



M8 M73 M74 MOTORWAY IMPROVEMENTS

DBFO AGREEMENT

TS/MTRIPS/WKS/2011/04



CONFIDENTIAL

AGREEMENT

**relating to the design, build, finance and operation of the
M8 M73 M74 Motorway Improvements Project**

between

SCOTTISH MINISTERS

and

SCOT ROADS PARTNERSHIP PROJECT LTD

Dated

2014

INDEX

1.	Definitions and Interpretation	5
2.	Duration of Agreement	65
3.	Conditions Precedent and Effect on Documents	65
4.	Warranties and Information	67
5.	Project Documents	70
6.	Access to and Occupation of Sites	73
7.	Access Rights and Orders – Warranties and Conditions	76
8.	Acquisition and Site Boundaries	77
9.	Condition and Use of the Sites	78
10.	Exercise Of Statutory Powers	81
11.	Consents by the Scottish Ministers	83
12.	The Operations	84
13.	Latent Defects in Existing Structures	90
14.	Construction Programme	98
15.	Design Development	99
16.	Company’s Representative	100
17.	Scottish Ministers’ Representatives	101
18.	Subcontracting Operations and Direct Agreements	103
19.	Delay	104
20.	CDM Regulations	106
21.	Apparatus	106
22.	Monitoring	113
23.	Protester Action	114
24.	Restricted Service Readiness Certificate	115
25.	Rail Underbridge	116
26.	Permits to Use	117
27.	Final Completion	119

28.	Quality Assurance	120
29.	Hazardous Substances	120
30.	Performance Monitoring and Suspension	121
31.	Employees	122
32.	Payment Provisions	133
33.	Relief Events	137
34.	Compensation Events	139
35.	Scottish Ministers Changes	141
36.	Company Changes	147
37.	Value for Money	150
38.	Qualifying Change in Law	151
39.	Implementation of Changes	153
40.	Refinancing	154
41.	Scottish Ministers Step-In	157
42.	Termination on Company Default	159
43.	Termination on Scottish Ministers Default	161
44.	Persistent Breach	161
45.	Force Majeure	162
46.	Corrupt Gifts and Fraud	164
47.	Voluntary Termination by the Scottish Ministers	166
48.	Termination on Breach of NPD Requirements	167
49.	Consequences of Termination	168
50.	Final Survey	170
51.	Transition to Another Company	172
52.	Indemnity	174
53.	Insurance	176
54.	Service Period Insurances	180
55.	Reinstatement	181
56.	Uninsurable Risks	183

57.	Terms and Conditions Which Become Unavailable	186
58.	Payment of Surpluses and Compliance with NPD Requirements	188
59.	Confidentiality	188
60.	Freedom of Information	192
61.	Dispute Resolution Procedure	195
62.	Not Used	195
63.	Data Protection	195
64.	Intellectual Property Rights	197
65.	Assignment and Sub-Contracting	200
66.	Audit and Regulatory Access	202
67.	Corporate Structures	202
68.	No Agency	204
69.	Entire Agreement	204
70.	Notices	205
71.	Public Relations, Publicity and Advertisements	206
72.	Waiver	207
73.	Severability	207
74.	Language	207
75.	Records and Liaison	208
76.	Parties not to Prevent	208
77.	Co-operation	209
78.	Exclusive Remedies	209
79.	Law of the Agreement and Jurisdiction	211

Schedules

Schedule 1	Conditions Precedent
Schedule 2	New Works Requirements
Schedule 3	Company's Design, Construction Programme, Quality Plans and Clarifications
Schedule 4	O&M Works Requirements
Schedule 5	Quality Assurance

Schedule 6	Payment Mechanism
Schedule 7	Dispute Resolution Procedure
Schedule 8	Environmental Assessment Documents
Schedule 9	Orders and Watercourse Notices
Schedule 10	Required Insurances
Schedule 11	Termination Compensation
Schedule 12	Design Agreements
Schedule 13	Authority of Representatives
Schedule 14	Direct Agreements
Schedule 15	Initial Financing Agreements
Schedule 16	Company's Details
Schedule 17	Commercially Sensitive Information
Schedule 18	Record Provisions
Schedule 19	Liaison Committee
Schedule 20	Third Party Rights
Schedule 21	Employment and Pensions
Schedule 22	Structures
Schedule 23	Bridge Agreements

DESIGN, BUILD, FINANCE & OPERATE AGREEMENT

BETWEEN:

- (1) **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 (who and whose successors are referred to as the **Scottish Ministers**);

and

- (2) **SCOT ROADS PARTNERSHIP PROJECT LTD**, a company registered in Scotland under the Companies Act 2006 having registered number SC465816 and whose registered address is at c/o Burness Paull, 120 Bothwell Street, Glasgow, Scotland G2 7JL (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. In accordance with PFI/PPP the Scottish Ministers 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.
- C. Following a tendering process in accordance with the provisions of the Public Contracts (Scotland) Regulations SSI 2006 No1, 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 6.1 (Access to and Occupation of 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 the roads described under the heading 'Accommodation Works Access Tracks' in Appendix D 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 Scottish Ministers) 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 Funders 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 Scottish Ministers have agreed that their 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 Scottish Ministers hereunder (if a positive number);
- b) the Tender Costs; and
- c) amounts which the Scottish Ministers is entitled to set off or deduct under this Agreement,

plus an amount equal to the aggregate of:

- d) 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; and
- e) any insurance proceeds and other amounts owing to the Company, Holdco or the Issuer (and which the Company, Holdco or the Issuer is entitled under this Agreement to retain), to the extent not included in (d) above; and
- f) 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) (d), (e) and (f) have not been directly taken into account when calculating the Estimated Fair Value; and

- b) in relation to (d) and (e) the Scottish Ministers have 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 Scottish Ministers are entitled to set off or deduct under this Agreement;

plus an amount equal to the aggregate of:

- d) 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
- e) any insurance proceeds and other amounts owing to the Company, Holdco or the Issuer (and which the Company, Holdco or the Issuer is entitled under this Agreement to retain) to the extent not included in (d) and (e) above; and
- f) any Post Termination Service Amounts (if a negative number);

to the extent that:

- g) (d), (e) and (f) have not been directly taken into account in that Compliant Tender; and
- h) in relation to (d) and (e), the Scottish Ministers have 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:

- a) in relation to any Financial Investor or other party, 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 the Issuer, Holdco and each of the Shareholders;

- b) in relation to any Financial Investor only:
- i) any unit trust, investment fund, partnership or other fund including any investor therein or other entity of which any entity referred to in paragraph (a) of this definition is the general partner, trustee, principal, manager or co-manager (either directly or indirectly);
 - ii) any company whose shares are held on behalf of any entity falling within paragraph (a) of this definition whose purpose is to hold shares or shareholder debt on their behalf (as nominee or trustee);

Agreed Departures means the agreed departures set out in Schedule 3A (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;

Asset Management Plan means the asset management plan entitled UB 140/23-1 on the Rutherglen – Coatbridge line (RCB) or any such other asset management plan for the proposed UB 140/23-1 (contract structure reference S105) (being the Rail Underbridge as

defined in this Agreement) agreed between Network Rail and the Company in accordance with Network Rail Standard NR/L3/MTC/089 Issue 1 dated 6 June 2009 (as updated or amended from time to time);

Assets means all assets and rights to enable the Scottish Ministers 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 Scottish Ministers are 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;

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):

- 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 Creditors 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 Creditors 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 Creditors 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 Creditors on or after the Termination Date and before the date on which any compensation is

payable by the Scottish Ministers to the Company as a result of enforcing any other rights they 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 mean the Settled Bonds and the Forward Purchase Bonds;

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 Scottish Ministers, in each case in consideration for the Scottish Ministers 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 Scottish Ministers 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 3D (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;

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 36;

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 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 Clauses 18.2 (Subcontracting Operations and Direct Agreements) or 65.2 (Restriction on the Company) occurs;
- h) a breach of Clause 67.2 (No Change of Ownership) or 67.3 (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 Unavailability 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;

In calculating the average monthly amounts account may be taken of a month where no Unavailability 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 36.1;

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 their 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 Scottish Ministers;

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 3A (Company's Design);

Company's Representative means Gabriel Valtuena Ramos 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 Scottish Ministers pay 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 Scottish Ministers of any of their obligations under this Agreement;
or

(b) any suspension or restriction of the Access Rights under Clause 7.4 of this Agreement;

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 Scottish Ministers' 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 1988; 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 set out in Schedule 3B (Construction Programme) 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 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) each provider of a letter of credit in support of the obligations of a Shareholder and/or a Noteholder pursuant to clause 4 of the Shareholder Support Agreement; and/or

d) 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 Creditors together with, without double counting, any security (by way of letter of credit, guarantee or otherwise) for those liabilities;

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 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;

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;

Cut-Off Date means the date which is ten (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 Creditors or which accrues as a result of any payment due to the Senior Creditors 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 of 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 Agreements);

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 Scottish Ministers 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 5 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;

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

- a) the ITPD - Instructions to Participants dated 25 June 2012 and associated revisions and clarifications issued by or on behalf of the Scottish Ministers to the Company;
- b) the Invitation to Submit Dialogue Period Submissions and Dialogue Period Submissions Evaluation Methodology dated 25 June 2012 and associated revisions and clarifications issued by or on behalf of the Scottish Ministers to the Company;
- c) the Invitation to Submit Final Tenders and Final Tender Evaluation Methodology dated 27 June 2013 and associated revisions and clarifications issued by or on behalf of the Scottish Ministers to the Company; and
- d) all information provided in the Information Room;

but excluding for the avoidance of doubt information contained in the First Employee List or any subsequently updated version of that list;

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;

Diversiónary Works means Diversiónary Works (Type 1) and Diversiónary Works (Type 2);

Diversiónary 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;

Diversiónary Works (Type 2) means any works involving the diversion, change in level, protection or removal of Apparatus arising as a direct consequence of the New Works other than in respect of Diversiónary Works (Type 1);

DMRB means Design Manual for Roads and Bridges published by the Stationery Office on 1 April 2012 and including those interim amendments and advice notes as implemented by Transport Scotland and which are current at 1 April 2012;

DPA means the Data Protection Act 1998;

Ecological Mitigation Works means the works required in the area with the notation 'set-aside ecological mitigation area' on the Indicative Landscape Drawing M8/C/3000/018 and as more fully described in Section 6 of Part 2 of Schedule 2;

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;

Emergency means any unforeseen event affecting the Operations, whether directly or indirectly, which causes an immediate and imminent threat to the integrity of any part of the Operations or the Sites, which event was not caused or contributed to by the Company or any Company Related Party;

Employee means any employee whose employment is subject to an Employee Transfer from an Employing Entity to the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors);

Employee Transfer means a relevant transfer in accordance with TUPE;

Employing Entity means (i) Balfour Beatty Group Employment Limited, a company registered under the Companies Acts (Registered number 8312432) and having its registered office at 130 Wilton Road, London, SW1V 1LQ and/or (ii) Mouchel Limited, a company registered under the Companies Acts (Registered number 1686040) and having its registered office at Export House, Cawsey Way, Woking, Surrey, GU21 6QX and/or any sub-contractor of either of them;

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;

Estimate has the meaning given in Clause 35.4.1;

Estimated Change in Project Costs means in relation to Clause 34 (Compensation Events), Clause 35 (Scottish Ministers Changes) and Clause 38 (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 Scottish Ministers 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 M8 Riddrie on average less frequently than once in 10 years;

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

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 Creditors on the dates at which the Senior Debt can be advanced to the Company 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 Creditors to the Scottish Ministers 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 Creditors to the Scottish Ministers 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 Creditors and the voting arrangements between the Senior Creditors 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 Scottish Ministers 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 15 March 2047;

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 4 and 5 in accordance with the New Works Requirements;

Final Completion Acceptance Notice means the notice to be issued by the Scottish Ministers pursuant to Clause 27.3.1;

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 means the Effective Date;

Financial Investor means each of (i) Meridiam Infrastructure Finance II Sarl a company incorporate and governed under the laws of Luxembourg (Company number B149218) and having its registered office at 5, Allée Scheffer L-2520 Luxembourg, (ii) Uberior Infrastructure Investments (No. 5) Limited, a company registered under the Companies Acts (Registered number 08063001) and having its registered office at 33 Old Broad Street, London, United Kingdom, EC2N 1HZ and (iii) Uberior Infrastructure Investments (No. 6) Limited, a company registered under the Companies Acts (Registered number 08062999) and having its registered office at 33 Old Broad Street, London EC2N 1HZ;

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 their 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 their indebtedness or any refinancing of the Project);

First Employee List has the meaning given in Clause 31.5;

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,

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 later of the date of issue of the Permit to Use in respect of either Phase 1 or Phase 2 and Full Services Commencement shall be construed accordingly;

Funders Direct Agreement means the direct agreement dated on or about the Date of this Agreement and made between the Scottish Ministers, the Company, the Security Trustee and the Intercreditor Agent;

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 Site 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 50.7;

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 Scot Roads Partnership Holdings Ltd, a company registered under the Companies Act 2006 (registered number SC463968) and having its registered office at 120 Bothwell Street, Glasgow, Scotland G2 7JL;

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 which was set up by the Scottish Ministers and made available to, *inter alia*, the Company using a version of the web based software *4Projects Tender & Bid Manager* which contained documents and other information relating to the Project;

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 53 (Insurance) and/or Schedule 10 (Required Insurance) but excluding any risk;

Insurance Undertaking has the meaning given in the rules from time to time of the Financial Services 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 [REDACTED] (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 Creditors 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 Scottish Ministers and the Company, having account number [REDACTED] and 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 (or associated defects) in any part of the Sites:

- a) in respect of which neither the Company nor any Company Related Party had any actual knowledge on the Date of this Agreement;
- b) which could not reasonably have been foreseen by a competent and experienced professional acting in accordance with Good Industry Practice and from an analysis of all relevant information available to the Company prior to the Date of this Agreement;
- c) which has not been caused (wholly or in part) by an act or omission of the Company or a Company Related Party from the Date of this Agreement, including by a breach of the Company's maintenance obligations under this Agreement; and
- d) which has not been caused by old age or fair wear and tear;

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 19 (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 Creditors 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 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;

LD Rectification Costs means, in respect of any LD Structure (Class A), the actual reasonably incurred direct cost of undertaking the LD Rectification Works in respect of that LD Structure (Class A) in accordance with Clause 13, but excluding:

- a) any such costs that result directly or indirectly from the LD Rectification Works being executed, or the contractual arrangements in respect thereof being administered, other than in accordance with the Rectification Plan;
- b) increased costs associated with performing the Operations as a consequence of the Latent Defect or the carrying out of the LD Rectification Works; and
- c) loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or consequential loss or indirect loss of any nature;

LD Structure means LD Structures (Class A) and LD Structures (Class B);

LD Structures (Class A) means each of the structures identified on the list in Schedule 22 Part 1 and existing as at the Date of this Agreement;

LD Structures (Class B) means each of the structures identified on the list in Schedule 22 Part 2 and existing as at the Date of this Agreement;

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 43 (Termination on Scottish Ministers 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 47 (Voluntary Termination by the Scottish Ministers), 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 Bond Margin and/or 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 32.1 (Payment of Unitary Charge) 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 Scottish Ministers incurring Rectification Costs or otherwise;

Maximum Amount means the maximum sum that the Company would be able to pay to the Scottish Ministers pursuant to Clause 50.6 (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 32.1 (Payment of Unitary Charge) 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 April 2012 and including those interim amendments and advice notes as implemented by Transport Scotland and which are current at 1 April 2012;

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

MF Roads means all of the Project Roads other than those roads which are categorised as **Network Roads** in Table 1 of Appendix D to Part 2 of Schedule 2 (New Works Requirements);

Mineworking Failure means any incident, arising out of the existence of mineworkings under or adjacent to the MF Roads, which directly affects (a) the MF Roads and/or (b) the ability of the Company to perform the Operations;

Monthly Invoice means the invoice issued by the Company in accordance with Clause 32.2 (Monthly Invoices);

Monthly Unitary Charge means the Monthly Unitary Charge calculated in accordance with Paragraph 2 of Schedule 6 (Payment Mechanism);

NPD Mandatory Provisions means the provisions of Article 22 (Votes) of the Articles of Association;

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 Scottish Ministers pursuant to Clause 58 (Payment of Surpluses and Compliance with NPD Requirements) or Articles 18 or 19 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]%;

Network Rail means Network Rail Infrastructure Limited and its successors incorporated under the Companies Acts (Company Number 02904587) having its registered office at Kings Place 90 York Place, London N1 9AG.

