for materials and/or workmanship other than those in the MCHW; and

- d) the use of a technical design directive or technical specification in a manner or circumstance which is not permitted or provided for in such directive or specification;

**Design** means all work necessary for the preparation, verification and completion of the drawings, specifications and other documents from which the New Works are to be constructed and the O&M Works are to be carried out and includes the carrying out of all procedures and checks and the obtaining of all approvals and consents and the provision of all certificates required under this Agreement;

**Design Agreements** means the contracts for the Design listed in Schedule 12 (Design & Road Safety Documents);

**Designer** means any person of appropriate skill who has entered into a design agreement with the Company or the New Works Contractor or such substitute as may be appointed in accordance with this Agreement and is acceptable to the Contracting Authority to undertake the Design;

**Designer's Direct Agreement** means an agreement substantially in the form set out in Part 4 of Schedule 14 (Direct Agreements);

**Design Checker** means any person of appropriate skill who has entered into a design checker's agreement with the Company or the New Works Contractor or such substitute as may be appointed in accordance with this Agreement;

**Design Checker's Direct Agreement** means an agreement substantially in the form set out in Part 4 of Schedule 14 (Direct Agreements);

**Design Data** means all material calculations, Designs, design information, specifications, plans, programmes (other than computer programs), drawings, graphs, sketches, models, engineering and other forms of material data in whatever medium prepared or to be prepared by or on behalf of the Company for the Operations;

**Detrunking Date** means, in respect of each Phase, the date of detrunking of the relevant sections of trunk road pursuant to the relevant Detrunking Order or Orders (which date of detrunking is anticipated in the Detrunking Orders to be the 1 April following the date of issue of Permit to Use for the Phase which includes the relevant sections of trunk road);

**Detrunking Orders** means:

- a) The A90 Trunk Road (Charleston to Blackdog) Detrunking Order 2010;

- b) The A96 Trunk Road (Dyce Drive Roundabout to Craibstone) Detrunking Order 2010;
- c) The A96 Trunk Road (Dyce Drive to Haudagain Roundabout) Detrunking Order 2010; and
- d) The M9/A90/M90 Trunk Road (Balmedie to Tippetty) (Trunking and Detrunking) Order 2012;

**Direct Agreement** means the direct agreement dated on or about the Date of this Agreement and made between the Contracting Authority, the Company and the Security Trustee;

**Disclosed Data** means all information relating to the Project disclosed to the Company including:

- a) the ITPD - Instructions to Participants dated 8 May 2013 and associated revisions and clarifications issued by or on behalf of the Contracting Authority to *inter alia* the Company;
- b) the Invitation to Submit Dialogue Period Submissions and Dialogue Period Submissions Evaluation Methodology dated 8 May 2013 and associated revisions and clarifications issued by or on behalf of the Contracting Authority to *inter alia* the Company;
- c) the Invitation to Continue in Dialogue dated 27 September 2013 and associated revisions and clarifications issued by or on behalf of the Contracting Authority to *inter alia* the Company;
- d) the Invitation to Submit Final Tenders and Final Tender Evaluation Methodology dated 11 April 2014 and associated revisions and clarifications issued by or on behalf of the Contracting Authority to *inter alia* the Company; and
- e) all information provided in the Information Room,

but excluding, for the avoidance of doubt, (i) Third Party Rights (Listed) and (ii) the restrictions to the Access Rights set out in Clause 6.4;

**Discriminatory Change in Law** means a Change in Law, the terms of which apply expressly to:

- a) the Project and not to similar projects procured under the PFI/PPP;

- b) the Company and not to other persons; and/or
- c) PFI/PPP companies and not to other persons;

**Dispute Resolution Procedure** means the procedure for the resolution of disputes set out in Schedule 7 (Dispute Resolution Procedure);

**Distribution** means:

- a) whether in cash or in kind, any:
  - i) dividend or other distribution in respect of share capital (whether made validly in accordance with the Articles of Association or otherwise);
  - ii) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
  - iii) payments under the Subordinated Financing Agreements (whether of principal, interest, breakage costs or otherwise);
  - iv) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms; or
  - v) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms; or
- b) the early release of any Contingent Funding Liabilities, the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;

**Diversiory Works** means Diversiory Works (Type 1) and Diversiory Works (Type 2);

**Diversiory Works (Type 1)** means the works involving the diversion, change in level, protection or removal of Apparatus included in Appendix 1/16 of Part 4 of Schedule 2 (as such Appendix 1/16 may be amended from time to time in accordance with Schedule 2);

**Diversiory Works (Type 2)** means any works involving the diversion, change in level, protection or removal of Apparatus other than in respect of those included in Appendix 1/16 of Part 4 of Schedule 2;

**DMRB** means Design Manual for Roads and Bridges published by the Stationery Office on 1 **October** 2013 and including those interim amendments and advice notes as implemented by Transport Scotland and which are current at 1 October 2013;

**DPA** means the Data Protection Act 1998;

**EEA** means from time to time the European Economic Area as created by the Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or **organisation** which has assumed either or both the function and responsibilities of the European Economic Area;

**Effective Date** means the date on which the Conditions Precedent are satisfied or waived;

**EIB Finance Contract** has the meaning given to it in the Common Terms Agreement;

**EIB Margin** has the meaning given to **Margin** in the EIB Finance Contract;

**Environmental Assessment Documents** means those documents listed in Schedule 8 (**Environmental Assessment Documents**) and contained in the Information Room;

**Environmental Information (Scotland) Regulations** means the Environmental Information Regulations (Scotland) 2004 together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Governmental Department in relation to such regulations;

**Equity Bridge Loan Facility** has the meaning given in the Common Terms Agreement;

**Esso** means Esso Exploration and Production UK Limited, a company incorporated under the laws of England and Wales (company number 00207426) and having its registered office at Exxonmobil House, Ermyn Way, Leatherhead, Surrey KT22 8UX and its successors, assignees and transferees;

**Estimate** has the meaning given in Clause 34.4.1;

**Estimated Change in Project Costs** means in relation to Clause 33 (Compensation Events), Clause 34 (Contracting Authority Changes) and Clause 37 (Qualifying Change in Law), the aggregate of any estimated increase in construction costs, operating costs and financing costs less the aggregate of any estimated reduction in construction costs, operating costs and financing costs;

**Estimated Fair Value** means the amount determined in accordance with paragraph 4 of Part 4 of Schedule 11 (Termination Compensation) which a third party would pay to the Contracting Authority as the market value of the Deemed New Contract;

**Event of Default** has the meaning given to it in the Common Terms Agreement;

**Exceptionally Adverse Weather** means weather conditions affecting the Sites (or any part thereof) that directly impact on the ability of the Company to carry out the Operations, and the recording of which, in comparison to relevant and reputable historic weather data agreed by the Parties (both acting reasonably), is shown to occur at the Transport Scotland weather station at A96 Tyrebagger on average less frequently than once in ten (10) years;

**Exempt Refinancing** means:

- a) any Refinancing that was fully taken into account in the calculation of the Unitary Charge;
- b) a change in taxation or change in accounting treatment;
- c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
  - i) breach of representations and warranties or undertakings;
  - ii) movement of monies between the Project Accounts in accordance with the terms of the Senior Financing Agreements as at Financial Close;
  - iii) late or non-provision of information, consents or licences;
  - iv) amendments to Sub-Contracts;
  - v) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Financing Agreements);
  - vi) restrictions imposed by the Senior Lenders on the dates at which the Senior Debt can be advanced to the Company or Issuer under the Senior Financing Agreements and/or amounts released from the ProjectCo Construction Escrow Account (as defined in the Senior Financing Agreements) during the New Works Period, each as defined in the Senior Financing Agreements and which are given as a result of any failure by the Company to ensure that the construction work is performed in accordance with the Construction



Programme and which are notified in writing by the Company or the Senior Lenders to the Contracting Authority prior to being given;

- vii) changes to milestones for drawdown and/or amounts released from the ProjectCo Construction Escrow Account (as defined in the Senior Financing Agreements) during the New Works Period set out in the Senior Financing Agreements and which are given as a result of any failure by the Company to ensure that construction work is performed in accordance with the Construction Programme and which are notified in writing by the Company or the Senior Lenders to the Contracting Authority prior to being given;
  - viii) failure by the Company to obtain any consent by statutory bodies required by the Senior Financing Agreements; or
  - ix) voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Financing Agreements;
- d) any amendment, variation or supplement of any agreement approved by the Contracting Authority as part of any Qualifying Variation under this Agreement;
  - e) any sale of shares in the Company, the Issuer or Holdco by the shareholders or securitisation of the existing rights and/or interests attaching to shares in the Company, the Issuer or Holdco provided that this paragraph (e) shall, in respect of shares in Holdco, only apply for so long as Holdco holds [REDACTED]% of the issued share capital of the Company or the Issuer;
  - f) any sale or transfer of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements or securitisation of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements; or
  - g) any Qualifying Bank Transaction;

**Expiry Date** means [REDACTED];

**Fair Value** means the amount at which an asset or liability could be exchanged in an arm's length transaction between informed and willing parties, other than in a forced or liquidation sale;

**Fees Regulations** means the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;

**Final Completion** means completion of the New Works other than Road Safety Audits Stage 4 and Stage 5 in accordance with the New Works Requirements;

**Final Completion Acceptance Notice** means the notice to be issued by the Contracting Authority pursuant to Clause 26.3.1;

**Final Completion Certificate** means a certificate of that name in the form set out in Part 5 of Schedule 2 (New Works Requirements);

**Financial Close** has the meaning given to it in the Common Terms Agreement;

**Financial Model** means the computer spreadsheet model for the Company incorporating statements of the Company's cashflows including all expenditure, revenues, financing and taxation of the Operations together with the profit and loss accounts and balance sheets for the Company throughout the Contract Period accompanied by details of all assumptions, calculations and methodology used in its compilation and any other documentation necessary or desirable to operate the model, as amended from time to time in accordance with the terms of Clause 5.4 (Financial Model), a copy of which is attached to this Agreement on disk as Attachment 1;

**Financing Agreements** means all or any of the agreements or instruments entered into or to be entered into by the Company or any Associated Company relating to the financing of the Project (including the Initial Financing Agreements and any agreements or instruments to be entered into by the Company or any Associated Company relating to the rescheduling of its indebtedness or any refinancing of the Project);

**FOISA** means the **Freedom of Information (Scotland) Act 2002** and any subordinate legislation (as defined in the Freedom of Information (Scotland) Act 2002) made under this Act from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant governmental department in relation to such legislation;

**Force Majeure Event** means the occurrence after the Date of the Agreement of:

- a) war, civil war, armed conflict or terrorism; or

- b) nuclear, chemical or biological contamination unless the source or the cause of the contamination is the result of the actions of or breach by the Company or its sub-contractors; or
- c) pressure waves caused by devices travelling at supersonic speeds; or
- d) the occurrence of an event of force majeure (as defined in the Pipeline Agreements) under either or both of the Pipeline Agreements,

which directly causes either Party (the **Affected Party**) to be unable to comply with all or a material part of its obligations under this Agreement;

**Force Majeure Termination Sum** means the sum defined in Paragraph 1 of Part 2 (Termination for Force Majeure) of Schedule 11 (Termination Compensation);

**Forward Purchase Bonds** has the meaning given to it in the Subscription and Bond Purchase Agreement;

**Fossils and Antiquities** means all fossils and antiquities and structures or other remains or things of archaeological or geological interest discovered within the Sites;

**Full Services Commencement Date** means the latest of the date of issue of the Permit to Use in respect of Phase 1, Phase 2, Phase 2A or Phase 3 and Full Services Commencement shall be construed accordingly;

**General Change in Law** means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law;

**Good Industry Practice** means the exercise of an appropriate degree of skill, diligence, prudence and foresight being that which would reasonably and ordinarily be expected from a person skilled and experienced in the design, construction, maintenance and operation of roads similar in type to the Project Roads seeking in good faith to comply with the same contractual obligations as the obligations of the Company under this Agreement;

**Guidance** means any applicable guidance or directions with which the Company is bound to comply (excluding DMRB and MCHW);

**Handback Assets** means the Assets excluding:

- a) the Project Roads;

- b) books and records (including operating and maintenance manuals, health and safety manuals and other know-how);
- c) revenues and any other contractual rights; and
- d) any Intellectual Property Rights;

**Handback Certificate** has the meaning given in Clause 49.7;

**Handback Report** means the report of that name referred to in paragraph 2.2 of Part 3 of Schedule 4 (O&M Works Requirements);

**Handback Requirements** means those requirements set out in Part 3 of Schedule 4 (O&M Works Requirements);

**Highest Compliant Tender Price** means the price offered by the Compliant Tenderer (if any) with the highest tender price and if no Compliant Tenders are received, means zero;

**Holdco** means Aberdeen Roads Holdings Limited, a company incorporated under the laws of Scotland registered number SC489526 and having its registered office at Dean House, 24 Ravelston Terrace, Edinburgh EH4 3TP;

**HSE** means the Health and Safety Executive and any successor body or bodies;

**Information** has the meaning given under Section 73 of the FOISA;

**Information Room** means the electronic storage area made available to participants to suit the purposes of the Tender Period using a version of the web based software Business Collaborator which contains documents and the other information relating to the Project for inspection by the Company;

**Initial Financing Agreements** means the Financing Agreements put in place upon the Date of this Agreement as set out in Schedule 15 (Initial Financing Agreements) copies of which have been initialled by the parties for the purposes of identification;

**Instalment Dates** shall have the meaning given to that term in paragraph 4.2.1 of Part 5 of Schedule 11 (Termination Compensation);

**Insurance Broker's Letter** means a letter in the form set out in Part 4 of Schedule 10 (Required Insurances) signed by the relevant insurance broker;

**Insurance Term** means any terms and/or conditions required to be included in a policy of insurance by Clause 52 (Insurance) and/or Schedule 10 (Required Insurances) but excluding any risk;

**Insurance Undertaking** has the meaning given in the rules from time to time of the Financial Conduct Authority;

**Intellectual Property Rights** means any and all patents, trademarks, service marks, copyright, moral rights, rights in a design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attached thereto;

**Intercreditor Agent** means HSBC Bank plc, a company incorporated under the laws of England & Wales registered number 00014259 and having its registered office at 8 Canada Square, London E14 5HQ (or any successor intercreditor agent appointed in accordance with the terms of the Security Trust and Intercreditor Deed) in its capacity as intercreditor agent for the Senior Lenders under the Senior Financing Agreements;

**Issuer** has the meaning given in the Senior Financing Agreements;

**Joint Insurance Account** means the joint bank account in the names of the Contracting Authority and the Company, having account number [REDACTED], sort code [REDACTED] and held with [REDACTED];

**Junior Debt** means all amounts outstanding at the Termination Date under the Subordinated Financing Agreements;

**Lane** means any delineated running lane or any hard shoulder of any Project Road and which is capable of carrying all permitted classes of vehicles except where it is preceded by 'Narrow' in which case such a Lane is capable of only carrying light vehicles as defined in Chapter 8 of the Traffic Signs Manual;

**Latent Defect** means any defect in any part of the Sites (including any existing structures upon or within the Site) which could not reasonably have been ascertained by a competent person acting in accordance with Good Industry Practice from an analysis of all relevant information available to the Company prior to the Date of this Agreement;

**Legislation** means any Act of Parliament (including the Scottish Parliament) or subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, any exercise of

the Royal Prerogative, and any enforceable community right within the meaning of Section 2 of the European Communities Act 1972, in each case in the United Kingdom;

**Liaison Committee** means the committee established pursuant to Schedule 20 (Liaison Committee);

**LIBOR** has the meaning given to it in the Senior Financing Agreements;

**Liquid Market** means that there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor) in the market in Scotland for design, build, finance and operate contracts or similar contracts for the provision of services (in each case the same as or similar to the Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Lenders specifically for the purposes of this Project and to which this Agreement may be novated shall be discounted in assessing whether there are sufficient willing parties in the market for such purposes;

**Long-Stop Date** means the date falling eighteen (18) months after the Planned Full Services Commencement Date;

**Losses** means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or at common law or in connection with judgments, proceedings, internal costs or demands;

**Major O&M Works** means any works for the implementation of replacement, renewal or improvement of the assets on the O&M Works Site that involves or requires the use of temporary traffic management systems on any Lane with the exception of works necessary solely in connection with an Emergency;

**Major Works for Roads Purposes** means both major works for roads purposes as defined in Section 145(3) of the 1991 Act and major bridge works as defined in Section 147(2) of the 1991 Act;

**Make-Whole Payment** means to the extent payable by the Company:

- a) in the event that any Bonds or the Unlisted Notes become due and payable pursuant to the relevant Conditions of such Bonds or Unlisted Notes following a prepayment of the Project On-Loan following a termination of this Agreement under Clause 42 (Termination on Contracting Authority Default), the excess (if any) of the

Default Amount over the principal amount of the Bonds or the Unlisted Notes (as applicable);

- b) in the event that the Bonds or the Unlisted Notes become due and payable pursuant to the relevant Conditions of such Bonds or Unlisted Notes following a prepayment of the Project On-Loan following a termination of this Agreement under Clause 46 (Voluntary Termination by the Contracting Authority), the excess (if any) of the Modified Default Amount over the principal amount of the Bonds or the Unlisted Notes (as applicable); and
- c) in relation to termination of this Agreement in any other circumstances, shall be zero,

each capitalised term, not otherwise defined in this Agreement, as further defined in the Senior Financing Agreements;

**Margin Gain** means an amount equal to the lower of:

- a) the Refinancing gain; and
- b) the higher of:
  - i) zero; and
  - ii)  $D - E$ ;

where:

**D** = the Net Present Value of the Surplus Payments projected immediately prior to the Refinancing (taking into account the effect of the change in the Bond Margin and/or the EIB Margin only in relation to the Refinancing and the Senior Debt repayment profile immediately prior to the Qualifying Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing but disregarding any Distribution to be made over the remaining term of this Agreement following the Refinancing save that, where the replacement finance is a bond, for the purpose of calculating the effect of the change to the Bond Margin and/or the EIB Margin, the margin on the bond shall be the rate of interest on the bond less the yield on the relevant reference gilt in place on issue of the bond; and

**E** = the Net Present Value of the Surplus Payments projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made over the remaining term of this Agreement following the Refinancing;

**Market Value Availability Deduction Amount** means for any Payment Month or part of a Payment Month an amount equal to:

- a) the Performance Deductions which were made from the Monthly Unitary Charge under Clause 31 (Payment Provisions) in the Monthly Invoice submitted for the Payment Month immediately preceding the Termination Date;

less:

- b) an amount equal to any Performance Deductions referred to in paragraph (a) above made in the Payment Month immediately preceding the Termination Date to the extent that the Performance Deductions relate to an area which was unavailable at the Termination Date which has subsequently become available (as at the date of calculation of any Post Termination Service Amount) whether it has become available as a result of the Contracting Authority incurring Rectification Costs or otherwise;

**Maximum Amount** means the maximum sum that the Company would be able to pay to the Contracting Authority pursuant to Clause 49.6 (Retention Fund) without triggering an Event of Default;

**Maximum Termination Amount** means either an amount equal to the aggregate of:

- a) the Base Senior Debt Termination amount; and
- b) the principal amount of the Subordinated Debt outstanding; and
- c) Redundancy Payments and Sub-Contractor Breakage costs;

OR, if the aggregate of the amounts referred to in (a) and (b) above is less than the Revised Senior Debt Termination Amount then an amount equal to the aggregate of:

- d) the Revised Senior Debt Termination Amount; and
  - e) Redundancy Payments;
-



**Maximum Monthly Unitary Charge** means the Monthly Unitary Charge payable during any Payment Month before any deductions under Clause 31 (Payment Provisions) but allowing for indexation under Schedule 6 (Payment Mechanism);

**MCHW** means Manual of Contract Documents for Highway Works published by the Stationery Office on 1 October 2013 and including those interim amendments and advice notes as implemented by Transport Scotland and which are current at 1 October 2013;

**Memorandum** means the Company's memorandum in the Agreed Form;

**Memorandum of Understanding** means the consolidated and amended memorandum between the Scottish Ministers, Aberdeen City Council and Aberdeenshire Council dated 16 May, 23 June and 7 July 2014;

**Monthly Invoice** means the invoice issued by the Company in accordance with Clause 31.2 (Monthly Invoices);

**Monthly Unitary Charge** means the Monthly Unitary Charge calculated in accordance with Paragraph 3 of Schedule 6 (Payment Mechanism);

**NPD Mandatory Provisions** means the provisions of (i) Article 16 (Votes) of the Articles of Association and (ii) Clause 5.3.3 hereof;

**NPD Requirements** means all of the following requirements:

- a) not to make a distribution of profit or surplus, or any transfer of assets, to one or more shareholders whether by means of any payment or transfer of assets, directly or indirectly, in cash or in kind, whether by way of dividend, bonus or release of obligation or in any other way other than:
  - i) for full consideration; or
  - ii) to the Contracting Authority pursuant to Clause 57 (Payment of Surpluses and Compliance with NPD Requirements) or Article 12 or 13 of the Articles of Association; or
  - iii) the Company's Share of a Company Change; or
  - iv) the Company's Share of a Refinancing Gain;
- b) not to amend or delete, or add new provisions to the Articles of Association which have the effect of amending or frustrating the NPD Mandatory Provisions;

- c) to comply with the NPD Mandatory Provisions; and
- d) not to frustrate the appointment of the Public Interest Director to the board of directors of the Company in accordance with the Articles of Association;

**NPV or Net Present Value** means the aggregate of the discounted values, calculated as at the relevant date, of each of the relevant projected cashflows in each case discounted at [REDACTED]%;

**New Contract** means an agreement on the same terms and conditions as this Agreement as at the Termination Date, but with the following amendments:

- a) if this Agreement is terminated during the New Works Period, the Planned Full Services Commencement Date will be extended by a period to allow a New Contractor to complete the New Works;
- b) any accrued Performance Deductions, Persistent Breach Warning Notices and/or Persistent Breach Final Notices shall be cancelled;
- c) the term of such agreement shall be such period as is equal to the term from the Termination Date until the Expiry Date;
- d) any other amendments which do not adversely affect the Company; and
- e) the New Contractor will pay the Capital Sum to the Contracting Authority on entering into the New Contract;

**New Contractor** means the person who has entered or who will enter into the New Contract with the Contracting Authority;

**New Means of Private Access** means those roads listed under the heading "New Access Roads / Tracks" in the table set out in Schedule 19;

**New Supplier** means any successor to the Company in the performance of services and/or activities which are equivalent or identifiably similar to the Operations upon the cessation of performance of the Operations by the Company, or upon the partial cessation of the performance of the Operations by the Company any successor to the Company in the performance of services and/or activities which are equivalent or identifiably similar to that part or those parts of the Operations which are to cease to be performed by the Company;

**New Works** means any and all activities and obligations to be carried out by the Company in order to meet the requirements of Schedule 2 (New Works Requirements) and as described and/or specified in, or required and/or prescribed by the New Works Requirements;

**New Works Agreement** means the contract so entitled in the Agreed Form to be entered into by the Company and the New Works Contractor in respect of the New Works;

**New Works Contractor** means an unincorporated joint venture consisting of:

- a) Balfour Beatty Civil Engineering Limited, a company incorporated in England under number 4482405 and having its registered office at 130 Wilton Road, London, SW1V 1LQ, an agent of Balfour Beatty Group Limited, a company incorporated in England under number 101073 and having its registered office at 130 Wilton Road, London, SW1V 1LQ;
- b) Carillion Construction Limited, a company incorporated in England under number 00594581 and having its registered office at 24 Birch Street, Wolverhampton, WV1 4HY; and
- c) Galliford Try Infrastructure Limited (trading as Morrison Construction) a company incorporated in Scotland under number SC055775 and having its registered office at 51 Melville Street, Edinburgh, EH3 7HL;

or such substitute as may be appointed by the Company for the time being in accordance with this Agreement;

**New Works Direct Agreement** means an agreement substantially in the form set out in Part 2 of Schedule 14 (Direct Agreements);

**New Works LMA Drawings** means the drawings entitled "Land Made Available by the Scottish Ministers for the New Works" contained in Appendix 0/4 of Part 4 of Schedule 2 (New Works Requirements);

**New Works Period** means the period from the Effective Date to the Full Services Commencement Date;

**New Works Period Insurance** means the Required Insurances in respect of the New Works Period;

**New Works Quality Plan** means the quality plan in respect of the New Works to be developed by the Company in accordance with this Agreement, the form of which is set out in Schedule 3 Part 2;

**New Works Requirements** means the requirements forming Schedule 2 (New Works Requirements) as amended from time to time in accordance with this Agreement;

**New Works Site** means:

- a) the areas of land shown shaded in pink and bounded by a red line including the red line;
- b) the areas of land shown shaded light blue and bounded by a red line including the red line;
- c) the areas of land shown shaded purple and bounded by a red line including the red line;
- d) the areas of land shown shaded brown and bounded by a red line including the red line; and
- e) the areas of land shown cross-hatched in dark blue and bounded by a red line including the red line,

in each case, on the New Works LMA Drawings and any further land acquired by, or conveyed to, the Scottish Ministers (from any person including the Company) from time to time for the purposes of carrying out the New Works;

**Noteholders** has the meaning given to it in the Shareholder Support Agreement;

**Notice Date** means the later of the Termination Date and (if applicable) the date that the Adjusted Estimated Fair Value of the Agreement is agreed between the Parties pursuant to of Part 5 of Schedule 11 (Termination Compensation);

**Notices** means the Notices listed in Schedule 9 (Orders and Watercourse Notices);

**Notifiable Financings** means any Refinancing described in paragraph (a) or (c) of the definition of Refinancing and any other arrangement which has or would have a similar effect or which has or would have the effect of limiting the Company's or any Associated Company's ability to carry out any such arrangement;

**O&M Manual** means the manual developed by the Company in accordance with this Agreement;

**O&M Roads** means those roads categorised as "O&M Roads" in column C of Table 1 in Schedule 19, on which O&M Works are required from the date of the issue of the relevant Permit to Use;

**O&M Works** means all activities and obligations to be carried out by the Company as described and specified in, or required and/or prescribed by the O&M Works Requirements;

**O&M Works Agreement** means the contract so entitled in the Agreed Form entered into between the Company and the O&M Works Contractor in respect of the O&M Works;

**O&M Works Contractor** means Balfour Beatty Civil Engineering Limited, a company incorporated in England under number 4482405 and having its registered office at 130 Wilton Road, London, SW1V 1LQ or such substitute as may be appointed by the Company for the time being in accordance with this Agreement;

**O&M Works Direct Agreement** means an agreement substantially in the form set out in Part 3 of Schedule 14 (Direct Agreements);

**O&M Works LMA Drawings** means the drawings entitled "Land Made Available by the Scottish Ministers for the O&M Works" contained in Appendix 0/4 of Part 5 of Schedule 4 (O&M Works Requirements);

**O&M Works Quality Plan** means the quality plan in respect of the O&M Works to be developed by the Company in accordance with this Agreement, the form of which is set out in Schedule 3 Part 2 (Plans and Manuals);

**O&M Works Requirements** means the requirements forming Schedule 4 (O&M Works Requirements) as amended from time to time in accordance with this Agreement;

**O&M Works Site** means

- a) the areas of land shown shaded in pink and bounded by a red line including the red line;
- b) the areas of land shown shaded light blue and bounded by a red line including the red line;

- c) the areas of land shown shaded purple and bounded by a red line including the red line;
- d) the areas of land shown cross-hatched in dark blue and bounded by a red line including the red line; and
- e) the areas of land shown cross-hatched in green and bounded by a red line including the red line,

in each case, on the O&M Works LMA Drawings (as may be amended pursuant to Clause 8.2) and any further land acquired by, or conveyed to, the Scottish Ministers (from any person including the Company) from time to time for the purposes of the carrying out of the O&M Works;

**Ombudsman** means the Scottish Public Services Ombudsman established pursuant to the Scottish Public Services Ombudsman Act 2002;

**Operations** means the activities of or required of the Company (and/or any of the Company's agents, employees, contractors or sub-contractors) in connection with the performance of any obligations or exercise of any rights of the Company under this Agreement, and the carrying out of any works or operations of the Company (and/or any of the Company's agents, employees, contractors or sub-contractors) on or in relation to the Sites, including for the avoidance of doubt the New Works and the O&M Works;

**Orders** means the Orders listed in Schedule 9 (Orders and Watercourse Notices) and contained in the Information Room;

**Original Senior Commitment** means the amount of principal issued and outstanding in respect of the Bonds and the Unlisted Notes as at Financial Close plus the amount committed under the EIB Finance Contract and the Commercial Term Loan Facility Agreement;

**Outstanding Principal** means the principal amount outstanding at the Termination Date of each borrowing (other than any borrowing under any equity bridge facility) under the Senior Financing Agreements;

**Overseeing Organisation** means:

- a) Transport Scotland, Trunk Road & Bus Operations (in respect of trunk roads and private means of accesses);
- b) Aberdeen City Council (in respect of adopted local roads within their area); and/or

- c) Aberdeenshire Council (in respect of adopted local roads within their area);

**Party** means a party to this Agreement and *Parties* shall be construed accordingly;

**Payment Calculation Schedule** means the excel worksheet in the form set out in Appendix 9 of Schedule 6 (Payment Mechanism) used to calculate the Unitary Charge for any Payment Month;

**Payment Month** has the meaning given to that term in Part 1 of Schedule 6 (Payment Mechanism);

**Payment Year** has the meaning given to that term in Part 1 of Schedule 6 (Payment Mechanism);

**Performance Deductions** means Availability Failure Deductions and Service Shortfall Deductions;

**Performance Guarantees** means the guarantees to the Company in respect of the New Works Agreement, the O&M Works Agreement which, as at the Date of this Agreement are in the Agreed Form;

**Permit to Use** means the notice issued by the Contracting Authority to the Company, in accordance with Clause 25, acknowledging the issue by the Company of a Substantial Completion Certificate(s) in respect of a Phase and confirming that the Phase is to be made available for public use with immediate effect;

**Permit to Use Date** means the dates of issue of each Permit to Use specified in the Construction Programme;

**Permitted Borrowing** means, without double counting, any:

- a) advance to the Company, the Issuer or Holdco under the Senior Financing Agreements;
- b) Additional Permitted Borrowing; and
- c) interest and, in respect of the original Senior Financing Agreements only (as entered into at the Date of this Agreement, prior to any subsequent amendment), other amounts accrued or payable under the terms of such original Senior Financing Agreements,

except where the amount referred to in paragraphs (a) to (c) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;

**Persistent Breach** means a breach for which a Persistent Breach Final Notice has been issued which has continued for more than twenty (20) Business Days or recurred in three (3) or more months within the six (6) months after the date on which such Persistent Breach Final Notice is served on the Company;

**Persistent Breach Final Notice** means the notice to be served by the Contracting Authority in accordance with Clause 43.2;

**Persistent Breach Warning Notice** has the meaning given in Clause 43.1;

**Personal Data** means personal data as defined in the DPA which is supplied to the Company by the Contracting Authority or obtained by the Company in the course of performing the Operations;

**PFI/PPP** means the Government's Private Finance Initiative/Public Private Partnership approach or any similar or replacement initiative or approach;

**PFI/PPP Company** means a person that has contracted with the Government, a local authority or other public or statutory body to provide services under the PFI/PPP;

**Phase** means each and any of the following parts of the New Works:

- a) Phase 1: all New Works for the Aberdeen Western Peripheral Route A96 junctions at Craibstone and Dyce Drive, including connections to adjacent roads, comprising as a minimum the Project Roads noted below (in each case as more fully described in Schedule 19):
  - i) Craibstone Roundabout;
  - ii) A96 Aberdeen to Inverness Road (1), (2) and (3);
  - iii) Northern 50m of A96 Craibstone Junction Link Road;
  - iv) A96 Park and Choose slip road;
  - v) Kirkhill Industrial Estate Link Road;
  - vi) Dyce Drive; and



- vii) Craibstone College Access Road (North);
- b) Phase 2: all New Works for the A90 Balmedie-Tipperty Improvement as more fully set out in Schedule 19;
- c) Phase 2A: all New Works for the Aberdeen Western Peripheral Route between Goval and Blackdog, as more fully set out in Schedule 19; and
- d) Phase 3: all New Works for the Aberdeen Western Peripheral Route as more fully set out in Schedule 19, other than those New Works for the Aberdeen Western Peripheral Route which comprise Phases 1 and 2A;

**Physical Damage Policies** means the policies referred to in paragraph 1 of both Parts 1 and 2 of Schedule 10 (Required Insurances);

**Pipeline Agreements** means:

- a) the pipeline agreement entered into between the Scottish Ministers and BP in respect of the pipeline from [REDACTED] to the [REDACTED] on 3 and 8 December 2014 (the **BP Agreement**); and
- b) the pipeline agreement entered into between the Scottish Ministers and Shell (in its capacity as pipeline operator for and on behalf of itself and as agent for the relevant Pipeline Owners being itself and Esso) in respect of the [REDACTED] pipeline from [REDACTED] to the [REDACTED] on 5 and 8 December 2014 (the **Shell Agreement**);

**Pipeline Claims** has the meaning given to it in Clause 51.2.4;

**Pipeline Excluded Obligations** means those obligations of the Scottish Ministers under the Pipeline Agreements which are contained in the clauses listed in Schedule 24 (Pipeline Excluded Obligations);

**Pipeline Insurance** means any and all Required Insurances (as such Required Insurances may be amended and/or extended from time to time by agreement between the Parties including pursuant to Clause 51.3.4(b)) required as a consequence of (i) works adjacent to or in the vicinity of the Shell and Esso [REDACTED] pipeline which runs from the [REDACTED] to the [REDACTED] and/or (ii) works adjacent to or in the vicinity of the BP pipeline which runs from the [REDACTED] to the [REDACTED];

**Pipeline Insurance Unavailability** has the meaning given to it in Clause 51.3.4;

**Pipeline Insurance Unavailability Notice** has the meaning given to it in Clause 51.3.4(a);

**Pipeline Owners** means BP (in respect of the pipeline from the [REDACTED] to the [REDACTED] ) and Shell and Esso (in respect of the [REDACTED] pipeline from the [REDACTED] to the [REDACTED] );

**Planned Full Services Commencement Date** means [REDACTED];

**Plant** means machinery, equipment, apparatus, materials and things of all kinds intended to form or forming part of the New Works, but not including any Constructional Plant;

**Plant Crossing** means a heavy plant crossing provided in accordance with section D3.23 of Chapter 8 of the Traffic Signs Manual;

**Post Termination Service Amount** means for the whole or any part of a Month for the period from the Termination Date to the Compensation Date an amount equal to the Maximum Monthly Unitary Charge (pro rata for any part of a Payment Month) which would have been payable in that period under the Agreement had the Agreement not been terminated less an amount equal to the aggregate of:

- a) the Market Value Availability Deduction Amount for the Payment Month (or pro rata for any part thereof) to which the Post Termination Service Amount relates; and
- b) the Rectification Costs incurred by the Contracting Authority during the Payment Month (or part thereof) to which the Post Termination Service Amount relates; and
- c) (where relevant), the amount by which the Post Termination Service Amount for the previous Payment Month was less than zero;

**Pre-Start Works Agreement** means the contract entered into by the Contracting Authority and the New Works Contractor dated 24 and 30 July and 1 August 2014 as extended by letter agreement dated 19, 20 and 24 November 2014;

**Prescribed Rate** means [REDACTED] per annum above LIBOR;

**Priority Surpluses** means each of the sums listed in the column headed "Priority Surplus Payment Nominal" in the table forming Appendix 11 to Schedule 6 (Payment Mechanism);

**Priority Surpluses (Cumulative) or PS(C)** means the amount in the relevant row under the column headed "Cumulative Priority Surpluses Nominal" in the table forming Appendix 11 to Schedule 6 (Payment Mechanism);

**Priority Surplus Payment Date** means the final day of each Priority Surplus Payment Period;

**Priority Surplus Payment Period** means each of the periods listed in the column headed "PS Payment Period" in the table forming Appendix 11 to Schedule 6 (Payment Mechanism);

**Priority Surplus Pre-Payment** or **PSP-P** means, in any Priority Surplus Payment Period, any payment made by the Company pursuant to Article 4.1.11 of the Articles of Association which exceeds the amount of Priority Surpluses for that Priority Surplus Payment Period;

**Prohibited Act** means:

- a) offering giving or agreeing to give to any servant of the Crown (which term shall include any successor entity to the Scottish Ministers) or to the Contracting Authority or to any other public body or any person employed by or on behalf of any servant of the Crown or the Contracting Authority or any other public body including any gift or consideration of any kind as an inducement or reward:
  - i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Crown or the Contracting Authority or any other public body; or
  - ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Crown or the Contracting Authority or any other public body;
- b) entering into this Agreement or any other contract with the Crown or the Contracting Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by the Company or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Contracting Authority;
- c) committing any offence:
  - i) under the Bribery Act 2010;
  - ii) under Legislation creating offences in respect of fraudulent acts; or