Network Rail Agreements means:

- a) the agreement titled Overbridge Agreement OB 140/26: M8S 8-8 31 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014 relating to M8 M73 M74 "S131";

- b) the agreement titled Overbridge Agreement OB 140/25 : M8S 8-8 21 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014 relating to M8 M73 M74 "S132";
- c) the agreement titled Overbridge Agreement OB 131/008: M8 7-8 17 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014 relating to M8 M73 M74 "S133";
- d) the agreement titled Overbridge Agreement OB 31/28: A725 200 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014 relating to M8 M73 M74 "S205";
- e) the agreement titled Overbridge Agreement OB 140/25B: M73 2-2 10 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014 relating to M8 M73 M74 "S404";
- f) the agreement titled Overbridge Agreement OB 31/33B and 286/68A: M74 5-4 60 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014 relating to M8 M73 M74 "S411";
- g) the agreement titled Overbridge Agreement OB 131/008-01: M8 7-8 15 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014 relating to M8 M73 M74 "S121";
- h) the agreement titled Overbridge Agreement OB 240/85A: M8 8-9 20 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014 relating to M8 M73 M74 "S101";
- i) the agreement titled Overbridge Agreement OB 240/83A: M73 2-3 10 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014;
- j) the agreement titled Overbridge Agreement OB 140/25A: M8S 8-8 20 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014;
- k) the agreement titled Overbridge Agreement OB 140/25C: M8S 8-8 30 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014;
- l) the agreement titled Overbridge Agreement OB 286/62A: A725 220 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014;

- m) the agreement titled Overbridge Agreement OB 131/007B: A8 40 entered into between the Scottish Ministers and Network Rail on 8th and 10th February 2014; and
- n) the Rail Underbridge Agreement;

each in the form as at the dates of signature thereof;

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 Scottish Ministers on entering into the New Contract;

New Contractor means the person who has entered or who will enter into the New Contract with the Scottish Ministers;

Network Roads means those roads for which O&M Works shall be required from the date of the issue of the relevant Permit to Use for either Phase 1 or Phase 2 and shall include those Accommodation Works Access Tracks over which access is required to carry out the O&M Works;

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 inferred as a consequence of, 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 the construction joint venture consisting of Ferrovial Agroman (UK) Limited a company with registered number 05779755 and whose registered office is at 10th Floor BSI Building, 389 Chiswick High Road, London W4 4AL and Lagan Construction Group Limited a company with registered number NI005233 and whose registered office is at Rosemount House, 21-23 Sydenham Road, Belfast, Northern Ireland BT3 9HA 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 period from the Effective Date to the Full Services Commencement Date;

New Works Quality Plan means the quality plan in respect of the New Works which is to be developed by the Company in accordance with this Agreement, the form of which (as at the Date of this Agreement) is set out in Schedule 3C (Quality Plans);

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 hatched in pink including the pink line;
- b) the areas of land shown hatched in dark blue including the dark blue line;

- c) the areas of land shown hatched in orange including the orange line;
- d) the areas of land shown cross-hatched in aqua including the aqua line;
- e) the areas of land shown hatched in purple including the purple line;
- f) the areas of land shown cross-hatched in pink including the pink line;
- g) the areas of land shown hatched in green including the green line;
- h) the areas of land shown hatched in aqua including the aqua line;
- i) the areas of land shown hatched in brown including the brown line;
- j) the areas of land shown cross-hatched in grey including the grey line; and
- k) the areas of land shown cross-hatched in brown including the brown 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 which is to be developed by the Company in accordance with this Agreement;

O&M Works means all activities and obligations to be carried out by the Company as described and specified in, or required or inferred as a consequence of, 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 Amey LG Limited, a company registered under the Companies Acts (Registered number 03612746) and having its registered office at The Sherard Building, Edmund Halley Road, Oxford OX4 4DQ 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 which is to be developed by the Company in accordance with this Agreement, the agreed form of which (as at the Date of this Agreement) is set out in Schedule 3C (Quality Plans);

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 hatched in pink including the pink line;
- b) the areas of land shown hatched in green including the green line;
- c) the areas of land shown cross-hatched in orange including the orange line;
- d) the areas of land shown hatched in dark blue including the dark blue line;
- e) the areas of land shown cross-hatched in pink including the pink line;
- f) the areas of land shown cross-hatched in aqua including the aqua line;
- g) the areas of land shown hatched in purple including the purple line;
- h) the areas of land shown cross-hatched in purple including the purple line;
- i) the areas of land shown cross-hatched in green including the green line;
- j) the areas of land shown hatched in lilac including the lilac line;

- k) the areas of land shown cross-hatched in grey including the grey line; and
- l) the areas of land shown hatched in aqua including the aqua 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;

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;

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 10 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 Unavailability Deductions and Service Shortfall Deductions in each case as defined in Part 1 of Schedule 6 (Payment Mechanism);

Performance Guarantees means:

- a) the guarantee to the Company, the Scottish Ministers and the Security Trustee and the performance bonds and/or letters of credit to the Company in each case in respect of the New Works Agreement; and
- b) the guarantees, performance bonds and/or letters of credit to the Company in respect of the O&M Works Agreement;

each of which, as at the date of this Agreement are in the Agreed Form;

Permit to Use means the notice issued by the Scottish Ministers to the Company, in accordance with Clause 26, 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;
- 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 (d) 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 Scottish Ministers in accordance with Clause 44.2;

Persistent Breach Warning Notice has the meaning given in Clause 44.1;

Personal Data means personal data as defined in the DPA which is supplied to the Company by the Scottish Ministers 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) that section of the New Works comprising all roads and associated works between Reference Point A27 and Reference Point A40 on the M74 motorway, Reference Point B28 and Reference Point B33 on the A725 All Purpose Road and Reference Point A17 and Reference Point A25 on the M73 motorway, including gantry works at gantry sites Reference Points; G21, G22, G23 on the M73 Motorway and G51, G52, G53, G54, G55, G56, G57 on the M74 Motorway, but excluding the following:
 - i) New Works to the motorway interchange link road between M73 northbound and M8 westbound;
 - ii) New Works to the motorway interchange link road between M8 eastbound and M73 southbound;
 - iii) New Works to the M73 northbound diverge slip road to Baillieston Interchange Roundabout;
 - iv) New Work to the M73 southbound merge slip road from Baillieston Interchange Roundabout;
 - v) New Works to Baillieston Interchange Roundabout and connecting roads and slip roads; and
 - vi) New Works to the A89, M8 Motorway and A8 All Purpose Road (**Phase 1**);

- b) that section of New Works comprising all roads and associated works between Reference Point A43 and Reference Point A16 on the M8 motorway, Reference Point B34 and Reference Point B26 on the A8 and generally all New Works with the exception of Phase 1 (**Phase 2**);

Physical Damage Policies means the policies referred to in paragraph 1 of both Parts 1 and 2 of Schedule 10 (Required Insurances) and paragraph 3 of Part 1 of Schedule 10 (Required Insurances);

Planned Full Services Commencement Date means 16 March 2017;

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;

Post Termination Service Amount means 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 Scottish Ministers 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 Scottish Ministers and the New Works Contractor dated 13, 14 and 27 January 2014;

Prescribed Rate means [REDACTED] over LIBOR;

Pricing Date has the meaning given in Clause 31.5;

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) 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
 - ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Crown;
- b) entering into this Agreement or any other contract with the Crown 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 Scottish Ministers;
- 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
- d) defrauding or attempting to defraud or conspiring to defraud the Crown;

Project means the M8 M73 M74 Motorway Improvements 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 Network Roads and the Site Roads;

Proposed Workforce has the meaning given in Clause 31.7.1;

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 B Director as defined in the Articles of Association;

Qualification Criteria means the criteria that the Scottish Ministers 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 Scottish Ministers and the Company;

Qualifying Bank Transaction means:

- a) the syndication by a Senior Creditor, 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 Creditor of any rights of participation, or the disposition by a Senior Creditor 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 Creditor (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 Scottish Ministers has been given;
- c) the grant by a Senior Creditor 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 Creditor (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 Scottish Ministers 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 involves Capital Expenditure.

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 Services 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 involve 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 Creditor 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 Scottish Ministers Notice of Change or a Company Notice of Change has been served and:
 - i) in the case of a Scottish Ministers Notice of Change, the Scottish Ministers have confirmed the Estimate and, where the Company is not funding all or part of the required Capital Expenditure, the Scottish Ministers 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 Scottish Ministers; 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 Underbridge means the New Works to be carried out by or on behalf of the Company to discharge obligations of the Scottish Ministers in respect of the Works as defined in the Rail Underbridge Agreement;

Rail Underbridge Agreement means the agreement titled 'Underbridge Agreement UB 140/23-1: M8 7-8 90" between the Scottish Ministers and Network Rail dated 8th and 10th February 2014 relating to Structure 105;

Rectification Costs means an amount equal to the reasonable and proper costs incurred by the Scottish Ministers in a particular Payment Month or part of a Payment Month in ensuring that the Project Roads are available in accordance with the O&M Works Requirements;

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 Services 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 Scottish Ministers 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 Scottish Ministers) or other like body to carry out works or provide services;
- c) failure by any Undertaker or utility company:
 - i) to carry out works or provide services in respect of Diversionary Works (Type 1), but only to the extent the Scottish Ministers have had the opportunity to object to any alteration of the timing or duration of Diversionary Works (Type 1) in accordance with Clause 14.2 and have not made such objection, and/or
 - ii) to carry out works or provide services other than in respect of Diversionary Works (Type 1) or Diversionary Works (Type 2);
- 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;
- h) Exceptionally Adverse Weather affecting the Sites;
- i) failure by Network Rail to provide any booked possession for Structure 105 unless such failure arises as a consequence of any breach, act or omission of the Company (other than as required by this Agreement);
- j) a Mineworking Failure, provided that the application of this limb j) shall be restricted to those periods during which the Company receives relief from Mineworking Deductions pursuant to Clause 9.6; and/or
- k) any Latent Defect in an LD Structure, provided that the application of this limb (k) shall be restricted to those periods during which the Company receives relief from Class A Deductions or Class B Deductions as the case may be;

unless any of the events listed in paragraphs a) 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;

Remuneration Costs has the meaning given in Clause 31.7.2;

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);

Reorganisation Costs has the meaning given in Clause 31.7.3;

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 53.1 and 53.2;

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 Access Site means the land shown in cross-hatched in dark grey on the New Works LMA Drawings and the O&M Works LMA Drawings;

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 Scottish Ministers of the Restricted Services Commencement Notice in accordance with Clause 24.3;

Restricted Services Commencement Notice means the notice issued by the Scottish Ministers pursuant to Clause 24.3;

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 date of issue of the Permit to Use for the relevant Phase;

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 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 50.6 (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 Creditors 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 Creditors 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, 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 Creditors 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 Creditors on or after the Termination Date and before the date on which any compensation is payable by the Scottish Ministers to the Company as a result of enforcing any other rights they 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 Traffic Management and Safety Limited, a company with registered number 03521791 whose registered office is at Sovereign House, 12 Warwick Street, Earlsdon, Coventry CV5 6ET 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 they 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 Change means a change to the Scottish Ministers' Requirements at any time;

Scottish Ministers 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, the Issuer or Holdco by the Scottish Ministers or other Relevant Authority;
- b) a failure by the Scottish Ministers 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 Scottish Ministers under this Agreement within 30 days of service of a formal written demand by the Company, where that amount fell due and payable two (or more) months prior to the date of service of the written demand;
- c) a breach by the Scottish Ministers of their 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 months; or
- d) a breach by the Scottish Ministers of Clause 65.1 (Restrictions on Transfer of the Agreement by the Scottish Ministers) occurs;

Scottish Ministers Default Termination Sum has the meaning given in paragraph 1 of Part 1 (Termination for Scottish Ministers Default) of Schedule 11 (Termination Compensation);

Scottish Ministers Notice of Change is the notice referred to in Clause 35.3;

Scottish Ministers Property has the meaning given in Clause 52.1.2;

Scottish Ministers' Conditions Precedent means those obligations of the Scottish Ministers set out in Part 1 of Schedule 1 (Conditions Precedent);

Scottish Ministers' Representative means the person authorised as such under Clause 17 being, as at the Date of this Agreement, Ainslie McLaughlin;

Scottish Ministers' Requirements means the New Works Requirements and the O&M Works Requirements;

Scottish Ministers' Site Representative means the person authorised as such under Clause 17 being, as at the Date of this Agreement, Ian McKay;

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 Creditors;

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 Creditors under the Senior Financing Agreements;

Senior Creditors has the meaning given to it in the Senior Financing Agreements;

Senior Debt means the financing provided by the Senior Creditors 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.); and
- d) 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;
- 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;

Service Period means the period specified in Clause 2.2;

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

SGN Diversionary Works means the works being carried out by Scotia Gas Networks within the boundaries of the SGN Diversionary Works Sites;

SGN Diversionary Works Sites means the land shown in cross-hatched in pink or brown on the New Works LMA Drawings and shown cross-hatched in pink, green or purple on the O&M Works LMA Drawings;

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

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

Side Roads means the roads described under the heading **Side Roads** in Appendix D to Part 2 of Schedule 2 (New Works Requirements) and all other public roads, cycle-paths, footpaths and footways within the Sites under the authority of the relevant Councils as **Local Roads Authorities**;

Site Roads means all roads within the Sites (excluding Network Roads), whether temporary or permanent and whether or not constructed under this Agreement for which Final Completion has not been achieved;

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

SM Direct Agreements means each of the New Works Direct Agreement, the O&M Works Direct Agreement, the Designer's Direct Agreement, the Design Checker's Direct Agreement and the Road Safety Auditor's Direct Agreement;

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 April 2012, 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 April 2012;

Structure 105 or **M8 M73 M74 "S105"** means the Rutherglen to Coatbridge railway bridge over the M8 motorway to be constructed as part of the New Works;

Sub-Contractors means each of the counterparties of the Company to the Project Documents (other than the Scottish Ministers and the Senior Creditors) 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 Scottish Ministers;

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 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, except in all cases for incomplete items which in the opinion of the Scottish Ministers 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 Scottish Ministers (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 Scottish Ministers pursuant to Clause 58.1;

Surplus Payment Date means each 31 March or 30 September of each year until 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 private new means of access.

Tender Costs means the reasonable and proper costs of 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 Scottish Ministers request 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 42 (Termination on Company Default), 43 (Termination on Scottish Ministers Default), 45 (Force Majeure), 46 (Corrupt Gifts and Fraud), 47 (Voluntary Termination by the Scottish Ministers) or 48 (Termination on Breach of NPD Requirements);

Termination Date Discount Rate means a discount rate expressed as

a) $(1 + \text{real base case project IRR} + \text{Gilt B} - \text{Gilt A})^i (1 + I) - 1$

where:

b) **real base case project IRR** is the real pre-tax Project IRR as set out in the Base Case at the Effective Date;

c) **i** is the reasonable forecast rate of increase in RPIX for the remaining term of the Agreement, as agreed between the Parties;

d) **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

e) **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 Scottish Ministers on the Company in accordance with Clause 42.1;

Termination Sum means any compensation payable by the Scottish Ministers 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, wayleaves, easements, public or private rights of way, title conditions, burdens, heritable title, 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 Schedule 20;

Third Party Roads means all roads (including roundabouts and access tracks) which are categorised as **Third Party Roads** in Table 1 of Appendix D to Part 2 of Schedule 2 (New Works Requirements), being those roads which are to be handed over to a third party (other than Transport Scotland and/or one of its maintenance contractors) at or around the time of Substantial Completion;

TPL Risk means a risk which is required to be insured under the third party liability insurance policy;

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 Scottish Ministers 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 Scottish Ministers 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, any Sub-Contractor or any of its sub-contractors), excluding, without limitation, any person engaged as an independent contractor, who are wholly or mainly assigned to the performance of those services that are similar to the Operations or 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);

Unavailability has the meaning given to that term in Schedule 6 (Payment Mechanism).

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;

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 Scottish Ministers by the Company in accordance with Clause 37.1;

VFM Review means the review of the operations to be carried out by the Company in accordance with Clause 37.1;

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;

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; and
- (j) references to sub-contractors means sub-contractors of any tier of the Company.

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 2013.

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 Funder's 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, 51.5, 59, 60, 61, 63, 65, 67, 68, 69, 70, 71, 72, 73, 76, 77, 78 and 79) 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 Scottish Ministers and, in relation to the Scottish Ministers' Conditions Precedent, to be given by the

Company), this Agreement shall terminate on the Cut-Off Date and, subject to Clause 51.5 (Accrued Rights), be without further effect.

3.3 Scottish Ministers' obligation to satisfy

The Scottish Ministers shall use their reasonable endeavours to ensure that the Scottish Ministers' 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 is 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 Scottish Ministers' Condition Precedent, is received by the Scottish Ministers from the Company; and

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

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 Scottish Ministers under the Pre-Start Works Agreement which constitute a change to the Scottish Ministers Requirements shall be considered a Scottish Ministers Change and the provisions of Clause 35 (Scottish Ministers Changes) shall apply; and

3A.1.3 any claims which the New Works Contractor may have against the Scottish Ministers 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 Scottish Ministers shall not be entitled to any relief or compensation (whether financial, relating to time or otherwise) under this Agreement to the extent that the Scottish Ministers have already been compensated (whether financial, relating to time or otherwise) under the Pre-Start Works Agreement.

4. **WARRANTIES AND INFORMATION**

4.1 **Company Warranties**

The Company warrants, represents and undertakes to the Scottish Ministers 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 Scottish Ministers and which if disclosed might reasonably have been expected to affect the decision of the Scottish Ministers 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 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 it is not aware of any claims against the Scottish Ministers existing under the Pre-Start Works Agreement;
- 4.1.9 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
- 4.1.10 no security interests exist over the Assets other than as created by or pursuant to the Financing Agreements.

and the Scottish Ministers rely upon such warranties, representations and undertakings.

4.2 **Undertakings of the Company**

The Company undertakes to the Scottish Ministers that the Company will not without the prior consent of the Scottish Ministers:

- 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 as permitted 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 Scottish Ministers**

The Scottish Ministers do 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 Scottish Ministers 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 Scottish Ministers 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 Scottish Ministers 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) without prejudice to Clause 12.11 (Fossils and Antiquities), 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 Scottish Ministers on grounds that any information, whether obtained from the Scottish Ministers or otherwise (including information made available by the Scottish Ministers) 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;

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 their

obligations (or waives or allows to lapse any rights they 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 Scottish Ministers' Representative for review and there has been no objection made by the Scottish Ministers within fifteen (15) Business Days of receipt by the Scottish Ministers 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).

5.2 **Delivery**

The Company has provided to the Scottish Ministers 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 Scottish Ministers a conformed copy of each such amendment or agreement within 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 Scottish Ministers 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 Scottish Ministers' liabilities on early termination of this Agreement unless:

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

5.3.3 The Company shall not, without the prior written consent of the Scottish Ministers 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; and/or
- (c) change the circumstances in, or conditions on, which the Company is entitled or obliged to make Surplus Payments.

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 40 (Refinancing).

5.3.5 Without prejudice to Clause 5.3.1, the Company shall liaise with the Scottish Ministers, and shall use all reasonable endeavours to provide the Scottish Ministers 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).

5.4 **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 Scottish Ministers (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 Scottish Ministers 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 SITES

6.1 The Scottish Ministers grant 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 (excluding the SGN Diversionary Works Sites and the Restricted Access Site) for the purpose of carrying out the New Works from the Effective Date;

6.1.2 the O&M Works Site (excluding the SGN Diversionary Works Sites and the Restricted Access 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 provided that such rights over those parts of the O&M Works Site shown hatched in lilac including the lilac line, hatched in green including the green line, shall cease on Final Completion;

6.1.3 the SGN Diversionary Works Sites for the purpose of carrying out the New Works and the O&M Works from 31 October 2014 until the Expiry Date or the Termination Date as the case may be provided that such rights over those parts of the O&M Works Site shown cross-hatched in green including the green line shall cease on Final Completion; and

6.1.4 the Restricted Access Site for the purpose of carrying out the New Works and the O&M Works from 31 October 2014;

in each case subject only to Clause 6.3, Clause 7 and to 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 Scottish Ministers Change.

6.3 Limitations to Access Rights

6.3.1 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 Scottish Ministers 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.

6.3.2 The Company's exercise of the Access Rights over the New Works Site and the O&M Works Site is subject to the following restrictions and limitations:

- (a) those parts shown hatched in dark blue including the dark blue line shall be as servitude rights or wayleaves for the purposes of construction and maintenance of drainage works only;
- (b) those parts shown hatched in purple including the purple line and shown cross-hatched in purple including the purple line shall be as servitude rights or wayleaves over Network Rail operational land for the purposes of construction and maintenance of bridge works and road works;
- (c) those parts shown cross-hatched in orange including the orange line shall be restricted and subject to a servitude rights of access in favour of a private individual for pedestrian use and the passage of animals and light vehicles; and
- (d) those parts shown cross-hatched in grey including the grey line shall be for the purpose of those parts of the Works which are within the Restricted Access Site only.

6.3.3 The Company's exercise of the Access Rights over the O&M Works Sites is subject to the following restrictions and limitations:

- (a) the Access Rights over those parts shown cross-hatched in pink including the pink line, shown cross-hatched in purple including the purple line and shown cross-hatched in green including the green line shall not be granted

until completion of the SGN Diversionary Works unless otherwise agreed in writing by the Scottish Ministers;

- (b) the Access Rights over those parts consisting the local authority road and associated features shown hatched in green including the green line, shown cross-hatched in purple including the purple line and shown cross-hatched in green including the green line shall cease when such parts become the responsibility of the relevant Local Roads Authority in accordance with the requirements of this Agreement;
- (c) the Access Rights over those parts consisting the private access track and associated features shown hatched in lilac including the lilac line shall cease when such parts become the responsibility of the relevant owner of the private access in accordance with the requirements of this Agreement;
- (d) the Access Rights over those parts shown hatched in aqua including the aqua line are restricted by the operation of the railway overhead and for those parts that form part of Network Rail operational land shall not be exercised without the express written permission of Network Rail; and
- (e) the Access Rights over those parts shown cross-hatched in aqua including the aqua line are restricted by the operation of the railway and, for those parts that form part of Network Rail operational land, shall not be exercised without the express written permission of Network Rail until the issue of the Permit to Use for Phase 2 of the New Works and thereafter such Access Rights shall be subject to a servitude in favour of Network Rail as more fully set out in Schedule 20.

6.3.4 The Company's exercise of the Access Rights over the New Works Sites is subject to the following restrictions and limitations:

- (a) those parts shown hatched in green including the green line shall be for temporary access for construction and maintenance of a temporary carriageway during the New Works Period only;
- (b) those parts shown cross-hatched in aqua including the aqua line are subject to the requirement to provide a temporary access across the New Works Site until a new permanent access is provided as part of the New Works;

- (c) The Access Rights over those parts shown cross-hatched in pink including the pink line and shown cross-hatched in brown including the brown line shall not be granted until the completion of the SGN Diversionary Works unless otherwise agreed in writing by the Scottish Ministers;
- (d) those parts shown hatched in brown including the brown line and shown cross-hatched in brown including the brown line shall be for the purposes of Ecological Mitigation Works only unless otherwise agreed in writing by the Scottish Ministers; and
- (e) the Access Rights over those parts shown hatched in aqua including the aqua line that form part of Network Rail operational land shall not be exercised without the express written permission of Network Rail.

7. ACCESS RIGHTS AND ORDERS – WARRANTIES AND CONDITIONS

7.1 The Scottish Ministers warrant 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 Scottish Ministers do 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. 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 Scottish Ministers take or expressly authorise 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

Scottish Ministers' 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 only as would be reasonably apparent on an 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 Scottish Ministers Change requiring the Company to allow for such interference in the performance of the Operations.

7.4 Suspension of Access Rights

Without prejudice to Clause 34 (Compensation Events), the Scottish Ministers on giving notice to the Company shall be entitled to suspend or restrict the Access Rights or any part of them at their discretion for such period or periods as they 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) days after the date of Final Completion, the Company shall by notice to the Scottish Ministers 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 Scottish Ministers shall

be entitled in their absolute discretion (as between the Scottish Ministers and the Company) either to retain or to dispose of such area of land in accordance with Scottish Ministers' procedures and requirements.

- 8.2 If the Scottish Ministers exercise their 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 180 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 Scottish Ministers do not exercise their 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);

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 subject to the provisions of Clause 9.6, 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 Scottish Ministers' 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 Scottish Ministers.

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 Scottish Ministers' 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 Scottish Ministers, the police, 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

Subject to Clauses 9.6 and 13, 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 Scottish Ministers Notices

The Company shall comply with and/or procure compliance with any notice issued by the Scottish Ministers 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 Scottish Ministers is prejudicial to the performance by the Scottish Ministers or any Relevant Authority of their duties, obligations or functions or the exercise by the Scottish Ministers 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.

9.6 Mineworkings

9.6.1 Where, as the consequence of a Mineworking Failure the Scottish Ministers become entitled to make or levy Lane Occupation Charges, Service Shortfall Deductions, Unavailability Deductions or Lane Availability Failure Charges (**Mineworking Deductions**) in accordance with Schedule 6 (Payment Mechanism), the following provisions shall apply.

9.6.2 Within 10 Business Days of the later of the occurrence of a Mineworking Failure or the Company becoming aware of the occurrence of that Mineworking Failure the Company shall (at all times acting in accordance with Good Industry Practice):

- (a) institute such traffic management measures as are appropriate in the circumstances so as to ensure the availability of an equivalent number of Lanes as were available immediately prior to the occurrence of the Mineworking Failure, provided always that where the Company proposes to use Narrow Lanes the requirement for such shall be demonstrated to the Scottish Ministers' reasonable satisfaction; and
- (b) submit to the Scottish Ministers a programme of action which will, when performed, mitigate the consequences of and remedy or rectify or otherwise resolve (to the extent reasonably practicable in the context of the

Operations) the Mineworking Failure to the reasonable satisfaction of the Scottish Ministers within such period as is reasonable in the circumstances (the **Mineworking Rectification Plan**);

and provided always that the Company has acted in accordance with Good Industry Practice when carrying out the Operations in the vicinity of any mineworkings then during that 10 Business Day period the Scottish Ministers shall not be entitled to make or levy any Mineworking Deductions.

9.6.3 The Company shall implement the Mineworking Rectification Plan timeously and in accordance with its terms. The Company shall be relieved of liability for Mineworking Deductions during the period in which the Company is diligently implementing the Mineworking Rectification Plan or such other period as is appropriate in the circumstances.

9.6.4 If at any time the Scottish Ministers (acting reasonably) are not satisfied with the implementation of the Mineworking Rectification Plan by the Company timeously and in accordance with its terms (other than for reasons or circumstances beyond the reasonable control of the Company) then the Scottish Ministers may by notice to the Company declare that the Scottish Ministers are forthwith entitled to make Mineworking Deductions.