- iii) at common law in respect of fraudulent acts in relation to this Agreement or any other contract with the Crown or the Contracting Authority or any other public body;
- d) defrauding or attempting to defraud or conspiring to defraud the Crown or the Contracting Authority or any other public body;
- e) committing any breach of the Employment Relations 1999 Act (Blacklists Regulations) 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992; or
- f) committing any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities;

**Project** means the Aberdeen Western Peripheral Route/Balmedie – Tippetty DBFO in relation to the design, construction and other activities of the New Works, the operation, maintenance and other activities of the O&M Works and the conduct of any other Operations and the financing of all such activities;

**Project Accounts** means accounts referred to in and required to be established under the Senior Financing Agreements;

**Project Data** means:

- a) all Design Data;
- b) all drawings, reports, documents, plans, formulae, calculations and other data relating to the provision of the Operations; and
- c) any other materials, documents or data acquired brought into existence or used in relation to the Operations or this Agreement;

**Project Documents** means the Ancillary Documents, the Design Agreements and the Financing Agreements;

**Project IRR** means [REDACTED]% being the real pre-tax pre-financing project internal rate of return;

**Project Roads** means the roads on which Works are required hereunder, being all of those roads listed in the table set out in Schedule 19;

**Protester** means any person or persons engaged in Protester Action;

**Protester Action** means any action taken or threatened to be taken by any person or persons protesting against the carrying out of any part of the Operations including construction of the New Works (or any part thereof) or of roads in general which directly or indirectly affects performance of the Operations including without limitation action or threatened action which results in:

- a) increases in the cost of performing the Operations (including increased security costs); and
- b) delays in performing the Operations;

**Public Interest Director** means the Director as defined in the Articles of Association;

**Qualification Criteria** means the criteria that the Contracting Authority require tenderers to meet as part of the Tender Process, which (except where these require to be amended or added to ensure compliance with the procurement rules) shall be:

- a) the New Contract terms;
- b) tenderers should have the financial ability to pay the capital sum tendered for the New Contract and the financial ability to deliver the New Works and/or the O&M Works (as appropriate) for the price tendered;
- c) the tenderers may only bid on the basis of a single capital payment to be made on the date the New Contract is executed;
- d) the tenderer is experienced in providing the O&M Works or similar services;
- e) the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the O&M Works; and
- f) any other tender criteria agreed by the Contracting Authority and the Company;

**Qualifying Bank Transaction** means:

- a) the syndication by a Senior Lender, in the ordinary course of its business, of any of its rights or interests in the Senior Financing Agreements;
- b) the grant by a Senior Lender of any rights of participation, or the disposition by a Senior Lender of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Senior Financing Agreements in favour of (i) any other Senior Lender (ii) any institution which is recognised or permitted under the law of

any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state (iii) a local authority or public authority (iv) a trustee of a charitable trust which has (or has had at any time during the previous two years) assets of at least £10 million (or its equivalent in any other currency at the relevant time) (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two years) at least 50 members and assets under management of at least £10 million (or its equivalent in any other currency at the relevant time) (vi) an EEA or Swiss Insurance Undertaking (vii) a Regulated Collective Investment Scheme (viii) any Qualifying Institution or (ix) any other institution in respect of which the prior written consent of the Contracting Authority has been given;

- c) the grant by a Senior Lender of any other form of benefit or interest in either the Senior Financing Agreements or the revenues or assets of the Company, the Issuer or Holdco whether by way of security or otherwise, in favour of (i) any other Senior Lender (ii) any institution specified in paragraphs (b)(ii) to (vii) above (iii) any Qualifying Institution or (iv) any other institution in respect of which the prior written consent of the Contracting Authority has been given;

**Qualifying Change in Law means:**

- a) a Discriminatory Change in Law;
- b) a Specific Change in Law; and/or
- c) a General Change in Law which comes into effect during the Service Period and which requires any work of alteration, addition, demolition, extension or variation in the quality or function of the Project Roads and which is not work which the Company would have been required to undertake in order to comply with its obligations under this Agreement had the Change in Law not occurred,

which was not foreseeable at the Date of this Agreement;

**Qualifying Institution** means:

- a) any holder in due course of any security arising under or constituted by the Senior Financing Agreements in respect of which an application has been made for such security to be admitted to listing, either:
  - i) on the Official List of the Financial Conduct Authority in its capacity as competent authority for the purposes of Part IV of the Financial Services and Markets Act 2000 (and to trading on the London Stock Exchange); or
  - ii) to the competent authority in any other EEA state; or
- b) in a situation where any security arising under or constituted by the Senior Financing Agreements is no longer admitted to listing as described in paragraph (a) above, any person whose ordinary activities involved them in acquiring, holding or disposing of investments (as principal or agent) for the purposes of their business where the acquisition of the rights of a Senior Lender in the Senior Financing Agreements takes place in accordance with all applicable securities legislation other than where such acquisition, grant or disposition is made in concert with the Shareholders and/or the Subordinated Lenders for the purpose of giving rise to a Refinancing Gain; or
- c) a trustee for any other entity listed in paragraph (b) (ii) to (viii) or (c) (ii) or (iii) of the definition of Qualifying Bank Transaction other than a trustee whose acquisition, grant or disposition is made in concert with the Shareholders and/or the Subordinated Lenders for the purpose of giving rise to a Refinancing Gain;

**Qualifying Refinancing** means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

**Qualifying Variation** means either

- a) a change in the New Works and/or the O&M Works in respect of which either a Contracting Authority Notice of Change or a Company Notice of Change has been served and:
  - i) in the case of a Contracting Authority Notice of Change, the Contracting Authority have confirmed the Estimate and, where the Company is not funding all or part of the required Capital Expenditure, the Contracting Authority have agreed to meet all or the remaining part (as appropriate) of such Capital Expenditure; and

ii) in the case of a Company Notice of Change, has been accepted by the Contracting Authority; or

b) a Qualifying Change in Law,

and in respect of which any documents or amendments to the Project Documents which are required to give effect to such change in the New Works, the O&M Works and/or the Qualifying Change in Law have become unconditional in all respects;

**Quality Plan** means the New Works Quality Plan and the O&M Works Quality Plan;

**Quality System** means the quality management systems required in accordance with Schedule 5 (Quality Assurance);

**Rail Overbridge Agreement** means the road over rail agreement relating to a new structure over the railway at 7 Miles and 0678 Yards between Dyce and Inverurie, structure number 293/044-2 and/or A90 856, as entered into between the Scottish Ministers and Network Rail on 2 and 4 December 2014;

**Rail Overbridge Excluded Obligations** means those obligations on the Scottish Ministers under the Rail Overbridge Agreement which are contained in the clauses listed in Schedule 23 (Rail Overbridge Excluded Obligations);

**Rectification Costs** means an amount equal to the reasonable and proper costs incurred by the Contracting Authority in a particular Payment Month or part of a Payment Month in ensuring that the Project Roads are available;

**Redundancy Payments** means redundancy payments and other termination payments which are required under Legislation to be made to employees of the Company reasonably and properly incurred by the Company arising as a direct result of terminating this Agreement (provided that the Company shall use all reasonable endeavours to mitigate its loss) and provided that in calculating such amount no account should be taken of any liabilities and obligations of the Company arising out of:

- a) Contracts of employment or other agreements or arrangements entered into by the Company to the extent that such contracts of employment agreements or arrangements were not entered into in connection with the Project; and/or
- b) Contracts of employment or other agreements or arrangements entered into by the Company to the extent that such contracts of employment agreements or



arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

**Reference Point** has the meaning ascribed to it in paragraph 1.6 of Part 1 of Schedule 2 (New Works Requirements);

**Refinancing** means:

- a) any amendment, variation, novation, supplement or replacement of any Financing Agreement (other than any Subordinated Financing Agreement);
- b) the exercise of any right, or the grant of any waiver or consent, under any Financing Agreement (other than any Subordinated Financing Agreement);
- c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Financing Agreements (other than the Subordinated Financing Agreements) or the creation or granting of any other form of benefit or interest in either the Financing Agreements (other than the Subordinated Financing Agreements) or the contracts, revenues or assets of the Company or the Issuer whether by way of security or otherwise; or
- d) any other arrangement put in place by the Company or the Issuer or another person which has an effect which is similar to any of (a)-(c) above or which has the effect of limiting the Company's or the Issuer's or any Associated Company's ability to carry out any of (a)-(c) above;

**Refinancing Gain** means an amount equal to the greater of zero and  $[A - B]$ , where:

- a) **A** = the Net Present Value of the Surplus Payments projected immediately prior to the Refinancing (taking into account the effect of the Refinancing using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing but disregarding any Distribution to be made over the remaining term of this Agreement following the Refinancing; and
- b) **B** = the Net Present Value of the Surplus Payments projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made over the remaining term of this Agreement following the Refinancing;

**Regulated Collective Investment Scheme** has the meaning given in the rules from time to time of the Financial Conduct Authority;

**Regulations** means regulations issued pursuant to Part IV of the 1991 Act;

**Relevant Assumptions** means the assumptions that the sale of the Company is on the basis that there is no default by the Contracting Authority under this Agreement, that the sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of the Company and the Project is taken into account;

**Relevant Authority** means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom or of the Scottish Government or of the European Union;

**Relief Event** means:

- a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion;
- b) failure by any local authority (other than the Contracting Authority and /or the Scottish Ministers) or other like body to carry out works or provide services;
- c) failure by any Undertaker or utility company to carry out works or provide services in respect of Diversionary Works (Type 1), but only to the extent the failure does not arise as a consequence of any breach or act of the Company (other than as required for compliance with the 1991 Act);
- d) any accidental loss or damage to the Project Roads;
- e) any failure or shortage of power, fuel or transport;
- f) any blockade or embargo which does not constitute a Force Majeure Event;
- g) any:
  - i) official or unofficial strike;
  - ii) lockout;

- iii) go-slow; or
- iv) other dispute,

generally affecting the roads construction or roads operation and maintenance industries or a significant sector of either of them; and/or

- h) Exceptionally Adverse Weather affecting the Sites;

unless any of the events listed in paragraphs (a), (b) or (d) to (g) inclusive arises (directly or indirectly) as a result of any wilful default or wilful act of the Company or any of its Sub-Contractors;

**Renewal Programme** has the meaning given to that term in Part 3 of Schedule 4 (O&M Works Requirements);

**Renewal Works** has the meaning given to that term in Part 3 of Schedule 4 (O&M Works Requirements);

**Requests for Information** shall have the meaning set out in the FOISA or the Environmental Information (Scotland) Regulations as relevant (where the meaning set out for the term "request" shall apply;

**Required Insurances** means the insurances which the Company is required to take out and maintain pursuant to Clauses 52.1 and 52.2;

**Required Amount** means:

- a) prior to the final repayment date for Senior Debt, the lesser of (i) the Rectification Costs and (ii) the Maximum Amount; and
- b) on or after the final repayment date for Senior Debt, sums amounting in aggregate to the outstanding Rectification Costs;

**Restricted Services** means the activities as described in Part 11 of Schedule 4 (O&M Works Requirements);

**Restricted Services Commencement Date** means the later of:

- a) sixty (60) days after the Effective Date; or

- b) the date of issue (or deemed issue) by the Contracting Authority of the Restricted Services Commencement Notice in accordance with Clause 24.3;

**Restricted Services Commencement Notice** means the notice issued by the Contracting Authority pursuant to Clause 24.3;

**Restricted Services Completion Date** means the final Detrunking Date;

**Restricted Services Payments** means the payments calculated in accordance with Schedule 6 (Payment Mechanism);

**Restricted Services Period** means the period from the Restricted Services Commencement Date to the Restricted Services Completion Date;

**Restricted Services Readiness Certificate** means a certificate in the form set out in Part 5 of Schedule 2 (New Works Requirements);

**Restricted Services Readiness Criteria** means the criteria listed on the Restricted Services Readiness Certificate;

**Restricted Services Roads** means those roads identified as being "Roads Subject to Restricted Services" in the table set out in Schedule 19;

**Restricted Share Transfer** means a proposed transfer of shares in the Company, the Issuer or HoldCo to:

- a) any person directly engaged in gambling, gaming, the production or sale of alcoholic drinks, the production or sale of products containing or derived from tobacco or the manufacture or sale of arms and weapons; or
- b) any person to whom the provisions of Regulations 23(1) or 23(4) of the Public Contracts (Scotland) Regulations 2006 would apply;

**Retention Fund Account** has the meaning given to it in Clause 49.6 (Retention Fund);

**Revenue** is the projected Unavoidable Fixed Costs and Senior Debt Service Costs of the Company;

**Revised Senior Debt Termination Amount** means, subject to Clause 5.3 (Changes to Financing Agreements and Refinancing):

- a) all amounts outstanding at the Termination Date, including interest and (other than in respect of Additional Permitted Borrowing) Default Interest accrued as at that date and which are payable by the Company, Holdco or the Issuer under the Senior Financing Agreements in respect of Permitted Borrowing; and
- b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs (including, for the avoidance of doubt, any Make-Whole Payment and any prepayment breakage costs payable under the EIB Finance Contract), payable by the Company, Holdco or the Issuer to the Senior Lenders as a result of a prepayment in respect of Permitted Borrowing and/or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement, subject to the Company, Holdco or the Issuer and the Senior Lenders mitigating all such costs to the extent reasonably possible (unless the amount, or the formula for determining the amount, of such costs is fixed in advance under the terms of the relevant Senior Financing Agreements),

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below):

- i) all credit balances on any bank accounts (but excluding the Joint Insurance Account) held by or on behalf of the Company on the Termination Date;
- ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Company, Holdco or the Issuer as a result of prepayment of amounts outstanding in respect of Permitted Borrowing, or, in the case of early termination or interest rate hedging arrangements only, as a result of termination of this Agreement;
- iv) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Contracting Authority to the Company as a result of enforcing any other rights it may have; and

- v) all APB Distributions;

**Road Safety Audit Stage 3** has the meaning given to it in the DMRB;

**Road Safety Auditor** means Stewart Paton Associates Limited, a company incorporated in Scotland under number SC234072 and having its registered office at 69 Barnton Park, Edinburgh EH4 6HD or such substitute as may be appointed in accordance with this Agreement;

**Road Safety Auditor's Agreement** means the contract dated on or around the date hereof between (i) the Company or the New Works Contractor and (ii) the Road Safety Auditor;

**Road Safety Auditor's Direct Agreement** means an agreement substantially in the form set out in Part 6 of Schedule 14 (Direct Agreements);

**Road Works Authority** has the meaning given in Section 108(1) of the 1991 Act;

**Routine Maintenance** means management, maintenance, inspection and survey work carried out on a routine or cyclic basis in accordance with the O&M Works Requirements;

**RPIX** means the index published in Table 38 (RPI All Items Excluding Mortgage Interest Payments (RPIX): 1975-2012) published by the Office of National Statistics or failing such publication or in the event of a fundamental change to the index, such other index as the Parties may agree, or such adjustments to the index as the Parties may agree (in each case with the intention of putting the Parties in no better nor worse position than would have been had the index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with Schedule 7 (Dispute Resolution Procedure);

**Sample Inspections** has the meaning given to it in the Code of Practice entitled Code of Practice for Inspections;

**Scottish Ministers** means The Scottish Ministers, Victoria Quay, Edinburgh EH6 6QQ acting through (i) its agency Transport Scotland, Buchanan House, 58 Port Dundas Road, Glasgow G4 0HF or (ii) such other agency, department or other organisational unit of the Scottish Government as they may from time to time nominate (including all respective assignees and successors);

**Secondment Agreement** means the agreement between the Company, the Issuer, Holdco and CRIIL dated 11 December 2014;

**Security Trust and Intercreditor Deed** means the security trust and intercreditor deed dated on or about the Date of this Agreement between, amongst others, the Company, the Security Trustee, the Intercreditor Agent and the Senior Lenders;

**Security Trustee** means [REDACTED] (or any successor security trustee appointed in accordance with the terms of the Security Trust and Intercreditor Deed) in its capacity as security trustee for the Senior Lenders under the Senior Financing Agreements;

**Senior Debt** means the financing provided by the Senior Lenders under the Senior Financing Agreements;

**Senior Debt Rate** means in respect of:

- a) the Bonds, the Interest in accordance with Condition 5 of the Bonds;
- b) the Unlisted Notes, the Interest in accordance with Condition 5 of the Unlisted Notes;
- c) the amount committed under the EIB Finance Contract, the Fixed Rate (as defined in the EIB Finance Contract);
- d) the amount committed under the Commercial Term Loan Facility Agreement, the rate of interest payable pursuant to clause 6.1 of the Commercial Term Loan Facility Agreement; and
- e) in respect of any other amount, the Prescribed Rate;

**Senior Debt Service Costs** shall mean interest and debt service costs incurred in respect of the Senior Financing Agreements less:

- a) sums which are in arrears; and
- b) all sums reserved by the Company and which the Company is entitled to use to make such payments, without breaching the Senior Financing Agreements;

**Senior Financing Agreements** means those of the Financing Agreements listed in Part 2 of Schedule 15 (Initial Financing Agreements) as at the Date of this Agreement or as amended as permitted under Clause 5.3;

**Senior Lender** means a person providing finance to the Company under the Senior Financing Agreements;

**Service Period** means the period specified in Clause 2.2;

**Service Shortfall Deductions** has the meaning given in Part 1 of Schedule 6 (Payment Mechanism);

**Settled Bonds** has the meaning given to it in the Subscription and Bond Purchase Agreement;

**Shareholder** means any person from time to time holding share capital in the Company, the Issuer or Holdco;

**Shareholder Support Agreement** has the meaning given to it in the Common Terms Agreement;

**Shareholders' Agreements** means the agreement or agreements between the Shareholders relating to the Company, including any agreement relating to the subscription of equity (or other shareholder funding) by the Shareholders in the Company;

**Shell** means Shell UK Limited a company incorporated in England under number 00140141 and having its registered office at Shell Centre, London SE1 7NA and its successors, assignees and transferees;

**Side Roads** means the roads described under the heading **New Side Roads, New Slip Roads and New Roundabouts** in Table 1 of Schedule 19 and all other public roads, cycle-paths, footpaths and footways within the Sites which are under the authority of Aberdeen City Council and/or Aberdeenshire Council in each case in their capacity as Local Roads Authorities;

**Sites** means the New Works Site and the O&M Works Site and the Accommodation Works Site;

**Specific Change in Law** means any Change in Law which specifically refers to the provision of operations the same as or similar to the Operations or to the holding of shares in companies whose main business is providing operations the same as or similar to the Operations;

**Specification** means the 'Specification for Highway Works', published by The Stationery Office as Volume 1 of the Manual of Contract Documents for Highway Works 1 October 2013,



as modified and extended by Part 4 of Schedule 2 (New Works Requirements) and Part 5 of Schedule 4 (O&M Works Requirements) and as implemented by Transport Scotland as at 1 October 2013;

**Sub-Contractors** means each of the counterparties of the Company to the Project Documents (other than the Contracting Authority, the Issuer, Holdco and the Senior Lenders) or any person engaged by the Company from time to time as may be permitted by this Agreement to procure the provision of the New Works and/or the O&M Works (or any of them);

**Sub-Contractor Breakage Costs** means Losses that have been or will be reasonably and properly incurred by the Company as a direct result of the termination of this Agreement, but only to the extent that:

- a) the Losses are being incurred in connection with the Project and in respect of the provision of the O&M Works or the completion of the New Works, including:
  - i) any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses incurred;
  - ii) any expenditure incurred in anticipation of the provision of the O&M Works or the completion of the New Works in the future;
  - iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project; and
  - iv) redundancy payments; and
- b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms; and
- c) the Company and the relevant Sub-Contractor has each used its reasonable endeavours to mitigate the Losses;

**Sub-Contracts** means the contracts entered into between the Company and the Sub-Contractors;

**Subordinated Debt** means the financing provided by the Subordinated Lenders under the Subordinated Financing Agreements;

**Subordinated Financing Agreements** means those of the Financing Agreements listed in Part 3 of Schedule 15 (Initial Financing Agreements) as at the Date of this Agreement or as amended with the prior written approval of the Contracting Authority;

**Subordinated Lender** means a person providing finance under a Subordinated Financing Agreement;

**Subscription and Bond Purchase Agreement** means the subscription and bond purchase agreement dated on or about the Date of this Agreement entered among the Company and others;

**Substantial Completion** means completion of a Phase such that:

- a) the New Works have been completed in accordance with the New Works Requirements including satisfactory completion of the Road Safety Audit Stage 3 for the Phase; and
- b) there are no existing Category 1 Defects and/or Category 2 Defects as described in Schedule 4,

except in all cases for incomplete items which in the sole opinion of the Contracting Authority do not prejudice the operation and safe use by Users of the Phase;

**Substantial Completion Certificate** means a certificate of that name provided in accordance with Part 5 of Schedule 2 (New Works Requirements);

**Suitable Substitute Contractor** means a person approved by the Contracting Authority (such approval not to be unreasonably withheld or delayed) as:

- a) having the legal capacity, power and authority to become a party to and perform the obligations of the Company under this Agreement;
- b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of the Company under this Agreement;
- c) having constitutional documents and a corporate structure that incorporate provisions substantially the same as, and which give effect to, the NPD Mandatory Provisions; and

- d) capable of fulfilling the NPD Requirements (incorporating the NPD Mandatory Provisions as may be adjusted in accordance with paragraph (c) above);

**Surplus** means on any given date the amount (if any) standing to the credit of the Surplus Account;

**Surplus Account** has the meaning given in the Senior Financing Agreements;

**Surplus Payment** means the payment of a Surplus or Surpluses by the Company to the Contracting Authority pursuant to Clause 57.1;

**Surplus Payment Date** means any six month period ending on 31st March or 30th September or, in relation to (i) the first Surplus Payment Date, the period from the Effective Date until the next following 31<sup>st</sup> March and (ii) the six month period in which the Expiry Date occurs, the period from the most recent Surplus Payment Date to the Expiry Date;

**Tax** means any kind of tax, duty, levy or other charge (other than VAT) whether or not similar to any in force at the Date of this Agreement and whether imposed by a local, governmental or other Relevant Authority in the United Kingdom or elsewhere;

**Temporary Traffic Management Scheme (TTMS)** means any traffic management arrangement which facilitates the temporary diversion of traffic in respect of any Project Road including, but not limited to:

- a) a temporary carriageway onto which vehicular traffic is diverted from a public road;
- b) a temporary footpath or cycle track onto which non-motorised User traffic is diverted from a public road;
- c) a combination of (a) and (b) or a temporary carriageway as in (a) with associated non-motorised User traffic; or
- d) a temporary private means of access onto which traffic is diverted from a New Means of Private Access;

**Tender Costs** means the reasonable and proper costs of the Contracting Authority and/or the Scottish Ministers incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of this Agreement;

**Tender Process** means the process by which the Contracting Authority and/or the Scottish Ministers requests tenders from any parties interested in entering into a New Contract,

evaluates the responses from those interested parties and enters into a New Contract with a New Contractor, in accordance with paragraph 3 of Part 4 of Schedule 11 (Termination Compensation);

**Tender Process Monitor** means an independent third party appointed pursuant to paragraph 3.5 of Part 4 of Schedule 11 (Termination Compensation);

**Termination Date** means any date of early termination of this Agreement in accordance with Clauses 41 (Termination on Company Default), 42 (Termination on Contracting Authority Default), 44 (Force Majeure), 45 (Corrupt Gifts and Fraud), 46 (Voluntary Termination by the Contracting Authority) or 47 (Termination on Breach of NPD Requirements);

**Termination Date Discount Rate** means a discount rate expressed as  $[(1 + \text{real base case project IRR} + \text{Gilt B} - \text{Gilt A}) * (1 + i) - 1]$

where:

- a) **real base case project IRR** is the real pre-tax Project IRR as set out in the Base Case at the Effective Date;
- b) **i** is the reasonable forecast rate of increase in RPIX for the remaining term of the Agreement, as agreed between the Parties;
- c) **Gilt A** is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as at the Effective Date; and
- d) **Gilt B** is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as at the Termination Date;

**Termination Notice** means a termination notice served by the Contracting Authority on the Company in accordance with Clause 41.1;

**Termination Sum** means any compensation payable by the Contracting Authority to the Company on an early termination of the Agreement under Schedule 11 (Termination Compensation) (excluding the Adjusted Highest Compliant Tender Price);

**Terms and Conditions of the Unlisted Notes** means the terms and conditions of the Unlisted Notes agreement dated on or about the Date of this Agreement entered among the Company and others;

**Third Party Rights** means any servitudes, way leaves, easements, public or private rights of way, title conditions, burdens, leases or any other overriding interest formal or informal over or affecting any of the land over which the Access Rights are granted including but not restricted to the Third Party Rights (Listed);

**Third Party Rights (Listed)** means those third party rights set out in the tables contained in Schedule 22;

**Third Party Roads** means those roads categorised as "Third Party Roads" in the tables set out in Schedule 19, being those roads which are to be handed over to a third party at or around the time of Substantial Completion;

**Third Party Road Completion Certificate** means a certificate in the form set out in Part 5 of Schedule 2 (New Works Requirements);

**TPL Risk** means a risk which is required to be insured under the third party liability insurance policy or the contractors' pollution liability insurance;

**Traffic Scotland** means that branch of Transport Scotland which is associated with trunk road communications;

**Transfer Assistance Period** means (a) the period (i) from 6 months prior to the Expiry Date or (ii) if longer, from the date the Company received notice in writing from the Contracting Authority that performance of the Operations is to cease until such cessation; and/or (b) the period or periods (if any) from the date or dates the Company receives notice in writing from the Contracting Authority that performance of a part only of the Operations is to cease until such cessation;

**Transfer Date** means the date on which any cessation or partial cessation of the Operations by the Company (and/or any sub-contractor of the Company, the Sub-Contractor or any of its sub-contractors) takes effect so as to transfer the contracts of employment of the Transferring Employees by virtue of TUPE;

**Transferring Employee Employment Liabilities** means any costs, claims, liabilities and expenses (including legal expenses) relating to or arising out of the employment of the Transferring Employees (or the termination thereof) including, without prejudice to the foregoing generality, negligence claims, unfair dismissal, redundancy, unlawful discrimination, breach of contract, claims in relation to pension entitlement, unlawful deduction of wages and equal pay;

**Transferring Employees** means those employees of the Company (and/or any sub-contractor of the Company, the Sub-Contractor or any of its sub-contractors) who are wholly or **mainly** assigned to the performance of those part(s) of the Operations which are to cease to be performed immediately prior to the cessation of performance of such part(s);

**TUPE** means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI No 246);

**Unavoidable Fixed Costs** means the fixed costs incurred by the Company which first fall due for payment by the Company during the period of indemnity but excluding:

- a) costs which could have reasonably been mitigated or avoided by the Company;
- b) payments to the Company's Affiliates;
- c) payments which are not entirely at arm's length;
- d) payments to holders of equity in the Company, Subordinated Lenders and any other financing costs other than Senior Debt Service Costs;
- e) indirect losses suffered or allegedly suffered by any person;
- f) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations;
- g) payments the Company can recover under contract or in respect of which the Company has a remedy against another person in respect of the same liability;
- h) payments to the extent that the Company has available to it reserves which the Company can draw upon without breaching the Senior Financing Agreements;
  - i) standby or contingent facilities or funds of Senior Debt or equity which the Company is entitled to have available; and
  - ii) payments representing any profits of the Project (to the extent not already excluded in above);

**Undertaker** means any undertaker for the purposes of or as defined in the 1991 Act;

**Uninsurable** means, in relation to a risk, either that:

- a) insurance is not available to the Company in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or
- b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;

**Uninsured Losses** has the meaning given to it in Clause 51.2.4;

**Unitary Charge** has the meaning given to that term in Schedule 6 (Payment Mechanism);

**Unitary Charge Adjustment** means an adjustment to the Unitary Charge made in accordance with the Unitary Charge Adjustment Procedure;

**Unitary Charge Adjustment Procedure** means the procedure set out in Schedule 6 (Payment Mechanism);

**Unlisted Notes** has the meaning given to it in the Terms and Conditions of the Unlisted Notes;

**Users** means users of the Project Roads;

**VAT** means any value added taxes;

**VFM Report** means the report of the result of the VFM Review to be submitted to the Contracting Authority by the Company in accordance with Clause 36.1;

**VFM Review** means the review of the operations to be carried out by the Company in accordance with Clause 36.1;

**VFM Review Date** means each of the 5th, 10th, 20th and 25th anniversary of the Planned Full Services Commencement Date or the date of issue of the final Permit to Use, whichever is earlier;

**Vitiating Act** means any fraud, misrepresentation, non-disclosure, neglect, error or omission or breach or violation of any warranty, declaration or condition contained in or with regard to any Pipeline Insurance;

**Works** shall mean the New Works and/or the O&M Works, as the case may be; and

**Works for Road Purposes** has the meaning given in Section 145(2) of the 1991 Act.

## 1.2 Interpretation

1.2.1 In this Agreement, except where the context otherwise requires:

- (a) the masculine includes the feminine and vice-versa;
- (b) the singular includes the plural and vice-versa;
- (c) a reference in this Agreement to any clause, sub-clause, paragraph, Schedule, Part of the Schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, Schedule, Part of the Schedule or annex of this Agreement;
- (d) save where stated to the contrary any reference to this Agreement or to any other document shall include any permitted variation, amendment, supplement or successor to such document;
- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) references to any documents being **in the Agreed Form** means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
- (g) the words **include** and **including** shall be construed without limitation;
- (h) a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
- (i) headings and words in parentheses after a clause reference or a reference to a Schedule are for convenience of reference only;
- (j) references to sub-contractors means sub-contractors of any tier of the Company; and
- (k) in respect of (i) materials or goods of a specific make or source and/or (ii) any particular process or trademark, patent type, origin or means of



production, references to any specific industry standard(s) include references to equivalent industry standard(s).

- 1.2.2 This Agreement is entered into under PFI/PPP. This Agreement is excluded from Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of paragraph 4 of the Construction Contracts (Scotland) Exclusion Order 1998 (S.I. 1998/686). The Company acknowledges that the operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Project Document shall not affect the Parties' rights or obligations under this Agreement.
- 1.2.3 References to amounts expressed to be **Indexed** are references to such amounts multiplied by  $RPIX_1/RPIX_2$  where  $RPIX_1$  is the value of RPIX most recently published prior to the relevant calculation date and  $RPIX_2$  is the value of RPIX on 28 February 2014.
- 1.2.4 The right of a Party to give or withhold its approval, consent, agreement or analogous endorsement shall in each case (unless otherwise stated) be subject to an obligation to act reasonably in the giving of and/or not to unreasonably withhold or delay the giving or withholding of any such approval, consent, agreement or analogous endorsement.
- 1.2.5 Subject to the provisions of clause 11.6 of the Direct Agreement, in the event of a conflict between this Agreement and any of the Project Documents, the provisions of this Agreement will prevail.
- 1.2.6 Accounts referred to in this Agreement shall be dealt with in accordance with this Agreement.

## 2. DURATION OF AGREEMENT

### 2.1 Commencement

Subject to Clause 3.1, this Agreement and the rights and obligations of the Parties shall take effect on the Date of this Agreement.

### 2.2 Expiry/Termination

The Service Period will commence on the Full Services Commencement Date and terminate on the earlier of:

- 2.2.1 the Expiry Date; and

2.2.2 the Termination Date.

### **3. CONDITIONS PRECEDENT AND EFFECT ON DOCUMENTS**

#### **3.1 Conditionality**

This Agreement (other than the provisions of Clauses 1, 2, 3, 16, 17, 51.6, 58, 59, 60, 62, 64, 66, 67, 68, 69, 70, 71, 72, 75, 76, 77 and 78) is conditional on the satisfaction of the Conditions Precedent in accordance with this Clause 3.

#### **3.2 Termination**

If the Conditions Precedent have not been satisfied or waived by the Cut-Off Date (such waiver, in relation to the Company's Conditions Precedent, to be given by the Contracting Authority and, in relation to the Contracting Authority's Conditions Precedent, to be given by the Company), this Agreement shall terminate on the Cut-Off Date and, subject to Clause 50.5 (Accrued Rights), be without further effect.

#### **3.3 The Contracting Authority's obligation to satisfy**

The Contracting Authority shall use its reasonable endeavours to ensure that the Contracting Authority's Conditions Precedent are satisfied by the Cut-Off Date.

#### **3.4 Company's obligation to satisfy**

The Company shall use its reasonable endeavours to ensure that the Company's Conditions Precedent are satisfied by the Cut-Off Date.

#### **3.5 Satisfaction of Conditions Precedent**

A Condition Precedent shall be deemed to be satisfied on the date on which notice of satisfaction or waiver:

3.5.1 in the case of a Contracting Authority Condition Precedent, is received by the Contracting Authority from the Company; and

3.5.2 in the case of a Company's Condition Precedent, is received by the Company from the Contracting Authority.

**3A PRE-START WORKS AGREEMENT****3A.1 Pre-Start Works**

On the Effective Date:

- 3A.1.1 all work performed by the New Works Contractor under the Pre-Start Works Agreement shall be deemed to have been performed under this Agreement and the Pre-Start Works Agreement shall terminate;
- 3A.1.2 any instructions or directions given by the Contracting Authority under the Pre-Start Works Agreement which constitute a change to the Contracting Authority's Requirements shall be considered a Contracting Authority Change and the provisions of Clause 34 (Scottish Ministers Changes) shall apply; and
- 3A.1.3 any claims which the New Works Contractor may have against the Contracting Authority under the Pre-Start Works Agreement (except claims relating to payment under clause 4 of the Pre-Start Works Agreement) shall be deemed to be claims available to the Company under this Agreement.

**3A.2 No Relief**

- 3A.2.1 The Company shall not be entitled to any relief or compensation (whether financial, relating to time or otherwise) under this Agreement to the extent that the New Works Contractor has already been compensated (whether financial, relating to time or otherwise) under the Pre-Start Works Agreement.
- 3A.2.2 The Contracting Authority shall not be entitled to any relief or compensation (whether financial, relating to time or otherwise) under this Agreement to the extent that the Contracting Authority has already been compensated (whether financial, relating to time or otherwise) under the Pre-Start Works Agreement.

**4. WARRANTIES AND GENERAL INFORMATION****4.1 Company Warranties**

The Company warrants, represents and undertakes to the Contracting Authority that as at the Date of this Agreement:

- 4.1.1 it is properly constituted and incorporated under the laws of Scotland and has all necessary authority, power and capacity to enter into this Agreement, to execute

and deliver the Financing Agreements to which it is a party and to exercise its rights under them;

- 4.1.2 the information relating to the Company and its Affiliates set out in Schedule 16 (Company's Details) is true and accurate;
- 4.1.3 there are no material facts or circumstances in relation to the financial position or operational constitution of the Company which have not been fully and fairly disclosed to the Contracting Authority and which if disclosed might reasonably have been expected to affect the decision of the Contracting Authority to enter into this Agreement;
- 4.1.4 neither the performance nor the functionality of any computer or any automatically controlled or embedded system used by the Company in support of the performance of this Agreement is affected by any date change;
- 4.1.5 it has not traded since incorporation or incurred any liabilities other than in terms of this Agreement, the Project Documents and the Financing Agreements or otherwise in relation to the Project;
- 4.1.6 the Financing Agreements set out the full basis on which the Company and/or the Issuer will obtain Senior Debt and Subordinated Debt;
- 4.1.7 the Project Documents referred to in this Agreement are the only agreements which would materially affect interpretation or application of any of the Project Documents;
- 4.1.8 the Company is solvent and that no litigation or other proceedings are pending, threatened or have been entered into against it or any of its assets; and
- 4.1.9 no security interests exist over the Assets other than as created by or pursuant to the Financing Agreements,

and the Contracting Authority rely upon such warranties, representations and undertakings.

## **4.2 Undertakings of the Company**

The Company undertakes to the Contracting Authority that the Company will not without the prior consent of the Contracting Authority:

- 4.2.1 engage in any business other than the entry into and implementation of this Agreement and the Project Documents and any related and consequential transactions;
- 4.2.2 amend or replace the Memorandum and/or Articles of Association or fail to abide by any restrictions in them;
- 4.2.3 form or acquire or dispose of any subsidiary or subsidiary undertaking;
- 4.2.4 consolidate or merge with any other person, or acquire any business or undertaking or sell or dispose of the business or undertaking or any substantial part thereof of the Company or any of its subsidiaries or subsidiary undertakings;
- 4.2.5 incur any indebtedness, other than its obligations under any Financing Agreement and any other Project Document, or assume or guarantee any indebtedness of any other person; and/or
- 4.2.6 create or permit to subsist any security interest other than as created by or pursuant to the Financing Agreements on, over or affecting the whole or any part of its undertaking or assets, present or future.

## **4.3 Status of Warranties**

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

## **4.4 No warranty by the Contracting Authority**

The Contracting Authority does not give any warranty or undertaking as to the relevance, completeness, accuracy or fitness for any purpose of any of the Disclosed Data.

**4.5 No liability to Company**

Subject to Clause 4.7 the Contracting Authority shall not be liable to the Company in contract, delict (including negligence or breach of statutory duty), statute or otherwise as a result of:

- 4.5.1 any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Disclosed Data (subject to Clause 7.1); or
- 4.5.2 any failure to make available to the Company any materials, documents, drawings, plans or other information relating to the Project.

**4.6 Disclosed Data**

The Company warrants and represents to the Contracting Authority that it has conducted its own analysis and review of the Disclosed Data and that it has satisfied itself as to the accuracy, completeness and fitness for purpose of any Disclosed Data on which it places reliance.

**4.7 Fraudulent Statements**

Nothing in this Clause 4 shall exclude any liability which the Contracting Authority would otherwise have to the Company in respect of any statements made fraudulently prior to the Date of the Agreement.

**4.8 Company's Due Diligence**

The Company shall be deemed to have:

- 4.8.1 satisfied itself as to the assets to which it will acquire rights and the nature and extent of the risks assumed by it under this Agreement; and
- 4.8.2 gathered all information necessary to perform its obligations under this Agreement and other obligations assumed, including:
  - (a) information as to the nature, location and condition of the Sites (including hydrological, geological, geo-technical, environmental and sub-surface conditions), any environmental contamination or existence of asbestos; and

- (b) information relating to archaeological finds, areas of archaeological, scientific, historic or natural interest, local conditions and facilities and the quality of existing structures; and
- (c) information relating to Apparatus.

#### 4.9 **No Relief**

The Company shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against the Contracting Authority on grounds that any information, whether obtained from the Contracting Authority or otherwise (including information made available by the Contracting Authority) is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

### 5. **PROJECT DOCUMENTS**

#### 5.1 **Project Documents**

The Company shall perform its obligations under, and observe all of the provisions of, the Project Documents to which it is a party and shall not:

- 5.1.1 terminate or agree to the termination of all or part of any Ancillary Document or Design Agreement (subject to Clause 18);
- 5.1.2 make or agree to any material variation of any Ancillary Document or Design Agreement;
- 5.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that any counterparty to an Ancillary Document or Design Agreement in any material respect departs from its obligations (or waives or allows to lapse any rights it may have in a material respect), under any Ancillary Document or Design Agreement; or
- 5.1.4 enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document or Design Agreement,

unless the proposed course of action (and any relevant documentation) has been submitted to the Contracting Authority's Representative for review and there has been no objection made by the Contracting Authority within fifteen (15) Business Days of receipt by the Contracting Authority of such submissions, or such shorter period as may be agreed by the

Parties and, provided, in the circumstances specified in Clause 5.1.1, that the Company has complied with the provisions of Clause 18 (Sub-Contracting Operations and Direct Agreements). The Contracting Authority may only object on the following grounds:

- 5.1.5 that the Company's ability to perform its obligations would be adversely affected;
- 5.1.6 that the Contracting Authority's ability to carry out their statutory functions may be adversely affected; or
- 5.1.7 that the proposed change would be likely to result in an increase to the Contracting Authority's liabilities or potential contingent liabilities.

## **5.2 Delivery**

The Company has provided to the Contracting Authority copies of the Ancillary Documents, the Design Agreements and the Initial Financing Agreements. Without prejudice to Clause 5.1 or 5.3 or to the definition of Senior Financing Agreements, if at any time:

- 5.2.1 an amendment is made to any Project Document; or
- 5.2.2 the Company enters into a new Project Document (or any agreement which affects the interpretation or application of any Project Document),

the Company shall deliver to the Contracting Authority a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation (as the case may be), certified as a true copy by an officer of the Company.

## **5.3 Changes to Financing Agreements and Refinancing**

- 5.3.1 Subject to Clauses 5.3.2, 5.3.3, and 5.3.4, the Company shall be free, at any time, to enter into, terminate, amend, waive its rights and generally deal with its Financing Agreements on such terms and conditions as it sees fit without the prior written consent of the Contracting Authority provided that (at the time such action is contemplated and effected) the same will not materially and adversely affect the ability of the Company to perform its obligations under the Project Documents or this Agreement.
- 5.3.2 No amendment, waiver or exercise of a right under any Project Document shall have the effect of increasing the Contracting Authority's liabilities on early termination of this Agreement unless:



- (a) the Company has obtained the prior written consent of the Contracting Authority to such increased liability for the purposes of this Clause 5.3; or
- (b) it is a Permitted Borrowing.

5.3.3 The Company shall not, without the prior written consent of the Contracting Authority for the purposes of this Clause 5.3.3, vary, amend or replace any Financing Agreement or enter into any new Financing Agreement, the effect of which is to:

- (a) change the circumstances in, or conditions on, which the Agreed Order of Priorities may be varied;
- (b) change the circumstances in, or conditions on, which the Company is entitled or obliged to make payments into the Surplus Account;
- (c) change the circumstances in, or conditions on, which the Company is entitled or obliged to make Surplus Payments or Priority Surplus Payments (as the case may be); and/or
- (d) change the circumstances in, or conditions on, which the shares and or loan notes issued by any of the Company, Holdco or the Issuer may be transferred (including in terms of their articles of association).

5.3.4 Any amendment or variation of any Financing Agreements which constitutes a Refinancing shall be carried out in accordance with the provisions of Clause 39 (Refinancing).

5.3.5 Without prejudice to Clause 5.3.1, the Company shall liaise with the Contracting Authority, and shall use all reasonable endeavours to provide the Contracting Authority with a copy of the relevant agreement in settled draft form, not less than ten (10) Business Days before it enters into any Financing Agreement (other than the Initial Financing Agreements).

5.3.6 The Company shall not, without the prior written consent of the Contracting Authority, amend the Secondment Agreement such that the circumstances referred to in Clauses 5.3.3(a) and/or 5.3.3(b) occur save that the consent of the Contracting Authority shall not be required to any increase in Base Charge and/or ProjectCo Expenses in respect of the Services and Additional Services arising where that increase reflects the actual cost of providing services similar to the

Services and Additional Services at the time of the increase (defined terms having the same meaning as in the Secondment Agreement).

#### 5.4 **Financial Model**

5.4.1 Unless otherwise agreed between the Parties, any amendments to the Financial Model shall reflect, be consistent with and be made only in accordance with the provisions of this Agreement, and shall in all cases be subject to the prior written approval of the Contracting Authority (such approval not to be unreasonably withheld or delayed). In the event that the Parties fail to agree any proposed amendments to the Financial Model, the matter shall be referred for resolution in accordance with Schedule 7 (Dispute Resolution Procedure).

5.4.2 Following any amendment of the Financial Model in accordance with this Agreement, the Company shall promptly deliver a copy of the revised Financial Model to the Contracting Authority in the same form as the original form (or such other form as may be agreed by the Parties from time to time).

### 6. **ACCESS TO AND OCCUPATION OF THE SITES**

6.1 The Contracting Authority grants to the Company and those authorised by the Company (i) non-exclusive rights of access and egress to and from and (ii) the right to occupy:

6.1.1 the New Works Site for the purpose of carrying out the New Works from the Effective Date; and

6.1.2 the O&M Works Site when, and to the extent, reasonably required to carry out the O&M Works in accordance with the terms of this Agreement for the period from the Restricted Services Commencement Date until the Expiry Date or the Termination Date as the case may be;

in each case subject only to Clauses 6.3 and 6.4, Clause 7 and the Third Party Rights (Listed).

#### 6.2 **Access for Accommodation Works**

The Company shall make its own arrangements for access to the Accommodation Works Sites with the owners of such sites for carrying out of the Accommodation Works, provided that if the Company having used reasonable endeavours cannot get access to an Accommodation Works Site, then the Accommodation Works to be carried out on that

Accommodation Works Site will be removed from the Operations by way of a Contracting Authority Change.

### 6.3 Limitations to Access Rights

The Access Rights are granted for the purposes of the Company carrying out the Operations and for no other purpose. The Company acknowledges that possession of the Sites is retained by the Contracting Authority subject to the rights created under this Clause 6 and that such rights shall not operate or be deemed to operate as a lease of the Sites. The rights granted under Clause 6.1 shall be granted to the Company by way of non-exclusive licence for the relevant part of the Operations only and shall not grant or be deemed to grant any other interest in the Sites.

### 6.4 Restrictions on Access Rights

- 6.4.1 The Access Rights over those parts of the New Works Site and the O&M Works Site shown shaded light blue and bounded by a red line including the red line shall be restricted to servitude rights or wayleaves for the purposes of construction and maintenance of drainage works and associated works only.
- 6.4.2 The Access Rights over those parts of the New Works Site and the O&M Works Site shown shaded light green and bounded by a red line including the red line shall be restricted to servitude rights or wayleaves for the purposes of construction and maintenance of field access works and associated works only.
- 6.4.3 The Access Rights over those parts of the New Works Site and the O&M Works Site shown shaded purple and bounded by a red line including the red line shall be restricted to authorised bat workers for the purposes of maintenance of the existing bat house.
- 6.4.4 The Access Rights over those parts of the New Works Site shown shaded in brown and bounded by a red line including the red line shall be restricted to temporary access for the purposes of construction of temporary road diversions and associated works only, in each case until issue of the relevant Permit to Use or Third Party Road Completion Certificate.
- 6.4.5 The Access Rights over those parts of the New Works Site and the O&M Works Site shown cross-hatched in dark blue and bounded by a red line including the red line shall be for the purposes of construction and maintenance of bridge works and

drainage works associated with Network Rail property and operational land. Access shall not be taken without the express written permission of Network Rail.

6.4.6 The Access Rights over those parts of the O&M Works Site shown cross-hatched in green and bounded by a red line including the red line shall be for the purposes of Restricted Services only and shall cease on the Restricted Services Completion Date.

6.4.7 The Access Rights over those parts of the New Works Site and the O&M Works Site shown cross-hatched in red and bounded by a red line including the red line shall not be for the purposes of using the part of the site so defined for temporary storage of materials or as a site compound.

## **7. ACCESS RIGHTS AND ORDERS – WARRANTIES AND CONDITIONS**

7.1 The Contracting Authority warrants that the Orders have been validly made, so as to validly grant to the Scottish Ministers the rights which they purport to grant.

7.2 The Contracting Authority does not warrant the sufficiency or adequacy of the Access Rights or of the Orders or of the rights granted under this Agreement to allow exclusive, peaceable and uninterrupted possession of the Sites or performance of the Operations in accordance with this Agreement (but without prejudice to the Company's rights under this Agreement in respect of breach by the Contracting Authority of its obligations under Clause 6.1). The Company shall not be relieved of any obligation under this Agreement on the grounds of such insufficiency or inadequacy, irrespective of whether or not any aspect of the Company's Design or the Design is or will be based on, or incorporates or will incorporate, or is or will be dependent on Disclosed Data.

### **7.3 Third Party Rights**

7.3.1 In carrying out the Operations the Company shall not in any way (i) disrupt the Third Party Rights (Listed) or (ii) prevent the exercise of the Third Party Rights (Listed) by the third parties benefitting from those rights.

7.3.2 If:

- (a) the Contracting Authority takes or expressly authorises third parties to take access to or occupation of any of the land over which the Access Rights are granted for any purpose other than as provided within or contemplated as part of this Agreement (including without limitation the exercise of the

Contracting Authority's rights under this Agreement), or dispose of any of such land; or

- (b) subject to Clauses 6.3 and 7.4 there are in existence at any time any Third Party Rights other than the Third Party Rights (Listed) or in the case of public rights of way or passage which would not have been reasonably apparent on a visual inspection of such land,

and such access, occupation, disposal or Third Party Rights materially prejudices performance of the Operations or any of them by the Company, then such access, occupation or disposal or the existence of such Third Party Rights shall:

- (i) if it occurs prior to Final Completion, be deemed to be a Compensation Event; or
- (ii) if it occurs after Final Completion, be equivalent to the making of a Contracting Authority Change requiring the Company to allow for such interference in the performance of the Operations.

7.3.3 The Company shall provide access to accommodate landowners and affected parties as required by Clause 1.3 of Appendix 1/15 of Part 4 of Schedule 2 (New Works Requirements).

#### **7.4 Suspension of Access Rights**

Without prejudice to Clause 33 (Compensation Events) the Contracting Authority on giving notice to the Company shall be entitled to suspend or restrict the Access Rights or any part of them at its discretion for such period or periods as it may require.

#### **7.5 Additional Interests in Land**

If at any time the Company requires any interest in any land (including access and/or occupation) which does not form part of the Sites or any additional rights beyond those which the Company has in relation to any part of the Sites, the Company shall be responsible for securing or acquiring such interest or additional rights for the benefit of the Scottish Ministers and (where such interest is required for the delivery of the Operations) in the name of the Scottish Ministers or their nominees or successors and (in all cases) at the Company's cost and without any encumbrances which would impede the Scottish Ministers' performance of any of their statutory obligations.

**8. ACQUISITION AND SITE BOUNDARIES**

- 8.1 Within thirty (30) Business Days after the date of Final Completion, the Company shall by notice to the Contracting Authority specify any area of land falling within the boundaries of the O&M Works Site which is not required by them in connection with the Project. The Contracting Authority shall be entitled in its absolute discretion (as between the Contracting Authority and the Company) either to retain or to dispose of such area of land in accordance with the Contracting Authority's procedures and requirements.
- 8.2 If the Contracting Authority exercises its rights to retain or dispose of any area of land referred to in Clause 8.1, then such area of land shall be excluded from the definition of the O&M Works Site, with effect from the effective date of such exercise. The Parties shall use their reasonable endeavours to agree any revisions to the O&M Works LMA Drawings necessary to reflect such exclusion and if they are unable to reach agreement within one hundred and twenty (120) Business Days of the effective date of such exercise then either Party may refer the matter for resolution under the Dispute Resolution Procedure.
- 8.3 If and so long as the Contracting Authority does not exercise its rights to retain or dispose of any area of land referred to in Clause 8.1 in respect of any such area of land, then such area shall remain part of the O&M Works Site and the terms of this Agreement shall continue to apply in respect of such area of land.

**9. CONDITION AND USE OF THE SITES**

- 9.1 The condition of the Sites shall be the sole responsibility of the Company. The Company is deemed to have:
- 9.1.1 carried out a ground physical and geophysical investigation and to have inspected and examined the Sites and their surroundings and (where applicable) any existing structures or works on, over or under the Sites;
  - 9.1.2 satisfied itself as to the nature of the Site conditions, the ground and the subsoil, the form and nature of the Sites, the load bearing and other relevant properties of the Sites, the risk of injury or damage to property affecting the Sites, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;
  - 9.1.3 satisfied itself as to the extent and adequacy of the Sites and of the rights of access to and through the Sites granted hereunder and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such

as additional land or buildings outside the Sites) without prejudice to the Company's rights under this Agreement in respect of a breach by the Contracting Authority of its obligations under Clause 6.1;

- 9.1.4 satisfied itself as to the information disclosed in the Information Room in respect of the Sites and the rights exercisable over or in relation to the Sites including the Third Party Rights (Listed);
- 9.1.5 satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties as well as the risks of interference by Protesters or others trespassing on the Sites;
- 9.1.6 obtained for itself all necessary information as to risks, contingencies and all other circumstances which may influence, delay or affect the Operations; and
- 9.1.7 accepted entire responsibility (including any financial, timing or other consequences which result whether directly or indirectly) for ascertaining and dealing with the matters detailed in Clauses 9.1.4 to 9.1.6.

## **9.2 Safety and Security of the New Works Site**

The Company shall procure at all times prior to Final Completion that the New Works Site is maintained in an orderly, safe and secure state and without prejudice to such generality in accordance with the Contracting Authority's Requirements. The Company shall have full regard for the safety of all persons entitled to be upon the New Works Site, and shall, in connection with the New Works, provide and maintain at the Company's own cost, all lights, guards, fencing, warning signs and watching when and where necessary or required by this Agreement or any Relevant Authority for the protection of the New Works or for the safety and convenience of the public or others. The Company shall take all reasonably practicable steps to prevent unauthorised access to the New Works Site. The Company will not be deemed to be in breach of this Clause 9.2 to the extent caused by any act or omission of the Contracting Authority.

## **9.3 Safety and Security of the O&M Works Site**

The Company shall procure at all times that the O&M Works Site is maintained in an orderly, safe and secure state and without prejudice to such generality in accordance with the Contracting Authority's Requirements. The Company shall have full regard for the safety of all persons entitled to be upon the O&M Works Site, and shall, in connection with the O&M

Works, provide and maintain at the Company's own cost all lights, guards, fencing, warning signs and watching when and where necessary or required by this Agreement or by any Authority or any Relevant Authority for the protection of the O&M Works or for the safety and convenience of the public or others. The Company shall take all reasonably practical steps to prevent unauthorised access to the O&M Works Site. The Company shall at all times co-operate with the Contracting Authority, the police, and other emergency services in planning for, training for and managing any event or situation which may threaten the safety and security of the Project Roads or the O&M Works Site.

#### **9.4 Defects and the Sites**

The Company accepts entire responsibility (including any financial or other consequences which result whether directly or indirectly) for the ascertainment of and rectification of all Latent Defects in the Sites so as to meet the requirements of Clause 12 (The Operations).

#### **9.5 Compliance with Contracting Authority Notices**

The Company shall comply with and/or procure compliance with any notice issued by the Contracting Authority from time to time prior to the Full Services Commencement Date requiring the removal from any of the Sites of any person employed or engaged thereon in the carrying out of the Operations who in the reasonable opinion of the Contracting Authority is prejudicial to the performance by the Contracting Authority or any Relevant Authority of their duties, obligations or functions or the exercise by the Contracting Authority or any Relevant Authority of their powers. Where the Company wishes to dispute any such notice, the relevant individual shall not attend any Site pending the outcome of the dispute.

### **10. EXERCISE OF POWERS AND RIGHTS**

#### **10.1 If the Company believes that:**

10.1.1 the exercise by the Contracting Authority or the Scottish Ministers or any other Relevant Authority of any statutory power (except to the extent delegated to the Company by the Contracting Authority in accordance with this Agreement); or

10.1.2 the enforcement by the Scottish Ministers of any of their rights under the Rail Overbridge Agreement and/or the Pipeline Agreements or the performance of their obligations thereunder,



would be necessary to enable performance of all or part of the Operations by the Company, the Company may give notice to that effect to the Contracting Authority (the **Notice**). A Notice shall:

- 10.1.3 clearly specify the action requested of the Contracting Authority or the Scottish Ministers or any other Relevant Authority (the **Requested Action**), the part of the Operations in respect of which such action is requested and the reasons why the Requested Action is requested;
  - 10.1.4 specify the date by which the Requested Action is required;
  - 10.1.5 set out any recommendation by the Company in respect of the Requested Action; and
  - 10.1.6 in respect of matters specified in Clause 10.1.2, clearly specify the actions taken by the Company to date.
- 10.2A Where the Contracting Authority considers that the matters set out in Clauses 10.1.1 or 10.1.2 are not necessary to enable performance of all or part of the Operations by the Company the Contracting Authority shall serve notice to that effect on the Company as soon as reasonably practicable and, in respect of matters specified in Clause 10.1.2, within five (5) Business Days after receipt of the Notice and such notice shall set out the basis on which the Contracting Authority has reached that decision. In the event of a dispute between the Parties in regard to the requirement for any Requested Action the dispute will be referred for determination under the Dispute Resolution Procedure.
- 10.2 Within twenty (20) Business Days after receipt of a Notice in respect of the matters specified in Clause 10.1.1 the Contracting Authority shall acknowledge receipt of the Notice and shall give its good faith estimate of the date on which it will respond to the request, provided that no such estimate shall be binding on the Contracting Authority.
- 10.3 Without in any way limiting the discretion of the Contracting Authority, the Contracting Authority shall give reasonable consideration on its merits and in accordance with its and the Scottish Ministers' respective statutory duties to the Requested Action and shall respond to the Notice:
- 10.3.1 in respect of the matters specified in Clause 10.1.1, as soon as reasonably practicable in the circumstances (taking into consideration inter alia the requirement to liaise with the Scottish Ministers and/or any Relevant Authority and

any requirement for consultation with the public or other interested parties in connection with the Requested Action); and

10.3.2 in respect of matters specified in Clause 10.1.2, within five (5) Business Days after receipt of the Notice and where the Scottish Ministers or the Contracting Authority elect to take the Requested Action they shall do so promptly and without delay.

10.4 The Contracting Authority, the Scottish Ministers and any other Relevant Authority shall be entitled to decline to take the Requested Action at its or their absolute discretion. The decision of the Contracting Authority, the Scottish Ministers and any other Relevant Authority on the merits of the Requested Action shall not be subject to review under the Dispute Resolution Procedure.

10.5 Where the Requested Action is necessary to enable the performance of the Operations by the Company and the Contracting Authority, the Scottish Ministers or any Relevant Authority declines, or is unable, to take the Requested Action (the **Requested Action Decision**), then:

10.5.1 where the Requested Action is necessary as a consequence of any act or omission of the Company (other than as required by this Agreement, the Rail Overbridge Agreement or the Pipeline Agreements) the Requested Action Decision shall be considered a Company Change and the provisions of Clause 35 (Company Changes) shall apply; and

10.5.2 where the Requested Action is necessary for any other reason the Contracting Authority shall issue a Contracting Authority Change requiring such variation, change or additional works or services as may be appropriate in the circumstances provided that where the Requested Action relates to Clause 10.1.2, this shall be construed as a Deemed Change (as defined in Clause 34.1).

10.6 Where a Requested Action:

10.6.1 is necessary to enable performance of all or a part of the Operations by the Company; and

10.6.2 is not necessary as a consequence of any act or omission of the Company (other than as required by this Agreement, the Rail Overbridge Agreement or the Pipeline Agreements),

failure by the Company to perform the affected part of the Operations shall neither be a breach of this Agreement nor cause the Company to incur Performance Deductions,

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Restricted Services Availability Failure Deductions or Restricted Services Performance Deductions in each case pending the taking of the Requested Action .

- 10.7 The Company shall reimburse the reasonable costs incurred by the Contracting Authority, the Scottish Ministers and/or any other Relevant Authority in considering any request under this Clause 10 and in taking any Requested Action.

## 11. **CONSENTS BY THE CONTRACTING AUTHORITY**

### 11.1 **Withdrawal of Consents**

The Contracting Authority shall be entitled to withdraw without liability to the Company a Consent which was given by the Contracting Authority or the Scottish Ministers:

- 11.1.1 on the basis of materially inaccurate or misleading facts, information or calculations provided to the Contracting Authority or the Scottish Ministers (as the case may be) by or on behalf of the Company or a Company Related Party; or
- 11.1.2 without all relevant material facts, information or calculations having been given to the Contracting Authority or the Scottish Ministers (as the case may be) which were known or which should reasonably have been known at the time of seeking the Consent by the Company or a Company Related Party.

### 11.2 **Disclaimers regarding Consents**

11.2.1 None of the:

- (a) giving of any Consent;
- (b) failure to withdraw a Consent;
- (c) withdrawing of a Consent;
- (d) knowledge of the terms of any contract or document (including without limitation the Project Documents);
- (e) review of any document or any course of action pursuant to or connected with the Certification Procedure in connection with the giving of a Consent; or
- (f) carrying out of or taking of (or failure to carry out or take) any inspection or sample,

by or on behalf of the Contracting Authority or the Scottish Ministers shall relieve the Company of any of its obligations under this Agreement or be deemed to constitute acceptance by the Contracting Authority except where expressly provided in this Agreement or notified by the Contracting Authority to the Company.

- 11.3 Notwithstanding the provisions of Clause 11.1, once the Restricted Services Commencement Notice, Permit to Use or the Final Completion Certificate have been issued, these shall be final and binding and shall not be subject to the terms of Clause 11.1 other than in the case of fraud.

## 12. THE OPERATIONS

### 12.1 The Operations

The Company shall:

- 12.1.1 carry out the New Works in accordance with and subject to the provisions of this Agreement;
- 12.1.2 carry out Restricted Services on the Restricted Services Roads (i) in accordance with and subject to the provisions of this Agreement and (ii) from the Restricted Services Commencement Date until the relevant Detrunking Date;
- 12.1.3 carry out the O&M Works in accordance with and subject to the provisions of this Agreement;
- 12.1.4 transfer each of the Third Party Roads to the relevant third party on or after the date of the relevant Third Party Road Completion Certificate;
- 12.1.5 remedy to the Contracting Authority's reasonable satisfaction, and within such reasonable time as the Contracting Authority may specify having regard to the nature of the Defect, all Defects occurring in:
  - (a) the Accommodation Works, insofar as notified to the Company by the Contracting Authority within sixty (60) months of Final Completion; and
  - (b) each of the Third Party Roads, insofar as notified to the Company by the Contracting Authority within sixty (60) months of the date of the relevant Third Party Road Completion Certificate; and
- 12.1.6 liaise with any contractor appointed by Aberdeen City Council to construct the A96 Park and Choose and Dyce Drive Link Road and/or by Aberdeenshire Council to

construct the A90 South Park and Choose site. This liaison shall include agreeing reasonable requests in respect of phasing of work at site interfaces.

## 12.2 **Community Benefits**

12.2.1 The Company shall, and shall procure that all Sub-contracts shall, comply with the requirements of Schedule 21.

## 12.3 **Maintenance**

12.3.1 The Company shall ensure on a continuing basis that at all times its maintenance and operating procedures are sufficient to ensure that:

- (a) the Project Roads are continuously available in accordance with this Agreement and the Contracting Authority's Requirements; and
- (b) the Assets are handed back to the Contracting Authority or the Scottish Ministers (as the case may be) on the Expiry Date in a condition complying with the Handback Requirements and the requirements of this Clause 12.

## 12.4 **Standard of Performance**

The Company shall (or shall procure that its Sub-Contractors shall):

- 12.4.1 achieve issue of each Permit to Use by relevant Permit to Use Date;
- 12.4.2 achieve Full Services Commencement on or before the Planned Full Services Commencement Date or, in the case of delay beyond the Planned Full Services Commencement Date, as soon as reasonably practicable thereafter and in any event before the Long Stop Date;
- 12.4.3 achieve Final Completion as soon as practicable following the Full Services Commencement Date;
- 12.4.4 perform all the Company's obligations under this Agreement in such a manner as fully to comply with and meet all the requirements of:
  - (a) Legislation;
  - (b) all Orders, Notices and Consents;
  - (c) the Contracting Authority's Requirements;

- (d) all Guidance;
- (e) Good Industry Practice;
- (f) the Company's Design, the Quality Plan and the O&M Manual,

provided always that in the event of any conflict or inconsistency between the requirements of (a) to (f), the requirements shall have precedence in the order set out therein;

- 12.4.5 ensure that the appropriate number of Lanes are available to Users throughout the Contract Period in accordance with the Contracting Authority's Requirements;
- 12.4.6 ensure that all persons employed in connection with the performance of the Operations will be careful, skilled and experienced in their several professions, trades and callings taking into account their roles and responsibilities;
- 12.4.7 ensure that all aspects of the Operations will be supervised by sufficient numbers of persons having adequate knowledge of such matters for the satisfactory and safe performance of the Operations in accordance with this Agreement and having regard to the activities which are carried on at the Sites;
- 12.4.8 supervise the New Works including the construction, completion and testing of the New Works by the New Works Contractor and procure the supervision by the Designer of the New Works including the construction, completion and testing of the New Works by the New Works Contractor;
- 12.4.9 be entirely responsible for the adequacy, stability and safety of all site operations and methods of construction;
- 12.4.10 give all notices and pay all fees required to be given or paid by Legislation in relation to the execution of the Operations and by the rules and regulations of all Relevant Authorities whose property or rights are or may be affected in any way by the Operations;
- 12.4.11 (i) perform all the Company's obligations under this Agreement in such a manner as to fully comply with and meet all of the requirements of the Rail Overbridge Agreement, and (ii) perform all of the obligations on the Scottish Ministers under the Rail Overbridge Agreement (save in each case for the Rail Overbridge Excluded Obligations which the Contracting Authority shall or shall procure that the Scottish Ministers shall perform);

12.4.12 (i) perform all the Company's obligations under this Agreement in such a manner as to fully comply with and meet all of the requirements of the Pipeline Agreements, and (ii) perform all of the obligations on the Scottish Ministers under the Pipeline Agreements (save in each case for the Pipeline Excluded Obligations which the Contracting Authority shall or shall procure that the Scottish Ministers shall perform); and

12.4.13 consult and comply with the requirements of:

- (a) Undertakers and other owners of Apparatus (including the Pipeline Owners) in connection with Apparatus;
- (b) Network Rail in connection with any Works on or adjacent to or otherwise affecting Network Rail operational railway land in accordance with the terms of this Agreement and (where relevant) the Rail Overbridge Agreement; and
- (c) any other Authority in connection with the carrying out of the Operations where required to do so by any Consent, Legislation, Guidance or any express provision of this Agreement.

## 12.5 **Health and Safety Legislation**

The Company acknowledges:

- 12.5.1 that it will comply with all its responsibilities and duties under health & safety Legislation and associated regulations and guidance, as may be applicable;
- 12.5.2 that the Contracting Authority has an interest in ensuring that the Company conducts or procures the conduct of all of its obligations under this Agreement in accordance with all Legislation relating to health and safety; and
- 12.5.3 that the Contracting Authority may make such reports to the HSE as the Contracting Authority see fit and should the Contracting Authority perceive any breach by the Company of its obligations to comply or procure compliance with Legislation relating to health and safety.

## 12.6 **Construction Traffic**

- 12.6.1 The Company shall use every reasonable means to prevent any of the roads, accesses or bridges communicating with or on the routes to the New Works Site

from being subjected to extraordinary traffic within the meaning of Section 96 of the Roads (Scotland) Act 1984 by any traffic of the Company and in particular shall select routes and use vehicles and restrict and distribute loads so that any such extraordinary traffic as shall arise from the moving of Constructional Plant and material or manufactured or fabricated articles from and to the New Works Site shall be limited as far as reasonably possible and so that no unnecessary damage or injury may be occasioned to such roads and bridges.

- 12.6.2 Save insofar as this Agreement otherwise provides the Company shall be responsible for and shall pay the costs of strengthening any bridges or altering or improving any road communicating with the New Works Site to facilitate the movement of Constructional Plant, equipment or temporary New Works or other items or vehicles required in the execution of the New Works and the Company shall negotiate and pay all claims arising out of any damage to any roads or bridges caused by such movement without recourse to the Contracting Authority.

## **12.7 Nuisance during Operations**

- 12.7.1 The Company shall at all times take all necessary steps to ensure that the Operations and any testing, investigation and surveys in connection therewith are carried out in such manner as to minimise nuisance, interference or material disturbance to proprietors or users of property adjacent to, or in the vicinity of, the Sites.
- 12.7.2 All operations necessary for the execution of the Operations shall, so far as compliance with the requirements of this Agreement permits, be carried on so as not to interfere unnecessarily or improperly with the public convenience or the access to or use or occupation of public or private roads and footpaths to or of properties whether in the possession of the Contracting Authority or any other person and the Company shall indemnify the Contracting Authority and the Scottish Ministers in respect of all claims, demands, proceedings, damages, costs, charges and expenses whatsoever arising out of or in relation to any such matters.
- 12.7.3 The Company shall take all reasonable measures necessary to prevent damage loss injury or nuisance caused by mud, dirt, stones or other material used or generated whilst carrying out the Operations.
- 12.7.4 The Company shall take all reasonable measures necessary to prevent damage loss injury or nuisance caused by smoke or dust generated whilst carrying out the Operations.



**12.8 Completion of New Works**

12.8.1 On the completion of the New Works the Company shall clear away and remove from the New Works Site all Constructional Plant, surplus material, rubbish and the temporary New Works of every kind and leave the whole of the Sites clean and in a workmanlike condition to the satisfaction of the Contracting Authority in accordance with the provisions of this Agreement.

**12.9 Fossils and Antiquities**

The Company shall have no entitlement to any Fossils and Antiquities which may be found on, in or under any Site or in connection with the Operations. The Company shall immediately when an object which is, or might be, a Fossil or Antiquity is discovered:

12.9.1 cease work, if to continue the Operations would further endanger or disturb the object or impede its excavation or removal;

12.9.2 take all steps which may be necessary to preserve the object in the exact position and condition in which it was found and carry out examination, excavation or removal as detailed in Schedule 2 (New Works Requirements) in consultation with Historic Scotland or any successor body; and

12.9.3 inform the Contracting Authority in writing of such discovery and precise location of the object.

12.10 Where the Company has ceased work pursuant to Clause 12.9.1 the Company shall not recommence work until the circumstances set out in Clause 12.9.1 have ceased to exist or the Company has agreed with Historic Scotland that work may continue.

12.11 Where the discovery of an object which is, or might be, a Fossil or Antiquity delays the Operations by thirty (30) days or more such discovery shall, with effect from the thirty first (31) day after its discovery, be deemed to be a Compensation Event.

**12.12 Construction Skills Certification Scheme or Equivalent**

12.12.1 The Company shall ensure that all on-site staff and other persons operating on-site are accredited under the Construction Skills Certification Scheme or an equivalent scheme.

12.12.2 Where the Company enters into any sub-contract for the purpose of performing all or part of the Agreement, the Company shall cause a term to be included in each such sub-contract:

- (a) which requires the sub-contractor to ensure that all on-site staff and other persons operating on-site are accredited under the Construction Skills Certification Scheme or an equivalent scheme; and
- (b) in the same terms as that set out in this Clause 12.12 (including for the avoidance of doubt this Clause 12.12.2(b)) subject only to modification to refer to the correct designation of the equivalent party as the Company and sub-contractor as the case may be.

12.12.3 In this Clause **on-site staff** means all persons engaged by the Company to undertake any Works or part thereof on the New Works Site and/or the O&M Works Site.

### 13. PRECEDENCE OF DOCUMENTS

13.1 In the event of any conflict or inconsistency between:

13.1.1 the New Works Requirements and any documents incorporated by reference therein; or

13.1.2 the New Works Requirements and the Company's Design,

the New Works Requirements shall prevail provided always that where the Agreed Departures conflict with the New Works Requirements the Agreed Departures shall prevail.

13.2 In the event of any conflict or inconsistency between:

13.2.1 the O&M Works Requirements and the O&M Works Quality Plan; or

13.2.2 the O&M Works Requirements and the O&M Manual,

the O&M Works Requirements shall prevail.

## 14. CONSTRUCTION PROGRAMME

### 14.1 Company to follow Construction Programme

Insofar as the carrying out of the New Works affects or may affect the exercise by the Contracting Authority or the Scottish Ministers of their respective duties and/or powers or cause the Contracting Authority or the Scottish Ministers to incur material additional costs the Company shall procure that the New Works are carried out in all material respects in accordance with the Construction Programme and so as to minimise any disruption to the exercise by the Contracting Authority or the Scottish Ministers of their respective duties and/or powers or any additional costs incurred by the Contracting Authority.

### 14.2 Diversionary Works (Type 1)

14.2.1 The Company may alter the timing or duration of Diversionary Works (Type 1) identified in the Construction Programme (a **Type 1 Alteration**).

14.2.2 Where a Type 1 Alteration arises as a consequence of any breach, act or omission of the Company (other than as required for compliance with this Agreement, the 1991 Act and/or the Pipeline Agreements), all additional costs arising as a consequence of the Type 1 Alteration shall be borne by the Company. The Contracting Authority shall remain liable for discharging its obligations under Clauses 21.2 and 21.3 in so far as they relate to the relevant Diversionary Works (Type 1).

14.2.3 Where the Company effects or reasonably believes that it will effect a Type 1 Alteration then, as soon as is reasonably practicable, it shall give the Contracting Authority a notice setting out the details of the Type 1 Alteration and shall consult with and provide to the Contracting Authority such supporting evidence as may be requested (including, where applicable, details of any inconsistency it believes exists between the requirements of this Agreement, the 1991 Act and/or the Pipeline Agreements). As soon as is reasonably practicable after issuance of said notice, the Parties shall meet to discuss the consequences of the Type 1 Alteration (or proposed Type 1 Alteration) with a view to mitigating both its impact on the Construction Programme and all costs associated with and arising as a consequence thereof and the Company shall have regard to the views expressed by the Contracting Authority.