10. EXERCISE OF STATUTORY POWERS

10.1 If the Company believes that:

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

10.1.2 the exercise by the Scottish Ministers of any of their rights under all or any of the Network Rail Agreements,

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 Scottish Ministers (the **Notice**). A Notice shall:

10.1.3 clearly specify the action requested of the Scottish Ministers or any other Relevant Authority (the **Requested Action**), the part of the Operations in respect of which the

Requested 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; and
 - 10.1.5 set out any recommendation by the Company in respect of the Requested Action.
- 10.2 Within 20 Business Days after receipt of a Notice the Scottish Ministers 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 Scottish Ministers.
- 10.3 Without in any way limiting the discretion of the Scottish Ministers, the Scottish Ministers shall give reasonable consideration on its merits and in accordance with their statutory duties to the Requested Action and shall respond to the Notice as soon as reasonably practicable in the circumstances (taking into consideration inter alia the requirement to liaise with any Relevant Authority and any requirement for consultation with the public or other interested parties in connection with the Requested Action). The Scottish Ministers and any other Relevant Authority shall be entitled to decline to take the Requested Action at their absolute discretion. The decision of the Scottish Ministers on the merits of the Requested Action shall not be subject to review under the Dispute Resolution Procedure.
- 10.4 Where the Requested Action is necessary to enable the performance of the Operations by the Company and the Scottish Ministers or any Relevant Authority decline, or are unable, to take the Requested Action (the **Requested Action Decision**), then:
- 10.4.1 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 Requested Action Decision shall be considered a Company Change and the provisions of Clause 36 (Company Changes) shall apply; and
 - 10.4.2 where the Requested Action is necessary for any other reason the Scottish Ministers shall issue a Scottish Ministers 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 Scottish Ministers Change).
- 10.5 Where a Requested Action:
- 10.5.1 is necessary to enable performance of all or a part of the Operations by the Company; and

10.5.2 is not necessary as a consequence of any act or omission of the Company (other than as required by this Agreement);

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, in each case pending the Requested Action Decision.

10.6 The Company shall reimburse the reasonable costs incurred by 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 SCOTTISH MINISTERS**

11.1 **Withdrawal of Consents**

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

11.1.1 on the basis of materially inaccurate or misleading facts, information or calculations provided to the Scottish Ministers 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 Scottish Ministers 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 Scottish Ministers shall relieve the Company of any of its obligations under this Agreement or be deemed to constitute acceptance by the Scottish Ministers except where expressly provided in this Agreement or notified by the Scottish Ministers to the Company.

11.3 Notwithstanding the provisions of Clause 11.1, once the Restricted Services Commencement Notice, any Permit to Use or the Final Completion Acceptance Notice 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 the O&M Works in accordance with and subject to the provisions of this Agreement;
- 12.1.3 carry out Restricted Services on the Project Roads;
- 12.1.4 transfer the Third Party Roads to the relevant third party prior to the Full Services Commencement Date;
- 12.1.5 remedy to the Scottish Ministers' (and in relation to Clause 12.1.5(b) below Network Rail's) reasonable satisfaction, and within such reasonable time as the Scottish Ministers may specify having regard to the nature of the Defect, all Defects occurring in:
 - (a) the Accommodation Works and/or the Third Party Roads in each case insofar as notified to the Company by the Scottish Ministers within 60 months of Final Completion; and

- (b) the Rail Underbridge insofar as notified to the Company by the Scottish Ministers and/or Network Rail within twelve (12) months of Final Completion.

12.2 Community Benefits

- 12.2.1 The Company shall comply with the requirements of Part 1 of Schedule 2 regarding training and employment opportunities.
- 12.2.2 The Company shall procure that any Sub-contract contains provisions identical to Clause 12.2.1 and where the New Works Contractor intends to procure any works, goods or services following the Date of this Agreement that such opportunities are advertised through the Public Contracts Scotland procurement portal (www.publiccontractsscotland.gov.uk).

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 Scottish Ministers' Requirements; and
 - (b) the Assets are handed back to the Scottish Ministers 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 as, 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 from the Restricted Services Commencement Date, carry out the Restricted Services on each Phase up to the date of the Permit to Use in respect thereof and thereafter carry out the O&M Works Requirements on the relevant section or sections of the Project Roads;

12.4.5 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 Scottish Ministers' 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;

12.4.6 ensure that the appropriate number of Lanes are available to Users throughout the Contract Period in accordance with the Scottish Ministers' Requirements;

12.4.7 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;

12.4.8 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;

12.4.9 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;

- 12.4.10 be entirely responsible for the adequacy, stability and safety of all site operations and methods of construction;
- 12.4.11 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;
- 12.4.12 perform all the Company's obligations under this Agreement in such a manner as fully to comply with and meet all the requirements of the Network Rail Agreements other than the Excluded Obligations, which the Scottish Ministers shall perform; and
- 12.4.13 consult and comply with the requirements of:
- (a) Undertakers and other owners of Apparatus in connection with Apparatus;
 - (b) Network Rail in connection with (i) the completion of the Rail Underbridge and (ii) any Works on or adjacent to or otherwise affecting Network Rail operational railway land, in each case in accordance with the terms of this Agreement and (where relevant) the Network Rail Agreements; 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 Scottish Ministers have 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 Scottish Ministers may make such reports to the HSE and as the Scottish Ministers see fit should the Scottish Ministers 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 Scottish Ministers.

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 Scottish Ministers or any other person and the Company shall indemnify 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 Scottish Ministers 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 Scottish Ministers 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 on-site staff 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 this Agreement, the Company shall cause a term to be included in each such sub-contract:

- (a) which requires the sub-contractor to ensure that on-site staff 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.

12.13 Precedence of Documents

12.13.1 In the event of any conflict or inconsistency between:

- (a) the New Works Requirements and any documents incorporated by reference therein; or
- (b) 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.

12.13.2 In the event of any conflict or inconsistency between:

- (a) the O&M Works Requirements and the O&M Works Quality Plan; or
- (b) the O&M Works Requirements and the O&M Manual,

the O&M Works Requirements shall prevail.

13. LATENT DEFECTS IN EXISTING STRUCTURES

LD Structures (Class A)

13.1 Reporting of Latent Defects

13.1.1 The Company shall promptly give notice to the Scottish Ministers of any Latent Defect which becomes apparent in any LD Structure (Class A) (a **Defect Notice**). The Defect Notice shall contain the following information, to the extent such information is available to the Company (using reasonable efforts):

- (a) the nature of the Latent Defect;
- (b) details of the affected LD Structure (Class A) and the affected parts of such LD Structure (Class A);
- (c) the Company's assessment of whether the LD Rectification Costs will exceed £[REDACTED] (indexed);
- (d) any measures adopted and/or to be adopted by the Company to prevent the Latent Defect from deteriorating in the period before the LD Rectification Plan is agreed or determined;
- (e) interim measures (and the costs thereof) whereby the Company will ensure the safety of Users, the public and the LD Structure (Class A);
- (f) traffic management measures that the Company has taken or proposes to take in the period before the LD Rectification Plan is agreed or determined; and
- (g) any inspections, tests, studies, trials, surveys or investigations that the Company proposes to conduct to assess any other LD Structure (Class A) or similar structure that may be affected by a similar Latent Defect.

13.1.2 If any of the information in the Defect Notice changes in any material way during the period between the issue of the Defect Notice and the date on which the LD Rectification Plan is agreed or determined in accordance with Clause 13.5, the Company shall notify the Scottish Ministers of the changed information as soon as reasonably practicable.

13.1.3 Where the Scottish Ministers do not agree with the Defect Notice or any of the information set out therein or any changed information provided pursuant to Clause 13.1.2 they will notify the Company within ten (10) Business Days after receipt of the relevant Defect Notice or notice pursuant to 13.1.2.

13.1.4 If the Parties are unable to reach agreement on any of the matters referred to in Clause 13.1.3 within ten (10) Business Days of the date of the Scottish Ministers' notification under Clause 13.1.3, then either Party may refer the matter or matters for resolution under the Dispute Resolution Procedure.

13.1.5 The Company shall implement the measures and take the actions set out in the Defect Notice (as updated pursuant to Clause 13.1.2) as agreed or determined pursuant to 13.1.4.

13.2 Remediation of Latent Defects

13.2.1 Subject to Clauses 13.3:

- (a) the Company shall be responsible for any reconstruction, repair, reinstatement, remediation, replacement, renewal or other works required as a result of any defect in the Project Roads, including any Latent Defect;
- (b) any reconstruction, repair, reinstatement, remediation, replacement, renewal or other works required as a result of any Latent Defect shall be carried out in accordance with the provisions of this Agreement;
- (c) all costs of and associated with any defect in the Project Roads (including any Latent Defect) and any reconstruction, repair, reinstatement, remediation, replacement, renewal or other works in respect thereof shall borne by the Company; and
- (d) and Clauses 13.7, 13.10 and 13.11, the Scottish Ministers shall have no liability to the Company in respect of any loss of profit, loss of income, loss of contract or any other Losses arising out of or in connection with the Latent Defect, or any reconstruction, repair, reinstatement, remediation, replacement, renewal or other works required as a result of any Latent Defect.

13.3 Limitations on liability

13.3.1 Subject to Clause 13.3.2:

- (a) the Company's liability for LD Rectification Costs in respect of each occurrence of a Latent Defect in an LD Structure (Class A) shall be limited to £[REDACTED] (Indexed); and

- (b) the Company's overall aggregate liability in respect of LD Rectification Costs shall be limited to £[REDACTED] (Indexed).

13.3.2 In determining the Company's limitations on liability under this Clause 13.3, there shall be excluded:

- (a) any liability for death, personal injury and/or any liability that cannot lawfully be excluded or limited; and
- (b) any liability, where and to the extent that the Company makes recovery or will make recovery (or being entitled to, fails to pursue such recovery or achieve such recovery as a result of the Company or any Company Related Party causing any insurance policy to become void or unenforceable or the Company or any Company Related Party failing to comply with the requirements of this Agreement or any insurance policy required pursuant to this Agreement) from insurances maintained by the Company whether pursuant to this Agreement or otherwise.

13.3.3 The Scottish Ministers shall indemnify the Company, and keep the Company indemnified, against any LD Rectification Costs over and above the Company's limits of liability set out in Clause 13.3.1. Such LD Rectification Costs shall be invoiced by the Company and paid for by the Scottish Ministers in accordance with Clause 32 (Payment Provisions).

13.4 **Initial Plan**

13.4.1 As soon as practicable and in any event within twenty (20) Business Days after service of a Defect Notice, the Company shall deliver to the Scottish Ministers a plan prepared by the Company (the **Initial Plan**) setting out:

- (a) details of any inspections, tests, studies, trials, surveys or investigations that the Company proposes to conduct in connection with the relevant Latent Defect; and
- (b) the Company's programme for:
 - (i) carrying out the inspections, tests, studies, trials, surveys or investigations referred to in Clause 13.4.1(a);
 - (ii) evaluating the options for dealing with the Latent Defect; and

- (iii) making a recommendation to the Scottish Ministers as to the Company's preferred solution for dealing with the Latent Defect (including any works of reconstruction, repair, reinstatement, remediation, replacement or renewal necessary to implement such solution); and
 - (c) the traffic management measures that the Company proposes to take or implement in order to carry out the inspections, tests, studies, trials, surveys or investigations referred to in Clause 13.4.1(a).
- 13.4.2 The Company shall have regard to any representations of the Scottish Ministers in respect of the Initial Plan and both Parties shall use reasonable endeavours to agree the Initial Plan timeously.
- 13.4.3 If the Parties are unable to reach agreement on the Initial Plan within twenty (20) Business Days of the date of its receipt by the Scottish Ministers, either Party may refer the matter for resolution under the Disputes Resolution Procedure.
- 13.4.4 Following agreement or determination of the Initial Plan the Company shall as soon as practicable:
 - (a) undertake any inspections, tests, studies, trials, surveys or investigations set out in the Initial Plan; and
 - (b) in accordance with the programme set out in the Initial Plan, proceed to evaluate the options for dealing with the Latent Defect and make a recommendation to the Scottish Ministers as to their preferred solution for doing so.
- 13.4.5 If as a consequence of (i) any changes to the Defect Notice pursuant to Clause 13.1 or (ii) any inspections, tests, studies, trials, surveys or investigations carried out pursuant to the Initial Plan, either or both of the Parties reasonably considers that further inspections, tests, studies, trials, surveys or investigations are required, said Party shall give notice to the other Party as soon as reasonably practicable and the provisions of this Clause 13.4 shall thereafter apply mutatis mutandis.

13.5 LD Rectification Plan

- 13.5.1 As soon as practicable following completion of the activities referred to in Clause 13.4.4, the Company shall deliver to the Scottish Ministers a plan (the **LD Rectification Plan**) setting out:

- (a) the results of any inspections, tests, studies, trials, surveys or investigations that the Company has conducted in accordance with the Initial Plan;
- (b) the Company's proposed options for dealing with the Latent Defect;
- (c) the Company's recommendation as to its preferred solution for dealing with the Latent Defect (including any works of reconstruction, repair, reinstatement, remediation, replacement or renewal necessary to implement such solution);
- (d) the proposed terms and timetable upon which the preferred solution referred to above is to be effected (including the date that the relevant LD Structure (Class A) will become fully operational);
- (e) the traffic management measures that the Company proposes to take or implement in order to carry out the LD Rectification Works; and
- (f) a detailed estimate of the cost of carrying out the LD Rectification Works.

13.5.2 The Company shall have regard to any representations of the Scottish Ministers in respect of the LD Rectification Plan and both Parties shall use reasonable endeavours to agree the LD Rectification Plan timeously.

13.5.3 If the Parties are unable to reach agreement on the LD Rectification Plan within twenty (20) Business Days of the date of its receipt by the Scottish Ministers, either Party may refer the matter for resolution under the Dispute Resolution Procedure.

13.5.4 Following agreement or determination of the LD Rectification Plan:

- (a) the works of reconstruction, repair, reinstatement, remediation, replacement or renewal necessary to implement the solution referred to in such LD Rectification Plan shall be the **LD Rectification Works**;
- (b) the period set out in the timetable for carrying out the LD Rectification Works shall be the **LD Rectification Period**.

13.6 LD Rectification Works

13.6.1 As soon as practicable following agreement or determination of the LD Rectification Plan, the Company shall procure that the LD Rectification Works are carried out in accordance with the Scottish Ministers' Requirements in order that, on completion of

the LD Rectification Works, the provisions of this Agreement have been complied with.

13.6.2 The Company shall report to the Scottish Ministers on at least a monthly basis (or at such other intervals as the Scottish Ministers may require from time to time) as to the progress of the LD Rectification Works, any changes to the information previously provided to the Scottish Ministers pursuant to this Clause 13, and all other relevant information. Where such information has a material effect on the matters contemplated in this Clause 13, the LD Rectification Plan (and the information set out in the assumptions underlying the original Defect Notice) shall be revisited in light of such information. Where appropriate, the provisions of Clause 13.5 shall apply to any updated LD Rectification Plan mutatis mutandis.

13.6.3 The Company shall maintain a record of all costs incurred in carrying out the LD Rectification Works and shall provide the Scottish Ministers full access to this information at all times.

13.7 Relief

13.7.1 The Company shall be relieved of liability for Lane Occupation Charges, Service Shortfall Deductions, Unavailability Deductions, Restricted Services Deductions and Lane Availability Failure Charges (**Class A Deductions**) where such Class A Deductions arise as a direct and unavoidable consequence of a Latent Defect or the carrying out of LD Rectification Works during the period from the later of (i) the occurrence of a Latent Defect or (ii) the Company becoming aware of the occurrence of that Latent Defect, until the completion of the LD Rectification Works.