**14.3 Failure to conform to Construction Programme**

The Contracting Authority may notify the Company if in its opinion at any time the actual progress of the New Works does not conform in any material respect with the Construction Programme. In such event, the Contracting Authority may serve notice on the Company requiring the Company either:

- 14.3.1 to submit to the Contracting Authority a report identifying the reasons for the delay;
- 14.3.2 to produce and submit to the Contracting Authority a revised Construction Programme showing the manner in which the New Works will be carried out and (if possible) the periods necessary to ensure that Full Services Commencement occurs by the Planned Full Services Commencement Date; and/or
- 14.3.3 to produce and submit to the Contracting Authority a revised Construction Programme showing the steps which the Company intends to take to eliminate or reduce any delay in reaching the Planned Full Services Commencement Date,

in each case within five (5) Business Days of receipt of said notice.

**14.4 Variations to the Construction Programme**

14.4.1 The Company may amend or revise the Construction Programme from time to time save in respect of its obligations under Clauses 12.4.1, 12.4.2 and/or 12.4.3 provided however that:

- (a) the Company shall not be entitled to amend or revise the Construction Programme where such amendment or revisal would affect or may affect the exercise by the Contracting Authority or the Scottish Ministers of their respective powers or cause the Contracting Authority or the Scottish Ministers to incur material additional costs; and
- (b) the Company shall be entitled, subject to the following provisions of this Clause 14.4, to amend or revise the Construction Programme to reflect the consequences of a Relief Event or a Compensation Event.

14.4.1 The Company shall consult timeously with the Contracting Authority and have due regard to the Contracting Authority's comments in relation to any material amendments to the Construction Programme.

14.4.2 Any revised Construction Programme shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail to enable the Contracting

Authority to monitor the progress of all elements of the New Works including all commissioning activities.

14.4.2 The Company shall promptly and in any event within three (3) Business Days of receipt of comments from the Contracting Authority submit to the Contracting Authority a copy of any revised Construction Programme in a form acceptable to the Contracting Authority provided that the Contracting Authority shall not be entitled to reject any such revised Construction Programme where the revisions directly relate to a Relief Event or Compensation Event (as the case may be).

14.4.3 Where any revised Construction Programme adjusts any Permit to Use Date or the date of Final Completion:

- (a) such revised Construction Programme shall reflect any extension of time agreed pursuant to Clause 33 and
- (b) such adjusted Permit to Use Dates and/or Final Completion date shall be used to determine the extent of costs incurred or revenue lost for the purposes of Clause 33.1.3.

**14.5 No relief for Company**

No report submitted to the Contracting Authority on the Construction Programme in accordance with Clause 14.1 nor any comment thereon nor any amendment or review thereof by the Contracting Authority shall relieve the Company of any of its obligations under this Agreement, except as regards any extension of time to which the Company is entitled under Clause 32 (Relief Events) and Clause 33 (Compensation Events).

**15. DESIGN DEVELOPMENT**

15.1 The Company shall prepare the Design by developing the Company's Design in accordance with the New Works Requirements, the Certification Procedures and the provisions of this Clause 15 and having regard to the Clarifications.

15.2 The Company shall prepare the O&M Manual in accordance with the Contracting Authority's Requirements and having regard to the Clarifications.

15.3 The Company shall allow the Contracting Authority at all times reasonable opportunities to view any items of Design Data, which shall be made available to the Contracting Authority as soon as practicable (and in any event within not more than five (5) Business Days) following receipt of a written request from the Contracting Authority.

15.4 All responsibility attaching to the design of the Operations and all subsidiary aspects associated with the Operations including any design element as may be set out as a minimum requirement in Schedule 2 and/or Schedule 4 shall remain with the Company and the Contracting Authority and/or the Scottish Ministers will not be held responsible for any aspect of design arising out of this Agreement.

15.5 All liability attaching to the Design (whether pursuant to Legislation, the provisions of this Agreement or otherwise) shall remain with the Company and shall not in any way be affected by:

15.5.1 any element of the Design set out in the Contracting Authority's Requirements;

15.5.2 any design carried out at the request of the Contracting Authority by or on behalf of the Company;

15.5.3 the agreement to or approval by the Contracting Authority of any design proposal made by the Company whether before, on or after the Effective Date; or

15.5.4 any Disclosed Data.

15.6 In preparing the Design the Company will not be entitled to make any material change to the Company's Design (other than where necessitated by a Specific Change in Law, a Discriminatory Change in Law or a Compensation Event or as a direct consequence of a variation to the Company's Design which is implemented at the request of the Contracting Authority) without the consent of the Contracting Authority.

15.7 Any material change proposed by the Company to the Company's Design shall be considered a Company Change and the provisions of Clause 35 (Company Changes) shall apply.

## 16. **COMPANY'S REPRESENTATIVE**

16.1 The Company shall appoint the Company's Representative to act on its behalf in connection with this Agreement. Such appointment (and the appointment of any replacement) shall be subject to the Contracting Authority's consent, which consent shall not be unreasonably withheld or delayed in respect of the appointment of an individual suitably qualified and competent to discharge the functions of the Company's Representative under this Agreement.

16.2 The Company's Representative shall be deemed to have full power and authority to act on behalf of the Company (but shall have no personal liability to the Contracting Authority) for

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the purposes of this Agreement. With effect from the Date of this Agreement (without prejudice to the Company's rights under this Clause 16) the Parties agree that the Company's Representative shall be authorised to exercise the rights and powers specified in Part 2 of Schedule 13 (Authority of Representatives). Any such authorisation (or withdrawal or amendment of such authorisation) shall take effect from the date on which notice thereof is received by the Contracting Authority or such later date as may be specified in such notice.

16.3 If at any time there is no Company's Representative:

16.3.1 the Company shall use its best endeavours to replace the Company's Representative as soon as practicable; and

16.3.2 from the date of receipt by the Contracting Authority of notice from the Company to that effect until the Company appoints a replacement in accordance with Clause 16.1, any notification to be made by the Contracting Authority to the Company's Representative shall be made to the Company and any action which requires to be taken by the Company's Representative shall be taken by the Company.

## 17. **THE CONTRACTING AUTHORITY'S REPRESENTATIVES**

17.1 The Contracting Authority's Representative has authority to act on behalf of the Contracting Authority under this Agreement only where, and to the extent that, this Agreement expressly so provides or where subsequently authorised by the Contracting Authority in terms of this Clause 17. In the absence of such express provision or authorisation, the Contracting Authority's Representative shall have no authority to act on behalf of, or to bind the Contracting Authority under this Agreement.

17.2 The Contracting Authority may from time to time authorise (or amend or withdraw such authorisation) the Contracting Authority's Representative to exercise any of the Contracting Authority's powers and rights under this Agreement on the Contracting Authority's behalf. With effect from the Effective Date (without prejudice to the Contracting Authority's rights under this Clause 17) the Parties agree that the Contracting Authority's Representative shall be authorised to exercise the powers and rights specified in Part 1 of Schedule 13 (Authority of Representatives). Any such authorisation (or withdrawal or amendment of such authorisation) shall take effect from the date on which notice thereof is received by the Company or such later date as may be specified in such notice.

- 17.3 In the discharge of his functions under this Agreement the Contracting Authority's Representative shall not owe any personal duty to the Company and shall incur no personal liability to it.
- 17.4 If at any time there is no Contracting Authority Representative appointed, pending appointment of a replacement, any notification to be made by the Company to the Contracting Authority's Representative shall be made to the Contracting Authority and any action which is required to be taken by the Contracting Authority's Representative shall be taken by the Contracting Authority.
- 17.5 The Contracting Authority's Site Representative has authority to act on behalf of the Contracting Authority under this Agreement only where, and to the extent that, this Agreement expressly so provides or where subsequently authorised by the Contracting Authority in terms of this Clause 17.
- 17.6 As at the Date of this Agreement, the Contracting Authority's Site Representative shall be authorised to exercise the powers set out in Part 1 of Schedule 13 (Authority of Representatives). The Contracting Authority may from time to time:
- 17.6.1 authorise the Contracting Authority's Site Representative to exercise any of the Contracting Authority's other powers under this Agreement (other than those conferred by Schedule 11 (Termination Compensation)) on the Contracting Authority's behalf; and/or
- 17.6.2 amend or withdraw any authorisation given to the Contracting Authority's Site Representative at any time,
- and any such authorisation, amendment or withdrawal (as the case may be) shall take effect from the date on which notice thereof is received by the Company or such later date as may be specified in such notice.
- 17.7 In the discharge of his functions under this Agreement the Contracting Authority's Site Representative shall not owe any personal duty to the Company and shall incur no personal liability to the Company.
- 17.8 If at any time there is no Contracting Authority's Site Representative appointed (or where the Contracting Authority's Site Representative is unable through illness, incapacity or any other reason to carry out his duties and obligations under this Agreement) then pending appointment of a replacement, any notification to be made by the Company to the Contracting Authority's Site Representative shall be made to the Contracting Authority's
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Representative and any action which is required to be taken by the Contracting Authority's Site Representative shall be taken by the Contracting Authority's Representative.

- 17.9 The respective roles of the Contracting Authority's Representative and the Contracting Authority's Site Representative are mutually exclusive. In the event that both the Contracting Authority's Representative and the Contracting Authority's Site Representative have authority to act on behalf of the Contracting Authority, the Company shall be entitled to disregard the Contracting Authority's Site Representative's authority to so act and rely solely on the authority of the Contracting Authority's Representative.

18. **SUBCONTRACTING OPERATIONS AND DIRECT AGREEMENTS**

- 18.1 The Company shall:

18.1.1 sub-contract the New Works to the New Works Contractor;

18.1.2 sub-contract the O&M Works to the O&M Works Contractor; and

18.1.3 sub-contract or procure that the New Works Contractor subcontracts:

- (a) the Design to the Designers;
- (b) the checking of the Design to the Design Checkers; and
- (c) all work in connection with safety audits to the Road Safety Auditor.

- 18.2 The Company shall not change any Sub-Contractor and shall procure that the New Works Contractor shall not change a Designer, Design Checker or the Road Safety Auditor without the Contracting Authority's consent. The Contracting Authority shall not withhold such consent if the Company can demonstrate to the Contracting Authority's reasonable satisfaction:

18.2.1 that the contract (the **Proposed Contract**) with the proposed replacement New Works Contractor, the proposed replacement O&M Works Contractor, the proposed replacement Designer, the proposed replacement Design Checker or the proposed replacement Road Safety Auditor (a **Proposed Contractor**) is in terms sufficient to procure the satisfaction of the Company's obligations relating to the New Works and O&M Works (as the case may be), and in all other respects is not inconsistent with the provisions of this Agreement; and

- 18.2.2 the Proposed Contractor has sufficient experience, qualifications, expertise and resources to properly perform its obligations under the Proposed Contract and is independent from the Sub-Contractor being replaced; and
- 18.2.3 the Proposed Contractor:
- (a) is of sound financial standing (having regard to the obligations to be performed by the Proposed Contractor); and
  - (b) has the financial capability to properly perform its obligations under the Proposed Contracts; and
- 18.2.4 where the Proposed Contractor is assuming a design responsibility in respect of the New Works or the O&M Works, that the Proposed Contractor has an appropriate level of professional indemnity insurance to cover its contractual obligations under the Proposed Contract, and that the terms of the Proposed Contract require such insurance to be maintained in force for an appropriate period, in each case in accordance with Good Industry Practice.
- 18.3 The Company shall procure that the New Works Contractor, the O&M Works Contractor, the Designer, Design Checker or the Road Safety Auditor or any Proposed Contractor shall not commence the provision of services without first having delivered to the Contracting Authority:
- 18.3.1 in the case of any New Works Contractor, a New Works Direct Agreement executed by the Company and the New Works Contractor;
  - 18.3.2 in the case of any O&M Contractor, an O&M Works Direct Agreement executed by the Company and the O&M Works Contractor;
  - 18.3.3 in the case of a Designer, a Designer's Direct Agreement executed by the Designer and the Company or the New Works Contractor (as the case may be);
  - 18.3.4 in the case of a Design Checker, a Design Checker's Direct Agreement executed by the Design Checker and the Company or the New Works Contractor (as the case may be); and
  - 18.3.5 in the case of the Road Safety Auditor, a Road Safety Auditor's Direct Agreement executed by the Road Safety Auditor and the Company or the New Works Contractor (as the case may be),
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in each case substantially in the form of the relevant direct agreement contained in Schedule 14 (Direct Agreements), together with certified true copies of the appointments and contracts referred to in each such direct agreement.

## **19. DELAY**

### **19.1 Notice**

If at any time the Company becomes aware that there will be or is likely to be a delay in achieving the Planned Full Services Commencement Date the Company shall as soon as reasonably practicable and in any event within five (5) Business Days of becoming so aware give notice to the Contracting Authority to that effect specifying:

19.1.1 the reason for the delay or likely delay; and

19.1.2 an estimate of the likely effect of the delay on achieving the Planned Full Services Commencement Date (taking into account any measures that the Company proposes to adopt to mitigate the consequences of the delay in accordance with Clause 19.3).

### **19.2 Supply of Information**

Following service of a notice by the Company pursuant to Clause 19.1 the Company shall supply to the Contracting Authority:

19.2.1 promptly, and in any event within three (3) Business Days of receipt, any further information relating to the delay which is received by the Company; and

19.2.2 promptly, and in any event within three (3) Business Days of request, any further information relating to the delay which is reasonably requested by the Contracting Authority.

### **19.3 Duty to Mitigate**

The Company shall take all reasonable steps to mitigate the consequences of any delay to the Construction Programme.

**19.4 Time for Completion**

If any anticipated failure to meet the Planned Full Services Commencement Date is directly attributable to:

19.4.1 a Relief Event, then the provisions of Clause 32 (Relief Events) shall apply; or

19.4.2 a Compensation Event, then the provisions of Clause 33 (Compensation Events) shall apply; or

19.4.3 a Force Majeure Event, then the provisions of Clause 44 (Force Majeure) shall apply.

**20. CDM REGULATIONS****20.1 Company as Client**

The Company hereby elects and the Contracting Authority hereby agrees that the Company will act as the only client in relation to the Operations for all the purposes of the CDM Regulations. The Company shall ensure that the New Works Contractor and the O&M Works Contractor are aware of such election and consent. The Company shall not prior to the completion of the Operations withdraw, terminate or in any manner derogate from its election that it will act as the only client for all the purposes of the CDM Regulations nor will it seek to do any such act.

**20.2 Duties under CDM Regulations**

The Company shall observe, perform and discharge and/or, as the case may be, shall procure the observance, performance and discharge of all the obligations, requirements and duties arising under the CDM Regulations in connection with the Operations (other than those that remain with the Contracting Authority pursuant to Regulation 8 of the CDM Regulations).

**20.3 Health and Safety File**

The Company shall, on request by the Contracting Authority, provide the Contracting Authority with a complete copy of the health and safety file (as such term is used in the CDM Regulations) as amended or updated from time to time. The Company shall forthwith on expiry or termination of this Agreement deliver to the Contracting Authority the said health and safety file as amended or updated.

## 20.4 Indemnity

The Company hereby indemnifies the Contracting Authority and the Scottish Ministers and shall keep the Contracting Authority and the Scottish Ministers indemnified in full from and against all direct, indirect or consequential liability, losses, damages, injury, claims, costs and expenses (including management and legal expenses) awarded against or incurred or paid by the Contracting Authority as a result of or in connection with the breach by the Company of its obligations under this Clause 20.

## 21. APPARATUS

For the purposes of this Clause 21:

**Affected** or **affecting** shall be regarded as including the meaning given to **affected** in Section 164(4) of the 1991 Act; and

**Direction** shall mean any direction made or given pursuant to the 1991 Act.

### 21.1 Authorisation in respect of Statutory Functions

21.1.1 The Company is authorised:

- (a) to exercise and shall exercise all the statutory functions of the Contracting Authority and/or the Scottish Ministers (as the case may be) specified in Appendix G to Part 1 of Schedule 4 (O&M Works Requirements) of this Agreement (**Appendix G**); and
- (b) to act as the Contracting Authority's and/or the Scottish Ministers' (as the case may be) authorised representative for all Diversionary Works,

in each case for a period of ten (10) years from the Date of this Agreement. The authorisation granted pursuant to this Clause shall for the purposes of this Clause 21.1 be referred to as an **Authorisation**.

21.1.2 The Company shall notify any interested parties in writing of each such Authorisation.

21.1.3 The Company shall not sub-contract responsibility for any Authorisation without the written consent of the Contracting Authority.

21.1.4 On each and every occasion when the Company acts or exercises functions pursuant to an Authorisation the Company shall prepare and maintain appropriate

records and registers including but not limited to record drawings, estimates and health and safety records.

21.1.5 Not less than six (6) months prior to the expiry of any Authorisation the Company shall request in writing that the Contracting Authority issue a new authorisation on similar terms for a further period of ten (10) years or for such shorter period as may be agreed between the Parties and the Contracting Authority shall either issue such new authorisation on similar terms and for a similar period to those contained in this Clause 21 or shall issue a Contracting Authority Change removing the relevant powers from the scope of the Company's obligations under this Agreement.

21.1.6 If any Authorisation is withdrawn or revoked by the Contracting Authority then:

- (a) the Company shall co-operate with the Contracting Authority as necessary to facilitate a transfer of any relevant delegated functions to the Contracting Authority or a third party nominated by them as soon as possible; and
- (b) (unless such withdrawal or revocation is due to an act or omission of the Company, other than as required for compliance with this Agreement, the 1991 Act and/or the Pipeline Agreements) the Contracting Authority shall issue a Contracting Authority Change removing the relevant delegated powers from the scope of the Company's obligations under this Agreement.

21.1.7 Where any withdrawal or revocation of an Authorisation is made:

- (a) as a consequence of any act or omission of the Company (other than as required by this Agreement) then such withdrawal or revocation shall be considered a Company Change and the provisions of Clause 35 (Company Changes) shall apply; or
- (b) for any other reason, the Contracting Authority shall issue a Contracting Authority Change requiring such variation, change or additional works or services as may be required so as to enable the Company to perform the Operations (as varied by such Contracting Authority Change),

provided always that where (a) above applies and the Company remedies, to the satisfaction of the Contracting Authority, the circumstances which gave rise to the

withdrawal or revocation the Contracting Authority may at its discretion re-grant the Authorisation to the Company and there shall be no such Change (and any such Change which has been set in motion shall be deemed to have been withdrawn).

- 21.1.8 The Company shall comply with all requirements set out in Appendix J to Part 1 of Schedule 4 (O&M Works Requirements).

## **21.2 Diversionary Works**

- 21.2.1 In performing the Operations, the Company shall comply with the 1991 Act and any requirements of Undertakers under the 1991 Act. In particular, the Company shall comply inter alia with such directions as to the co-ordination of the Works as the Contracting Authority may give from time to time under sections 118 (4) and 118 (5) of the 1991 Act.
- 21.2.2 The Contracting Authority shall pay to the Company within twenty (20) Business Days of receipt any monies actually received by the Contracting Authority from any Undertaker in respect of the Project Roads and the local roads network pursuant to any provision of the 1991 Act other than fees relating to Sample Inspections as defined in the 1991 Act.
- 21.2.3 If a contribution is made to the Contracting Authority pursuant to Section 137 of the 1991 Act then payment shall only be made to the Company if the contribution relates to costs actually incurred or likely to be incurred by the Company during the Contract Period and the Company shall pay to the Contracting Authority any contribution received if the contribution relates to costs incurred or likely to be incurred outside the Contract Period.
- 21.2.4 At the request of the Company, and subject to an indemnity for all costs, including administrative costs, the Contracting Authority shall endeavour to recover all possible charges, fees, contributions and costs due to the Contracting Authority or the Scottish Ministers (as the case may be), in each case as Road Works Authority, in respect of the Project Roads and the local roads network pursuant to the 1991 Act.
- 21.2.5 The Company shall provide to such person as may be nominated from time to time by the Contracting Authority such information as may be prescribed pursuant to Section 112B of the 1991 Act and such other information of which it becomes aware which is eligible for registration and shall make such payment or payments

to such party as the Contracting Authority may require pursuant to Section 112A of the 1991 Act. The Company shall maintain at all times a computer linked to the road works register for the purposes of giving and receiving notices and information affecting the Project Roads and the local road network.

21.2.6 The Company shall notify the Contracting Authority of any possible offence committed or likely to be committed by any Undertaker under the 1991 Act of which the Company is or should reasonably be aware and shall provide such information relating to such offence as may be reasonably specified by the Contracting Authority.

21.2.7 The Company shall, in performing the Operations, at all times assist and facilitate the Contracting Authority in carrying out, and shall take all steps necessary to ensure that the Contracting Authority and/or any other relevant Road Works Authority are able to comply with, its or their duties under the 1991 Act.

21.2.8 If works are necessary to the Sites or the Project Roads as a consequence of an event described in Section 141(2) of the 1991 Act then the Company shall, at its own cost, carry out and complete all such works in such manner as shall be consistent with its other obligations under this Agreement.

### 21.3 **Diversiónary Works (Type 1)**

21.3.1 The Contracting Authority has instructed or shall instruct the Diversiónary Works (Type 1), which the Company shall manage on behalf of the Contracting Authority. Other than as contemplated in Clause 14.2.2, the Contracting Authority shall be responsible for and shall indemnify the Company against any amounts due to an Undertaker in respect of Diversiónary Works (Type 1).

### 21.4 **Diversiónary Works (Type 2)**

21.4.1 The Company shall notify the Contracting Authority of all proposed Major Works for Road Purposes, Diversiónary Works (Type 2) and Works for Road Purposes (as defined in the 1991 Act) necessary in connection with the Operations and except where otherwise agreed between the Company and the appropriate Undertaker the Company shall employ the appropriate Undertaker in respect of Diversiónary Works (Type 2) and the Company shall, except as expressly provided for in this Agreement, be responsible for all relevant costs recoverable under the 1991 Act and shall make all payments due to Undertakers in connection with Diversiónary Works (Type 2).



21.4.2 In the event that any Undertaker declines to enter into a contract with the Company in respect of any Diversionary Works (Type 2), despite the Company using its best endeavours to agree such a contract, the Contracting Authority shall take such steps as are required under the 1991 Act to facilitate completion of the Diversionary Works (Type 2) when reasonably requested by the Company to do so provided that the Company shall reimburse to the Contracting Authority on demand all sums paid or payable in respect of the actions taken by the Contracting Authority under this Clause and/or all sums reasonably incurred in connection therewith.

21.4.3 Neither the employment by the Company of any Undertaker, nor the taking of such action under Clause 21.4.2 (even where the Undertaker delays in performing such contract or executing Diversionary Works (Type 2) or performs or executes the same negligently) shall relieve the Company of any of its obligations under this Agreement and the Company shall not be entitled to any relief or compensation for additional payment and the Company shall indemnify the Contracting Authority and the Scottish Ministers against all losses or claims of any person arising out of or in connection with Diversionary Works (Type 2).

## 21.5 **Apparatus**

21.5.1 The Company shall arrange either collectively or separately for the procurement, construction and completion of all Diversionary Works necessary for the design, construction and completion of the New Works and will be responsible for all costs of the same other than as set out in Clause 21.3.

21.5.2 In respect of existing Apparatus which is not owned by an Undertaker the Company shall raise, lower or relocate the covers of existing manholes, chambers, catch-pits, gullies or otherwise where necessary resulting from the design, construction, completion and maintenance of the New Works.

21.5.3 All Apparatus owned by an Undertaker shall be diverted to a standard equivalent to that which would be provided by an equivalent Undertaker or to a higher standard where this existed prior to the commencement of the Operations.

21.5.4 All Apparatus which is not owned by an Undertaker shall be diverted to a standard equivalent to that which would be provided by an Undertaker or to a higher standard where this existed prior to the commencement of the Operations.

- 21.5.5 Ducting, chambers and draw-pits shall be provided as required to allow the service, supply or otherwise to be accessed and maintenance from points wholly outwith the Operations wherever possible.

**21.6 Management of Operations affecting Apparatus**

- 21.6.1 The Company shall manage any works in relation to the Sites in respect of or affecting Apparatus and in particular on behalf of the Contracting Authority and/or any other relevant Road Works Authority:

- (a) identify measures and settle specifications with Undertakers in connection with Diversionary Works (Type 2);
- (b) notify the Contracting Authority of the need for any notices, consents or directions to Undertakers which may be required pursuant to Sections 113(4), 115(1), 115(1A), 115A, 117(1), 117(5), 120(1), 121(2), 121(4), 124(2), 125(3), 131(3), 133(3) and 133(4) of the 1991 Act and give such notices, consents or directions to Undertakers as the Contracting Authority may instruct the Company to issue in regard thereto;
- (c) seek to recover directly from Undertakers the costs incurred by the Company in connection with obtaining any orders pursuant to the Road Traffic Regulation Act 1984;
- (d) in respect of Section 133 of the 1991 Act and/or any regulations made or to be made thereunder, seek to recover directly from Undertakers any charge specified by the Contracting Authority for the occupation of the Project Roads where works carried out by Undertakers have been unreasonably prolonged;
- (e) notify the Contracting Authority in reasonable detail of all Major Works for Roads Purposes affecting the Sites and the local roads network and where instructed to do so by the Contracting Authority notify Undertakers, persons to whom Apparatus belongs and the Road Works Authorities for roads adjacent to the Sites of any proposed Major Works for Roads Purposes or Works for Road Purposes;
- (f) carry out such inspections or investigatory works on the Project Roads and the local roads network as may be necessary to ascertain whether

Undertakers have complied with their duties under the 1991 Act; provided always that no charge shall be made for any Sample Inspections;

- (g) carry out any necessary remedial works required either for the reinstatement of the Project Roads following works by Undertakers or for the emergency maintenance of Apparatus and seek to recover directly from Undertakers and other owners of Apparatus any costs reasonably incurred;
- (h) notify the Contracting Authority of any works which may be required pursuant to Sections 124(5) and 125(4) of the 1991 Act and carry out any works necessary pursuant to said Sections as may be instructed by the Contracting Authority and seek to recover directly from Undertakers any costs reasonably incurred;
- (i) notify the Contracting Authority of any obstructions to the Project Roads by Undertakers or Apparatus and give such notices as may be instructed by the Contracting Authority requiring Undertakers to mitigate or discontinue obstructions to the Project Roads, take any steps instructed by the Contracting Authority if Undertakers fail to comply with such notices and seek to recover directly from Undertakers any costs reasonably incurred;
- (j) notify the Contracting Authority of any unauthorised Apparatus in the Project Roads and remove same if instructed to do so by the Contracting Authority; and
- (k) notify the Contracting Authority of any necessary works, operations or actions in respect of or affecting Apparatus as are ancillary to the general management of the Project Roads and carry out such works, operations or actions as may be instructed by the Contracting Authority.

21.6.2 The Company shall not contract with, enter into binding commitments with, compromise with, give a notice of intention to proceed to, impose obligations upon, issue licences or permissions to, permit the placing of Apparatus in the Sites or to seek to recover costs from Undertakers or carry out works affecting Undertakers unless having complied with 21.4.1 and being instructed so to do by the Contracting Authority, which instructions shall not be unreasonably withheld or delayed.

21.6.3 Any instructions issued to the Company in terms of this Clause 21 in furtherance of the statutory duties referred to in this Clause 21 of the Contracting Authority and/or the Scottish Ministers (as the case may be) shall not be deemed to be a Contracting Authority Change.

21.6.4 Subject to Clause 21.3.1 where it is provided in this Clause 21 that the Company is to seek to recover costs, it shall have no right of recovery against the Contracting Authority in the event it is unable to recover such costs.

## 21.7 **The Contracting Authority's Responsibilities**

21.7.1 The Contracting Authority shall:

- (a) at the request of the Company notify Undertakers that the Company shall be managing the Project Roads on the terms and conditions set out in this Clause 21; and
- (b) notify the Company promptly of any Undertakers' requirements or notices or any notices from Road Works Authorities which the Contracting Authority receives pursuant to the 1991 Act or any Direction.

## 22. **MONITORING**

### 22.1 **Right of Access**

The Company shall procure that the Contracting Authority and any Authority or any Relevant Authority and any other representative of the Contracting Authority or of an Authority or any Relevant Authority shall have, on written notice from the Contracting Authority:

22.1.1 the right to enter any of the Sites in order to monitor and view the state and progress of the Operations and to ascertain whether they are being executed in accordance with this Agreement and for all other purposes related to the Project; and

22.1.2 the right to enter upon any property used by the Company as training or workshop facilities and places where work is being prepared or materials being obtained for the Project;

in all cases subject to compliance with health and safety requirements. The Company shall procure that satisfactory facilities are made available to the Contracting Authority and/or any Authority or any Relevant Authority and/or any other representative of the Contracting

Authority or of any Authority or any Relevant Authority and that reasonable assistance is given for the purposes of the rights referred to in Clauses 22.1.1 and 22.1.2, subject to the Company's operational requirements not being adversely affected.

## **22.2 Supply of Information**

The Company shall promptly (and in any event within five (5) Business Days of request) supply to the Contracting Authority and any representative or adviser of the Contracting Authority such information in respect of all or any of the Operations as may reasonably be requested.

## **23. PROTESTER ACTION**

23.1 The management of any Protester Action, including the consequences of any Protester Action on the Operations, shall be the responsibility of the Company.

23.2 If the Sites or any part thereof are occupied by Protesters at any time during the Contract Period, then the Company shall:

23.2.1 notify the Contracting Authority as soon as reasonably practicable; and

23.2.2 use any legal remedies available to the Company to remove such Protesters.

23.3 The Company may request the assistance of the Contracting Authority to remove Protesters where the Company can demonstrate to the Contracting Authority's reasonable satisfaction that the legal remedies available to the Company have been exhausted or are not suitable in the circumstances (whether by reason of timescale or otherwise).

23.4 Within ten (10) Business Days of any request in accordance with Clause 23.3, the Contracting Authority shall notify the Company whether the Contracting Authority or the Scottish Ministers can provide any assistance as the Contracting Authority and/or the Scottish Ministers (acting reasonably) consider reasonable and appropriate in relation to the removal of such Protesters.

23.5 Where the conditions set out in Clause 23.3 are satisfied and the Contracting Authority and/or the Scottish Ministers are legally able to assist the Company in relation to the removal of Protesters but elect not to assist pursuant to Clause 23.4 then, provide always that the Protester Action has not arisen (directly or indirectly) as a result of any wilful default or wilful act of the Company or any of the Sub-Contractors, the Protester Action shall be deemed to be a Relief Event.

- 23.6 If, in accordance with Clause 23.4, the Contracting Authority has notified the Company that the Contracting Authority and/or the Scottish Ministers are willing to instigate and conduct legal action to secure the lawful eviction of Protesters, then such legal action will be reasonably and properly conducted on the basis of any legal advice given to the Contracting Authority and/or the Scottish Ministers by their respective legal advisers.
- 23.7 Where the Company is given assistance by the Contracting Authority and/or the Scottish Ministers in accordance with Clause 23.4 or legal action is raised in accordance with Clause 23.6, including in either case where and to the extent expedited in accordance with Clause 23.8, then the Company will indemnify the Contracting Authority and the Scottish Ministers in respect of any costs, losses, liabilities, expenses and claims suffered by any or all of them as a result of or in connection with the provision of such assistance and/or the raising of such legal action.
- 23.8 Where it is in the interests of the Project to deal expeditiously with any Protester Action, the Contracting Authority will use all reasonable endeavours to expedite its decision making process under Clause 23.4 and its or the Scottish Ministers' action under Clause 23.6.

24. **RESTRICTED SERVICE READINESS CERTIFICATE**

24.1 **Notice**

When the Company is of the opinion that it has achieved the Restricted Services Readiness Criteria it shall give notice to that effect to the Contracting Authority accompanied by a completed and signed Restricted Services Readiness Certificate.

24.2 **Review**

Following issue of such notice the Company shall give the Contracting Authority such reasonable opportunities as the Contracting Authority may require to confirm the validity of the notice.

24.3 **The Contracting Authority's Obligations**

The Contracting Authority shall within ten (10) Business Days of receipt of a Restricted Services Readiness Certificate either:

- 24.3.1 issue a notice to the Company confirming that it accepts that the Restricted Service Readiness Criteria have been met (a **Restricted Services Commencement Notice**); or

24.3.2 notify the Company that in its opinion, notwithstanding the issue of the Restricted Services Readiness Certificate, the Company has not met the Restricted Services Readiness Criteria. In that event the Contracting Authority shall state in such notice which of the Restricted Services Readiness Criteria the Company has not satisfied.

**24.4 Failure to Serve Notice**

Subject to compliance by the Company with Clause 24.2, if the Contracting Authority fails to serve a notice under Clause 24.3.2, it shall be deemed to have issued a Restricted Services Commencement Notice in accordance with Clause 24.3.1 on expiry of the ten (10) Business Days referred to in Clause 24.3.

**24.5 Further Works**

If the Contracting Authority notify the Company under Clause 24.3.2, the Company shall carry out such further works or other measures necessary or appropriate to meet the Restricted Services Readiness Criteria and on its completion, the Company shall give notice to the Contracting Authority that such further works have been carried out or measures taken. The provisions of Clauses 24.2, 24.3 and 24.4 shall then apply mutatis mutandis as if receipt by the Contracting Authority of such notice were receipt of a Restricted Services Readiness Certificate.

**24.6 Disputes**

In the event of a dispute between the Parties in regard to a notice under Clause 24.3.2 the dispute will be referred for determination under the Dispute Resolution Procedure. If the Dispute Resolution Procedure determines that the Company has met the Restricted Services Readiness Criteria, the Dispute Resolution Procedure shall determine the date on which the Restricted Services Commencement Notice should properly have been issued under Clause 24.3.1 and the failure by the Contracting Authority to have issued the Restricted Services Commencement Notice on that date shall be deemed to be a Compensation Event.

**25. PERMITS TO USE**

25.1 The New Works shall be carried out in four (4) Phases which may be completed in any order.

25.2 The following provisions shall apply to Substantial Completion and the issue of a Permit to Use for each Phase:

25.2.1 the Company shall give the Contracting Authority five (5) Business Days' notice of the Road Safety Audit Stage 3 for the Phase and the Contracting Authority shall be entitled to attend;

25.2.2 not later than twenty (20) Business Days prior to the date upon which the Company expects issue of the Substantial Completion Certificate for a Phase, the Company shall issue to the Contracting Authority a notice to that effect, and the Company shall deliver to the Contracting Authority such Substantial Completion Certificate as soon as it is available;

25.2.3 following issue of the Substantial Completion Certificate for a Phase the Company will afford to the Contracting Authority such reasonable opportunities as the Contracting Authority may require to confirm the validity of the notice; and

25.2.4 the Contracting Authority shall within fifteen (15) Business Days of the receipt of the Substantial Completion Certificate for a Phase either:

(a) issue a Permit to Use; or

(b) notify the Company that in its opinion notwithstanding issue of the Substantial Completion Certificate the relevant Phase has not reached Substantial Completion which notice shall state the respects in which the relevant Phase has not reached Substantial Completion.

25.3 The Traffic Scotland communications system not being operational because, for reasons outwith the control of the Company:

25.3.1 the equipment to be supplied by Traffic Scotland has not been provided on time which results in a delay to the Operations;

25.3.2 the equipment to be supplied by Traffic Scotland is not provided to the appropriate specification; or

25.3.3 the equipment to be supplied by Traffic Scotland has been tested and commissioned but the interface with existing Traffic Scotland equipment is not operational,



shall not constitute sufficient grounds for the Contracting Authority to assert that a Phase has not reached Substantial Completion nor to withhold the issuance of a Permit to Use, provided always that the Company shall demonstrate to the Contracting Authority's satisfaction that the Phase is in a safe condition and is suitable for use prior to the issuance of a Permit to Use.