13.7.2 No such relief shall be given where the Company fails to act in accordance with the agreed LD Rectification Plan, Good Industry Practice and in an efficient, effective and safe manner.

13.8 Scottish Ministers' Change

13.8.1 The Scottish Ministers shall be entitled at any point subsequent to receipt by them of a Defect Notice to issue a Scottish Ministers Change removing the affected Structure (Class A) from the scope of the Company's obligations under this Agreement and 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 Scottish Ministers Change),

LD Structures (Class B)

13.9 Where, as the consequence of a Latent Defect in a LD Structure (Class B) the Scottish Ministers become entitled to make or levy Lane Occupation Charges, Service Shortfall Deductions, Unavailability Deductions, Restricted Services Deductions or Lane Availability Failure Charges (**Class B Deductions**) in accordance with Schedule 6 (Payment Mechanism), the following provisions shall apply.

13.10 Within ten (10) Business Days (or such longer period as may be agreed by the Scottish Ministers acting reasonably) of the later of the occurrence of a Latent Defect in an LD Structure (Class B) (**Class B LD**) or the Company becoming aware of the occurrence of that Class B LD the Company shall (at all times acting in accordance with Good Industry Practice):

13.10.1 institute such traffic management measures as are appropriate in the circumstances so as to ensure the availability of an appropriate number of Lanes having regard to the nature of the Class B LD, provided always that where the Company proposes to use Narrow Lanes the requirement for such shall be demonstrated to the Scottish Ministers' reasonable satisfaction; and

13.10.2 submit to the Scottish Ministers a programme of action which will, when performed, mitigate the consequences of and remedy or rectify or otherwise resolve (to the extent reasonably practicable in the context of the Operations) the Class B LD to the reasonable satisfaction of the Scottish Ministers within such period as is reasonable in the circumstances (the **Class B LD Rectification Plan**);

and provided always that the Company has acted in accordance with Good Industry Practice when carrying out the Operations in the vicinity of any Class B LD and any affected LD Structure (Class B) then during that ten (10) Business Day period the Scottish Ministers shall not be entitled to make or levy any Class B Deductions.

13.11 The Company shall implement the Class B LD Rectification Plan timeously and in accordance with its terms. The Company shall be relieved of liability for Class B Deductions during the period in which the Company is diligently implementing the Class B LD Rectification Plan or such longer period as the Scottish Ministers consider appropriate in the circumstances.

13.12 If at any time the Scottish Ministers (acting reasonably) are not satisfied with the implementation of the Class B LD Rectification Plan by the Company timeously and in accordance with its terms (other than for reasons or circumstances beyond the reasonable control of the Company) then the Scottish Ministers may by notice to the Company declare that the Scottish Ministers are forthwith entitled to make the relevant Class B Deductions.

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 Scottish Ministers of their duties and/or powers or cause 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 Scottish Ministers of their duties and/or powers or any additional costs incurred by the Scottish Ministers.

14.2 **Diversionsary Works (Type 1)**

The Company shall not alter the timing or duration of Diversionsary Works (Type 1) identified in the Construction Programme without first having notified the Scottish Ministers in writing who may object if any such alteration could give rise to a claim for relief under Clause 33 (Relief Events).

14.3 **Failure to conform to Construction Programme**

The Scottish Ministers may notify the Company if in their 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 Scottish Ministers may serve notice on the Company requiring the Company either:

- 14.3.1 to submit to the Scottish Ministers a report identifying the reasons for the delay;
- 14.3.2 to produce and submit to the Scottish Ministers 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 Scottish Ministers 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 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, other than pursuant to a Scottish Ministers Change or a Compensation Event, the Company shall not be entitled to amend or revise the Construction Programme where such amendment or revision would affect or may affect the exercise by the Scottish Ministers of their duties and/or powers or cause the Scottish Ministers to incur material additional costs. The Company shall consult timeously with the Scottish Ministers and have due regard to the Scottish Ministers' 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 Scottish Ministers to monitor the progress of all elements of the New Works including all commissioning activities.

14.4.3 The Company shall promptly and in any event within three (3) Business Days of receipt of comments from the Scottish Ministers submit to the Scottish Ministers a copy of any revised Construction Programme in a form acceptable to the Scottish Ministers.

14.5 No relief for Company

No report submitted to the Scottish Ministers on the Construction Programme in accordance with Clause 14.1 nor any comment thereon nor any amendment or review thereof by the Scottish Ministers 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 33 (Relief Events) and Clause 34 (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 Scottish Ministers' Requirements and having regard to the Clarifications.

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

- 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 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 Scottish Ministers' Requirements;
- 15.5.2 any design carried out at the request of the Scottish Ministers by or on behalf of the Company;
- 15.5.3 the agreement to or approval by the Scottish Ministers 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 Scottish Ministers) without the consent of the Scottish Ministers.
- 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 36 (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 Scottish Ministers' 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 Scottish Ministers) for 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 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 Scottish Ministers 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 Scottish Ministers 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 Scottish Ministers 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. SCOTTISH MINISTERS' REPRESENTATIVES

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

17.2 The Scottish Ministers may from time to time authorise (or amend or withdraw such authorisation) the Scottish Ministers' Representative to exercise any of the Scottish Ministers' powers and rights under this Agreement on the Scottish Ministers' behalf. With effect from the Effective Date (without prejudice to the Scottish Ministers' rights under this Clause 17) the Parties agree that the Scottish Ministers' 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 Scottish Ministers' 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 Scottish Ministers' Representative appointed, pending appointment of a replacement, any notification to be made by the Company to the Scottish Ministers'

Representative shall be made to the Scottish Ministers and any action which is required to be taken by the Scottish Ministers' Representative shall be taken by the Scottish Ministers.

17.5 The Scottish Ministers' Site Representative has authority to act on behalf of the Scottish Ministers under this Agreement only where, and to the extent that, this Agreement expressly so provides or where subsequently authorised by the Scottish Ministers in terms of this Clause 17.

17.6 As at the Date of this Agreement, the Scottish Ministers' Site Representative shall be authorised to exercise the powers set out in Part 1 of Schedule 13 (Authority of Representatives). The Scottish Ministers may from time to time:

17.6.1 authorise the Scottish Ministers' Site Representative to exercise any of the Scottish Ministers' other powers under this Agreement (other than those conferred by Schedule 11 (Termination Compensation)) on the Scottish Ministers' behalf; and/or

17.6.2 amend or withdraw any authorisation given to the Scottish Ministers' 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 Scottish Ministers' 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 Scottish Ministers' Site Representative appointed (or where the Scottish Ministers' 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 Scottish Ministers' Site Representative shall be made to the Scottish Ministers' Representative and any action which is required to be taken by the Scottish Ministers' Site Representative shall be taken by the Scottish Ministers' Representative.

17.9 The respective roles of the Scottish Ministers' Representative and the Scottish Ministers' Site Representative are mutually exclusive. In the event that both the Scottish Ministers' Representative and the Scottish Ministers' Site Representative have authority to act on behalf of the Scottish Ministers, the Company shall be entitled to disregard the Scottish Ministers'

Site Representative's authority to so act and rely solely on the authority of the Scottish Ministers' 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 Scottish Ministers' consent. The Scottish Ministers shall not withhold such consent if the Company can demonstrate to the Scottish Ministers' 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;

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 Scottish Ministers:

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).

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 Scottish Ministers 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 Scottish Ministers:

- 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 Scottish Ministers.

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 33 (Relief Events) shall apply; or
- 19.4.2 a Compensation Event, then the provisions of Clause 34 (Compensation Events) shall apply; or
- 19.4.3 a Force Majeure Event, then the provisions of Clause 45 (Force Majeure) shall apply.

20. **CDM REGULATIONS**

20.1 **Company as Client**

The Company hereby elects and the Scottish Ministers hereby agree 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 Scottish Ministers pursuant to Regulation 8 of the CDM Regulations).

20.3 **Health and Safety File**

The Company shall, on request by the Scottish Ministers, provide the Scottish Ministers 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 Scottish Ministers the said health and safety file as amended or updated.

20.4 **Indemnity**

The Company hereby indemnifies the Scottish Ministers and shall keep 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 Scottish Ministers as a result of or in connection with the breach by the Company of its obligations under this Clause 20.

21. **APPARATUS**

21.1 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.

21.2 **Delegation and Representation in respect of Statutory Functions**

21.2.1 The Company is authorised:

- (a) to exercise and shall exercise all the statutory functions of the Scottish Ministers 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 Scottish Ministers' 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 21.2 be referred to as an **Authorisation**.

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

21.2.3 The Company shall not sub-contract or delegate responsibility for any Authorisation without the written consent of the Scottish Ministers.

21.2.4 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.

21.2.5 Not less than six (6) months prior to the expiry of any Authorisation the Company shall request in writing that the Scottish Ministers 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 Scottish Ministers 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 Scottish Ministers Change removing the relevant delegated powers from the scope of the Company's obligations under this Agreement.

21.2.6 If any Authorisation is withdrawn or revoked by the Scottish Ministers then:

- (a) the Company shall co-operate with the Scottish Ministers as necessary to facilitate a transfer of any relevant delegated functions to the Scottish Ministers 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) the Scottish Ministers shall issue a Scottish Ministers Change removing the relevant delegated powers from the scope of the Company's obligations under this Agreement.

21.2.7 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 36 (Company Changes) shall apply; or
- (b) for any other reason, the Scottish Ministers shall issue a Scottish Ministers 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 Scottish Ministers Change),

provided always that where (a) above applies and the Company remedies, to the satisfaction of the Scottish Ministers, the circumstances which gave rise to the withdrawal or revocation the Scottish Ministers may at their 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).

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

21.3 The 1991 Act

21.3.1 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 Scottish Ministers may give from time to time under sections 118 (4) and 118 (5) of the 1991 Act.

21.3.2 The Company shall notify the Scottish Ministers of all proposed Major Works for Road Purposes, Diversionary 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 Diversionary 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 Diversionary Works (Type 2).

- 21.3.3 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 Scottish Ministers 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 Scottish Ministers on demand all sums paid or payable in respect of the actions taken by the Scottish Ministers under this Clause and/or all sums reasonably incurred in connection therewith.
- 21.3.4 Neither the employment by the Company of any Undertaker, nor the taking of such action under Clause 21.3.3 (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 Scottish Ministers against all losses or claims of any person arising out of or in connection with Diversionary Works (Type 2).
- 21.3.5 The Scottish Ministers shall pay to the Company within 20 Business Days of receipt any monies actually received by the Scottish Ministers 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.
- 21.3.6 If a contribution is made to the Scottish Ministers 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 Scottish Ministers any contribution received if the contribution relates to costs incurred or likely to be incurred outside the Contract Period.
- 21.3.7 At the request of the Company, and subject to an indemnity for all costs, including administrative costs, the Scottish Ministers shall endeavour to recover all possible charges, fees, contributions and costs due to the Scottish Ministers, as Road Works

Authority, in respect of the Project Roads and the local roads network pursuant to the 1991 Act.

- 21.3.8 The Company shall provide to such person as may be nominated from time to time by the Scottish Ministers 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 Scottish Ministers 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.
- 21.3.9 The Company shall notify the Scottish Ministers 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 Scottish Ministers.
- 21.3.10 The Company shall, in performing the Operations, at all times assist and facilitate the Scottish Ministers in carrying out, and shall take all steps necessary to ensure that the Scottish Ministers and/or any other relevant Road Works Authority are able to comply with, their duties under the 1991 Act.

21.4 Apparatus

- 21.4.1 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 costs paid by the Scottish Ministers directly to the Undertaker pursuant to Clause 21.6.3.
- 21.4.2 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.
- 21.4.3 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.

21.4.4 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.

21.4.5 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.

21.5 Management of Operations affecting Apparatus

21.5.1 The Company shall manage any works in relation to the Sites in respect of or affecting Apparatus and in particular on behalf of the Scottish Ministers 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 Scottish Ministers 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 to give such notices, consents or directions to Undertakers as the Scottish Ministers 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 Scottish Ministers for the occupation of the Project Roads where works carried out by Undertakers have been unreasonably prolonged;
- (e) notify the Scottish Ministers 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 Scottish Ministers to 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 to seek to recover directly from Undertakers and other owners of Apparatus any costs reasonably incurred;
- (h) notify the Scottish Ministers of any works which may be required pursuant to Sections 124(5) and 125(4) of the 1991 Act and to carry out any works necessary pursuant to said Sections as may be instructed by the Scottish Ministers and seek to recover directly from Undertakers any costs reasonably incurred;
- (i) notify the Scottish Ministers of any obstructions to the Project Roads by Undertakers or Apparatus and to give such notices as may be instructed by the Scottish Ministers requiring Undertakers to mitigate or discontinue obstructions to the Project Roads, take any steps instructed by the Scottish Ministers if Undertakers fail to comply with such notices and to seek to recover directly from Undertakers any costs reasonably incurred;
- (j) notify the Scottish Ministers of any unauthorised Apparatus in the Project Roads and to remove same if instructed to do so by the Scottish Ministers; and
- (k) notify to the Scottish Ministers 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 to carry out such works, operations or actions as may be instructed by the Scottish Ministers.

21.5.2 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 21.3.2 and being instructed so to do by the Scottish Ministers, which instructions shall not be unreasonably withheld or delayed.

21.5.3 Any instructions issued to the Company in terms of this Clause 21 shall not be deemed to be a Scottish Ministers Change.

21.5.4 Subject to Clause 21.6.3 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 Scottish Ministers in the event it is unable to recover such costs.

21.6 The Scottish Ministers' Responsibilities

21.6.1 The Scottish Ministers 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 Scottish Ministers receive pursuant to the 1991 Act or any Direction.

21.6.2 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.

21.6.3 The Scottish Ministers shall be responsible for and shall indemnify the Company against any amounts due to an Undertaker in respect of Diversionary Works (Type 1).

22. MONITORING

22.1 Right of Access

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

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 Scottish Ministers and/or any Authority or any Relevant Authority and/or any other representative of the Scottish Ministers or of any Authority or any Relevant Authority and that reasonable assistance is given for the purposes 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 Scottish Ministers and any representative or adviser of the Scottish Ministers 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 Scottish Ministers 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 Scottish Ministers to remove Protesters where the Company can demonstrate to the Scottish Ministers' 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 10 Business Days of any request in accordance with Clause 23.3, the Scottish Ministers shall notify the Company whether the Scottish Ministers can provide any assistance as 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 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, provided 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 its Sub-Contractors, the Protester Action shall be deemed to be a Relief Event.

23.6 If, in accordance with Clause 23.4, the Scottish Ministers have notified the Company that 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 Scottish Ministers by their legal advisers.