- 25.4 In the event of the service of a notice by the Contracting Authority under Clause 25.2.4(b) and unless the matter has been referred to the Dispute Resolution Procedure in terms of Clause 25.5 following completion by the Company of such further works or other actions necessary or appropriate to remedy or remove the cause of the refusal to accept the Substantial Completion Certificate, the Company may give notice to the Contracting Authority that such further works have been completed or measures taken. The provisions of this Clause 25.4 shall then apply mutatis mutandis as if receipt by the Contracting Authority of such notice were receipt of the Substantial Completion Certificate except that the time limit in Clause 25.2.4 shall be ten (10) Business Days.
- 25.5 In the event of a dispute between the Parties in regard to a notice under Clause 25.2.4(b) the dispute will be referred for determination under the Dispute Resolution Procedure. If the Dispute Resolution Procedure determines that the Phase has reached Substantial Completion, the Dispute Resolution Procedure shall determine the date on which the Permit to Use for the Phase should have been issued under Clause 25.2.4(a) and the failure by the Contracting Authority to have issued the Permit to Use on that date shall be deemed to be a Compensation Event.
- 25.6 The issue of a Permit to Use and the identification of any incomplete items which in the sole opinion of the Contracting Authority would not prejudice the safe use of the Project Roads by Users shall not relieve the Company of any liability for Performance Deductions in terms of Schedule 6 (Payment Mechanism) or otherwise diminish the obligations of the Company under this Agreement.
- 25.7 As from the date of issue (or deemed issue under Clause 25.5) of a Permit to Use, the Phase of the Operations to which the Permit to Use relates shall be opened as a road (or, as the case may be, part of a road) within the meaning of the Roads (Scotland) Act 1984.
- 25.8 No Major O&M Works may be carried out between the hours of 06:00 and 22:00 on any Phase of the Operations from the date of issue (or deemed issue under Clause 25.5) of the Permit to Use for that Phase until expiration of a period of twenty four (24) months following Final Completion other than where:

25.8.1 the Company, acting in accordance with Good Industry Practice, requires to carry out Major O&M Works in order to rectify one or more Category 1 Defects or Urgent Category 2 Defects (in each case as described in Schedule 4) on the relevant Phase; and

25.8.2 it is not possible to carry out and/or complete (as the case may be) the necessary rectification in accordance with this Agreement between the hours of 22:00 and 06:00,

and in such circumstances the Company shall take all reasonable steps to mitigate the consequences of any such Major O&M Works on Users. Where Major O&M Works are commenced on any Phase prior to the issue of the Permit to Use for that Phase, the completion of those Major O&M Works shall form part of the requirements for issue of the Permit to Use for that Phase.

## 26. **FINAL COMPLETION**

### 26.1 **Notice**

When the Company is of the opinion that it has achieved Final Completion in accordance with this Agreement it shall give notice to that effect to the Contracting Authority accompanied by a completed and signed Final Completion Certificate.

### 26.2 **Review**

Following issue of the Final Completion Certificate the Company shall give the Contracting Authority such reasonable opportunities as the Contracting Authority may require to confirm the validity of the Final Completion Certificate.

### 26.3 **Acceptance**

The Contracting Authority shall within fifteen (15) Business Days of the receipt of the Final Completion Certificate either:

26.3.1 acknowledge receipt of the Final Completion Certificate (a **Final Completion Acceptance Notice**); or

26.3.2 notify the Company that in its opinion the New Works have not reached Final Completion. In that event the Contracting Authority shall state in such notice the respects in which the New Works have not reached Final Completion.

**26.4 Failure to Serve Notice**

If the Contracting Authority fail to serve a notice in accordance with Clause 26.3.2 it shall be deemed to have issued a Final Completion Acceptance Notice on expiry of the fifteen (15) Business Days referred to in Clause 26.3.

**26.5 The Traffic Scotland communications system not being operational because, for reasons outwith the control of the Company:**

26.5.1 the equipment to be supplied by Traffic Scotland has not been provided on time which results in a delay to the Operations;

26.5.2 the equipment to be supplied by Traffic Scotland is not provided to the appropriate specification; or

26.5.3 the equipment to be supplied by Traffic Scotland has been tested and commissioned but the interface with existing Traffic Scotland equipment is not operational,

shall not constitute sufficient grounds for the Contracting Authority to assert that the Operations have not reached Final Completion nor to withhold the issuance of the Final Completion Acceptance Notice.

**26.6 Further Works**

In the event of service of a notice by the Contracting Authority under Clause 26.3.2 and following completion by the Company of such further works or other measures necessary to achieve Final Completion, the Company shall give notice to the Contracting Authority that such further works have been completed and the Contracting Authority shall inspect such further works within five (5) Business Days of receipt of such notice by the Company. The provisions of this Clause 26 shall thereafter apply to such notice mutatis mutandis as if such further notice by the Company were the last Final Completion Certificate(s) except that the time limit in Clause 26.3 shall be ten (10) Business Days.

**26.7 Final Completion**

The date of Final Completion shall be:

26.7.1 where no notice is given by the Contracting Authority in accordance with Clause 26.3.2, the date of issue or deemed issue of the Final Completion Acceptance Notice in accordance with Clauses 26.3 and 26.4; or

26.7.2 where a notice under Clause 26.3.2 is given by the Contracting Authority, the date of receipt by the Contracting Authority of any further notice in accordance with Clause 26.6 in respect of which no further notice is given by the Contracting Authority under Clause 26.3.2.

## **26.8 Disputes**

If there is a dispute between the Parties in regard to a notice under Clause 26.3.2 the dispute will be referred for determination under the Dispute Resolution Procedure. If the Dispute Resolution Procedure determines that the Company has achieved Final Completion, the Dispute Resolution Procedure shall determine the date on which the Final Completion Acceptance Notice should properly have been issued under Clause 26.3.1 and the failure by the Contracting Authority to have issued the Notice on that date shall be deemed to be a Compensation Event.

## **27. QUALITY ASSURANCE**

The Company shall develop, maintain and implement the Quality System and the Quality Plan in accordance with the procedures set out in Schedule 5 (Quality Assurance).

## **28. HAZARDOUS SUBSTANCES**

### **28.1 Storage**

The Company shall ensure that any hazardous materials or equipment used or intended to be used in the provision of the Operations are kept under control and in safe keeping in accordance with all relevant Legislation and Good Industry Practice and shall ensure that all such materials or equipment are properly and clearly labelled on their containers, and shall promptly and in any event within five (5) Business Days of bringing such materials or equipment onto the Sites inform the Contracting Authority of all such materials or equipment being used or stored at the Sites and shall comply with any reasonable requirement of the Contracting Authority in respect thereof.

### **28.2 COSHH Register**

The Company shall maintain a COSHH Register for each Site and shall ensure that a copy of each register is held at the relevant Site and at the Company's registered office and that a copy thereof is given to the Contracting Authority, including copies of any changes when made (or, in such circumstances and at the request of the Contracting Authority, a copy of the updated register reflecting such changes).

**29. PERFORMANCE MONITORING AND SUSPENSION****29.1 Company Monitoring**

The Company shall monitor its performance in the delivery of the Operations in accordance with the procedures set out in Schedule 4 (O&M Works Requirements) and Schedule 6 (Payment Mechanism).

**29.2 Contracting Authority Monitoring**

The Contracting Authority shall be entitled, at its own cost, to undertake its own performance monitoring at any time during the Contract Period for any purpose including in order to ensure that the Operations are being provided in accordance with this Agreement. The Company shall use all reasonable endeavours to assist the Contracting Authority in such an exercise but without being required to disrupt the proper delivery of the Operations in accordance with this Agreement. The Contracting Authority may notify the Company of the outcome of the performance monitoring, and the Company shall have due regard to the Contracting Authority's comments in relation to the future provision of the Operations.

**29.3 Suspension of Work**

29.3.1 The Contracting Authority may at any time instruct the Company to suspend progress of part or all of the Works, including where the Scottish Ministers are instructed to do so pursuant to either of the Pipeline Agreements. During such suspension, the Company shall protect, store and secure such part or all of the Works against any deterioration, loss or damage. The Contracting Authority shall notify the Company of the cause for the suspension.

29.3.2 Where the Contracting Authority suspends all or part of the Works pursuant to Clause 29.3.1, such suspension shall be deemed to be a Compensation Event other than where the suspension has arisen (directly or indirectly) as a result of:

- (a) any negligence or wilful misconduct of the Company or any of its Sub-Contractors,
- (b) all or any part of the Works being carried out in a manner which, in the reasonable opinion of the Contracting Authority, prejudices the operation and safe use of any of the Project Roads by Users; or
- (c) all or any part of the Works not being carried out in accordance with the provisions of the Agreement.

### 30. **EMPLOYEES**

#### 30.1 **Application of TUPE**

The Contracting Authority and the Company agree that by virtue of the cessation or partial cessation of the Operations by the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors), whether or not on the Expiry Date or earlier termination of this Agreement, TUPE may apply so that (i) the contracts of employment between the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) and each Transferring Employee (excluding any benefits for old age, invalidity or survivors provided under an occupational pension scheme) and (ii) any collective agreement between the Company and any trade union recognised by the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) in respect of each Transferring Employee may have effect after such cessation as if originally made between a New Supplier or the Contracting Authority and each Transferring Employee to whom such cessation is relevant or between the New Supplier or the Contracting Authority and the relevant trade union (as the case may be).

#### 30.2 **Apportionment**

All remuneration, expenses and outgoings in relation to each Transferring Employee (including, but not limited to salaries, wages, bonus (even if not due and payable at that time) but subject always to each Party exercising any discretion reasonably in respect of any bonus award it makes which is payable by the other Party in accordance with this Clause 30.2, National Insurance Contributions, pension contributions, PAYE remittances and payments in respect of any other emoluments) (together referred to in this clause as **Charges**) shall be apportioned on a time basis so that the part of the Charges accruing in the period on and before the Transfer Date applicable to any Transferring Employee shall be borne and discharged by the Company and the part of the Charges accruing in the period after the Transfer Date applicable to any Transferring Employee shall be borne and discharged by the New Supplier or the Contracting Authority.

#### 30.3 **Employment Liability Indemnity**

The Company will indemnify and keep indemnified the Contracting Authority and the Scottish Ministers on demand and/or, on demand by the Contracting Authority, any New Supplier from and against any Transferring Employee Employment Liabilities which relate to or arise out of any act or omission by the Company (and/or by any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) or any other event or occurrence in each case on or before the Transfer Date applicable to any Transferring

Employee for which the Contracting Authority and/or any New Supplier is or becomes liable by reason of the operation of TUPE or otherwise and/or any judicial decision interpreting the same.

#### **30.4 TUPE Indemnity**

The Company will indemnify and keep indemnified the Contracting Authority and the Scottish Ministers on demand and/or, on demand by the Contracting Authority, any New Supplier from and against any costs, claims, liabilities and expenses (including legal expenses) suffered or incurred by the Contracting Authority or the New Supplier as a result of any failure by the Company (and/or by any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) to comply with its obligations under Regulations 13 and/or 14 of TUPE, unless such costs, claims, liabilities and expenses (including legal expenses) arise as a result of the Contracting Authority's, or the New Supplier's, failure to comply with their obligations under Regulation 13(4) of TUPE.

#### **30.5 Company Undertaking**

The Company undertakes that in respect of any Transfer Assistance Period it shall not (and it shall procure that any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors shall not) without the prior written consent of the Contracting Authority (such consent not to be unreasonably withheld or delayed):

- 30.5.1 materially vary the terms and conditions of any of the Assigned Employees to whom the Transfer Assistance Period applies (including without limitation remuneration, benefits and other perquisites and collective agreements which relate to the employment of such employees);
- 30.5.2 increase the numbers of any of the Assigned Employees to whom the Transfer Assistance Period applies;
- 30.5.3 transfer any of the Assigned Employees to whom the Transfer Assistance Period applies to different roles;
- 30.5.4 replace any of the Assigned Employees to whom the Transfer Assistance Period applies save where the Company replaces any such individuals with individuals of equivalent levels of skills and experience; or
- 30.5.5 dismiss any of the Assigned Employees.

**30.6 Employee Information**

During any Transfer Assistance Period the Company shall within five (5) Business Days of its receipt of a request in writing by the Contracting Authority supply in writing to the Contracting Authority or to its nominee:

- 30.6.1 full, complete and accurate information as to the terms and conditions of employment of all Assigned Employees to whom the Transfer Assistance Period applies at the time of a request for the same, whether contractual or otherwise (including without limitation remuneration, benefits and other perquisites), collective agreements which relate to the employment of such employees and any written or unwritten express obligations on the Company (and/or on any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) or any reasonably well known custom or practice of the Company whether or not such custom or practice is legally binding (and/or of any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) to increase or otherwise vary such remuneration, benefits and other perquisites;
- 30.6.2 the job title, role, length of service and age of all Assigned Employees to whom the Transfer Assistance Period applies at the time of a request for the same;
- 30.6.3 full, complete and accurate details of any outstanding disputes between the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) and any of the Assigned Employees to whom the Transfer Assistance Period applies or their representatives; and
- 30.6.4 such other information relating to Assigned Employees to whom the Transfer Assistance Period applies at the time of a request for the same which is in the possession of the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) or which can reasonably be obtained by the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) from any other third party as may reasonably be required by the Contracting Authority.

**30.7 Transferring Employee Information**

On any Transfer Date the Company shall supply in writing to the Contracting Authority or its nominee all of the information and details referred to in Clauses 30.6.1 to 30.6.4 (inclusive) but in respect of the Transferring Employees to whom such Transfer Date is applicable instead of the Assigned Employees.



**30.8 Employee Meeting**

At any time during the Transfer Assistance Period, the Company shall (and shall procure that any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors shall) allow the Contracting Authority and/or a New Supplier to meet the Assigned Employees at their place of work within five (5) Business Days of receiving a request in writing from the Contracting Authority to meet such employees and the Company shall (and shall procure that any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors shall) do what is reasonably required by the Contracting Authority at such time to facilitate such meetings with such employees.

**30.9 Personnel Records**

The Company shall (and shall procure that any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors shall) during the Service Period maintain complete personnel records in the format normally adopted by it regarding the service of each of the Assigned Employees including all personnel records required to be maintained by Legislation and the Company shall (and shall procure that any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors shall) within five (5) Business Days of receiving a request in writing by the Contracting Authority deliver the personnel records referred to in this clause as the Contracting Authority may direct at any time.

**30.10 Employee Negotiations**

The Company shall use all reasonable endeavours to ensure that there will not, at any Transfer Date, be any current or pending negotiations with or offers to the Transferring Employees to whom such Transfer Date is applicable (or any of them) concerning either the terms and conditions of their employment, whether contractual or otherwise, (including without limitation remuneration, benefits and other perquisites) or collective agreements which relate to the employment of such employees.

**30.11 Indemnity to New Supplier**

The Company acknowledges and agrees that the Contracting Authority or the Scottish Ministers (as the case may be) shall grant an indemnity in favour of each and any New Supplier to the same extent that the Company is undertaking to indemnify the Contracting Authority in terms of Clauses 30.3 and 30.4 and agrees that in the event of a claim on any indemnity in terms of Clauses 30.3 and 30.4 for loss incurred by the Contracting Authority or the Scottish Ministers (as the case may be), that loss shall include the amount, if any, which the Contracting Authority or the Scottish Ministers (as the case may be) has paid or are

required to pay to any New Supplier by virtue of any indemnity granted by the Contracting Authority or the Scottish Ministers (as the case may be) in favour of any New Supplier in accordance with the provisions of this Clause 30.11. For the avoidance of doubt, to the extent to which the Company has made payment to a New Supplier under Clause 30.3 then the Company shall not be liable to make any corresponding payment in respect of the same Transferring Employee Employment Liabilities to the Contracting Authority or the Scottish Ministers (as the case may be) under this Clause 30.11.

## **31. PAYMENT PROVISIONS**

### **31.1 Payment of Unitary Charge**

In consideration for the provision of the Operations the Contracting Authority shall pay to the Company the Restricted Services Payment and the Monthly Unitary Charge in accordance with Schedule 6 (Payment Mechanism) and this Clause 31.

### **31.2 Monthly Invoices**

Within ten (10) Business Days following the beginning of each Payment Month the Company shall issue a Monthly Invoice accompanied by the relevant Payment Calculation Schedule. The Monthly Invoice shall show the following amounts separately and in aggregate:

- 31.2.1 the Monthly Unitary Charge and/or the Restricted Services Payment in each case for that Payment Month;
- 31.2.2 as a negative figure, any reimbursement of step-in costs incurred by the Contracting Authority;
- 31.2.3 any amount owed by either Party to the other in accordance with Clauses 34 (Contracting Authority Changes), 35 (Company Changes) or 37 (Qualifying Change in Law) (and where owed by the Company, appearing as a negative figure);
- 31.2.4 any undisputed amounts owed by either Party to the other in accordance with Clause 51 (Indemnity) (and where owed by the Company, appearing as a negative figure);
- 31.2.5 any amounts owed by the Company under Clause 48 (Consequences of Termination) and/or Clause 49 (Final Survey);

- 31.2.6 any interest due in accordance with Clause 31.4 (Disputed Amounts);
- 31.2.7 any other amounts agreed or determined to be due and payable under the Agreement by one Party to the other (and where owed by the Company, appearing as a negative figure); and
- 31.2.8 any VAT payable on amounts due.

### 31.3 **Payments**

- 31.3.1 The Monthly Invoice shall be paid by the Contracting Authority on the later of ten (10) Business Days after the end of the month in respect of which that Monthly Invoice is issued or within fifteen (15) Business Days of receipt of that Monthly Invoice and the Payment Calculation Schedule.
- 31.3.2 The Monthly Unitary Charge in respect of the Final Payment Month shall be invoiced within twenty (20) Business Days following the Expiry Date or the Termination Date and shall be payable within fifteen (15) Business Days of that Monthly Invoice and the Payment Calculation Schedule.
- 31.3.3 Except where provided otherwise under this Agreement, all payments under this Agreement shall be due and payable by the later of:
  - (a) the date specified for payment in this Agreement, or where no such date is specified, twenty (20) Business Days after the date on which the amount of the payment is agreed or determined; or
  - (b) twenty (20) Business Days after the date of issue of an invoice for the payment (or VAT invoice where VAT is payable).
- 31.3.4 All invoices under this Agreement shall be raised in Pounds Sterling and the money of account and money of payment in respect of all payments, liabilities and claims (including any accrued rights) under this Agreement at any time shall remain denominated in and be made in Pounds Sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made. **Pounds Sterling** means the currency issued by the Bank of England from time to time.

**31.4 Disputed Amounts**

- 31.4.1 Either Party shall have the right to dispute, in good faith, any amount specified in an invoice referred to in this Agreement. The Party disputing any such amount shall pay such amount of the invoice in question as is not in dispute and shall be entitled to withhold the balance pending resolution of the dispute.
- 31.4.2 The Parties shall use all reasonable endeavours to resolve the dispute in question within fifteen (15) Business Days of the dispute arising. If they fail to resolve it, either Party may refer the matter to the Dispute Resolution Procedure.
- 31.4.3 Following resolution of the dispute, any amount agreed or adjudged to be due shall be promptly on demand be paid, together with interest thereon at a rate per annum equal to the Prescribed Rate from the day after the date on which payment became properly due to (and including) the date of payment.

**31.5 Late Payments**

Save where provided otherwise under this Agreement, where any payment or sum of money due from the Company to the Contracting Authority or from the Contracting Authority to the Company under any provision of this Agreement is not paid on the due date it shall bear interest thereon at the Prescribed Rate from the due date (whether before or after any judgement) until actual payment and it is agreed between the Parties that the Prescribed Rate and the provisions of this Agreement relating to the payment of compensation on termination of this Agreement following the occurrence of a Contracting Authority Default provide the Company with a substantial remedy pursuant to Sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

**31.6 Set-off**

- 31.6.1 The Company shall not be entitled to retain or set off any amount due to the Contracting Authority by it, but the Contracting Authority may retain or set off any amount owed to them by the Company under this Agreement which has fallen due and payable against any amount due to the Company under this Agreement.
- 31.6.2 If the payment or deduction of any amount referred to in Clause 31.6.1 above is disputed then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with Schedule 7 (Dispute Resolution Procedure).

**31.7 VAT**

- 31.7.1 All amounts due under this Agreement are exclusive of VAT.
- 31.7.2 If any supply made or referred to in this Agreement is or becomes chargeable to VAT then the person receiving the supply (the **Recipient**) shall in addition pay the person making the supply (the **Supplier**) the amount of that VAT against receipt by the Recipient from the Supplier of a valid VAT invoice in respect of that supply.
- 31.7.3 Where under this Agreement any amount is calculated by reference to any sum which has or may be incurred by any person, the amount shall include any VAT in respect of that amount only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set-off, or repayment.
- 31.7.4 The Company shall provide the Contracting Authority with any information reasonably requested by the Contracting Authority in relation to the amount of VAT chargeable in accordance with the Agreement and payable or repayable by the Contracting Authority to the Company.
- 31.7.5 In the event that the Contracting Authority assigns, novates or otherwise transfers its obligations and rights under this Agreement in accordance with Clause 64.1, the Contracting Authority shall procure that such assignee, novatee or transferee (as the case may be) is registered for VAT in order that the Company remains entitled to recovery of input VAT in accordance with the Value Added Tax Act 1994.

**31.8 Prompt Payment of Sub-contractors and Suppliers**

- 31.8.1 Where the Company enters into a subcontract for the purpose of performing all or part of this Agreement, the Company shall, subject to the requirements of the Construction Act (where appropriate), cause a term to be included in such subcontract:
- (a) which requires payment to be made to the sub-contractor or supplier (as appropriate) within a specified period not exceeding thirty (30) days from receipt of a valid invoice as defined by the subcontract requirements and provides that, for the purpose of payment alone, where the Contracting Authority has made payment to the Company and the sub-contractor's or supplier's (as appropriate) invoice includes works, services and/or supplies

in relation to which payment has been made by the Contracting Authority to the Company pursuant to the Agreement then, to the extent that it relates to such works, services and/or supplies, the invoice shall be treated as valid and payment shall be made to the sub-contractor without deduction except in so far as such deduction is permitted pursuant to a subcontract and/or pursuant to the Construction Act;

- (b) which notifies the sub-contractor or supplier (as appropriate) that the contract forms part of a larger contract for the benefit of the Scottish Government and that should the sub-contractor or supplier (as appropriate) have any difficulty in securing the timely payment of an invoice that matter may be referred by the sub-contractor or supplier (as appropriate) to the Contracting Authority's Representative; and
- (c) in the same terms as those set out in this Clause 31.8 subject only to modification to refer to the correct designation of the equivalent party as the Company and sub-contractor or supplier as the case may be.

31.8.2 The Company shall ensure that each subcontract which it enters into for the purposes of performing all or any part of the Agreement shall not contain any term which in relation to any plant or materials shall provide that ownership shall not pass, or shall entitle the sub-contractor or supplier to exercise a lien, until such time as the sub-contractor or supplier has received payment in full in respect of such plant or materials or any other sums which may become due or which become due to the sub-contractor or supplier from the Company.

## **32. RELIEF EVENTS**

### **32.1 Occurrence**

If and to the extent that a Relief Event:

- 32.1.1 is the direct cause of a delay in achieving the Full Services Commencement Date; and/or
- 32.1.2 adversely affects the ability of the Company to perform any of its obligations under this Agreement,

then the Company is entitled to apply for relief from any rights of the Contracting Authority arising under Clause 41 (Termination on Company Default) and its obligations under this Agreement.

## 32.2 Relief

To obtain relief, the Company must:

32.2.1 as soon as practicable, and in any event within fourteen (14) days after it becomes aware that the Relief Event has caused or is likely to cause delay and/or adversely affect the ability of the Company to perform its other obligations, give to the Contracting Authority a notice of its claim for relief from its obligations under the Agreement, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;

- (a) within seven (7) days of receipt by the Contracting Authority of the notice referred to in Clause 32.2.1 above, give full details of the relief claimed; and
- (b) demonstrate to the reasonable satisfaction of the Contracting Authority that:
  - (i) the Company and its Sub-Contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;
  - (ii) the Relief Event directly caused the delay to the Planned Full Services Commencement Date or, following the Planned Full Services Commencement Date, delay in achieving Full Services Commencement by the Long-Stop Date;
  - (iii) the time lost and/or relief from the obligations under the Agreement claimed could not reasonably be expected to be mitigated or recovered by the Company acting in accordance with Good Industry Practice, without incurring material expenditure; and
  - (iv) the Company is using reasonable endeavours to perform its obligations under the Agreement.

## 32.3 Consequences

In the event that the Company has complied with its obligations under Clause 32.2 above, then:

32.3.1 the Planned Full Services Commencement Date or, following the Planned Full Services Commencement Date, the Long-Stop Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or

32.3.2 the Contracting Authority shall not be entitled to exercise its rights to terminate the Agreement under Clause 41 (Termination on Company Default).

#### **32.4 Performance Deductions**

Nothing in Clause 32.3 above shall affect any entitlement to make Performance Deductions or any deductions made as a result of Schedule 6 (Payment Mechanism) during the period in which the Relief Event is subsisting.

#### **32.5 Information**

In the event that information required by Clause 32.2 above is provided after the dates referred to in that Clause 32.2, then the Company shall not be entitled to any relief during the period for which the information is delayed.

#### **32.6 Notify**

The Company shall notify the Contracting Authority if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

#### **32.7 Disputes**

If the Parties cannot agree the extent of the relief required, or the Contracting Authority disagrees that a Relief Event has occurred or that the Company is entitled to any extension of the Planned Full Services Commencement Date or the Long-Stop Date the Parties shall resolve the matter in accordance with Schedule 7 (Dispute Resolution Procedure).

### **33. COMPENSATION EVENTS**

#### **33.1 Occurrence**

If, as a direct result of the occurrence of a Compensation Event:

33.1.1 the Company is or is likely to be unable to achieve the Full Services Commencement Date on or before the Planned Full Services Commencement



Date, or, following the Planned Full Services Commencement Date, the Long Stop Date;

33.1.2 the Company is or is likely to be unable to comply with its obligations under this Agreement; and/or

33.1.3 the Company is or is likely to incur costs or lose revenue,

then the Company is entitled to apply for relief from its obligations and/or claim compensation under this Agreement provided that, where the relevant Compensation Event falls within limbs (c)-(e) of the definition thereof, the Company shall, notwithstanding the notice periods in Clause 33.2, promptly and without delay notify the Contracting Authority of the relevant circumstances and to the extent that the provisions of Clause 10.1.2 may apply to such circumstances the Company shall promptly issue a notice in accordance with Clause 10.1 and, without prejudice to the relief available under this Clause 33, all relevant provisions of Clause 10 shall apply.

## 33.2 **Relief**

Subject to Clause 33.4 below, to obtain relief and/or claim compensation the Company must:

33.2.1 as soon as practicable, and in any event within twenty one (21) days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement and/or the Company to incur costs or lose revenue, give to the Contracting Authority a notice of its claim for an extension of time for the Full Services Commencement Date, payment of compensation and/or relief from its obligations under the Agreement;

33.2.2 within fourteen (14) days of receipt by the Contracting Authority of the notice referred to in Clause 33.2.1 above, give full details of the Compensation Event and the extension of time and/or any Estimated Change in Project Costs and/or loss of revenue claimed; and

33.2.3 demonstrate to the reasonable satisfaction of the Contracting Authority that:

(a) the Compensation Event was the direct cause of the Estimated Change in Project Costs and/or loss of revenue and/or any delay in the achievement of the Planned Full Services Commencement Date and/or breach of the Company's obligations under this Agreement, or, following the Planned

Full Services Commencement Date, delay in achieving Full Services Commencement before the Long-Stop Date; and

- (b) the Estimated Change in Project Costs and/or loss of revenue, time lost, and/or relief from the obligations under the Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Company acting in accordance with Good Industry Practice.

### **33.3 Consequences**

In the event that the Company has complied with its obligations under Clause 33.2 above, then:

33.3.1 in the case of a delay, the Planned Full Services Commencement Date or following the Planned Full Services Commencement Date the Long-Stop Date shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay;

33.3.2 in the case of an additional cost being incurred or revenue being lost by the Company:

- (a) on or before the Full Services Commencement Date; or
- (b) as a result of Capital Expenditure being incurred by the Company at any time,

the Contracting Authority shall compensate the Company for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred and, without double counting, for revenue actually lost (to the extent it could not reasonably have been mitigated), within thirty (30) days of receipt of a written demand by the Company supported by all relevant information;

33.3.3 in the case of payment of compensation for the Estimated Change in Project Costs and/or without double counting, loss of revenue that does not result in Capital Expenditure being incurred by the Company as referred to in Clause 33.3.2 above but which reflects a change in the costs being incurred by the Company after the Full Services Commencement Date, the Contracting Authority shall compensate the Company in accordance with Clause 33.6 below by an adjustment to the Unitary Charge; and/or

33.3.4 the Contracting Authority shall give the Company such relief from its obligations under the Agreement, as is reasonable for such a Compensation Event.

33.4 In the event that information is provided after the dates referred to in Clause 33.2 above, then the Company shall not be entitled to any extension of time, compensation, or relief from its obligations under the Agreement in respect of the period for which the information is delayed.

33.5 If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Company's obligations under the Agreement, or the Contracting Authority disagrees that a Compensation Event has occurred (or as to its consequences), or that the Company is entitled to any relief under this Clause 33, the Parties shall resolve the matter in accordance with Schedule 7 (Dispute Resolution Procedure).

33.6 Any payment of compensation referred to in Clause 33.3.3 above shall be calculated in accordance with the Unitary Charge Adjustment Procedure.

#### 34. **CONTRACTING AUTHORITY CHANGES**

##### 34.1 **Change in Service**

The Contracting Authority has the right to propose Contracting Authority Changes in accordance with this Clause. Where the Contracting Authority Change arises as a consequence of any of the following (a **Deemed Change**), then the Contracting Authority shall be required to serve a Contracting Authority Notice of Change and where it fails to do so timeously the Company shall be entitled to serve notice on the Contracting Authority stating which of the events set out below has occurred and confirming the date by which the Estimate shall be provided and the Contracting Authority shall be deemed to have served a Contracting Authority Notice of Change:

34.1.1 either or both of the Pipeline Agreements becoming unenforceable or either or both of the Pipeline Agreements being terminated, other than by reason of a breach or wilful act or default of the Company or any of its Sub-Contractors of this Agreement; or

34.1.2 any changes to the Pipeline Agreements (and/or any information provided or to be provided in connection therewith) and/or the requirements of the parties to those agreements other than by reason of a breach or wilful act or default of the Company or any of its Sub-Contractors of this Agreement, and in each case (i) which could not have been reasonably contemplated taking account of the

information available to the Company at the Date of this Agreement and (ii) which have a material adverse impact on the ability of the Company to comply with its obligations hereunder and/or cause the Company to or to be likely to incur costs or lose revenue; or

- 34.1.3 any change in the condition of the pipelines identified in the Pipeline Agreements from that reasonably contemplated by the Company based on the information made available to it and it having made all reasonable enquiries in respect of the same as at the date of this Agreement and which has a material adverse impact on the ability of the Company to comply with its obligations hereunder and/or causes the Company to or to be likely to incur costs or lose revenue.

## 34.2 Limitations

The Contracting Authority shall not propose a Contracting Authority Change which:

- 34.2.1 requires to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;
- 34.2.2 would cause any Consent to be revoked (or a new Consent required to implement the relevant Contracting Authority Change to be unobtainable);
- 34.2.3 would, if implemented, result in a fundamental change in the nature of the Project;
- 34.2.4 would materially and adversely affect the Company's ability to deliver the Operations;
- 34.2.5 would materially and adversely affect the health and safety of any person;
- 34.2.6 requires the Company to implement the Contracting Authority Change in an unreasonable period of time;
- 34.2.7 would represent a departure from Good Industry Practice; or
- 34.2.8 the Contracting Authority does not have the legal power or capacity to require the Company to implement.

provided that where any of Clauses 34.2.1 to 34.2.8 apply in respect of a circumstance that would otherwise give rise to a Deemed Change, the Parties shall meet to agree, within 15 Business Days of the later of the occurrence of the relevant circumstance or either of the Parties becoming aware of the same, the matters listed at Clause 34.5 to mitigate the effects of the relevant circumstances to leave the Company in a no better no worse position

and failing agreement the matter shall be resolved in accordance with Clause 60 (Dispute Resolution Procedure).

#### **34.3 Contracting Authority Notice of Change**

If the Contracting Authority requires a Contracting Authority Change, it must serve a Contracting Authority Notice of Change on the Company.

#### **34.4 Details in Contracting Authority Notice of Change**

A Contracting Authority Notice of Change shall:

- 34.4.1 set out the Contracting Authority Change required in sufficient detail to enable the Company to calculate and provide the Estimated Change in Project Costs in accordance with Clause 34.5 below (the Estimate);
- 34.4.2 in the event that the Contracting Authority Change will require Capital Expenditure, state whether the Contracting Authority intends to pay to the Company the costs involved in implementing the Contracting Authority Change or whether the Contracting Authority require the Company to use its reasonable efforts to obtain funding in accordance with Clause 34.11 below; and
- 34.4.3 require the Company to provide the Contracting Authority within fifteen (15) Business Days of receipt of the Contracting Authority Notice of Change with the Estimate.

#### **34.5 Estimate**

As soon as practicable, and in any event within fifteen (15) Business Days after having received the Contracting Authority Notice of Change, the Company shall deliver to the Contracting Authority the Estimate. The Estimate shall include the opinion of the Company on:

- 34.5.1 whether relief from compliance with obligations is required, including the obligations of the Company to achieve the Planned Full Services Commencement Date during the implementation of the Contracting Authority Change;
- 34.5.2 any impact on the provision of the Operations;
- 34.5.3 any amendment required to this Agreement and/or any Project Document as a result of the Contracting Authority Change;

- 34.5.4 any Estimated Change in Project Costs that results from the Contracting Authority Change;
- 34.5.5 any Capital Expenditure that is required or no longer required as a result of the Contracting Authority Change;
- 34.5.6 the programme for implementing the Contracting Authority Change;
- 34.5.7 any regulatory approvals or Consents which are required; and
- 34.5.8 the proposed method of certification of any construction or operational aspects of the Operations required by the Contracting Authority Change if not covered by the procedures specified in Clauses 25 (Permits to Use) and 26 (Final Completion) and the Contracting Authority's Requirements.

#### **34.6 Parties to Discuss**

As soon as practicable after the Contracting Authority receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate, including:

- 34.6.1 providing evidence that the Company has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
- 34.6.2 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, foreseeable Changes in Law at that time have been taken into account by the Company; and
- 34.6.3 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Contracting Authority Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clauses 34.5.4, and/or 34.5.5 above.

In such discussions the Contracting Authority may modify the Contracting Authority Notice of Change (but not, in the case of a Deemed Change, so as to withdraw or materially alter the nature of the Deemed Change) and (if the estimated increase in Capital Expenditure in respect of the Contracting Authority Change is expected to exceed £[REDACTED] (Indexed) and it is practicable for the Company to do so), the Contracting Authority may require the Company to seek and evaluate competitive tenders for the relevant capital works. In each

case the Company shall, as soon as practicable, and in any event not more than ten (10) Business Days after receipt of such modification, notify the Contracting Authority of any consequential changes to the Estimate.

**34.7 Company Procuring Work and Services**

If the Company does not intend to use its own resources to implement any Contracting Authority Change it shall comply with Good Industry Practice with the objective of ensuring that it obtains best value for money (taking into account all relevant circumstances including, in particular, the requirement that the Company should not be worse off as a result of the implementation of the Contracting Authority Change) when procuring any work, services, supplies, materials or equipment required in relation to the Contracting Authority Change.

**34.8 Disputes**

If the Parties cannot agree on the contents of the Estimate then the dispute will be determined in accordance with Schedule 7 (Dispute Resolution Procedure).

**34.9 Confirmation or Withdrawal of Contracting Authority Change**

As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to Schedule 7 (Dispute Resolution Procedure), the Contracting Authority shall:

34.9.1 confirm in writing the Estimate (as modified); or

34.9.2 withdraw the Contracting Authority Notice of Change,

provided that the Contracting Authority shall not be entitled to withdraw a Deemed Change.

**34.10 Deemed Withdrawal of Contracting Authority Notice of Change**

If the Contracting Authority does not confirm in writing the Estimate (as modified) within twenty (20) Business Days of the contents of the Estimate having been agreed in accordance with Clause 34.6 above or determined pursuant to Clause 34.8 above, then the Contracting Authority Notice of Change shall be deemed to have been withdrawn, save that there shall be no deemed withdrawal in the circumstances contemplated in the proviso to Clause 34.9 and the Estimate pertaining thereto shall be deemed to be agreed on an interim basis only until such time as the terms of the Estimate are finally agreed (the Parties having used all reasonable endeavours to reach agreement) or failing agreement are determined in

accordance with Clause 60 (Dispute Resolution Procedure) and any necessary reconciliations shall take place. Where there is such a withdrawal (either pursuant to this Clause 34.10 or Clause 34.9 above) the Contracting Authority shall pay to the Company the reasonable additional third party costs incurred by the Company in preparing such Estimate provided that:

34.10.1 the Company has used all reasonable endeavours to submit a reasonable priced Estimate;

34.10.2 the Company has made available to the Contracting Authority a cost breakdown of the Estimate including an estimate of third party costs to be incurred by the Contracting Authority if the Contracting Authority Notice of Change is withdrawn or deemed to be withdrawn;

34.10.3 the Contracting Authority have:

- (a) approved the estimate of third-party costs referred to above and the type of third party prior to any third party costs being incurred; and
- (b) agreed that, given the nature of the proposed Change, it is reasonable to expect the relevant third party to incur costs in preparing the Estimate on the basis of the extent of the proposed change to the O&M Works or the New Works and the work required in submitting an accurate Estimate in compliance with this Clause 34; and

34.10.4 the Company has provided the Contracting Authority with such evidence as it may reasonably require in order to verify the additional third party costs incurred by the Company.