23.7 Where the Company is given assistance by 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 Scottish Ministers in respect of any costs, losses, liabilities, expenses and claims suffered by 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 Scottish Ministers will use all reasonable endeavours to expedite their decision making process under Clause 23.4 and their 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 Scottish Ministers accompanied by a completed and signed Restricted Services Readiness Certificate.

24.2 **Review**

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

24.3 **Scottish Ministers' Obligations**

The Scottish Ministers 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 they accept that the Restricted Service Readiness Criteria have been met (a **Restricted Services Commencement Notice**); or

24.3.2 notify the Company that in their opinion, notwithstanding the issue of the Restricted Services Readiness Certificate, the Company has not met the Restricted Services Readiness Criteria. In that event the Scottish Ministers 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 Scottish Ministers fail to serve a notice under Clause 24.3.2, they 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 Scottish Ministers 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 their completion, the Company shall give notice to the Scottish Ministers 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 Scottish Ministers 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 Scottish Ministers to have issued the Restricted Services Commencement Notice on that date shall be deemed to be a Compensation Event.

25. RAIL UNDERBRIDGE

25.1 The Company shall carry out and complete the Rail Underbridge in accordance with this Agreement and the Rail Underbridge Agreement and the Asset Management Plan.

25.2 The Company acknowledges that the completion of the Rail Underbridge in accordance with the Asset Management Plan as evidenced by a construction completion certificate using the Network Rail form NR/L3/EBM/089/AMP015 (Taking Over Certificate) is a condition precedent

to the issue of the Substantial Completion Certificate for the Phase which includes the Rail Underbridge.

26. PERMITS TO USE

26.1 The New Works shall be carried out in two (2) Phases which may be completed in any order.

26.2 Without prejudice to Clause 25 the following provisions shall apply to Substantial Completion and the issue of a Permit to Use for each Phase:

26.2.1 the Company shall give the Scottish Ministers five (5) Business Days' notice of the Road Safety Audit Stage 3 for the Phase and the Scottish Ministers shall be entitled to attend.

26.2.2 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 Scottish Ministers a notice to that effect, and the Company shall deliver to the Scottish Ministers such Substantial Completion Certificate as soon as it is available.

26.2.3 following issue of the Substantial Completion Certificate for a Phase the Company will afford to the Scottish Ministers such reasonable opportunities as the Scottish Ministers may require to confirm the validity of the notice.

26.2.4 the Scottish Ministers 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 their 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.

26.3 In the event of the service of a notice by the Scottish Ministers under Clause 26.2.4(b) and, unless the matter has been referred to the Dispute Resolution Procedure in terms of Clause 26.4, 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 Scottish Ministers that such further works have been completed or measures taken. The provisions of this Clause 26.3 shall then apply mutatis mutandis as if receipt by the Scottish Ministers of such notice were

receipt of the Substantial Completion Certificate except that the time limit in Clause 26.2.4 shall be ten (10) Business Days.

- 26.4 In the event of a dispute between the Parties in regard to a notice under Clause 26.2.4(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 26.2.4(a) and the failure by the Scottish Ministers to have issued the Permit to Use on that date shall be deemed to be a Compensation Event.
- 26.5 The issue of a Permit to Use and the identification of any incomplete items which in the sole opinion of the Scottish Ministers 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.
- 26.6 As from the date of issue (or deemed issue under Clause 26.4) 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.
- 26.7 No Major O&M Works may be carried out between the hours of 06:00 and 20:00 on any Phase of the Operations from the date of issue (or deemed issue under Clause 26.4) of the Permit to Use for that Phase until expiration of a period of twenty four (24) months following Final Completion other than where:
- 26.7.1 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
- 26.7.2 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 20:00 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.

27. **FINAL COMPLETION**

27.1 **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 Scottish Ministers accompanied by a completed and signed Final Completion Certificate,

27.2 **Review**

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

27.3 **Acceptance**

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

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

27.3.2 notify the Company that in their opinion the New Works have not reached Final Completion. In that event the Scottish Ministers shall state in such notice the respects in which the New Works have not reached Final Completion.

27.4 **Failure to Serve Notice**

If the Scottish Ministers fail to serve a notice in accordance with Clause 27.3.2 they shall be deemed to have issued a Final Completion Acceptance Notice on expiry of the fifteen (15) Business Days referred to in Clause 27.3.

27.5 **Further Works**

In the event of service of a notice by the Scottish Ministers under Clause 27.3.2 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 Scottish Ministers that such further works have been completed and the Scottish Ministers shall inspect such further works within five (5) Business Days of receipt of such notice by the Company. The provisions of this Clause 27 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 27.3 shall be ten (10) Business Days.

27.6 Final Completion

The date of Final Completion shall be:

27.6.1 where no notice is given by the Scottish Ministers in accordance with Clause 27.3.2, the date of issue or deemed issue of the Final Completion Acceptance Notice in accordance with Clauses 27.3 and 27.4; or

27.6.2 where a notice under Clause 27.3.2 is given by the Scottish Ministers, the date of receipt by the Scottish Ministers of any further notice in accordance with Clause 27.5 in respect of which no further notice is given by the Scottish Ministers under Clause 27.3.2.

27.7 Disputes

If there is a dispute between the Parties in regard to a notice under Clause 27.3.2 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 27.3.1 and the failure by the Scottish Ministers to have issued the Notice on that date shall be deemed to be a Compensation Event.

28. 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).

29. HAZARDOUS SUBSTANCES

29.1 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 Scottish Ministers of all such materials or equipment being used or stored at the Sites and shall comply with any reasonable requirement of the Scottish Ministers in respect thereof.

29.2 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 Scottish Ministers, including copies of any changes when made (or, in such circumstances and at the request of the Scottish Ministers, a copy of the updated register reflecting such changes).

30. PERFORMANCE MONITORING AND SUSPENSION

30.1 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).

30.2 Scottish Ministers Monitoring

The Scottish Ministers shall be entitled, at their own cost, to undertake their 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 Scottish Ministers in such an exercise but without being required to disrupt the proper delivery of the Operations in accordance with this Agreement. The Scottish Ministers may notify the Company of the outcome of the performance monitoring, and the Company shall have due regard to the Scottish Ministers' comments in relation to the future provision of the Operations.

30.3 Suspension of Work

30.3.1 The Scottish Ministers may at any time instruct the Company to suspend progress of part or all of the Works. During such suspension, the Company shall protect, store and secure such part or all of the Works against any deterioration, loss or damage. The Scottish Ministers shall notify the Company of the cause for the suspension.

30.3.2 Where the Scottish Ministers suspend 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 opinion of the Scottish Ministers, prejudices the operation and safe use of any of the Project Roads by Users;
- (c) the Company or any of its Sub-Contractors acting in such a way as to (i) bring the standing or reputation of the Scottish Ministers into disrepute (in the opinion of the Scottish Ministers) or (ii) attract adverse publicity to the Scottish Ministers; or
- (d) all or any part of the Works not being carried out in accordance with the provisions of the Agreement.

31. EMPLOYEES

31.1 Application of TUPE on commencement

The Scottish Ministers and the Company agree that TUPE shall apply on the Restricted Services Commencement Date.

31.2 Transfer of contracts

As a consequence of this Clause 31.2, and in accordance with TUPE, the contracts of employment of all Employees shall (subject to Regulation 4(7) of TUPE) have effect after the Restricted Services Commencement Date (or such other date as may be determined by Legislation) as if originally made between those employees and the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) except insofar as such contracts relate to an occupational pension scheme.

31.3 Procuring Employing Transfers

The Scottish Ministers and the Company agree and intend and shall take all reasonable steps to procure that there shall be an Employee Transfer on each occasion on which the identity of a service provider changes pursuant to this Agreement, and that the contracts of employment of all those employees of the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) wholly or mainly engaged in the provision of the relevant part(s) of the Operations immediately before the change of identity of the service provider shall have effect (subject to Regulation 4(7) of TUPE) thereafter as if originally made between those employees and the successor service provider except insofar as such contracts relate to an occupational pension scheme. The Company shall procure that both the former and the successor service provider shall comply with their obligations under TUPE.

31.4 **Obligations under TUPE**

The Scottish Ministers shall use all reasonable endeavours to procure that any Employing Entity complies with its obligations under TUPE in respect of each Employee Transfer pursuant to this Agreement and the Company shall comply, and shall procure that the relevant sub-contractor of the Company, Sub-Contractor or any of its sub-contractors shall comply with its obligations (including without limitation the obligation under Regulation 13(4) of TUPE) in respect of each Employee Transfer pursuant to this Agreement and each of the Scottish Ministers and the Company shall indemnify the other against any Losses sustained as a result of any breach of this Clause 31.4 by the party in default.

31.5 **Provision of Information and Employment Costs**

The Scottish Ministers have supplied to the Company the information, as at May 2013 (the **Pricing Date**), which is contained in Part A of Schedule 21 (Employment and Pensions) (the **First Employee List**) regarding the identity, number, age, sex, length of service, job title, pension entitlement, grade and terms and conditions of employment of and other matters affecting each of those employees of the Employing Entities and of any sub-contractor of the Employing Entities who it is expected, if they remain in the employment of the Employing Entities or any sub-contractor until immediately before the Restricted Services Commencement Date, would be Employees but the Scottish Ministers give no warranty as to the accuracy or completeness of this information.

31.6 **Timescales for Employee Information**

The Scottish Ministers shall also supply to the Company within five (5) Business Days after the Restricted Services Commencement Date information, which was correct as at the Restricted Services Commencement Date, in respect of the Employees on all the same matters as should be provided in the First Employee List. This list is the **Final Employee List**. The Scottish Ministers give and shall give no warranty as to the accuracy or completeness of any information contained in the First Employee List or in the Final Employee List.

31.7 **Details of Employee Information**

The Company has provided to the Scottish Ministers, and the Scottish Ministers have agreed, the details set out in Part B of Schedule 21 (Employment and Pensions) which show, in respect of the Operations, the following information:

- 31.7.1 the workforce which the Company proposes to establish to provide the Operations (the **Proposed Workforce**) classified by reference to grade, job description, pension entitlement, hours worked, shift patterns, pay scales, rates of pay and terms and conditions;
- 31.7.2 the monthly costs of employing the Proposed Workforce. These costs (the **Remuneration Costs**) have been calculated on the basis of (amongst other things) the information contained in the First Employee List as at the Pricing Date;
- 31.7.3 the costs, including any lump sum payments, which the Company has allowed for the purposes of any reorganisation which may be required to establish the Proposed Workforce or a workforce which is as close as reasonably practicable to the Proposed Workforce (including but not limited to costs associated with dismissal by reason of redundancy or capability and costs of recruitment). These costs (the **Reorganisation Costs**) have been calculated by the Company on the basis of (amongst other things) the information contained in the First Employee List as at the Pricing Date.

31.8 Adjustment to Remuneration Costs and/or the Reorganisation Costs

If at any time (including, for the avoidance of doubt, after the submission of the Final Employee List) the Remuneration Costs and/or the Reorganisation Costs require to be adjusted on account of any differences between the information contained in the First Employee List as at the Pricing Date and that contained in the Final Employee List, or on account of any inaccuracies in or omissions from the information contained in such First Employee List or the Final Employee List then (subject to Clauses 31.9, 31.10 and 31.11) there shall be a corresponding adjustment (upwards or downwards) to the Monthly Unitary Charge to compensate for any such difference.

31.9 More Transferring Employees than Expected

If the circumstances described in Clause 31.8 arise and in circumstances where there are more Employees than shown on the Final Employee List then the parties shall discuss the implications for the provision of the Operations, and the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) shall take all reasonable steps to mitigate any additional costs and any adjustment to the Monthly Unitary Charge shall be calculated as if they had done so.

31.10 Calculating Adjustments

In calculating any adjustment which shall be made to the Monthly Unitary Charge pursuant to Clause 31.8:

- 31.10.1 no account shall be taken of a decrease in the Remuneration Costs or Reorganisation Costs to the extent that it arises from a reduction in the number of Employees or their whole time equivalent such that there are immediately after the Restricted Services Commencement Date, fewer suitably qualified persons available than are required in order to establish the Proposed Workforce;
- 31.10.2 to avoid double counting, no account shall be taken of any change to the Remuneration Costs or the Reorganisation Costs to the extent that the Company has been or will be compensated as a result of any indexation of the Monthly Unitary Charge under this Agreement;
- 31.10.3 to avoid doubt any changes in costs which fall to be dealt with under Clause 31.8 and which arise from a Change in Law shall be dealt with in accordance with the provisions of Clause 31.8 and shall not be taken into account for the purposes of Clause 38 (Changes in Law);
- 31.10.4 no adjustments under Clause 31.8 shall be made in respect of overpayments made by the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) to Employees which arise from reliance on the Final Employee List to the extent that the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) is unable to correct overpayments in respect of continuing employment having taken reasonable steps to do so; and
- 31.10.5 if there are underpayments by the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) to Employees, whether claimed or established as unlawful deductions from wages or as a breach of contract, which arise from reliance on the Final Employee List, there shall be an increase to the Monthly Unitary Charge in respect of all such liabilities of the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) for all such underpayments which are retrospective (save that any such liabilities which relate to the period prior to the Restricted Services Commencement Date shall be dealt with in accordance with Clause 31.13) and an appropriate increase in respect of such liabilities of the Company which represent ongoing costs.

To the extent that it is appropriate to do so, in order to ensure that the parties are treated fairly and reasonably, the Scottish Ministers reserve the right at any time to make a lump sum deduction or payment in place of some or all of any adjustment referred to above which would otherwise have been required to the Monthly Unitary Charge.

31.11 Notification of Adjustment to Monthly Unitary Charge

Either party may propose an adjustment to the Monthly Unitary Charge pursuant to Clause 31.8 by giving not less than ten (10) Business Days' notice to the other. Each party will provide or procure the provision to the other on an open book basis access to any information or data which the other party reasonably requires for the purpose of calculating or confirming the calculation of any adjustment pursuant to Clause 31.8.

31.12 Sub-Contractors' Co-operation

31.12.1 In relation to all matters described in Clause 31.9, the Company and the Scottish Ministers shall, and the Company shall procure that the relevant sub-contractor of the Company, Sub-Contractor or any of its sub-contractors shall, co-operate with the other or others and take all reasonable steps to mitigate any costs and expenses and any adverse effect on industrial or employee relations.

31.12.2 The Scottish Ministers shall and the Company shall, and the Company shall procure that any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors shall, take all reasonable steps, including co-operation with reasonable requests for information, to ensure that each and every Employee Transfer pursuant to this Agreement takes place smoothly with the least possible disruption to the services of the Scottish Ministers including the Operations and to the employees who transfer.