#### **34.11 Capital Expenditure**

In the event that the Estimate (as modified) involves estimated Capital Expenditure in excess of £[REDACTED] Indexed then (unless the Contracting Authority has elected to fund such costs in accordance with Clause 34.4.2) the Company shall use its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, on terms reasonably satisfactory to it and the Senior Lenders.

#### **34.12 Funding Unavailable for Capital Expenditure**

If the Estimate (as modified) involves estimated Capital Expenditure of less than £[REDACTED] Indexed or the Company has used its reasonable endeavours to obtain funding for the

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whole of the estimated Capital Expenditure, but has been unable to do so within forty (40) Business Days of the date that the Contracting Authority confirmed the Estimate, then the Company shall have no obligation to carry out the Contracting Authority Change, unless the Contracting Authority agrees within twenty (20) days of the end of such period to pay the costs for which funding is not available on the basis provided in Clause 34.15 (Capital Expenditure Payment Procedure) below.

**34.13 Contracting Authority Payment of Capital Expenditure**

The Contracting Authority may, at any time following the date on which the Estimate is confirmed, agree to meet all or, to the extent the Company has obtained funding for part of the Capital Expenditure, the remaining part of the estimated Capital Expenditure.

**34.14 Unitary Charge Adjustment**

In the event that the Estimate has been confirmed by the Contracting Authority, then the adjustment to the Unitary Charge shall be made in accordance with the Unitary Charge Adjustment Procedure.

**34.15 Capital Expenditure Payment Procedure**

Where the Contracting Authority agrees to pay the costs for which funding is not available pursuant to Clause 34.12 above:

34.15.1 the Contracting Authority and Company shall agree:

- (a) a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by Company in carrying out the Contracting Authority Change to the extent borne by the Contracting Authority; and
- (b) where payment for part of the Contracting Authority Change reflects the carrying out of, or specific progress towards, an element within the Contracting Authority Change, an objective means of providing evidence confirming that the part of the Contracting Authority Change corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment schedule and evidence to be determined in accordance with Schedule 7 (Dispute Resolution Procedure) in the event of the Contracting Authority and the Company failing to agree as to its terms);

34.15.2 the Contracting Authority shall make a payment to the Company within twenty one (21) days of receipt by the Contracting Authority of invoices presented to the Contracting Authority (in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Contracting Authority Change has been carried out; and

34.15.3 if payment is not made in accordance with Clause 34.15.2 above, the Contracting Authority shall pay interest to the Company on the amount unpaid from the date twenty one (21) days after receipt of the relevant invoice until paid at the Prescribed Rate.

#### **34.16 Implementation of Contracting Authority Change**

In the event that the Estimate has been confirmed by the Contracting Authority the relevant Contracting Authority Change shall be commenced by the Company within seven (7) days of the Contracting Authority's confirmation and implemented by the Company in accordance with the programme for implementing the proposed change included in the Estimate. As soon as reasonably practicable and in any event within twenty eight (28) days of confirmation of the Estimate the Parties shall enter into any documents to amend this Agreement or any relevant Project Document which are necessary to give effect to such change.

### **35. COMPANY CHANGES**

#### **35.1 Company Notice of Change**

Subject to Clause 35.8 (Departures) if the Company wishes to introduce a Company Change or if the provisions of Clause 36 (Value for Money), apply it must serve a Company Notice of Change on the Contracting Authority.

#### **35.2 Details of Company Notice of Change**

The Company Notice of Change must:

35.2.1 set out the proposed Company Change in sufficient detail to enable the Contracting Authority to evaluate it in full including the programme for implementing the Company Change;

35.2.2 specify the Company's reasons for proposing the Company Change;

35.2.3 request the Contracting Authority to consult with the Company with a view to deciding whether to agree to the Company Change and, if so, what consequential changes the Contracting Authority require as a result;

35.2.4 indicate any implications of the Company Change;

35.2.5 indicate, in particular, whether a variation to the Unitary Charge is proposed (and, if so, give a detailed cost estimate of such proposed change); and

35.2.6 indicate if there are any dates by which a decision by the Contracting Authority is critical.

### **35.3 Evaluation of Company Notice of Change**

The Contracting Authority shall evaluate the Company Change in good faith, taking into account all relevant issues, including whether:

35.3.1 a change in the Unitary Charge will occur;

35.3.2 the Company Change affects the quality of the Operations or the likelihood of successful delivery of the Operations;

35.3.3 the Company Change will interfere with the relationship of the Contracting Authority or the Scottish Ministers (as the case may be) with third parties;

35.3.4 the financial strength of the Company is sufficient to perform the Company Change;

35.3.5 the residual value of the Assets is reduced; or

35.3.6 the Company Change materially affects the risks or costs to which the Contracting Authority or the Scottish Ministers (as the case may be) are exposed.

### **35.4 Parties to Discuss**

As soon as practicable after receiving the Company Notice of Change, the Parties shall meet and discuss the matter referred to in it. During its discussions the Contracting Authority may propose modifications to or accept or reject the Company Notice of Change.

### **35.5 Acceptance of Company Notice of Change**

35.5.1 If the Contracting Authority accepts the Company Notice of Change (with or without modification), the relevant Company Change shall thereafter be

implemented by the Company in accordance with the programme for implementing the proposed change as set out in the Company Notice of Change (as the same may have been amended). As soon as practicable, the Parties shall consult and agree any remaining details and shall promptly enter into any documents to amend this Agreement or any relevant Project Document which are necessary to give effect to the Company Change.

35.5.2 The Company may not implement or take any steps towards implementing a Company Change until the Contracting Authority accepts the relevant Company Notice of Change in writing (with or without modification).

**35.6 Rejection of Company Notice of Change**

If the Contracting Authority rejects the Company Notice of Change, it shall not be obliged to give its reasons for such a rejection.

**35.7 No Increase in the Unitary Charge**

Unless the Contracting Authority's acceptance specifically agrees to an increase in the Unitary Charge, there shall be no increase in the Unitary Charge as a result of the Company Change.

**35.8 Departures**

35.8.1 The Company shall not propose a Company Change which requires a Departure unless such Departure has first been approved by the relevant Overseeing Organisation(s).

35.8.2 For the avoidance of doubt, the approval of a Departure by the Contracting Authority acting (i) in its capacity as Road Works Authority or (ii) as agent for the Scottish Ministers in their capacity as Road Works Authority shall not constitute an acceptance of a Company Change for the purpose of this Agreement.

**35.9 Savings to be Shared**

If the Company Change causes or will cause the Company's costs or those of a Sub-Contractor to decrease, there shall be a decrease in the Unitary Charge equivalent to 50% of the difference between: (i) the Unitary Charge immediately prior to implementation of any decrease; and (ii) the nominal Unitary Charge calculated in accordance with paragraph 6 of Schedule 6 (Payment Mechanism) to give effect to 100% of such decrease.

**35.10 Change in Law**

The Contracting Authority cannot reject a Company Change which is required in order to conform to a Change in Law. The costs of introducing a Company Change resulting from a Qualifying Change in Law (including any resulting variation in the Unitary Charge) shall be dealt with in accordance with Clause 37 (Qualifying Change in Law) and to the extent not dealt with shall be borne by the Company.

**36. VALUE FOR MONEY**

36.1 The Company shall carry out a VFM Review in accordance with this Clause 36 (Value for Money) on each VFM Review Date.

36.2 The VFM Review shall consider and report on:

36.2.1 any material innovations in technology which have come to the attention of the Company and which could enhance the Operations; and

36.2.2 the O&M Works Requirements jointly with the Contracting Authority in order to assess whether any alteration in the O&M Works Requirements would represent increased value for money for both Parties.

36.3 The Company shall, no later than sixty (60) days before each VFM Review Date, submit to the Contracting Authority its proposed methodology for undertaking the VFM Review.

36.4 The Contracting Authority shall, not later than one (1) Contract Month before the VFM Review Date, comment on the methodology referred to in Clause 36.3 and the Company shall have reasonable regard to such comments in finalising such methodology.

36.5 On or before the date falling three (3) Contract Months after the VFM Review Date the Company shall submit to the Contracting Authority the VFM Report setting out:

36.5.1 the methodology of the review;

36.5.2 any material innovations in technology or material efficiencies in best working practices relevant to the delivery of the Operations which represent value for money; and

36.5.3 any proposed changes to the O&M Works Requirements.

36.6 If a VFM Report proposes changes to the O&M Works Requirements, either Party may propose a Change in accordance with Clauses 34 (Contracting Authority Changes) and 35

(Company Changes) and if such Change is implemented as proposed in the VFM Report then, notwithstanding anything to the contrary in Clauses 34 (Contracting Authority Changes) and 35 (Company Changes) the cost savings (if any) shall be shared between the Parties in such proportion as the Parties may agree, or, in the absence of such agreement, as the Dispute Resolution Procedure may determine having fair regard to the value to the Contracting Authority of such Change and to the degree of innovation and originality of the Change proposed in the VFM Report.

**37. QUALIFYING CHANGE IN LAW**

**37.1 Change in Law**

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

- 37.1.1 any necessary change in the Operations;
- 37.1.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;
- 37.1.3 whether relief from compliance with obligations is required, including the obligation of the Company to achieve the Planned Full Services Commencement Date and/or comply with the Contracting Authority's Requirements during the implementation of any relevant Qualifying Change in Law;
- 37.1.4 any gain or loss of revenue that will result from the relevant Qualifying Change in Law;
- 37.1.5 any Estimated Change in Project Costs that directly results from the Qualifying Change in Law; and
- 37.1.6 any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the Service Period,

in each case giving in full detail the procedure for implementing the Change. Responsibility for the costs of implementation (and any resulting variation to the Unitary Charge) shall be dealt with in accordance with Clauses 37.2 to 37.4 below.

**37.2 Parties to Discuss**

As soon as practicable after receipt of any notice from either Party under Clause 37.1, the Parties shall discuss and agree the issues referred to in Clause 37.1 and any ways in which the Company can mitigate the effect of the Qualifying Change of Law, including:

- 37.2.1 providing evidence that the Company has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
- 37.2.2 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Company;
- 37.2.3 giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the Shareholders or their Affiliates carry on business; and
- 37.2.4 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clauses 37.1.5 and/or 37.1.6 above.

**37.3 Change Agreed**

If the Parties agree or it is determined under Schedule 7 (Dispute Resolution Procedure) that the Company is required to incur additional Capital Expenditure due to a Qualifying Change in Law, then the Company shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it and the Senior Lenders.

**37.4 Financing**

If the Company has used reasonable endeavours to obtain funding for Capital Expenditure referred to in Clause 37.3 (Change Agreed), but has been unable to do so within 60 days of the date that the agreement or determination in Clause 37.3 (Change Agreed) occurred, then the Contracting Authority shall pay to the Company an amount equal to that Capital Expenditure on or before the date falling thirty (30) days after the Capital Expenditure has been incurred.

**37.5 Unitary Charge Adjustment**

Any compensation payable under this Clause by means of an adjustment to or reduction in the Unitary Charge shall be paid in accordance with the Unitary Charge Adjustment Procedure.

**37.6 Payment of Irrecoverable VAT**

The Contracting Authority shall pay to the Company from time to time as the same is incurred by the Company sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within twenty eight (28) days of the delivery by the Company to the Contracting Authority of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this Clause 37.6 **Irrecoverable VAT** means input VAT incurred by the Company on any supply which is made to it which is used or to be used exclusively in performing the New Works or the O&M Works or any of the obligations or provisions under the Agreement (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Company is not entitled to repayment or credit from HM Revenue & Customs in respect of such input VAT.

**38. IMPLEMENTATION OF CHANGES****38.1 Implementation**

The Company shall implement any Contracting Authority Change, Company Change or Qualifying Change in Law in accordance with:

38.1.1 Legislation;

38.1.2 Consents;

38.1.3 the Contracting Authority's Requirements as amended in accordance with Clauses 34, 35 or 37 as applicable;

38.1.4 Good Industry Practice; and

38.1.5 the proposal in respect of the Contracting Authority Change, Company Change or Qualifying Change in Law (including any further Company proposals) agreed or determined in accordance with Clauses 34, 35 or 37 as applicable.



**38.2 Precedence**

In the event of a conflict between the requirements of Clauses 38.1.1 to 38.1.5 the requirements shall have precedence in the numerical order in Clause 38.1, provided always that where such further Company proposals provide greater benefit to the Contracting Authority or the Scottish Ministers, of which (as between the Contracting Authority and the Company) the Contracting Authority shall be sole judge, there shall be deemed to be no conflict.

**39. REFINANCING****39.1 Company to Obtain the Contracting Authority's Consent**

The Company shall obtain the Contracting Authority's prior written consent to any Qualifying Refinancing and both the Contracting Authority and the Company shall at all times act in good faith with respect to any Refinancing.

**39.2 The Contracting Authority's Share (Senior Refinancing)**

The Contracting Authority shall be entitled to receive:

39.2.1 a 90% share of the Margin Gain arising from any Qualifying Refinancing which gives rise to a reduction in the Margin from the Margin as shown in the Senior Financing Agreements as at Financial Close (or, in the case of a second or subsequent Qualifying Refinancing, from the Margin as shown in the Senior Financing Agreements as updated at the immediately preceding Qualifying Refinancing; and

39.2.2 a share of any Refinancing Gain (arising otherwise than from a reduction in Margin) from a Qualifying Refinancing, in respect of any Refinancing Gain (when considered in aggregate with all previous Qualifying Refinancings) as follows:

- (a) for a Refinancing Gain from £1 to £1 million, a 50% share;
- (b) for a Refinancing Gain of £1 million up to £3 million, a 60% share; and
- (c) for a Refinancing Gain in excess of £3 million, a 70% share.

**39.3 The Contracting Authority not to Withhold or Delay Consent**

The Contracting Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater share of the Refinancing Gain than that specified in Clause 39.2.

**39.4 Company to Provide Full Details**

The Company shall promptly provide the Contracting Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Contracting Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing (whether that Refinancing is a Qualifying Refinancing or not).

**39.5 The Contracting Authority's Election for Payment of Share**

The Contracting Authority shall have the right to elect to receive its share of any Refinancing Gain (including any Margin Gain) as:

39.5.1 a single payment being the proportion (corresponding to the proportion of the Refinancing Gain to which the Contracting Authority is entitled pursuant to Clause 39.2 above) of the amount which, but for the provisions of this Clause 39, would otherwise be capable of being released as a Distribution and/or a Surplus Payment on or about the date of the Refinancing;

39.5.2 a reduction in the Unitary Charge over the remaining term of the Agreement; or

39.5.3 a combination of any of the above.

**39.6 Negotiations in Good Faith**

The Contracting Authority and the Company shall negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain (including any Margin Gain) and payment of the Contracting Authority's share of the Refinancing Gain (taking into account how the Contracting Authority has elected to receive its share of the Refinancing Gain under Clause 39.5 (the Contracting Authority's Election for Payment of Share) above). If the Parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Contracting Authority's share, the dispute shall be determined in accordance with Schedule 7 (Dispute Resolution Procedure).

**39.7 Professional Cost**

The Refinancing Gain (including any Margin Gain) shall be calculated after taking into account any breakage costs necessary to facilitate the Qualifying Refinancing together with the reasonable and proper professional costs that each Party directly incurs in relation to the

Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Contracting Authority will be paid to the Contracting Authority by the Company within twenty eight (28) days of any Qualifying Refinancing. Such costs shall be allocated pro rata as between the Margin Gain (if any) and the Refinancing Gain net of Margin Gain.

**39.8 Notifiable Financings**

Without prejudice to the other provisions of this Clause 39, the Company shall (a) notify the Contracting Authority of all Notifiable Financings on becoming aware of the same and again when they are entered into and provide full details of the same and (b) include a provision in the Financing Agreements (other than the Subordinated Financing Agreements) whereby it is entitled to be informed of any proposals which the Senior Lenders may have to refinance the Financing Agreements (other than the Subordinated Financing Agreements).

**39.9 Breach by the Company**

If the Company wilfully breaches this Clause 39 then the Contracting Authority may terminate this Agreement in accordance with Clause 39.10 below.

**39.10 Notice of Termination**

If the Contracting Authority wishes to terminate this Agreement under this Clause 39, it must first give the Company written notice stating:

39.10.1 that the Contracting Authority is terminating this Agreement under this Clause 39;  
and

39.10.2 that this Agreement will terminate on the date falling thirty days after the receipt of the notice.

**39.11 Date of Termination**

Subject to Clause 39.9, this Agreement will terminate on the date falling thirty (30) days after the receipt of the notice referred to in Clause 39.10 above.

**39.12 Compensation**

On termination of the Agreement in accordance with this Clause 39, the provisions of Part 3 of Schedule 11 (Termination Compensation) shall apply.

**40. CONTRACTING AUTHORITY STEP-IN****40.1 Reason for Step-In**

If the Contracting Authority reasonably believes that it needs to take action in connection with the O&M Works:

40.1.1 because a serious risk exists to the health or safety of persons, or property or to the environment; or

40.1.2 to discharge a statutory duty,

then the Contracting Authority shall be entitled to take action in accordance with Clauses 40.2 (Notify Company) to 40.5 (Company in Breach) below.

**40.2 Notify Company**

If Clause 40.1 (Reason for Step-In) applies and the Contracting Authority wishes to take action, the Contracting Authority shall notify the Company in writing of the following:

40.2.1 the action it wishes to take;

40.2.2 the reason for such action;

40.2.3 the date it wishes to commence such action;

40.2.4 the time period which it believes will be necessary for such action; and

40.2.5 to the extent practicable, the effect on the Company and its obligation to carry out the Operations during the period such action is being taken.

**40.3 Action by the Contracting Authority**

40.3.1 Following service of such notice, the Contracting Authority shall take such action as notified under Clause 40.2 (Notify Company) above and any consequential additional action as it reasonably believes is necessary (together, the **Required Action**) and the Company shall give all reasonable assistance to the Contracting Authority while it is taking such Required Action.

40.3.2 In carrying out the Required Action, the Contracting Authority shall act in accordance with Good Industry Practice.

**40.4 Company Not in Breach**

If the Company is not in breach of its obligations under the Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Company from carrying out any part of the Operations:

40.4.1 the Company shall be relieved from its obligations to carry out such part of the Operations; and

40.4.2 in respect of the period in which the Contracting Authority is taking the Required Action and provided that the Company provides the Contracting Authority with reasonable assistance (such assistance to be at the expense of the Contracting Authority to the extent incremental costs are incurred), the Unitary Charge due from the Contracting Authority to the Company shall equal the amount the Company would receive if it were satisfying all its obligations and providing the Operations affected by the Required Action in full over that period.

**40.5 Company in Breach**

If the Required Action is taken as a result of a breach of the obligations of the Company under the Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Company from providing any part of the Operations:

40.5.1 the Company shall be relieved of its obligations to provide such part of the Operations; and

40.5.2 in respect of the period in which the Contracting Authority is taking the Required Action, the Unitary Charge due from the Contracting Authority to the Company shall equal the amount the Company would receive if it were satisfying all its obligations and providing the Operations affected by the Required Action in full over that period, less an amount equal to all the Contracting Authority's costs of operation in taking the Required Action.

**40.6 Step Out**

40.6.1 The Contracting Authority shall give the Company such notice as is reasonable in the circumstances if the Contracting Authority considers that the Required Action is no longer required or has been completed.

40.6.2 The Contracting Authority shall ensure that on the expiry of the notice served under Clause 40.6.1 the Sites and the Project Roads shall be in no worse condition than they were immediately before the Required Action was taken.

#### 40.7 **Indemnity**

40.7.1 The Contracting Authority shall indemnify the Company and keep the Company indemnified in full from and against all liability, losses, damages, injury, claims, costs and expenses which may arise out of the Contracting Authority taking any Required Action where in taking the Required Action the Contracting Authority has failed to act in accordance with Good Industry Practice.

### 41. **TERMINATION ON COMPANY DEFAULT**

#### 41.1 **Termination Notice**

If a Company Default has occurred and the Contracting Authority wishes to terminate the Agreement, it must serve a Termination Notice on the Company.

#### 41.2 **Detail in Termination Notice**

The Termination Notice must specify:

41.2.1 the type and nature of Company Default that has occurred, giving reasonable details; and

41.2.2 that in the case of any Company Default falling within the limbs (a), (g), (h) and (k) of the definition of Company Default this Agreement will terminate on the day falling sixty days after the date the Company received the Termination Notice, unless:

(a) in the case of a breach under limb (a) of the definition of Company Default the Company puts forward an acceptable rectification programme within thirty days after the Company receives the Termination Notice (and implements such programme in accordance with its terms and rectifies the Company Default in accordance with the rectification programme); or

(b) in the case of any Company Default falling within the limbs (a), (g), (h) and (k) of the definition of Company Default the Company rectifies the Company Default within sixty (60) days after the date the Company receives the Termination Notice; or

41.2.3 that in the case of any other Company Default (not being limbs (a), (g), (h) and (k)), this Agreement will terminate on the date falling thirty days after the date the Company receives the Termination Notice.

#### **41.3 Revocation of Termination Notice**

If the Company either rectifies the Company Default within the time period specified in the Termination Notice or implements the rectification programme, if applicable, in accordance with its terms, the Termination Notice will be deemed to be revoked and the Agreement will continue.

#### **41.4 Termination on Failure to Rectify**

If:

41.4.1 in the case of a Company Default within limb (a) of the definition of that term no acceptable rectification programme has been put forward pursuant to Clause 41.2.2(a) and the Company fails to rectify the Company Default within the time period specified in the Termination Notice; or

41.4.2 in the case of a Company Default falling within limbs (g), (h) or (k) of the definition of Company Default, the Company fails to rectify the Company Default within the time period specified in the Termination Notice,

the Contracting Authority may give notice stating that the Agreement will, subject to the terms of the Direct Agreement, terminate on the date falling seven days after the date of receipt of such notice.

#### **41.5 Termination on Failure to Implement Rectification Programme**

If the Company fails to implement any rectification programme in accordance with its terms, the Agreement will, subject to the terms of the Direct Agreement, terminate on the date falling seven days after the date of notification by the Contracting Authority to the Company of such failure to implement the rectification programme in accordance with its terms.

#### **41.6 No Event of Default**

No Company Default shall be deemed to have occurred and the Contracting Authority shall have no right to terminate this Agreement to the extent that the acts or omissions of the Company are directly attributable to a Compensation Event, a Relief Event, or a Force Majeure Event.

**41.7 Compensation on Termination for Company Default**

Subject to Clauses 39 and 47, on termination of the Agreement under this Clause 41, the provisions of Part 4 of Schedule 11 (Termination Compensation) shall apply.

**42. TERMINATION ON CONTRACTING AUTHORITY DEFAULT****42.1 Termination Notice**

If a Contracting Authority Default has occurred and the Company wishes to terminate the Agreement, it must serve a termination notice on the Contracting Authority within forty five (45) days of becoming aware of Contracting Authority Default.

**42.2 Detail in Termination Notice**

The termination notice must specify the type of Contracting Authority Default which has occurred entitling the Company to terminate.

**42.3 Termination Date**

The Agreement will terminate on the day falling forty five (45) days after the date the Contracting Authority receives the termination notice, unless the Contracting Authority rectifies the Contracting Authority Default within thirty (30) days of receipt of the termination notice.

**42.4 Compensation on Termination for Contracting Authority Default**

On termination of the Agreement under this Clause 42, the provisions of Part 1 of Schedule 11 (Termination Compensation) shall apply.

**43. PERSISTENT BREACH****43.1 Persistent Breach Warning Notice**

If:

43.1.1 during the New Works Period a particular breach that (i) results in a risk to the health or safety of persons or property or (ii) has or risks having a significant negative impact on the environment; or

43.1.2 during the Service Period a particular breach (other than one for which Performance Deductions could have been made),



has continued for more than (20) Business Days or has occurred more than four (4) times in any twelve (12) month period then the Contracting Authority may serve a notice (**Persistent Breach Warning Notice**) on the Company:

43.1.3 specifying that it is a formal warning notice;

43.1.4 giving reasonable details of the breach; and

43.1.5 stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Agreement.

#### 43.2 **Persistent Breach Final Notice**

If, following service of a Persistent Breach Warning Notice, the breach specified has continued beyond twenty (20) Business Days or recurred in two (2) or more months within the six (6) month period after the date of service, then the Contracting Authority may serve a Persistent Breach Final Notice on the Company:

43.2.1 specifying that it is a Persistent Breach Final Notice;

43.2.2 stating that the breach specified has been the subject of a warning notice served within the twelve (12) month period prior to the date of service of the Persistent Breach Final Notice; and

43.2.3 stating that if such breach continues for more than (20) Business Days or recurs in three (3) or more months within the six (6) month period after the date of service of the Persistent Breach Final Notice, the Agreement may be terminated.

#### 43.3 **Limitation on Service of Persistent Breach Warning Notice**

A Persistent Breach Warning Notice may not be served in respect of any breach which has previously been counted in the making of a separate Persistent Breach Warning Notice.

### 44. **FORCE MAJEURE**

#### 44.1 **No Claims**

No Party shall be entitled to bring a claim for a breach of obligations under the Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt (but without prejudice to Clauses 44.5 or 44.7), the Contracting Authority shall not be entitled to

terminate this Agreement for a Company Default if such Company Default arises from a Force Majeure Event.

#### 44.2 **Deductions**

Nothing in Clause 44.1 above shall affect any entitlement to make Performance Deductions or any Performance Deductions made in the period during which the Force Majeure Event is subsisting.

#### 44.3 **Notify**

On the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

#### 44.4 **Parties to Discuss**

As soon as practicable following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the Agreement.

#### 44.5 **Ability to Terminate**

If no such terms are agreed on or before the date falling one hundred and twenty (120) days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Agreement for a period of more than one hundred and eighty (180) days, then, subject to Clause 44.6, either Party may terminate the Agreement by giving thirty (30) days' written notice to the other Party.

#### 44.6 **Consequences of Termination**

If the Agreement is terminated under Clause 44.5 (Ability to Terminate) or Clause 44.7:

44.6.1 compensation shall be payable by the Contracting Authority in accordance with Clause 44.10; and

44.6.2 the Contracting Authority may require the Company to transfer its right, title and interest in and to any Assets to the Contracting Authority.

**44.7 Company Notice of Termination**

If the Company gives notice to the Contracting Authority under Clause 44.5 that it wishes to terminate the Agreement, then the Contracting Authority has the option either to accept such notice or to respond in writing on or before the date falling ten (10) days after the date of its receipt stating that it requires the Agreement to continue. If the Contracting Authority gives the Company such notice, then:

44.7.1 the Contracting Authority shall pay to the Company the Unitary Charge from the day after the date on which the Agreement would have terminated under Clause 44.5 as if the Operations were being fully provided; and

44.7.2 the Agreement will not terminate until expiry of written notice (of at least thirty (30) days) from the Contracting Authority to the Company that it wishes the Agreement to terminate.

**44.8 Mitigation**

The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Company shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

**44.9 Cessation of Force Majeure Event**

The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification the Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

**44.10 Compensation on Termination for Force Majeure**

On termination of the Agreement under Clause 44.5, the Contracting Authority shall pay to the Company the Force Majeure Termination Sum in accordance with Part 2 of Schedule 11 (Termination Compensation).

**45. CORRUPT GIFTS AND FRAUD****45.1 Company Warranty**

The Company warrants that in entering into this Agreement it has not committed any Prohibited Act.

**45.2 Powers of the Contracting Authority**

If the Company or any Shareholder in the Company, Sub-Contractor (or anyone employed by or acting on behalf of any of them) or any of its or their agents commits any Prohibited Act, then the Contracting Authority shall be entitled to act in accordance with Clauses 45.3 to 45.7 below.

**45.3 Termination Following Action of Company**

If a Prohibited Act is committed by the Company or by an employee not acting independently of the Company, then the Contracting Authority may terminate the Agreement by giving notice to the Company.

**45.4 Termination Following Action of Company's Employee Acting Independently**

If the Prohibited Act is committed by an employee of the Company acting independently of the Company, then the Contracting Authority may give notice to the Company of termination and the Agreement will terminate, unless within thirty (30) days of receipt of such notice the Company terminates the employee's employment and (if necessary) procures the performance of such part of the Operations by another person.

**45.5 Termination Following Action of Sub-Contractor**

If the Prohibited Act is committed by a Sub-Contractor or by an employee of that Sub-Contractor not acting independently of that Sub-Contractor, then the Contracting Authority may give notice to the Company of termination and the Agreement will terminate, unless within thirty (30) days of receipt of such notice the Company terminates the relevant Project Document and procures the performance of such part of the Operations by another person.

**45.6 Termination Following Action of Sub-Contractor's Employee Acting Independently**

If the Prohibited Act is committed by an employee of a Sub-Contractor acting independently of that Sub-Contractor, then the Contracting Authority may give notice to the Company of termination and the Agreement will terminate, unless within thirty (30) days of receipt of

such notice the Sub-Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Operations by another person.

**45.7 Termination Following Action of Third Party**

If the Prohibited Act is committed by any other person not specified in Clauses 45.3 to 45.6 above, then the Contracting Authority may give notice to the Company of termination and the Agreement will terminate unless within thirty (30) days of receipt of such notice the Company procures the termination of such person's employment and of the appointment of their employer (where not employed by the Company or the Sub-Contractors) and (if necessary) procures the performance of such part of the Operations by another person.

**45.8 Termination Notice**

Any notice of termination under this Clause shall specify:

45.8.1 the nature of the Prohibited Act;

45.8.2 the identity of the Party whom the Contracting Authority believes has committed the Prohibited Act;

45.8.3 the date on which the Agreement will terminate, in accordance with the applicable provisions of this Clause; and

45.8.4 the Contracting Authority's chosen option under Clause 45.9.

**45.9 Compensation on Termination for Corrupt Gifts and Fraud**

On termination of the Agreement in accordance with this Clause 45, then the provisions of Part 3 of Schedule 11 (Termination Compensation) shall apply.

**46. VOLUNTARY TERMINATION BY THE CONTRACTING AUTHORITY**

**46.1 The Contracting Authority's Ability to Terminate**

The Contracting Authority may terminate the Agreement at any time before its Expiry Date by complying with its obligations under Clauses 46.2 to 46.4 below.

**46.2 Notice of Termination**

If the Contracting Authority wishes to terminate the Agreement under this Clause, it must give notice to the Company stating:

46.2.1 that the Contracting Authority is terminating the Agreement under this Clause 46;

46.2.2 that the Agreement will terminate on the date specified in the notice, which must be a minimum of thirty (30) days after the date of receipt of the notice; and

46.2.3 whether the Contracting Authority has chosen to exercise its option under Clause 46.3 below.

**46.3 Assets**

On termination, the Contracting Authority shall have the option to require the Company to transfer its rights, title and interest in and to the Assets to the Contracting Authority or as directed by the Contracting Authority.

**46.4 Termination Date**

The Agreement will terminate on the date specified in the notice referred to in Clause 46.2 above.

**46.5 Compensation on Voluntary Termination**

On termination under Clause 46.4 above, the provisions of Part 1 of Schedule 11 (Termination Compensation) shall apply.

**47. TERMINATION ON BREACH OF NPD REQUIREMENTS****47.1 Breach by the Company**

If the Company breaches Clause 57 (Payment of Surpluses and Compliance with NPD Requirements) then the Contracting Authority may terminate this Agreement at any time within eighteen (18) months of becoming aware of such breach in accordance with Clause 47.2 below. The Contracting Authority shall inform the Company of the occurrence of any such breach as soon as reasonably practicable after becoming aware of the breach, provided that failure by the Contracting Authority to so inform the Company shall not constitute a breach of this Agreement by the Contracting Authority and shall not prejudice the exercise of its rights under Clause 47.2.

**47.2 Notice of Termination**

If the Contracting Authority wishes to terminate this Agreement under this Clause 47.2, it must first give the Company written notice stating:

47.2.1 that the Contracting Authority is terminating this Agreement under this Clause 47;  
and

47.2.2 that this Agreement will terminate on the date falling thirty (30) days after the receipt of the notice,

and this Agreement will terminate on the date falling thirty (30) days after the Company receives the notice unless the Company demonstrates to the satisfaction of the Contracting Authority (acting reasonably) that such breach was caused by an administrative error of the Company and the Company rectifies such breach within ten (10) days of receipt of such notice, in which case the notice shall be deemed not to have been served.

**47.3 Compensation**

On termination of the Agreement in accordance with this Clause 47, then the provisions of Part 3 of Schedule 11 (Termination Compensation) shall apply.

**48. CONSEQUENCES OF TERMINATION****48.1 Handover**

Without prejudice to any other provision of this Agreement, including without limitation the provisions of Schedule 4 (O&M Works Requirements) on the termination of this Agreement (irrespective of the cause) the Company shall:

48.1.1 within twenty (20) Business Days of the date of termination remove from the Sites all Plant not yet incorporated in the New Works, materials, Constructional Plant, temporary buildings, vehicles, and other property belonging to the Company, its agents, contractors (including the New Works Contractor and the O&M Works Contractor) and sub-contractors and over which it has power of disposal, failing which the Contracting Authority and/or the Scottish Ministers shall be entitled to remove and sell any such property subject to paying to the Company any sale proceeds less all costs and expenses reasonably incurred by the Contracting Authority in such removal and sale;

48.1.2 thereafter immediately vacate the Sites (insofar as occupied by the Company or its contractors or sub-contractors at the date of termination) and leave the Sites (to the extent that the Company is entitled to occupy them at the date of termination):

- (a) in a condition consistent in all respects with performance of the Company's obligations under this Agreement relating thereto; and
- (b) in the event of termination of this Agreement prior to the Expiry Date, in a condition consistent in all respects with Good Industry Practice; and

48.1.3 deliver to the Contracting Authority or its nominee:

- (a) all outstanding records, drawings and information which the Company is obliged to deliver to the Contracting Authority from time to time under this Agreement up to the date of termination including without limitation (to the extent that the New Works have been completed) as built drawings of all New Works carried out in the performance of the Operations and all O&M Manuals, only insofar as the Company has or can reasonably obtain the same;
- (b) keys to all traffic sign housings held by the Company; and
- (c) lifting keys for all types of chamber covers held by the Company.

#### 48.2 **Legal Effect of Termination**

On termination of this Agreement (irrespective of the cause) the obligations of the Company and the Contracting Authority hereunder shall cease, other than under Clauses 51 (Indemnity), 58 (Confidentiality), 63 (Intellectual Property Rights) and Schedule 11 (Termination Compensation) and any other Clauses which expressly or necessarily provide for continuing obligations or which are required to give effect to such termination or the consequences of such termination, and in any case subject to the accrued rights and liabilities (including the right to refer disputes to the Dispute Resolution Procedure) of the Contracting Authority, the Scottish Ministers and the Company in respect of any antecedent breaches as at the date of termination.

#### 48.3 **Assignment of Agreements**

To the extent required by the Contracting Authority, on or prior to termination of this Agreement (irrespective of the cause), the Company shall immediately upon instruction of the Contracting Authority, assign or novate, or procure the assignment or novation of any of



the Company's interests, in any of the following agreements to the Contracting Authority or its nominee:

- 48.3.1 any agreement for the supply of any goods or materials and/or for the execution of any work or provision of any services in connection with performance of the Operations which the Company may have entered into insofar as such agreement is capable of assignation; and
- 48.3.2 any warranties or guarantees in respect of any works carried out by the Company as part of the Operations.

This Clause 48.3 shall not apply in respect of the New Works Agreement and the O&M Works Agreement.

#### 49. **FINAL SURVEY**

##### 49.1 **Final Survey**

Thirty (30) months prior to the Expiry Date, the Contracting Authority shall be entitled to carry out or procure the carrying out of a final survey of the Handback Assets to assess whether they have been and are being maintained by the Company in accordance with the Handback Requirements. The final survey shall be carried out by a suitably qualified and experienced surveyor employed jointly by the Parties.

##### 49.2 **Seasonal Survey**

Where the final survey includes any inspection of mature trees, areas of tree and shrub planting, areas of grassland or areas of habitat creation the Parties shall have regard to the provisions of paragraph 2.4.3 of Part 3 of Schedule 4 (O&M Works Requirements).

##### 49.3 **Notification of Survey**

The Contracting Authority shall notify the Company in writing a minimum of five (5) Business Days in advance of the date it wishes to carry out the final survey and shall afford the Company reasonable opportunity to attend. The Contracting Authority shall consider in good faith any reasonable request by the Company for the final survey to be carried out on a different date if such request is made at least two (2) Business Days prior to the notified date and the Company (acting reasonably) is able to demonstrate that carrying out the final survey on the notified date would materially prejudice the Company's ability to provide the O&M Works.

#### 49.4 **Minimise Disruption**

When carrying out the final survey, the Contracting Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the O&M Works by the Company. The Company shall afford the Contracting Authority (free of charge) any reasonable assistance required by the Contracting Authority during the carrying out of the final survey. The cost of the final survey shall be borne by the Contracting Authority.

#### 49.5 **Results of Survey**

If the final survey shows that the Company has not complied with or is not complying with the Handback Requirements, the Contracting Authority shall:

49.5.1 issue a notice to the Company containing the information set out in paragraph 2.4.1 of Part 3 of Schedule 4 (O&M Works Requirements); and

49.5.2 recover the cost of the survey from the Company by means of a withdrawal from the Retention Fund Account or a deduction from the next Unitary Charge.

#### 49.6 **Retention Fund**

If the Company has been notified under Clause 49.5.1 that Renewal Works are required and those Renewal Works have not been carried out to the Contracting Authority's reasonable satisfaction, then twenty four (24) months prior to the Expiry Date the Contracting Authority shall deduct the Required Amount from the next following instalment (or, where such deduction is insufficient, from the next instalments as necessary) of Unitary Charge and pay such amount into an interest bearing account (the **Retention Fund Account**).

#### 49.7 **Handback Certificate**

When the Company is of the opinion that it has complied with all the Handback Requirements and carried out the Renewal Works it shall issue a certificate to the Contracting Authority stating that it considers that the Handback Requirements have been met (a **Handback Certificate**). The Company shall afford the Contracting Authority such reasonable opportunities as it may require to confirm the validity of the Handback Certificate in accordance with paragraph 2.5 of Part 3 of Schedule 4.

#### 49.8 **Costs**

If and to the extent that the Company carries out the Renewal Works to the Contracting Authority's reasonable satisfaction within the period specified in the revised Renewal

Programme produced in accordance with paragraph 2.4.2 of Part 3 of Schedule 4, the Contracting Authority shall reimburse the Company's costs of so doing no later than ten (10) Business Days after the date of agreement of the Handback Certificate by withdrawing amounts from the Retention Fund Account. If the amount in the Retention Fund Account is insufficient to cover the Company's costs, the Company shall bear the balance of its costs itself.

**49.9 Failure to Carry Out Work**

If and to the extent that the Company fails to carry out the Renewal Works to the Contracting Authority's reasonable satisfaction within the period specified in the revised Renewal Programme referred to in Clause 49.8, the Contracting Authority shall be entitled to carry out itself, or procure, the Renewal Works at the Company's expense and shall make withdrawals from the Retention Fund Account to pay for such Renewal Works or, where there are insufficient funds in the Retention Fund Account, make deductions from the Unitary Charge to pay for such.

**49.10 Balance of Fund**

If:

49.10.1 the Renewal Works identified by the Contracting Authority have been carried out to the Contracting Authority's reasonable satisfaction;

49.10.2 all such work has been paid for by the Company or, where the Contracting Authority have carried out or procured the carrying out of the works pursuant to Clause 49.8, by the Contracting Authority; and

49.10.3 no termination notice given in accordance with this Agreement is outstanding,

then the Contracting Authority shall pay any credit balance on the Retention Fund Account to the Company as soon as practicable and in any event within fifteen (15) Business Days.

**50. TRANSITION TO ANOTHER COMPANY**

**50.1 Duty to Co-operate**

During the final twelve (12) months of the Contract Period (where this expires by effluxion of time) or during the period of any notice of termination of this Agreement or termination of any of the Operations, and in any case for a period of twelve (12) months thereafter, the Company shall co-operate fully with the transfer of responsibility for the Operations (or any

of the Operations) to any new contractor or other entity of such operations the same or similar to the Operations (**New Company**), and for the purposes of this Clause 50 the meaning of the term **co-operate** shall include:

- 50.1.1 liaising with the Contracting Authority and/or any New Company, and providing reasonable and timely assistance and advice concerning the Operations and its transfer to the Contracting Authority or to such New Company;
- 50.1.2 complying with any instructions given by the Contracting Authority pursuant to Clause 49.3 or 49.4 of this Agreement;
- 50.1.3 allowing the Contracting Authority or any such New Company access (at reasonable times and on reasonable notice) to the Project Roads but not so as to interfere with or impede the provision of the Operations;
- 50.1.4 providing to the Contracting Authority and/or to any New Company, all and any information concerning the Sites and the Operations which is required for the efficient transfer of responsibility for their performance; and
- 50.1.5 making its sub-contractors like bound by the provision of Clauses 50.1 and 50.2 with a third party right of direct enforcement by the Contracting Authority.

## 50.2 **Transfer of Responsibility**

The Company shall use all reasonable endeavours so as to facilitate the smooth transfer of responsibility for the Operations to a New Company or to the Contracting Authority, as the case may be, and the Company shall take no action at any time during the Contract Period or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer.

## 50.3 **Minimise Disruption**

The Company shall take all reasonable steps and shall co-operate fully with the Contracting Authority and any New Company so that any continuation in the Operations is achieved with the minimum of disruption and so as to prevent or mitigate any inconvenience or risk to health and safety of the employees of the Contracting Authority and members of the public.

**50.4 Treatment of Assets at Expiry Date**

50.4.1 On or before a date falling no later than twelve (12) months prior to the Expiry Date the Contracting Authority shall notify the Company in writing whether it wishes to retender the provision of the Operations.

50.4.2 If the Contracting Authority wishes to retender the provision of the Operations (or any elements thereof) then:

- (a) the Company shall do all necessary acts (including entering into any contracts) to ensure that the successor contractor obtains all of its rights, title and interest in and to the Assets with effect on and from the Expiry Date;
- (b) the Company shall comply with any instructions given by the Contracting Authority pursuant to Clause 48.3 of this Agreement; and
- (c) the Contracting Authority will bear all costs of any retendering of the Agreement on expiry.

50.4.3 If the Contracting Authority does not wish to retender the Operations then the Assets shall transfer to the Contracting Authority on the Expiry Date and the Company shall do any necessary acts (including entering into any contracts) to ensure that the Contracting Authority obtains all of its rights, title and interest in the Assets with effect on and from the Expiry Date.

**50.5 Accrued Rights**

The termination of this Agreement howsoever arising is without prejudice to the rights, duties and liabilities of either Party accrued prior to the events giving rise to termination. The Clauses of this Agreement which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination.

**51. INDEMNITY****51.1 Company's Indemnity**

The Company shall, subject to Clause 51.2, be responsible for, and shall release and indemnify the Contracting Authority and the Scottish Ministers, their employees, agents and contractors on demand from and against, all liability for:

51.1.1 death or personal injury;

51.1.2 loss of or damage to property (including property belonging to the Contracting Authority and/or the Scottish Ministers or for which the Contracting Authority and/or the Scottish Ministers are responsible but excluding Project Roads (**Contracting Authority Property**));

51.1.3 breach of statutory duty;

51.1.4 actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis); and

51.1.5 any claim made against the Contracting Authority and/or Scottish Ministers for Losses arising as a consequence of a breach by the Company of Clause 7.3 (Third Party Rights),

which may arise out of, or in consequence of, the Operations or maintenance of any Assets or the performance or non-performance by the Company of its obligations under this Agreement (including without limitation where such performance or non-performance by the Company of its obligations under this Agreement causes the Scottish Ministers to be in breach of any of their obligations under the Rail Overbridge Agreement and/or the Pipeline Agreements or either of them) or the presence on the Contracting Authority's Property of the Company, a Company Related Party, their employees or agents.

**51.2 Company Not Responsible under Clause 51.1**

The Company shall not be responsible or be obliged to indemnify the Contracting Authority or the Scottish Ministers under Clause 51.1 or elsewhere in the Agreement for:

51.2.1 any of the matters referred to in Clauses 51.1.1 to 51.1.4 above which arises as a direct result of the Company acting on the instruction of the Contracting Authority;  
or

- 51.2.2 any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Contracting Authority, its employees, agents or contractors or by the breach by the Contracting Authority of its obligations under this Agreement;
- 51.2.3 any claims (other than claims arising as a consequence of any breach by the Company of Clauses 12.4.11 and/or 12.4.12) made under Clause 51.1.4 in excess of £[REDACTED] in excess of the Limits of Indemnity specified in Parts 1 and 2 to Schedule 10;
- 51.2.4 demands, claims, liabilities, damages (whether arising in contract or delict), expenses and costs relating to or arising from loss of or damage to a Pipeline (as defined in each Pipeline Agreement) or any part of it (including repairs, replacement and removal of any debris) caused by or arising out of the performance, misperformance or non-performance of the Operations (**Pipeline Claims**) to the extent that the Company's Uninsured Losses in respect thereof exceed:
- (a) £[REDACTED] in aggregate during the New Works Period;
  - (b) £[REDACTED] (Indexed) per annum during the Service Period;  
and
  - (c) £[REDACTED] (Indexed) in aggregate during the Service Period;

and provided that the Contracting Authority shall indemnify and keep indemnified the Company and any Company Related Party for Pipeline Claims made by third parties (in delict or otherwise) to the extent that the Company's Uninsured Losses in respect of such claims, when aggregated with claims made by the Contracting Authority and/or the Scottish Ministers as contemplated by this Clause 51.2.4, exceed the limits stated in this Clause 51.2.4;

and for the purposes of this Clause 51.2.4, **Uninsured Losses** means any action, claim, demand, cost, charge, expense and/or loss which:

- (a) is not covered by the scope of the Pipeline Insurances including by reason of the period for claims under the relevant insurance having expired;
- (b) exceeds the maximum sum insured under any Pipeline Insurances;
- (c) is not recoverable under the Pipeline Insurance as a result of the relevant Pipeline Insurance being cancelled or the insolvency of the insurer; and/or

- (d) is not recoverable under the Pipeline Insurance as a result of the insurers withholding payment under the relevant policy;

provided always that Uninsured Losses shall not include demands, claims, liabilities, damages expenses and costs which would have been covered under the Pipeline Insurance but for a Vitiating Act by the Company or any Company Related Party or a wilful or negligent failure by the Company or any Company Related Party to procure the relevant Pipeline Insurance;

51.2.5 any liability or compensation payable to third parties as a consequence of the acquisition by the Contracting Authority of land and rights necessary for the Contracting Authority to comply with its obligations to provide the Access Rights, other than where such liability or compensation arises as a consequence of any act or omission of the Company or any Company Related Party; or

51.2.6 any breach by the Contracting Authority or the Scottish Ministers of Legislation unless such breach is wholly or partly caused by an act or omission of the Company or any Company Related Party.

### 51.3 Pipeline Claims

51.3.1 In the event of a Pipeline Claim, and only to the extent that to do so would not prejudice the Contracting Authority from making a claim under any of the Pipeline Insurances and/or the terms of this Agreement, the Contracting Authority shall use all reasonable endeavours to recover under the Pipeline Insurances prior to enforcing that Pipeline Claim against the Company pursuant to this Clause 51.

51.3.2 In the event of a Pipeline Claim which is, as between the Parties, settled pursuant to Clauses 51.1 and 51.2.4 prior to insurance proceeds in respect thereof being received, the Parties agree to apply any insurance proceeds subsequently received in respect of that Pipeline Claim in a manner which would place the Parties in the same position as they would have been had the relevant insurance proceeds been received prior to the Parties' liabilities under Clauses 51.1 and 51.2.4 in respect of that Pipeline Claim being settled. Following any application of proceeds in accordance with this Clause 51.3.2, the Parties shall (acting reasonably) agree an appropriate allocation of the costs incurred in making recovery from the relevant insurances, if any, and where such agreement is not achieved within 20 Business Days of the application of proceeds, either Party may refer the matter for resolution in accordance with Clause 60 (Dispute Resolution Procedure).



51.3.3 The Company shall notify the Contracting Authority immediately on becoming aware that any Uninsured Losses have arisen or are likely to arise or that there is likely to be an occurrence of Pipeline Insurance Unavailability (as defined below).

51.3.4 Where any Pipeline Insurance has ceased to be available on the same terms as the Required Insurances (including where any risk covered by that Pipeline Insurance has become Uninsurable) or has been cancelled (in either case, **Pipeline Insurance Unavailability**):

- (a) the Company shall notify the Contracting Authority immediately on becoming aware of the same (such notification being a **Pipeline Insurance Unavailability Notice**);
- (b) within 5 Business Days of the date of the Pipeline Insurance Unavailability Notice, the Parties shall meet to discuss the means by which the relevant risk shall be managed; and
- (c) where the Parties have failed to reach agreement on how the relevant risk will be managed within 20 Business Days of the aforementioned meeting or where, in respect of the period between the Contracting Authority receiving a Pipeline Insurance Unavailability Notice and the expiry of that 20 Business Day period, a Pipeline Claim is made, the Contracting Authority shall elect either to:
  - (i) terminate this Agreement pursuant to Clause 51.3.6; or
  - (ii) allow the Agreement to continue and on the occurrence of any Pipeline Claim following issue of the Pipeline Insurance Unavailability Notice, pay to the Company an amount equal to the insurance proceeds that would have been payable had the relevant Pipeline Insurance continued to be available on the same terms as the Required Insurances minus the premium paid or payable in respect of said insurance and Clause 55.2.3 shall apply mutatis mutandis,

and where this Agreement continues the Company shall, subject to Clause 51.3.7 and whatever agreement is reached under limb (b) of this Clause 51.3.4, be relieved of its obligation to maintain insurance in respect of the relevant risk.

51.3.5 Subject to Clause 51.2.4 and without prejudice to Clause 51.3.4, where a Pipeline Insurance Unavailability Notice is provided and the insurance to which that notice pertains is required in respect of the remediation of defects in the New Works following issue of the relevant Permit to Use, the Company shall be responsible for the cost of procuring the Pipeline Insurance and any reasonable additional costs associated with managing the relevant risk in each case on such terms as have been agreed pursuant to Clause 51.3.4(b). The Company's obligation to meet the cost of insurance in this Clause 51.3.5 shall not apply to the extent that the insurance premium payable for insuring the relevant risk is at such a level that the risk is not generally being insured against in the worldwide insurance market by contractors in the United Kingdom.

51.3.6 Clause 51.2.4 and Clauses 51.3.3 to 51.3.7 (inclusive) shall operate to the exclusion of (and not subject to) Clause 55 (Uninsurable Risks) and Clause 56 (Terms and Conditions which become Uninsurable), provided that:

- (a) where the Contracting Authority elects to terminate this Agreement in accordance with Clause 51.3.4(c)(i); and
- (b) the relevant risk has become Uninsurable; and
- (c) the conditions specified in Clause 55.1.2 (Risks become Uninsurable) have been satisfied (the Company having been given reasonable opportunity to demonstrate the same),

the Contracting Authority shall pay the Company an amount equal to the Force Majeure Termination Sum or, where the Pipeline Insurance Unavailability has arisen as a consequence of an act or omission of the Company or a Company Related Party, an amount calculated in accordance with Clause 45.9 (Compensation on Termination for Corrupt Gifts and Fraud), and this Agreement will terminate.

51.3.7 Following issue of a Pipeline Insurance Unavailability Notice and for so long as all or any Pipeline Insurances remain a requirement but have not been procured on the same terms as the Required Insurances, the Company shall approach the insurance market every month to establish if the relevant insurance on the same terms as the Required Insurances is available. As soon as the Company is aware and the Parties agree or it is determined pursuant to the Dispute Resolution Procedure that the relevant insurance on the same terms as the Required Insurances is available, the Company shall take out and maintain or procure the

taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) in accordance with this Agreement.

**51.4 No Limitation**

An indemnity by either Party under any provision of this Agreement shall be without limitation to any indemnity by that Party under any other provision of this Agreement.

**51.5 Notification of Claims**

Where either Party (the **Indemnified Party**) wishes to make a claim under this Agreement against the other (the **Indemnifying Party**), the Indemnified Party shall give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

**51.6 Conduct of Claims**

The Indemnifying Party may at its own expense and with the assistance and co-operation of the Indemnified Party have the conduct of the claim including its settlement and the Indemnified Party shall not, unless the Indemnifying Party has failed to resolve the claim within a reasonable period, take any action to settle or prosecute the claim.

**51.7 Costs of Claims**

The Indemnifying Party shall, if it wishes to have conduct of any claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the claim by the Indemnifying Party.

**51.8 Mitigation of Losses**

Each Party shall take all reasonable steps to mitigate any losses which are the subject matter of an indemnity under this Agreement.

**51.9 Human Rights**

51.9.1 The Contracting Authority and the Company shall at all times comply, and the Company shall procure the compliance of the Company Related Parties respectively, with the requirements of the Human Rights Act 1998 (the **1998 Act**) to the extent applicable to the Party in question and (subject to Clause 37 (Qualifying Change in Law) with any subsequent amendment or re-enactment thereof and all secondary legislation made under the 1998 Act or any subsequent amendment thereto or re-enactment thereof.

51.9.2 Each Party (the **first party**) shall indemnify the other against all losses, costs, expenses, damages, liabilities, demands, claims, actions or proceedings which may be incurred arising out of a breach of this Clause by the first party.

## 52. **INSURANCE**

### 52.1 **Requirement to Maintain Prior to Full Services Commencement**

The Company shall, prior to the Full Services Commencement Date, take out and maintain or procure the maintenance of: (i) the insurances described in Part 1 of Schedule 10 (Required Insurances); and (ii) any other insurances as may be required by law. These insurances must be effective in each case not later than the date on which the relevant risk commences. The Company shall provide to the Contracting Authority the Insurance Broker's Letter in respect of such insurances within five (5) Business Days of the requirement to take out such insurances coming into effect.

### 52.2 **Requirement to Maintain during Service Period**

The Company shall during the Service Period take out and maintain or procure the maintenance of the insurances described in Part 2 of Schedule 10 (Required Insurances) and any other insurances as may be required by Legislation.

### 52.3 **Obligation on Parties**

No Party shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured or additional insured person.

### 52.4 **Nature of Insurances**

With the exception of any insurances required by law the insurances referred to in Clauses 52.1 and 52.2 shall:

52.4.1 subject to Clause 52.5 below, name the Company as co-insured with any other party maintaining the insurance;

52.4.2 provide for non-vitiation protection in respect of any claim made by the Contracting Authority and the Scottish Ministers as co-insureds in accordance with Endorsement 2 in Part 3 of Schedule 10 (Required Insurances);

52.4.3 contain a clause waiving the insurers' subrogation rights against the Contracting Authority and the Scottish Ministers and their respective employees and agents in accordance with Endorsement 2 in Part 3 of Schedule 10 (Required Insurances);

52.4.4 provide for 30 days' prior written notice of their cancellation, non-renewal or amendment to be given to the Contracting Authority in accordance with Endorsement 1 in Part 3 of Schedule 10 (Required Insurances); and

52.4.5 in respect of the Physical Damage Policies provide for payment of any proceeds received by the Company to be applied in accordance with Clause 54 (Reinstatement).

#### **52.5 Co-Insured**

Wherever possible, the insurances referred to in Clauses 52.1 and 52.2 shall name the Contracting Authority and the Scottish Ministers as co-insureds for their separate interests.

#### **52.6 Evidence of Policies**

The Company shall provide to the Contracting Authority:

52.6.1 copies on request of all insurance policies referred to in Clauses 52.1 and 52.2 (together with any other information reasonably requested by the Contracting Authority relating to such insurance policies) and the Contracting Authority shall be entitled to inspect them during ordinary business hours; and

52.6.2 evidence that the premiums payable under all insurance policies have been paid and that the insurances are in full force and effect in accordance with the requirements of this Clause 52 and Schedule 10 (Required Insurances).

#### **52.7 Renewal Certificates**

Renewal certificates in relation to the insurances referred to in Clauses 52.1 and 52.2 shall be obtained as and when necessary and copies (certified in a manner acceptable to the Contracting Authority) shall be forwarded to the Contracting Authority as soon as possible but in any event on or before the renewal date.

#### **52.8 Breach**

If the Company is in breach of Clauses 52.1 and 52.2 above, the Contracting Authority may pay any premiums required to keep such insurance in force or itself procure such insurance and may in either case recover such amounts from the Company on written demand,

provided that if the default occurs in relation to Clause 52.2 the amount recoverable from the Company shall be the difference between the premiums that would have been payable had the Company taken out or continued to maintain the insurances referred to in Clause 52.2 and the premiums paid by the Contracting Authority to take out and maintain the said insurances.

#### 52.9 **Notification of Claims**

The Company shall give the Contracting Authority notification within thirty (30) days after any claim in excess of £[REDACTED] or incidents in excess of £[REDACTED] which, but for the application of the applicable policy excess, would be made on any of the insurance policies referred to in this Clause accompanied by full details of the incident giving rise to the claim. Immediate notification shall be given to the Contracting Authority in respect of fatalities.

#### 52.10

##### **Limit of Liability**

Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Company of its liabilities and obligations under this Agreement.

#### 52.11

##### **Premiums**

The insurance premiums in respect of the insurances referred to in Clauses 52.1 and 52.2 shall be the responsibility of the Company.

#### 52.12

##### **Contracting Authority Approval**

The insurance policies referred to in this Clause shall be effected with insurers approved by the Contracting Authority, such approval not to be unreasonably withheld or delayed.

#### 52.13

##### **Risk Management**

With effect from the Date of this Agreement, the Contracting Authority and the Company shall each designate or appoint an insurance and risk manager and notify details of the same to the other Party. Such persons shall:

52.13.1 be responsible for designating Party in all risk management matters ensuring compliance by that Party with this Clause 52;

52.13.2 advise and report to its appointing or designating Party on such matters; and

52.13.3 subject to Clause 57, ensure that any report provided or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the Parties.

**52.14 Claims**

The Company, where it is obliged to effect insurance under this Agreement, shall not bring any claim or action against the Contracting Authority or the Scottish Ministers in respect of any loss or damage in circumstances where the Company is able to recover such loss or damage under such insurance (or where it would have been able to recover such loss had it been complying with its obligations under this Agreement).

**52.15 Insured Sums**

The cover provided by Required Insurances shall be reviewed by the Company on a regular basis in order to ensure the Sum Insured in respect of each Required Insurance is at a level compliant with the requirements of Schedule 10.

**53. SERVICE PERIOD INSURANCES**

53.1 Subject to Clause 53.2, the Company may include the premiums paid by the Company to take out and maintain the Insurances set out in Part 2 of Schedule 10 (Required Insurances) in the Monthly Unitary Charge in accordance with paragraph 3.1.1 of Schedule 6 on the basis of the cost incurred by the Company and supported by an appropriate premium notices from the relevant insurer.

53.2 There shall be excluded from the premiums referred to in Clause 53.1 a sum equal to any portion of the premiums attributable to any issue or factor other than (i) circumstances generally prevailing in the relevant insurance market and (ii) circumstances attributable to the claims history or re-rating of the Scottish Ministers or the Contracting Authority.

53.3 The Company must comply with the provisions of Clauses 53.4 to 53.7 when placing or renewing the Service Period Insurances.

53.4 Not less than sixty (60) Business Days prior to the Full Services Commencement Date and each subsequent renewal date or expiry date of any long-term agreement in respect of each of the Service Period Insurances, the Company shall inform the Contracting Authority of the forthcoming requirement to place or renew any Service Period Insurance and provide either:

53.4.1 confirmation that an existing long-term agreement (entered into with the agreement of the Contracting Authority) is being maintained with no alterations to

the terms and conditions and rating of the relevant insurance policies, the Company having taken advice from reputable insurance brokers experienced in arranging insurances for similar risks, confirming that the renewal quotations represent best value; or

- 53.4.2 its proposals for obtaining competitive quotations from at least three (3) suitable insurers. The Company shall take advice from reputable insurance brokers experienced in arranging insurances for similar risks as to which insurers are most likely to provide quotations that will represent best value for money for the Contracting Authority as payer of the premiums for such insurance. In considering which insurers to approach, the Company shall consider whether the Shareholders or the New Works Contractor or the O&M Works Contractor enjoys any special relationship with any insurer and/or is otherwise able to procure the placing of the Relevant Insurance in any particular manner consistent with the requirements of this Agreement that may result in lower premiums and shall include such insurers in its proposal under this Clause 53.4. The Company shall provide details of the terms of any long-term agreement forming part of any of the quotations, which will be subject to acceptance by the Contracting Authority.
- 53.5 Within ten (10) Business Days of receiving a notice from the Company pursuant to Clause 53.4, the Contracting Authority may provide the Company with details of any other insurers that it wishes the Company to invite to quote for provision of the relevant Service Period Insurance.
- 53.6 Not less than thirty (30) Business Days prior to the Full Services Commencement Date and each subsequent renewal date or expiry date of any long-term agreement (entered into with the agreement of the Contracting Authority) for any of the Service Period Insurances, the Company shall forward to the Contracting Authority's Representative quotes from the proposed insurers (together with the principal terms and conditions of the relevant insurance policies), to include any insurer nominated by the Contracting Authority pursuant to Clause 53.5, including (i) a reasoned recommendation as to which quote the Company views as offering best value for money for the Contracting Authority, taking into account all relevant circumstances and (ii) highlighting any changes in the relevant Service Period Insurance including any non-compliance with the requirements of Schedule 10. The Company shall obtain the prior written consent of the Contracting Authority to any non-compliance with the requirements of Schedule 10 prior to renewing any of the Service Period Insurances.
- 53.7 Within ten (10) Business Days of receiving a recommendation from the Company pursuant to Clause 53.6, the Contracting Authority must notify the Company in writing which insurer it
-



is to place the relevant Service Period Insurance with, failing which the Company shall be entitled to place the relevant Service Period Insurance with the insurer recommended by the Company.

#### 54. REINSTATEMENT

##### 54.1 Application of Proceeds

All insurance proceeds received under any of the Physical Damage Policies shall be applied to repair, reinstate and replace each part or parts of the Assets in respect of which the proceeds were received.

##### 54.2 Joint Account

All insurance proceeds paid under any Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of £[REDACTED] (Indexed) shall be paid into the Joint Insurance Account.

##### 54.3 Reinstatement Obligations

Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the **(Relevant Incident)** in an amount in excess of £[REDACTED] (Indexed):

54.3.1 the Company shall deliver as soon as practicable and in any event within twenty eight (28) days after the making of the claim a plan prepared by the Company for the carrying out of the works necessary (the **Reinstatement Works**) to repair, reinstate or replace (the **Reinstatement Plan**) the assets which are the subject of the relevant claim or claims in accordance with Clause 54.4 (Works Carried Out) below. The Reinstatement Plan shall set out:

- (a) if not the New Works Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Contracting Authority; and
- (b) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Contracting Authority, which approval shall not be unreasonably delayed;

54.3.2 provided that the Contracting Authority is satisfied that the Reinstatement Plan will enable the Company to comply with Clause 54.4 below within a reasonable timescale:

- (a) the Reinstatement Plan will be adopted;
- (b) the Company shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Contracting Authority;
- (c) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Joint Insurance Account (the **Relevant Proceeds**) (together with any interest accrued) may be withdrawn by the Company from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in Clause 54.3.2(b) above, and to meet any other reasonable costs and expenses of the Company for the sole purpose of funding the Reinstatement Works and the Parties shall operate the signatory requirements of the Joint Insurance Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Contracting Authority may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Works;
- (d) the Contracting Authority agrees and undertakes that, subject to compliance by the Company with its obligations under this Clause, and provided that the Company procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 54.3.2(b), it shall not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;
- (e) the Contracting Authority undertakes to use reasonable endeavours to assist the Company in the carrying out of the Reinstatement Plan;
- (f) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Contracting Authority and in accordance with Clause 54.4 (Works Carried Out) below the Contracting Authority shall permit withdrawal by the Company of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under Clause 54.3.2(c)

above, in respect of the Relevant Incident, together with any interest accrued; and

- (g) subject to the provisions of Clause 51 (Indemnity) the Company shall be solely responsible for the payment of any deficiency.

#### 54.4 **Works Carried Out**

Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any Asset, the Company shall carry out the work in accordance with the Contracting Authority's Requirements so that on completion of the work, the provisions of this Agreement are complied with.

### 55. **UNINSURABLE RISKS**

Nothing in Clause 52 shall oblige the Company to take out insurance in respect of a risk which is Uninsurable save where the predominant cause of the risk being Uninsurable is any act(s) or omission(s) of the Company or a Company Related Party.

#### 55.1 **Risks Become Uninsurable**

If a risk usually covered by contractor's 'all risks' insurance, property damage insurance, third party liability insurance, contractors' pollution liability insurance, delay in start-up and business interruption insurance (but not loss of profits) or statutory insurances becomes Uninsurable then:

55.1.1 the Company shall notify the Contracting Authority of any risk becoming Uninsurable within five (5) Business Days of becoming aware of the same and in any event at least five (5) Business Days before expiry or cancellation of any existing insurance in respect of that risk; and

55.1.2 if both Parties agree, or it is determined in accordance with Schedule 7 (Dispute Resolution Procedure) that the risk is Uninsurable and that:

- (a) the risk being Uninsurable is not caused by the actions of the Company or a Company Related Party; and
- (b) the Company has demonstrated to the Contracting Authority that the Company and a prudent board of directors of a company operating the same or substantially similar PFI/PPP businesses in the United Kingdom to that operated by the Company would in similar circumstances (in the

absence of the type of relief envisaged by this Clause) be acting reasonably and in the best interests of the company if it resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

the Parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either Party).

## **55.2 Management of Risk**

If the requirements of Clause 55.1 are satisfied, but the Parties cannot agree as to how to manage or share the risk, then:

- 55.2.1 in respect of such third party liability insurance and contractors' pollution liability insurance only the Contracting Authority shall (at the Contracting Authority's option) either pay to the Company an amount equal to the amount calculated in accordance with Clause 44.10 (Compensation on Termination for Force Majeure) and the Agreement will terminate, or elect to allow the Agreement to continue and Clause 55.2.2 below shall thereafter apply in respect of such risk;
- 55.2.2 in respect of such contractor's 'all risks' insurance, property damage insurance, third party liability insurance, and contractors' pollution liability insurance (if the Contracting Authority elects to allow the Agreement to continue in accordance with Clause 55.2.1), delay in start-up and business interruption insurance (but not loss of profits) or statutory insurances the Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Contracting Authority shall (at the Contracting Authority's option) either pay to the Company an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and the Agreement will continue, or an amount equal to the amount calculated in accordance with Clause 44.10 (Compensation on Termination for Force Majeure) plus (in relation to third party liability insurance and third party claims under contractors' pollution liability insurance only) the amount of insurance proceeds that would have been payable whereupon the Agreement will terminate;

- 55.2.3 where pursuant to Clauses 55.2.1 and/or 55.2.2 this Agreement continues then the Unitary Charge shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by the Company in respect of the relevant risk in the year prior to it becoming Uninsurable (Indexed from the date that the risk becomes Uninsurable) save to the extent that such reduction is otherwise reflected in a reduction in the payments claimed by the Company pursuant to paragraph 2.1.1 of Schedule 6 (Payment Mechanism). Where the risk is Uninsurable for part of a year only the reduction in the Unitary Charge shall be pro-rated to the number of months for which the risk is Uninsurable;
- 55.2.4 where pursuant to Clause 55.2.1 and/or 55.2.2 this Agreement continues the Company shall approach the insurance market at least every four (4) months to establish whether the risk remains Uninsurable. As soon as the Company is aware (and the parties agree or it is determined pursuant to the Dispute Resolution Procedure) that this risk is no longer Uninsurable, the Company shall take out and maintain or procure the taking out and maintenance of such insurance (to be incepted as soon as it is reasonably practicable) for such risk in accordance with this Agreement;
- 55.2.5 in respect of any period between the Contracting Authority receiving notification in accordance with Clause 55.1.1 that a TPL Risk has become Uninsurable and the Contracting Authority's notification to the Company in accordance with Clause 55.2.1 in respect of such risk then, provided it is ultimately agreed or determined that the requirements of Clause 55.1.2 are satisfied in respect of the Uninsurable TPL Risk and subject to Clause 55.2.6 below, Clause 55.2.2 shall apply in respect of occurrences of the Uninsurable TPL Risk during such period unless the Parties otherwise agree how to manage the risk during this period; and
- 55.2.6 Clause 55.2.5 shall only apply provided the Company does not unreasonably materially delay (a) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of Clause 55.1.2 are satisfied in respect of the Uninsurable TPL Risk and/or (b) meeting with the Contracting Authority to discuss the means by which the risk should be managed.

Where this Clause 55.2 applies and this Agreement continues, the Company shall, subject to Clause 55.2.4, be relieved of its obligations to maintain insurance in respect of the relevant Uninsurable risk.

55.3 If, pursuant to Clause 55.2.2, the Contracting Authority elects to make payment to the Company (such that the Agreement will terminate) (the **Relevant Payment**), the Company shall have the option (exercisable in writing within twenty (20) Business Days of the date of such election by the Contracting Authority (the **Option Period**)) to pay to the Contracting Authority on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the relevant risk not become Uninsurable, in which case the Agreement will continue (and the Relevant Payment will not be made by the Contracting Authority), and the Company's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

55.4 During the Service Period, the Contracting Authority shall be entitled to notify the Company that a risk has become Uninsurable under paragraph (b) of the definition of "Uninsurable". Following such notification Clauses 55.1.2 to 55.3 (except Clause 55.1.2 (b)) shall apply as if the Company has issued a notice under Clause 55.1.1).

#### 56. **TERMS AND CONDITIONS WHICH BECOME UNAVAILABLE**

56.1 If, upon the renewal of any insurance which the Company is required to maintain or to procure the maintenance of pursuant to this Agreement:

56.1.1 any Insurance Term is not available to the Company in the worldwide insurance market with reputable insurers of good standing; and/or

56.1.2 the insurance premium payable for insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,

(other than, in each case, by reason of one or more actions of the Company and/or any Company Related Party (of any tier) then Clause 56.2 shall apply.

56.2 If it is agreed or determined that Clause 56.1 applies then the Contracting Authority shall waive the Company's obligations in Clause 52 (Insurance) and/or Schedule 10 (Required Insurances) in respect of that particular Insurance Term and the Company shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in Clause 56.1 continue to apply to such Insurance Term.

- 56.3 To the extent that the Parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and /or condition of insurance is available to the Company in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address the Company's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, the Company shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition.
- 56.4 The Company shall notify the Contracting Authority as soon as reasonably practicable and in any event within five (5) days of becoming aware that Clause 56.1.1 and/or Clause 56.1.2 are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). During the Service Period the Contracting Authority shall be entitled to notify the Company that Clause 56.1.2 is likely to apply or (on expiry of the relevant insurance then in place) does apply in respect of an Insurance Term (irrespective of the reason for the same). The Company shall provide the Contracting Authority with such information as the Contracting Authority reasonably requests regarding the unavailability of the Insurance Term and the parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.
- 56.5 In the event that Clause 56.1.1 and/or Clause 56.1.2 apply in respect of an Insurance Term, (irrespective of the reason for the same) the Company shall approach the insurance market at least every four months to establish whether Clause 56.1.1 and/or Clause 56.1.2 remain applicable to the Insurance Term. As soon as the Company is aware and the parties agree or it is determined pursuant to the Dispute Resolution Procedure that Clause 56.1.1 and/or Clause 56.1.2 has ceased to apply to the Insurance Term, the Company shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

**57. PAYMENT OF SURPLUSES AND PRIORITY SURPLUSES AND COMPLIANCE WITH NPD REQUIREMENTS**

For the purposes of this Clause 57, "payment" means a payment in cash, the discharge of an obligation by way of set-off or the reduction in an obligation and payments being "received" shall be construed accordingly.

**Surpluses**

57.1 The Company shall, subject to the provisos, obligations and restrictions referred to in Article 3.1.2 of the Articles of Association, notify the Contracting Authority on the earlier of:

- a) fifteen (15) Business Days after each Surplus Payment Date or Priority Surplus Payment Date (as the case may be); or
- b) the date on which the Intercreditor Agent approves the draft Forecast in accordance with clause 8.3 and schedule 3 of the Common Terms Agreement,

of the Surplus available as at that Surplus Payment Date or Priority Surplus Payment Date (as the case may be). In notifying the Contracting Authority of the Surplus available, the Company shall provide a credit note for the amount of the Surplus available, and:

57.1.1 subject to Clauses 57.1.2 and 57.3 below, the Contracting Authority shall receive that Surplus as a rebate of the previous Monthly Unitary Charges by way of set off against the next occurring (and, where necessary, any subsequent) Monthly Unitary Charge pursuant to Clause 31.6;

57.1.2 provided always that where no Monthly Unitary Charge remains to be paid, or where the aggregate of all remaining payments of Monthly Unitary Charge is less than the amount of said Surplus, and where no direction has been given pursuant to Clause 57.3, the Company shall pay as a direct payment said Surplus to the Contracting Authority (or such other party as the Contracting Authority may, in its absolute discretion direct) as a rebate of the previous Monthly Unitary Charges within 30 Business Days of that Surplus Payment Date or Priority Surplus Payment Date (as the case may be).