31.13 Scottish Ministers Indemnities

The Scottish Ministers shall indemnify or shall procure that the relevant Employing Entity shall indemnify the Company in respect of any Losses arising from:

31.13.1 the employment of any Employee by any Employing Entity (or any sub-contractor of such Employing Entity);

31.13.2 any act or omission by any Employing Entity (or any sub-contractor of such Employing Entity) in relation to the Employees;

- 31.13.3 any claim (including any entitlement of any Employees consequent on such a claim) by any trade union or staff association or employee representative arising from or connected with any failure by any Employing Entity (and/or any sub-contractor of such Employing Entity) to comply with any legal obligation to such trade union or staff association or employee representative (whether under TUPE or otherwise);
- 31.13.4 any failure by any Employing Entity (and/or any sub-contractor of such Employing Entity) to comply with its obligations under Clause 31; and
- 31.13.5 any failure by any Employing Entity (and/or any sub-contractor of such Employing Entity) to comply with its obligations under Regulations 11 and 13 of TUPE save where such failure arises from any failure to comply with Regulation 13(4) of TUPE by the Company, any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors.

31.14 Compliance with the Law

The Company shall comply and shall procure that any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors and all persons employed or engaged by same in connection with the provision of any Operations shall comply at all times with the Legislation regarding health and safety at work and on anti-discrimination and equal opportunities.

31.15 Compliance with the Scottish Ministers' Policies

- 31.15.1 The Company shall take and shall procure that any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors takes all reasonable steps to procure that all persons including any employed or engaged by same in connection with the provision of any Operations shall, so far as applicable, comply with the Scottish Ministers' policies as regards health and safety at work and with those relating to anti-discrimination and equal opportunities (including those relating to harassment).
- 31.15.2 The Company shall take and shall procure that any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors shall take all such steps as the Scottish Ministers may reasonably require, which shall include co-operation with action proposed or taken by the Scottish Ministers, to ensure that the Scottish Ministers comply with their duty under section 3(1) Health and Safety at Work etc Act 1974.

31.16 The Company's Indemnities

The Company shall indemnify and keep indemnified in full the Scottish Ministers and, at the Scottish Ministers' request, each Employing Entity against:

31.16.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) to any person entitled to such payments from the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) who is or has been employed or engaged by the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) in connection with the provision of any of the Operations which relate to any period of employment or engagement with the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) on or after the Restricted Services Commencement Date but on or prior to the relevant Transfer Date, and all income tax and pension and National Insurance contributions payable thereon; and

31.16.2 insofar as Clause 31.16.1 does not apply, all Losses incurred by the Scottish Ministers as a result of any claim against the Scottish Ministers in respect of any liability to any person who is or has been employed or engaged by the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) in connection with the provision of any of the Operations, where such claim arises as a result of any act or omission of the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) occurring on or after the Restricted Services Commencement Date but on or prior to the relevant Transfer Date;

31.16.3 any failure on the part of the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) to comply with its obligations under Regulation 13(4) of TUPE;

31.17 BUT the indemnities in Clauses 31.16.1 and 31.16.2 shall not apply:

31.17.1 in respect of any sum for which the Scottish Ministers are obliged to indemnify the Company (and/or any sub-contractor of the Company, any Sub-Contractor or any of its sub-contractors) pursuant to Clause 31.13 or as a result of any adjustment to the Monthly Unitary Charge in accordance with Clause 31.8 or deduction/payment in accordance with Clause 31.10; or

31.17.2 to the extent that the claim arises from a wrongful act or omission of the Scottish Ministers.

31.18 Clause 52.5 (Conduct of Claims) of this Agreement shall apply where any claim is made in respect of the indemnities given by the Company under Clause 31.16.

31.19 Application of TUPE

The Scottish Ministers 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 Scottish Ministers and each Transferring Employee to whom such cessation is relevant or between the New Supplier or the Scottish Ministers and the relevant trade union (as the case may be).

31.20 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 31.20, 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 Scottish Ministers.

31.21 Employment Liability Indemnity

The Company will indemnify and keep indemnified the Scottish Ministers on demand and/or, on demand by the Scottish Ministers, 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 Scottish Ministers 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.

31.22 **TUPE Indemnity**

The Company will indemnify and keep indemnified the Scottish Ministers on demand and/or, on demand by the Scottish Ministers, any New Supplier from and against any costs, claims, liabilities and expenses (including legal expenses) suffered or incurred by the Scottish Ministers 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 Scottish Ministers', or the New Supplier's, failure to comply with their obligations under Regulation 13(4) of TUPE.

31.23 **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 Scottish Ministers (such consent not to be unreasonably withheld or delayed):

31.23.1 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);

31.23.2 increase the numbers of any of the Assigned Employees to whom the Transfer Assistance Period applies;

31.23.3 transfer any of the Assigned Employees to whom the Transfer Assistance Period applies to different roles;

31.23.4 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

31.23.5 dismiss any of the Assigned Employees.

31.24 **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 Scottish Ministers supply in writing to the Scottish Ministers or to its nominee:

31.24.1 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;

31.24.2 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;

31.24.3 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

31.24.4 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 Scottish Ministers.

31.25 **Transferring Employee Information**

On any Transfer Date the Company shall supply in writing to the Scottish Ministers or its nominee all of the information and details referred to in Clauses 31.24.1 to 31.24.4 (inclusive) but in respect of the Transferring Employees to whom such Transfer Date is applicable instead of the Assigned Employees.

31.26 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 Scottish Ministers 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 Scottish Ministers 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 Scottish Ministers at such time to facilitate such meetings with such employees.

31.27 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 Scottish Ministers deliver the personnel records referred to in this clause as the Scottish Ministers may direct at any time.

31.28 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.

31.29 Indemnity to New Supplier

The Company acknowledges and agrees that the Scottish Ministers shall grant an indemnity in favour of each and any New Supplier to the same extent that the Company is undertaking to indemnify the Scottish Ministers in terms of Clauses 31.21 and 31.22 and agrees that in the event of a claim on any indemnity in terms of Clauses 31.21 and 31.22 for loss incurred by the Scottish Ministers, that loss shall include the amount, if any, which the Scottish Ministers have paid or are required to pay to any New Supplier by virtue of any indemnity granted by the Scottish Ministers in favour of any New Supplier in accordance with the provisions of this

Clause 31.29. For the avoidance of doubt, to the extent to which the Company has made payment to a New Supplier under Clause 31.21 then the Company shall not be liable to make any corresponding payment in respect of the same Transferring Employee Employment Liabilities to the Scottish Ministers under this Clause 31.29.

32. PAYMENT PROVISIONS

32.1 Payment of Unitary Charge

In consideration for the provision of the Operations the Scottish Ministers shall pay to the Company the Restricted Services Payment and the Monthly Unitary Charge in accordance with Schedule 6 (Payment Mechanism) and this Clause 32.1.

32.2 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:

- 32.2.1 the Monthly Unitary Charge and/or the Restricted Services Payment in each case for that Payment Month;
- 32.2.2 as a negative figure, any reimbursement of step-in costs incurred by the Scottish Ministers;
- 32.2.3 any amount owed by either Party to the other in accordance with Clauses 35 (Scottish Ministers Change), 36 (Company Change) or 38 (Qualifying Change in Law) (and where owed by the Company, appearing as a negative figure);
- 32.2.4 any undisputed amounts owed by either Party to the other in accordance with Clause 52 (Indemnity) (and where owed by the Company, appearing as a negative figure);
- 32.2.5 any amounts owed by the Company under Clause 49 (Consequences of Termination) and/or Clause 50 (Final Survey);
- 32.2.6 any interest due in accordance with Clause 32.4 (Disputed Amounts);
- 32.2.7 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

32.2.8 any VAT payable on amounts due.

32.3 **Payments**

32.3.1 The Monthly Invoice shall be paid by the Scottish Ministers on the later of 10 Business Days after the end of the Payment 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.

32.3.2 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).

32.3.3 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 lawful currency of the United Kingdom.

32.4 **Disputed Amounts**

32.4.1 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.

32.4.2 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.

32.4.3 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.

32.5 **Late Payments**

Save where provided otherwise under this Agreement, where any payment or sum of money due from the Company to the Scottish Ministers or from the Scottish Ministers 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 Scottish Ministers Default provide the Company with a substantial remedy pursuant to Sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

32.6 **Set-off**

32.6.1 The Company shall not be entitled to retain or set off any amount due to the Scottish Ministers by it, but the Scottish Ministers 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.

32.6.2 If the payment or deduction of any amount referred to in Clause 32.6.1 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).

32.7 **VAT**

32.7.1 All amounts due under this Agreement are exclusive of VAT.

32.7.2 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.

32.7.3 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.

32.7.4 The Company shall provide the Scottish Ministers with any information reasonably requested by the Scottish Ministers in relation to the amount of VAT chargeable in accordance with the Agreement and payable or repayable by the Scottish Ministers to the Company.

32.7.5 In the event that the Scottish Ministers assign, novate or otherwise transfer their obligations and rights under this Agreement in accordance with Clause 65.1, the Scottish Ministers 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.

32.8 Prompt Payment of Subcontractors and Suppliers

32.8.1 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 subcontractor 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 Scottish Ministers have made payment to the Company and the subcontractor's or supplier's (as appropriate) invoice includes works, services and/or supplies in relation to which payment has been made by the Scottish Ministers 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 subcontractor 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 subcontractor or supplier (as appropriate) that the contract forms part of a larger contract for the benefit of the Scottish Government and that should the subcontractor or supplier (as appropriate) have any difficulty in securing the timely payment of an invoice that matter may be referred by the subcontractor or supplier (as appropriate) to the Scottish Ministers' Representative; and

- (c) in the same terms as those set out in this Clause 32.8 subject only to modification to refer to the correct designation of the equivalent party as the Company and subcontractor or supplier as the case may be.

32.8.2 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 subcontractor or supplier to exercise a lien, until such time as the subcontractor 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 subcontractor or supplier from the Company.

33. RELIEF EVENTS

33.1 Occurrence

If and to the extent that a Relief Event:

- 33.1.1 is the direct cause of a delay in achieving the Full Services Commencement Date; and/or
- 33.1.2 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 Scottish Ministers arising under Clause 42 (Termination on Company Default) and its obligations under this Agreement.

33.2 Relief

To obtain relief, the Company must:

- 33.2.1 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 Scottish Ministers 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 Scottish Ministers of the notice referred to in Clause 33.2.1 above, give full details of the relief claimed; and
 - (b) demonstrate to the reasonable satisfaction of the Scottish Ministers 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.

33.3 Consequences

In the event that the Company has complied with its obligations under Clause 33.2 above, then:

33.3.1 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

33.3.2 the Scottish Ministers shall not be entitled to exercise their rights to terminate the Agreement under Clause 42 (Termination on Company Default).

33.4 Performance Deductions

Nothing in Clause 33.3 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.

33.5 Information

In the event that information required by Clause 33.2 above is provided after the dates referred to in that Clause 33.2, then the Company shall not be entitled to any relief during the period for which the information is delayed.

33.6 Notify

The Company shall notify the Scottish Ministers if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

33.7 Disputes

If the Parties cannot agree the extent of the relief required, or the Scottish Ministers disagree 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).

34. COMPENSATION EVENTS

34.1 Occurrence

If, as a direct result of the occurrence of a Compensation Event:

34.1.1 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;

34.1.2 the Company is or is likely to be unable to comply with its obligations under this Agreement; and/or

34.1.3 the Company incurs 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.

34.2 Relief

Subject to Clause 34.4 below, to obtain relief and/or claim compensation the Company must:

34.2.1 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 Scottish Ministers 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;

34.2.2 within fourteen (14) days of receipt by the Scottish Ministers of the notice referred to in Clause 34.2.1 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

34.2.3 demonstrate to the reasonable satisfaction of the Scottish Ministers 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.

34.3 Consequences

In the event that the Company has complied with its obligations under Clause 34.2 above, then:

34.3.1 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;

34.3.2 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 Scottish Ministers 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;

34.3.3 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 34.3.2 above but which reflects a change in the costs being incurred by the Company after the Full Services Commencement Date, the Scottish Ministers shall compensate the Company in accordance with Clause 34.6 below by an adjustment to the Unitary Charge; and/or

34.3.4 the Scottish Ministers shall give the Company such relief from its obligations under the Agreement, as is reasonable for such a Compensation Event.

34.4 In the event that information is provided after the dates referred to in Clause 34.2 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.

34.5 If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Company's obligations under the Agreement, or the Scottish Ministers disagree that a Compensation Event has occurred (or as to its consequences), or that the Company is entitled to any relief under this Clause 34, the Parties shall resolve the matter in accordance with Schedule 7 (Dispute Resolution Procedure).

34.6 Any payment of compensation referred to in Clause 34.3.3 above shall be calculated in accordance with the Unitary Charge Adjustment Procedure.

35. SCOTTISH MINISTERS CHANGES

35.1 Change in Service

The Scottish Ministers have the right to propose Scottish Ministers Changes in accordance with this Clause.

35.2 Limitations

The Scottish Ministers shall not propose a Scottish Ministers Change which:

35.2.1 requires any or all of the Operations to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;

- 35.2.2 would cause any Consent to be revoked (or a new Consent required to implement the relevant Scottish Ministers Change to be unobtainable);
- 35.2.3 would, if implemented, result in a fundamental change in the nature of the Project;
- 35.2.4 would materially and adversely affect the Company's ability to deliver the Operations;
- 35.2.5 would materially and adversely affect the health and safety of any person;
- 35.2.6 requires the Company to implement the Scottish Ministers Change in an unreasonable period of time;
- 35.2.7 would represent a departure from Good Industry Practice; or
- 35.2.8 the Scottish Ministers do not have the legal power or capacity to require the Company to implement,

35.3 **Scottish Ministers Notice of Change**

If the Scottish Ministers require a Scottish Ministers Change, they must serve a Scottish Ministers Notice of Change on the Company.

35.4 **Details in Scottish Ministers Notice of Change**

The Scottish Ministers Notice of Change shall:

- 35.4.1 set out the Scottish Ministers Change required in sufficient detail to enable the Company to calculate and provide the Estimated Change in Project Costs in accordance with Clause 35.5 below (the **Estimate**);
- 35.4.2 in the event that the Scottish Ministers Change will require Capital Expenditure, state whether the Scottish Ministers intend to pay to the Company the costs involved in implementing the Scottish Ministers Change or whether the Scottish Ministers require the Company to use its reasonable efforts to obtain funding in accordance with Clause 35.11 below; and
- 35.4.3 require the Company to provide the Scottish Ministers within fifteen (15) Business Days of receipt of the Scottish Ministers Notice of Change with the Estimate.

35.5 Estimate

As soon as practicable, and in any event within fifteen (15) Business Days after having received the Scottish Ministers Notice of Change, the Company shall deliver to the Scottish Ministers the Estimate. The Estimate shall include the opinion of the Company on:

- 35.5.1 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 Scottish Ministers Change;
- 35.5.2 any impact on the provision of the Operations;
- 35.5.3 any amendment required to this Agreement and/or any Project Document as a result of the Scottish Ministers Change;
- 35.5.4 any Estimated Change in Project Costs that results from the Scottish Ministers Change;
- 35.5.5 any Capital Expenditure that is required or no longer required as a result of the Scottish Ministers Change;
- 35.5.6 the programme for implementing the Scottish Ministers Change;
- 35.5.7 any regulatory approvals or Consents which are required; and
- 35.5.8 the proposed method of certification of any construction or operational aspects of the Operations required by the Scottish Ministers Change if not covered by the procedures specified in Clauses 26 (Permits to Use) and 27 (Final Completion) and the Scottish Ministers' Requirements.