57.2 **Payment of Priority Surpluses and Priority Surplus Pre-Payments**

57.2.1 Subject always to the provisions of the Financing Agreements, the Company shall transfer funds into the Surplus Account:

- (a) in accordance with Article 4 (Application of Revenues) of the Articles of Association; and
- (b) during each Priority Surplus Payment Period, such sums as are necessary so as to ensure that the total amounts that will then have been paid into the Surplus Account as at that Priority Surplus Payment Period are at least



equivalent to the amounts set out in the corresponding row of the Priority Surpluses (Cumulative);

and Clause 57.1 shall apply thereto.

57.2.2 If any Priority Surpluses are not received by the Contracting Authority in the relevant Priority Surplus Payment Period, the shortfall shall be added to the sums due in the next and any subsequent Priority Surplus Payment Period. Any such shortfall shall be reduced to zero prior to the Company making any Priority Surplus Pre-Payment.

57.2.3 Once the total Priority Surpluses plus the total of any Priority Surplus Pre-Payments (in each case as received by the Contracting Authority pursuant to Clause 57.1) are equal to the total Priority Surpluses (Cumulative):

i.e.  $PSP + PSP - P \geq PS(C)$

then the Company's obligation to make payments of Priority Surpluses shall cease.

57.2.4 The Company shall not make any Priority Surplus Pre-Payment pursuant to Clause 57.1 where Availability Failure Deductions and/or Service Shortfall Deductions exceed [REDACTED] of that proportion of the Unitary Charge payable in the preceding Priority Surplus Payment Period.

57.2.5 Where a Priority Surplus Pre-Payment cannot be made as a consequence of the application of Clause 57.2.4, the sums that would have been used to make such Priority Surplus Pre-Payment shall be reserved in a separate account until the next Priority Surplus Payment Date whereupon the Company can apply to utilise such funds to make a Priority Surplus payment and/or a Priority Surplus Pre-Payment and the provisions of this Clause 57 shall apply *mutatis mutandis*.

57.3 Notwithstanding the provisions of Clauses 57.1 and 57.2, the Contracting Authority may direct the Company to pay any such Surplus as a direct payment to a third party and the Parties shall each act reasonably and in good faith in order to agree any amendments to this Agreement and the Articles of Association which may be required as a consequence of such direction.

**57.4 Compliance with NPD Requirements**

The Company shall comply with the NPD Requirements at all times throughout the Contract Period.

**58. CONFIDENTIALITY**

58.1 The Contracting Authority and the Scottish Ministers shall, subject to Clause 58.2 be entitled to make the documents and information listed in this Clause 58.1 freely available to the public (which may include, without limitation, publication on the Contracting Authority's and/or the Scottish Ministers' websites):

58.1.1 this Agreement;

58.1.2 the Contracting Authority Direct Agreements; and

58.1.3 the Financial Model (as updated from time to time in accordance with this Agreement);

and the Company acknowledges and agrees that, subject to the exclusion of information referred to in Clause 58.2, the provision or publication of the documents and information listed in this Clause 58.1 shall not give rise to any liability under the terms of this Agreement or otherwise. The Contracting Authority shall notify the Company in writing not less than ten (10) Business Days prior to any intended provision or publication of information pursuant to this Clause 58.1.

58.2 The Parties agree that provisions of this Agreement and each Project Document and the Financial Model (as updated from time to time in accordance with this Agreement) shall, subject to Clause 58.3 below, not be treated as Confidential Information and may be disclosed without restriction and the Company acknowledges that the Contracting Authority and the Scottish Ministers shall, subject to Clause 58.3 below, be entitled to make this Agreement, the Financial Model and each Project Document available in the public domain.

58.3 Clause 58.2 shall not apply to provisions of this Agreement or a Project Document or the Financial Model (as updated from time to time in accordance with this Agreement) designated as Commercially Sensitive Information and listed in Schedule 17 (Commercially Sensitive Information) to this Agreement which shall, subject to Clause 58.5, be kept confidential for the periods specified in that Schedule.

58.4 The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Agreement and Project Documents or the Project and shall

use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

#### **58.5 Permitted Disclosure**

Clauses 58.3 and 58.4 shall not apply to:

- 58.5.1 any disclosure of information that is reasonably required by any person engaged in the performance of its obligations under the Agreement for the performance of those obligations;
- 58.5.2 any matter which a Party can demonstrate is already generally available and in the public domain otherwise than as a result of a breach of this Clause;
- 58.5.3 any disclosure to enable a determination to be made under Schedule 7 (Dispute Resolution Procedure) or in connection with a dispute between the Company and any of its Sub-Contractors;
- 58.5.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the Party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 58.5.5 any disclosure of information which is already lawfully in the possession of the receiving Party, prior to its disclosure by the disclosing Party;
- 58.5.6 any provision of information to the Parties' own professional advisers or insurance advisers or to the Senior Lenders or the Senior Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Company to enable it to carry out its obligations under the Agreement, or may wish to acquire shares in the Company and/or Holdco in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 58.5.7 any disclosure by the Contracting Authority or the Scottish Ministers of information relating to the design, construction, operation, maintenance and financing of the

Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to:

- (a) any proposed new contractor, its advisers and lenders, should the Contracting Authority or the Scottish Ministers decide to retender the Agreement; and
- (b) any registration or recording of the Consents and property registration required;

58.5.8 any disclosure of information by the Contracting Authority or the Scottish Ministers to any department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Contracting Authority or the Scottish Ministers for any purpose related to or ancillary to the Agreement;

58.5.9 any disclosure for the purpose of:

- (a) the examination and certification of the Contracting Authority's or the Scottish Ministers' or the Company's accounts; or
- (b) any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Contracting Authority and/or the Scottish Ministers has used its or their resources; or
- (c) complying with a proper request from either Party's insurance adviser, or insurer on placing or renewing any insurance policies; or
- (d) without prejudice to the generality of Clause 58.5.4 compliance with the FOISA and/or the Environmental Information (Scotland) Regulations;

58.5.10 disclosure pursuant to Clause 58.1; and

58.5.11 any disclose to the extent required by Clause 58.7,

provided that, for the avoidance of doubt, neither Clauses 58.5.9(b), 58.5.9(d) nor 58.5.4 shall permit disclosure of Confidential Information otherwise prohibited by Clause 58.4 above where that information is exempt from disclosure under section 36 of the FOISA.

## 58.6 **Obligations Preserved**

Where disclosure is permitted under Clause 58.5, other than Clause 58.5.2, 58.5.4, 58.5.5, 58.5.7(b) and 58.5.9, the Party providing the information shall procure that the recipient of

the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

#### 58.7 **Audit**

For the purpose of:

58.7.1 the examination and certification of the Contracting Authority's or the Scottish Ministers' accounts; or

58.7.2 any examination pursuant to section 23 of the Public Finance and Accountability (Scotland) Act 2000 of the economy, efficiency and effectiveness with which the Contracting Authority or the Scottish Ministers have used its or their resources,

the Auditor General for Scotland may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Company (and the Company shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require the Company to produce such oral or written explanations as he considers necessary.

#### 58.8 **Exploitation of Information**

The Company shall not make use of the Agreement or any Confidential Information issued or provided by or on behalf of the Contracting Authority in connection with the Agreement otherwise than for the purpose of the Agreement, except with the written consent of the Contracting Authority.

#### 58.9 **Information Relating to People or Users**

Where the Company, in carrying out its obligations under the Agreement, is provided with information relating to any Users, the Company shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Company has sought the prior written consent of that person and has obtained the prior written consent of the Contracting Authority.

#### 58.10 **Expiry**

On or before the Expiry Date, the Company shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any User or the Contracting Authority or the Scottish Ministers or any of their respective agents, contractors and sub-contractors of any tier and its or their directors, officers and employees

but excluding the Company or any Company Related Party including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to the Contracting Authority.

**58.11 Disclosure by Audit Scotland**

The Parties acknowledge that Audit Scotland has the right to publish details of the Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.

**58.12 Official Secrets**

The provisions of this Clause are without prejudice to the application of the Official Secrets Act 1911 to 1989.

**59. FREEDOM OF INFORMATION**

**59.1 FOISA and Environmental Information (Scotland) Regulations**

The Company acknowledges that the Contracting Authority and the Scottish Ministers are subject to the requirements of the FOISA and the Environmental Information (Scotland) Regulations and shall facilitate the Contracting Authority's and the Scottish Ministers' compliance with their respective Information disclosure requirements pursuant to the same in the manner provided for in Clause 59.2 to 59.7 (inclusive).

**59.2 Request for Information**

Where the Contracting Authority receives a Request for Information in relation to Information that the Company is holding on its behalf and which the Contracting Authority and the Scottish Ministers do not hold, the Contracting Authority shall refer to the Company such Request for Information that it receives as soon as practicable and in any event within five (5) Business Days of receiving a Request for Information and the Company shall:

59.2.1 provide the Contracting Authority with a copy of all such Information in the form that the Contracting Authority requires as soon as practicable and in any event within ten (10) Business Days (or such other period as the Contracting Authority acting reasonably may specify) of the Contracting Authority's request; and

59.2.2 provide all necessary assistance as reasonably requested by the Contracting Authority in connection with any such Information, to enable the Contracting Authority or the Scottish Ministers (as the case may be) to respond to a Request

for Information within the time for compliance set out in Section 10 of the FOISA or Regulation 5 of the Environmental Information (Scotland) Regulations.

**59.3 Representations by the Company**

Following notification under Clause 59.2 and up until such time as the Company has provided the Contracting Authority with all the Information specified in Clause 59.2.1, the Company may make representations to the Contracting Authority as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Contracting Authority shall be responsible for determining at its absolute discretion:

59.3.1 whether Information is exempt from disclosure under the FOISA and the Environmental Information (Scotland) Regulations;

59.3.2 whether Information is to be disclosed in response to a Request for Information, and

in no event shall the Company respond directly, or allow its Sub-contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Contracting Authority.

**59.4 Retention of Information**

The Company shall ensure that all Information held on behalf of the Contracting Authority is retained for disclosure for at least five (5) years (from the date it is acquired) and shall permit the Contracting Authority to inspect such information as requested from time to time.

**59.5 Transfer of Request for Information**

The Company shall transfer to the Contracting Authority any Request for Information received by the Company as soon as practicable and in any event within two (2) Business Days of receiving it.

**59.6 Disclosure of Confidential Information**

The Company acknowledges that any lists provided by it listing or outlining Confidential Information are of indicative value only and that the Contracting Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of the FOISA and the Environmental Information (Scotland) Regulations.

**59.7 Costs of Compliance**

In the event of a request from the Contracting Authority pursuant to Clause 59.2 above, the Company shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Contracting Authority of the Company's estimated costs of complying with the request to the extent those would be recoverable if incurred by the Contracting Authority under Section 12(1) of the FOISA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Contracting Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOISA and as set out in the Fees Regulations (the **Appropriate Limit**) the Contracting Authority shall inform the Company in writing whether or not it still requires the Company to comply with the request and where it does require the Company to comply with the request the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as the Contracting Authority is entitled to under Section 10 of the FOISA. In such case, the Contracting Authority shall notify the Company of such additional days as soon as practicable after becoming aware of them and shall reimburse the Company for such costs as the Company incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOISA policy from time to time.

**59.8 Disclosure of Information**

The Company acknowledges that (notwithstanding the provisions of Clause 58) the Contracting Authority may, acting in accordance with the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (the **Code**), be obliged under the FOISA or the Environmental Information (Scotland) Regulations to disclose Information concerning the Company or the Project:

59.8.1 in certain circumstances without consulting with the Company; or

59.8.2 following consultation with the Company and having taken the Company's views into account,

provided always that where Clause 59.8.1 above applies the Contracting Authority shall, in accordance with the recommendations of the Code, draw this to the attention of the Company prior to any disclosure.

59.9 In the event that the Company is or becomes subject to Environmental Information (Scotland) Regulations or FOISA it shall comply with its obligations under Environmental



Information (Scotland) Regulations and FOISA. In doing so, it will use reasonable endeavours to consult the Contracting Authority before disclosing Information about them or any agreement entered into between the Contracting Authority and the Company.

**60. DISPUTE RESOLUTION PROCEDURE**

Any dispute arising in relation to any aspect of the Agreement shall be resolved in accordance with Schedule 7 (Dispute Resolution Procedure).

**61. NOT USED**

**62. DATA PROTECTION**

**62.1 Compliance with DPA**

In relation to all Personal Data, the Company shall at all times comply with the DPA as a data controller if necessary, including maintaining a valid and up to date registration or notification under the DPA covering the data processing to be performed in connection with the Operations.

**62.2 Permitted Processing**

The Company and any Sub-Contractor shall only undertake processing of Personal Data reasonably required in connection with the Operations and shall not transfer any Personal Data to any country or territory outside the European Economic Area.

**62.3 No Disclosure**

The Company shall not disclose Personal Data to any third parties other than:

62.3.1 to employees and Sub-Contractors to whom such disclosure is reasonably necessary in order for the Company to carry out the Operations;

62.3.2 to the extent required under Legislation or a court order;

62.3.3 for the purpose of complying with demand or requests made by law enforcements authorities or with any court process;

62.3.4 for the purpose of preventing or detecting crime, apprehending or prosecuting offenders; or

62.3.5 as directed in writing to do so by the Scottish Ministers,

provided that disclosure under Clause 62.3.1 is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this Clause 62 (Data Protection) and that the Company shall give notice in writing to the Contracting Authority of any disclosure of Personal Data it or a Sub-Contractor is required to make under Clause 62.3.2 immediately it is aware of such a requirement.

**62.4 Required Measures**

The Company shall bring into effect and maintain all technical and organisational measures to prevent unauthorised or unlawful processing of Personal Data and accidental loss or destruction of, or damage to, Personal Data including but not limited to taking reasonable steps to ensure the reliability of staff having access to the Personal Data.

**62.5 Contracting Authority Requests for Details of Measures**

The Contracting Authority may, at reasonable intervals, request a written description of the technical and organisational methods employed by the Company and the Sub-Contractors referred to in Clause 62.4 (Required Measures). Within thirty (30) days of such a request, the Company shall supply written particulars of all such measures detailed to a reasonable level such that the Contracting Authority can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.

**62.6 Indemnity**

The Company shall indemnify and keep indemnified the Contracting Authority and the Scottish Ministers against all losses, claims, damages, liabilities, costs and expense (including reasonable legal costs) incurred by it in respect of any breach of this Clause 62 by the Company and/or any act or omission of any Sub-Contractor.

**63. INTELLECTUAL PROPERTY RIGHTS**

**63.1 Company to Make Available Project Data**

The Company shall make available to the Contracting Authority and the Scottish Ministers free of charge (and hereby irrevocably licences the Contracting Authority and the Scottish Ministers to use) all Project Data that might reasonably be required by the Contracting Authority and the Company shall ensure that the Company obtains all necessary licences, permissions and consents to ensure that the Company can make the Project Data available to the Contracting Authority on these terms, for the purposes of:

63.1.1 the Contracting Authority discharging its obligations under this Agreement and/or any statutory duties which the Contracting Authority and/or the Scottish Ministers may have; and

63.1.2 following termination of this Agreement, the design, construction, operation, maintenance or improvement of the Project Roads and/or the provision of services the same as, or similar to, the Operations,

(together, the **Approved Purposes**), and in this Clause **use** shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term **the right to use** shall be construed accordingly. The licence granted pursuant to this Clause 63.1 shall be free of charge and non-exclusive.

#### 63.2 **Licence to Use Intellectual Property Rights**

The Company:

63.2.1 hereby grants to the Contracting Authority and the Scottish Ministers, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use all the Intellectual Property Rights which are or become vested in the Company; and

63.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, use its reasonable endeavours to procure the grant of a like licence to that referred to in Clause 63.2.1 above to the Contracting Authority and the Scottish Ministers,

in both cases, solely for the Approved Purposes.

#### 63.3 **Intellectual Property Rights to Vest in Company**

The Company shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in the Company and the Company shall enter into appropriate agreements with any Company Related Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights. The provisions of this Clause 63.3 shall not apply to moral rights, which are not transferable.

**63.4 Licence to Use Software**

To the extent that any of the Project Data are generated by or maintained on a computer or similar system, the Company shall:

63.4.1 use all reasonable endeavours to procure for the benefit of the Contracting Authority, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Contracting Authority or its nominee to access and otherwise use (subject to the payment by the Contracting Authority of the relevant fee, if any) such Project Data for the Approved Purposes. As an alternative, the Company may provide such Project Data in a format which may be read by software generally available in the market at the relevant time or in hard copy format; and

63.4.2 where the Company owns the relevant software and has the source code, enter into the escrow agent's then current multi-licensee escrow deposit agreement or standard single licensee escrow deposit agreement as appropriate in each case.

**63.5 Safe Storage Data**

The Company shall ensure the back-up and storage in safe custody of the Project Data referred to in Clause 63.4 (Licence to Use Software) in accordance with Good Industry Practice. Without prejudice to this obligation, the Company shall from time to time on reasonable request submit to the Contracting Authority for approval of its proposals for the back-up and storage in safe custody of the data, materials and documents and the Contracting Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. The Company shall comply, and shall cause all Company Related Parties to comply, with all procedures to which the Contracting Authority has given its approval. The Company may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Contracting Authority, who shall be entitled to object on the basis set out above.

**63.6 Infringement of Rights**

Where a claim or proceeding is made or brought against the Contracting Authority or the Scottish Ministers by a third party on grounds that the Contracting Authority's or the Scottish Ministers' use of any Intellectual Property Rights in the Project Data (other than any Disclosed Data) infringes any rights in or to such Intellectual Property Rights of that third party then, unless such infringement has arisen out of the use of such Intellectual Property Rights by or on behalf of the Contracting Authority otherwise than in accordance with the

terms of this Agreement or the relevant licence, the Company shall indemnify the Contracting Authority and the Scottish Ministers at all times from and against all such claims and proceedings and the provisions of Clause 51.6 (Conduct of Claims) shall apply.

#### **63.7 Traffic Data**

63.7.1 Without prejudice to any rights which the Company may have in any traffic data collected by the Company in connection with the Project, the Contracting Authority and/or the Scottish Ministers (as the case may be) shall be entitled without further consent from the Company:

- (a) to use such traffic data for the purposes of exercising its rights or carrying out its duties under this Agreement or carrying out any statutory function; and
- (b) to incorporate such traffic data in any traffic or other statistics prepared by or on behalf of the Contracting Authority or the Scottish Ministers (as the case may be) and to publish such statistics of the traffic data either generally or to a limited category of persons and whether or not in return for any fee.

63.7.2 Without prejudice to any rights which the Contracting Authority may have in any traffic data collected by the Contracting Authority in connection with the Project, the Company shall be entitled without further consent from the Contracting Authority:

- (a) to use such traffic data for the purposes of exercising its rights or carrying out its duties under this Agreement; and
- (b) to incorporate such traffic data in any traffic or other statistics prepared by or on behalf of the Company and to publish such statistics of the traffic data either generally or to a limited category of persons and whether or not in return for any fee.

#### **64. ASSIGNATION AND SUB-CONTRACTING**

##### **64.1 Restrictions on transfer of the Agreement by the Scottish Ministers**

The rights and obligations of the Scottish Ministers under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public

body (being a single entity) acquiring the whole of the Agreement and the Direct Agreement and having the legal capacity, power and authority to become a party to and to perform the obligations of the Scottish Ministers under this Agreement and the Direct Agreement being:

64.1.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975; or

64.1.2 any other public body whose obligations under this Agreement and the Direct Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Company) by the Scottish Ministers or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Scottish Ministers under this Agreement and the Direct Agreement.

**64.1A Restrictions on transfer of the Agreement by the Contracting Authority**

The rights and obligations of the Contracting Authority under this Agreement and the Direct Agreement shall not be assigned, novated or otherwise transferred.

**64.2 Restriction on the Company**

Subject to Clause 64.3 and subject always to the provisions of the Direct Agreement the Company shall not assign, sublet, charge, sell, bargain or otherwise deal in any way with the benefit of this Agreement in whole or in part except with the prior written consent of the Contracting Authority (which the Contracting Authority may in its absolute discretion refuse). The provisions of this Clause 64.2 shall not apply to any assignation or other dealing by the Company by way of security in accordance with the Financing Agreements or by way of enforcement of any such security.

**64.3 Exception**

Subject to the provisions of Clauses 5 and 18, nothing in this Clause 64 shall prohibit the Company from providing or procuring the provision of the New Works or the O&M Works from a sub-contractor of sound financial standing and good repute and whose identity and the terms and conditions of contract have been notified to the Contracting Authority by the Company and approved by the Contracting Authority prior to the appointment of such Sub-Contractor, provided that the Company shall remain primarily and directly liable for the Company's obligations under this Agreement.

**64.4 Company's Obligations**

The Company shall perform its obligations under and observe all the terms of any Sub-Contract.

**64.5 Sub-Contractors**

Nothing in this Agreement shall prohibit or prevent any Sub-Contractor employed by the Company from being employed by the Contracting Authority.

**64.6 Replacement of a non-performing Sub-Contractor**

64.6.1 On the substitution or replacement of the O&M Works Contractor due to a breach or default under the O&M Works Agreement the Company may elect, subject to Clause 64.6.5 and provided that at the time of making such election no Termination Notice has been served under this Agreement, that for the purposes of limbs (b) and (m) of the definition of Company Default and Clause 41 (Termination on Company Default) only, all Performance Deductions incurred and/or notices served under Clause 43 (Persistent Breach) prior to the date of such substitution or replacement and in each case relating to the O&M Works shall be disregarded by virtue of Clause 64.6.5 below.

64.6.2 If the Company makes an election pursuant to Clause 64.6.1 above then, with effect from the date of substitution or replacement of the O&M Works Contractor, all Performance Deductions incurred and/or notices served under Clause 43 (Persistent Breach) prior to that date and in each case relating to the O&M Works shall be disregarded for the purposes of limbs (b) and (m) of the definition of Company Default and Clause 41 (Termination on Company Default). For the avoidance of doubt, the Contracting Authority shall retain the right to make Performance Deductions in accordance with Schedule 6 (*Payment Mechanism*) in respect of the failures to which the Performance Deductions are attributable.

64.6.3 On the substitution or replacement of the New Works Contractor due to a breach or default under the New Works Agreement the Company may elect, subject to Clause 64.6.5 and provided that at the time of making such election no Termination Notice has been served under this Agreement, that for the purposes of limb (b) of the definition of Company Default and Clause 41 (Termination on Company Default) only, all notices served under Clause 43 (Persistent Breach) prior to the date of such substitution or replacement and in each case relating to the New Works shall be disregarded by virtue of Clause 64.6.4 below.

64.6.4 If the Company makes an election pursuant to Clause 64.6.3 above then, with effect from the date of substitution or replacement of the New Works Contractor, all notices served under Clause 43 (Persistent Breach) prior to that date and in each case relating to the New Works shall be disregarded for the purposes of limb (b) of the definition of Company Default and Clause 41 (Termination on Company Default).

64.6.5 The Company shall be entitled to make an election pursuant to this Clause 65 on a maximum of two occasions during the Contract Period.

## **65. AUDIT AND REGULATORY ACCESS**

Notwithstanding the provisions of Clause 76 (Co-operation), the Company shall co-operate fully and in a timely manner with any reasonable request from time to time of any auditor (whether internal or external) of the Contracting Authority or the Scottish Ministers (as the case may be) or regulator and at the expense of the Company to provide documents, or to procure the provision of documents, relating to the Project, and to provide, or to procure the provision of, any oral or written explanation relating to the same.

## **66. CORPORATE STRUCTURES**

### **66.1 Obligation to Inform**

66.1.1 The Company represents and warrants to the Contracting Authority that at the Date of this Agreement, the legal and beneficial ownership of the Company and Holdco is as set out in Schedule 16 (Company's Details) and that, other than any Shareholder pre-emption rights and any security granted to the Senior Lenders under the Senior Financing Agreements, no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in the Company or Holdco.

66.1.2 The Company shall inform the Contracting Authority as soon as reasonably practicable (and, in any event, within thirty (30) days) of any Change of Ownership of the Company and/or Holdco.

66.1.3 The Contracting Authority may, not more than twice in any Contract Year, or at any time when a Company Default is outstanding, request that the Company inform them as soon as reasonably practicable and in any event within thirty (30) days of receipt of the Contracting Authority's request for details of any Change of Ownership.



66.1.4 The Company's obligations under Clauses 66.1.2 and 66.1.3 shall, except where a legal transfer or shares has occurred, be limited to the extent of the Company's awareness having made all reasonable enquiry.

**66.2 No Change of Ownership**

66.2.1 The Company shall not and shall procure that the Issuer and Holdco shall not register any person as a member where such registration would result in a Change of Ownership occurring prior to the first anniversary of the Full Services Commencement Date.

66.2.2 For the purposes of this Clause 66.2:

- (a) any change in beneficial or legal ownership of any shares that are listed on a recognised investment exchange (as defined in Section 285 of the Financial Services and Markets Act 2000);
- (b) any transfer of shares or of any interest in shares by a Shareholder to its Affiliate; and
- (c) any transfer of shares or of any interest in shares by way of security pursuant to the Financing Agreements or by way of enforcement of such security; or
- (d) the exercise by the Senior Lenders of their rights in respect of shares of the Company or the Issuer granted in any document conferring security over any of the shares of the Company or the Issuer, provided that any document conferring security over any shares has been approved by the Contracting Authority (such approval not to be unreasonably withheld or delayed),

shall be disregarded.

Where sub-paragraph (b) applies and subsequent to any such transfer (the **Original Transfer**) the transferee ceases to be an Affiliate of the original transferor, it shall be a breach of this Clause 66.2 if the shares or interests which were the subject of the Original Transfer are not within twenty (20) days of the transferee ceasing to be an Affiliate of the original transferor transferred to that original transferor or any Affiliate of such transferor.

**66.3 Change of Ownership**

66.3.1 The Company shall obtain the Contracting Authority's prior written consent (which may be given subject to conditions) to any Restricted Share Transfer of the Company. Further the Company shall procure that the Issuer and/or Holdco shall not register any person as a member of the Issuer and/or Holdco as a result of a Restricted Share Transfer without the prior written consent of the Contracting Authority.

66.4 The Company shall procure that Holdco does not transfer any shares in the Issuer or the Company without the written consent of the Contracting Authority, save that any transfer arising as a consequence of the grant or enforcement of security in favour of the Senior Lenders over or in relation to any of the shares of the Issuer and/or the Company shall not require such consent where the document conferring such security over said shares has been approved by the Contracting Authority (such approval not to be unreasonably withheld or delayed). The terms of the HoldCo Share Pledges (as such term is defined in the Common Terms Agreement) as at the date of this Agreement are deemed to be approved by the Contracting Authority for these purposes.

**67. NO AGENCY****67.1 No Partnership**

Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Contracting Authority and/or the Scottish Ministers and the Company.

**67.2 No Agency**

Save as expressly provided otherwise in this Agreement, the Company will not be, or be deemed to be, an agent of the Contracting Authority or the Scottish Ministers and the Company shall not hold itself out as having authority or power to bind the Contracting Authority or the Scottish Ministers in any way.

**67.3 Company's Deemed Knowledge**

Without limitation to its actual knowledge, the Company shall for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project as is held (or ought reasonably to be held) by any Company Related Party.

**68. ENTIRE AGREEMENT****68.1 Agreement Supersedes Prior Communications**

Except where expressly provided in this Agreement, this Agreement, the Direct Agreement and the other Project Documents to which both Parties are party constitute the entire agreement between the Parties in connection with their subject matter and supersede all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement, the Direct Agreement and the other Project Documents.

**68.2 Acknowledgement of the Parties**

Each of the Parties acknowledges that:

- 68.2.1 it does not enter into this Agreement on the basis of and does not rely, and has not relied upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and
- 68.2.2 this Clause 68.2 shall not apply to any statement, representation or warranty made fraudulently in association with this Agreement, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

**69. NOTICES****69.1 Notice Requirements**

All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class recorded delivery post or by hand, leaving the same at:

**If to the Company**

Alan Gibson  
Aberdeen Roads Limited  
Dean House  
24 Ravelston Terrace  
Edinburgh  
EH4 3TP

**Copied to**

[REDACTED]  
Balfour Beatty Investments Limited  
Regent's Place  
350 Euston Road  
London  
NW1 3AX

**If to the Contracting Authority**

Margaret Bochel  
Head of Planning & Sustainable Development  
Aberdeen City Council  
Marischal College  
Business Hub 12  
Broad Street  
Aberdeen  
AB10 1AB

**Copied to**

Ainslie McLaughlin  
Transport Scotland  
Buchanan House  
58 Port Glasgow Road  
Glasgow  
G4 0HG

**69.2 Submission of Information**

Where any information or documentation is to be provided or submitted to the Contracting Authority's Representative or the Company's Representative it shall be provided or submitted by sending the same by first class recorded delivery post or by hand, leaving the same at:

**If to the Company's Representative**

Alan Gibson  
Aberdeen Roads Limited  
Dean House  
24 Ravelston Terrace  
Edinburgh, EH4 3TP

**Copied to**

[REDACTED]  
 Balfour Beatty Investments Limited  
 Regent's Place  
 350 Euston Road  
 London  
 NW1 3AX

**If to the  
 Contracting Authority's Representative**

Margaret Bochel  
 Head of Planning & Sustainable Development  
 Aberdeen City Council  
 Marischal College, Business Hub 12  
 Broad Street  
 Aberdeen, AB10 1AB

**Copied to**

[REDACTED]  
 (Contracting Authority's Site Representative)  
 Jacobs  
 95 Bothwell Street  
 Glasgow  
 G2 7HX

**69.3 Change of Nominated Address**

Either Party (and either Representative) may change its nominated address by prior notice to the other Party.

**69.4 Effective Notices**

Notices given by recorded delivery post shall be effective upon the earlier of (i) actual receipt and (ii) two (2) Business Days after mailing. Notices delivered by hand shall be effective upon delivery.

**69.5 Effective Notices**

In proving posting of a notice sent by recorded delivery post it shall be sufficient to prove that the envelope containing the notice was duly addressed in accordance with the provisions of this Clause 69 and posted to the place to which it was addressed.

**70. PUBLIC RELATIONS, PUBLICITY AND ADVERTISEMENTS**

**70.1 Company communication with press**

The Company shall not by itself, its employees or agents and shall procure that its Sub-Contractors shall not communicate with representatives of the press, television, radio or other communications media on any matter concerning the Agreement without the prior written approval of the Contracting Authority.

**70.2 Filming and Photography**

No facilities to photograph or film in or upon any property used in relation to the Project shall be given or permitted by the Company unless the Contracting Authority has given its prior written approval.

**70.3 Reputation of the Contracting Authority**

The Company shall procure that its employees, agents and Sub-Contractors shall use all reasonable endeavours not to do anything which has the intention of bringing the standing or reputation of the Contracting Authority or the Scottish Ministers into disrepute or attracting adverse publicity to the Contracting Authority or the Scottish Ministers.

**70.4 Advertisements**

The Company shall not exhibit or attach to any part of the Sites or the Project Roads any notice or advertisement without the prior written permission of the Contracting Authority, save where otherwise required to comply with Legislation.

**71. WAIVER****71.1 Waiver**

No term or provision of this Agreement shall be considered as waived by any Party unless a waiver is given in writing by that Party.

**71.2 No Future Waiver**

No waiver under Clause 71.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

**72. SEVERABILITY**

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

**73. LANGUAGE****73.1 All:**

73.1.1 correspondence, Design Data, test reports, certificates, specifications and all other information to be provided to the Contracting Authority in accordance with this Agreement; and

73.1.2 operating and maintenance instructions, identification labels appearing on plant and equipment; and

73.1.3 other written and printed matter required for the Operations,  
  
shall be in English.

**74. RECORDS AND LIAISON****74.1 Records and Reports**

The provisions of Schedule 18 (Record Provisions) shall apply.

**74.2 Liaison Committee**

The Parties shall give effect to Schedule 20 (Liaison Committee).

**75. PARTIES NOT TO PREVENT****75.1 The Contracting Authority not to Hinder Company**

Save to the extent that it is entitled to do so in terms of this Agreement or that it is required to do so by virtue of its statutory duties, the Contracting Authority shall not deliberately do or omit to do any act which will prevent the Company from carrying out its obligations under this Agreement.

**75.2 Company not to Hinder the Contracting Authority**

Save to the extent that it is entitled to do so in terms of this Agreement or otherwise obliged or entitled to do so by Legislation, the Company shall not and shall use reasonable endeavours to procure that any Company Related Party shall not do or omit to do any act which will prevent the Contracting Authority or the Scottish Ministers:

75.2.1 using, or allowing others to use, any of the Project Roads;

75.2.2 from discharging its or their duties or functions; or

75.2.3 carrying out its obligations under this Agreement or its or their statutory duties.

**75.3 Minor Infringements**

Neither Party shall invoke the provisions of this Clause in respect of minor infringements of it by the other Party.

**75.4 Interactive Nature of Activities**

The phrase “deliberately do or omit to do any act” shall be construed in this Clause 75 having regard to the interactive nature of the activities of the Contracting Authority and the Company, but shall exclude any acts or omissions carried out in the ordinary course of the Contracting Authority’s or the Scottish Ministers’ activities including acting as statutory authority, or which were within the contemplation of the Parties, or which are otherwise permitted in this Agreement save to the extent that the Contracting Authority is expressly precluded from acting in such a manner by another provision of this Agreement.

**76. CO-OPERATION**

76.1 The Company shall co-operate fully and in a timely manner with any request from time to time of any auditor (whether internal or external) of the Contracting Authority or the Scottish Ministers or the Ombudsman to provide documents, or to procure the provision of documents, relating to the Project, and to provide, or to procure the provision of, any oral or written explanation relating to the same.

**77. EXCLUSIVE REMEDIES**

**77.1 Termination**

Neither Party shall have the right to terminate this Agreement in whole or in part for breach of contract, save as expressly set out in this Agreement.

**77.2 Common Law Rights**

Save as otherwise provided for in this Agreement, the Company will not be entitled to any common law rights including (but not limited to) rights to damages or any other rights under contract, delict or otherwise (other than specific performance, interim specific performance, injunction or interim injunction (or their equivalent in any jurisdiction)) in relation to any breach of this Agreement by the Contracting Authority.



**77.3 Payment Mechanism: No Double Remedy****77.3.1 Subject to:**

- (a) any other express right of the Contracting Authority pursuant to this Agreement; and
- (b) the Contracting Authority's right to claim, on or after termination of this Agreement, the amount of its and/or the Scottish Ministers' reasonable costs, losses, damages and expenses suffered or incurred by it or them as a result of rectifying or mitigating the effects of any breach of this Agreement by the Company, save to the extent that the same has already been recovered by the Contracting Authority pursuant to this Agreement or has been taken into account to calculate any compensation payable by the Contracting Authority pursuant to Schedule 11 (Termination Compensation),

the sole remedy of the Contracting Authority in respect of a failure to provide the Operations in accordance with this Agreement shall be the operation of Schedule 6 (Payment Mechanism).

**77.3.2** Nothing in this Clause 77.3 shall prevent or restrict the right of the Contracting Authority to seek injunctive relief or a decree of specific performance or other discretionary remedies of the courts.

**78. LAW OF THE AGREEMENT AND JURISDICTION**

The Agreement shall be governed by the laws of Scotland and subject to Schedule 7 (Dispute Resolution Procedure), the Parties submit to the exclusive jurisdiction of the courts of Scotland.

IN WITNESS WHEREOF these presents consisting of this and the preceding 206 pages together with the Schedules attached as relative hereto are executed as follows:

SIGNED for and on behalf of the SCOTTISH MINISTERS by **ABERDEEN CITY COUNCIL** (as agent)

JANE GLAISTER MACEACHRAN

by Jane Glaister MacEachran

at London on 12/12/14

in the presence of: [REDACTED]

Address [REDACTED]

EXECUTED for and on behalf of **ABERDEEN ROADS LIMITED**

RICHARD TURNER

by Richard Charles Turner

at London on 12 December 2014

in the presence of: [REDACTED]

Address [REDACTED]



Aberdeen Western Peripheral Route / Balmedie-Tipperty  
AWPR / B-T Managing Agent, Aberdeen Business Centre,  
Willowbank House, Willowbank Road, Aberdeen AB11 6YG

Tel: **01224 332322** | Fax: **01224 322 361** | Email: **[enquiries@awpr.co.uk](mailto:enquiries@awpr.co.uk)** | Web:  
**[www.awpr.co.uk](http://www.awpr.co.uk)**

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