35.6 Parties to Discuss

As soon as practicable after the Scottish Ministers receive the Estimate, the Parties shall discuss and agree the issues set out in the Estimate, including:

- 35.6.1 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;
- 35.6.2 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

- 35.6.3 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 Scottish Ministers Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clauses 35.5.4, and/or 35.5.5 above.

In such discussions the Scottish Ministers may modify the Scottish Ministers Notice of Change and (if the estimated increase in Capital Expenditure in respect of the Scottish Ministers Change is expected to exceed £[REDACTED] (Indexed) and it is practicable for the Company to do so), the Scottish Ministers 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 Scottish Ministers of any consequential changes to the Estimate.

35.7

Company Procuring Work and Services

If the Company does not intend to use its own resources to implement any Scottish Ministers 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 Scottish Ministers Change) when procuring any work, services, supplies, materials or equipment required in relation to the Scottish Ministers Change.

35.8

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).

35.9

Confirmation or Withdrawal of Scottish Ministers 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 Scottish Ministers shall:

- 35.9.1 confirm in writing the Estimate (as modified); or

- 35.9.2 withdraw the Scottish Ministers Notice of Change.

35.10 Deemed Withdrawal of Scottish Ministers Notice of Change

If the Scottish Ministers do 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 35.6 above or determined pursuant to Clause 35.8 above, then the Scottish Ministers Notice of Change shall be deemed to have been withdrawn. Where there is such a withdrawal (either pursuant to this Clause 35.10 or Clause 35.9 above) the Scottish Ministers shall pay to the Company the reasonable additional third party costs incurred by the Company in preparing such Estimate provided that:

35.10.1 the Company has used all reasonable endeavours to submit a reasonable priced Estimate;

35.10.2 the Company has made available to the Scottish Ministers a cost breakdown of the Estimate including an estimate of third party costs to be incurred by the Scottish Ministers if the Scottish Ministers Notice of Change is withdrawn or deemed to be withdrawn;

35.10.3 the Scottish Ministers 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 35; and

35.10.4 the Company has provided the Scottish Ministers with such evidence as it may reasonably require in order to verify the additional third party costs incurred by the Company.

35.11 Capital Expenditure

In the event that the Estimate (as modified) involves estimated Capital Expenditure in excess of £[REDACTED] Indexed then (unless the Scottish Ministers have elected to fund such costs in accordance with Clause 35.4.2) 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 Creditors.

35.12 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 whole of the estimated Capital Expenditure, but has been unable to do so within 40 Business Days of the date that the Scottish Ministers confirmed the Estimate, then the Company shall have no obligation to carry out the Scottish Ministers Change, unless the Scottish Ministers agree 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 35.15 (Capital Expenditure Payment Procedure) below.

35.13 Scottish Ministers Payment of Capital Expenditure

The Scottish Ministers 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.

35.14 Unitary Charge Adjustment

In the event that the Estimate has been confirmed by the Scottish Ministers, then the adjustment to the Unitary Charge shall be made in accordance with the Unitary Charge Adjustment Procedure.

35.15 Capital Expenditure Payment Procedure

Where the Scottish Ministers agree to pay the costs for which funding is not available pursuant to Clause 35.12 above:

35.15.1 the Scottish Ministers 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 Scottish Ministers Change to the extent borne by the Scottish Ministers; and
- (b) where payment for part of the Scottish Ministers Change reflects the carrying out of, or specific progress towards, an element within the Scottish Ministers Change, an objective means of providing evidence confirming that the part of the Scottish Ministers 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 Scottish Ministers and the Company failing to agree as to its terms);

35.15.2 the Scottish Ministers shall make a payment to the Company within twenty one (21) days of receipt by the Scottish Ministers of invoices presented to the Scottish Ministers (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 Scottish Ministers Change has been carried out; and

35.15.3 if payment is not made in accordance with Clause 35.15.2 above, the Scottish Ministers 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.

35.16 Implementation of Scottish Ministers Change

In the event that the Estimate has been confirmed by the Scottish Ministers the relevant Scottish Ministers Change shall be commenced by the Company within seven (7) days of the Scottish Ministers' 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.

36. COMPANY CHANGES

36.1 Company Notice of Change

Subject to Clause 36.8 (Departures) if the Company wishes to introduce a Company Change or if the provisions of Clause 37 (Value for Money), apply it must serve a Company Notice of Change on the Scottish Ministers.

36.2 Details of Company Notice of Change

The Company Notice of Change must:

36.2.1 set out the proposed Company Change in sufficient detail to enable the Scottish Ministers to evaluate it in full including the programme for implementing the Company Change;

- 36.2.2 specify the Company's reasons for proposing the Company Change;
- 36.2.3 request the Scottish Ministers to consult with the Company with a view to deciding whether to agree to the Company Change and, if so, what consequential changes the Scottish Ministers require as a result;
- 36.2.4 indicate any implications of the Company Change;
- 36.2.5 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
- 36.2.6 indicate if there are any dates by which a decision by the Scottish Ministers is critical.

36.3 **Evaluation of Company Notice of Change**

The Scottish Ministers shall evaluate the Company Change in good faith, taking into account all relevant issues, including whether:

- 36.3.1 a change in the Unitary Charge will occur;
- 36.3.2 the Company Change affects the quality of the Operations or the likelihood of successful delivery of the Operations;
- 36.3.3 the Company Change will interfere with the relationship of the Scottish Ministers with third parties;
- 36.3.4 the financial strength of the Company is sufficient to perform the Company Change;
- 36.3.5 the residual value of the Assets is reduced; or
- 36.3.6 the Company Change materially affects the risks or costs to which the Scottish Ministers are exposed.

36.4 **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 their discussions the Scottish Ministers may propose modifications to or accept or reject the Company Notice of Change.

36.5 Acceptance of Company Notice of Change

36.5.1 If the Scottish Ministers accept 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.

36.5.2 The Company may not implement or take any steps towards implementing a Company Change until the Scottish Ministers accept the relevant Company Notice of Change in writing (with or without modification).

36.6 Rejection of Company Notice of Change

If the Scottish Ministers reject the Company Notice of Change, they shall not be obliged to give their reasons for such a rejection.

36.7 No Increase in the Unitary Charge

Unless the Scottish Ministers' 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.

36.8 Departures

36.8.1 The Company shall not propose a Company Change which requires a Departure unless such Departure has first been approved by the Scottish Ministers acting in their capacity as Road Works Authority.

36.8.2 For the avoidance of doubt, the approval of a Departure by the Scottish Ministers acting in their capacity as Road Works Authority shall not constitute an acceptance of a Company Change for the purpose of this Agreement.

36.9 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.

36.10 Change in Law

The Scottish Ministers 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 38 (Qualifying Change in Law) and to the extent not dealt with shall be borne by the Company.

36.11 Deemed Changes

The Scottish Ministers cannot reject a Company Change which is required pursuant to Clauses 10.4.1 or 21.2.7, provided always that the costs of introducing any such Company Changes shall be borne by the Company.

37. VALUE FOR MONEY

37.1 The Company shall carry out a VFM Review in accordance with this Clause 37 (Value for Money) on each VFM Review Date.

37.2 The VFM Review shall consider and report on:

37.2.1 any material innovations in technology which have come to the attention of the Company and which could enhance the Operations; and

37.2.2 the O&M Works Requirements jointly with the Scottish Ministers in order to assess whether any alteration in the O&M Works Requirements would represent increased value for money for both Parties.

37.3 The Company shall, no later than sixty (60) days before each VFM Review Date, submit to the Scottish Ministers its proposed methodology for undertaking the VFM Review.

37.4 The Scottish Ministers shall, not later than 1 (one) Contract Month before the VFM Review Date, comment on the methodology referred to in Clause 37.3 and the Company shall have reasonable regard to such comments in finalising such methodology.

37.5 On or before the date falling three (3) Contract Months after the VFM Review Date the Company shall submit to the Scottish Ministers the VFM Report setting out:

37.5.1 the methodology of the review;

37.5.2 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

37.5.3 any proposed changes to the O&M Works Requirements.

37.6 If a VFM Report proposes changes to the O&M Works Requirements, either Party may propose a Change in accordance with Clauses 35 (Scottish Ministers Changes) and 36 (Company Changes) and if such Change is implemented as proposed in the VFM Report then, notwithstanding anything to the contrary in Clauses 35 (Scottish Ministers Changes) and 36 (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 Scottish Ministers of such Change and to the degree of innovation and originality of the Change proposed in the VFM Report.

38. **QUALIFYING CHANGE IN LAW**

38.1 **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:

38.1.1 any necessary change in the Operations;

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

38.1.3 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 Scottish Ministers' Requirements during the implementation of any relevant Qualifying Change in Law;

38.1.4 any gain or loss of revenue that will result from the relevant Qualifying Change in Law;

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

38.1.6 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 38.2 to 38.4 below.

38.2 Parties to Discuss

As soon as practicable after receipt of any notice from either Party under Clause 38.1, the Parties shall discuss and agree the issues referred to in Clause 38.1 and any ways in which the Company can mitigate the effect of the Qualifying Change of Law, including:

38.2.1 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;

38.2.2 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;

38.2.3 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

38.2.4 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 38.1.5 and/or 38.1.6 above.

38.3 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 Creditors.

38.4 Financing

If the Company has used reasonable endeavours to obtain funding for Capital Expenditure referred to in Clause 38.3 (Change Agreed), but has been unable to do so within 60 days of the date that the agreement or determination in Clause 38.3 (Change Agreed) occurred, then

the Scottish Ministers 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.

38.5 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.

38.6 Payment of Irrecoverable VAT

The Scottish Ministers 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 (28) days of the delivery by the Company to the Scottish Ministers 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 38.6 **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.

39. IMPLEMENTATION OF CHANGES

39.1 Implementation

The Company shall implement any Scottish Ministers Change, Company Change or Qualifying Change in Law in accordance with:

39.1.1 Legislation;

39.1.2 Consents;

39.1.3 the Scottish Ministers' Requirements as amended in accordance with Clauses 35, 36 or 38 as applicable;

39.1.4 Good Industry Practice; and

39.1.5 the proposal in respect of the Scottish Ministers Change, Company Change or Qualifying Change in Law (including any further Company proposals) agreed or determined in accordance with Clauses 35, 36 or 38 as applicable.

39.2 Precedence

In the event of a conflict between the requirements of Clauses 39.1.1 to 39.1.5 the requirements shall have precedence in the numerical order in Clause 39.1, provided always that where such further Company proposals provide greater benefit to the Scottish Ministers, of which the Scottish Ministers shall be sole judge, there shall be deemed to be no conflict.

40. REFINANCING

40.1 Company to Obtain Scottish Ministers' Consent

The Company shall obtain the Scottish Ministers' prior written consent to any Qualifying Refinancing and both the Scottish Ministers and the Company shall at all times act in good faith with respect to (a) any Refinancing or (b) any potential or proposed Refinancing under Article 8 of the Articles of Association.

40.2 Scottish Ministers' Share (Senior Refinancing)

40.2.1 The Scottish Ministers shall be entitled to receive:

- (a) a 90% share of the Margin Gain arising from any Qualifying Refinancing which gives rise to a reduction in the Bond Margin and/or the EIB Margin from the Bond Margin and/or the EIB 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 Bond Margin and/or the EIB Margin as shown in the Senior Financing Agreements as updated at the immediately preceding Qualifying Refinancing); and
- (b) a share of any Refinancing Gain (arising otherwise than from a reduction in the Bond Margin and/or the EIB Margin) from a Qualifying Refinancing, in respect of any Refinancing Gain (when considered in aggregate with all previous Qualifying Refinancings) as follows:
 - (i) for a Refinancing Gain from £1 to £1 million, a 50% share;
 - (ii) for a Refinancing Gain of £1 million up to £3 million, a 60% share;and

(iii) for a Refinancing Gain in excess of £3 million, a 70% share.

40.3 Scottish Ministers not to Withhold or Delay Consent

The Scottish Ministers shall not withhold or delay their consent to a Qualifying Refinancing to obtain a greater share of the Refinancing Gain than that specified in Clause 40.2.

40.4 Company to Provide Full Details

The Company shall promptly provide the Scottish Ministers 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 Scottish Ministers 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).

40.5 Scottish Ministers' Election for Payment of Share

The Scottish Ministers shall have the right to elect to receive their share of any Refinancing Gain (including any Margin Gain) as:

40.5.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;

40.5.2 a reduction in the Unitary Charge over the remaining term of the Agreement; or

40.5.3 a combination of any of the above.

40.6 Negotiations in Good Faith

The Scottish Ministers 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 Scottish Ministers' share of the Refinancing Gain (taking into account how the Scottish Ministers have elected to receive their share of the Refinancing Gain under Clause 40.5 (Scottish Ministers 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 Scottish Ministers' share, the dispute shall be determined in accordance with Schedule 7 (Dispute Resolution Procedure).

40.7 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 Scottish Ministers will be paid to the Scottish Ministers by the Company within 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.

40.8 Notifiable Financings

Without prejudice to the other provisions of this Clause 40, the Company shall (a) notify the Scottish Ministers 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 Creditors may have to refinance the Financing Agreements (other than the Subordinated Financing Agreements).

40.9 Breach by the Company

If the Company wilfully breaches this Clause 40.9 then the Scottish Ministers may terminate this Agreement in accordance with Clause 40.10 below.

40.10 Notice of Termination

If the Scottish Ministers wish to terminate this Agreement under this Clause 40, they must first give the Company written notice stating:

40.10.1 that the Scottish Ministers are terminating this Agreement under this Clause 40;

40.10.2 that this Agreement will terminate on the date falling thirty days after the receipt of the notice.

40.11 Date of Termination

Subject to Clause 40.9, this Agreement will terminate on the date falling thirty (30) days after the receipt of the notice referred to in Clause 40.10 above.

40.12 **Compensation**

On termination of the Agreement in accordance with this Clause 40, the provisions of Part 3 of Schedule 11 (Termination Compensation) shall apply.

41. **SCOTTISH MINISTERS STEP-IN**

41.1 **Reason for Step-In**

If the Scottish Ministers reasonably believe that they need to take action in connection with the Operations:

41.1.1 because a serious risk exists to the health or safety of persons, or property or to the environment; or

41.1.2 to discharge a statutory duty;

then the Scottish Ministers shall be entitled to take action in accordance with Clauses 41.2 (Notify Company) to 41.5 (Company in Breach) below.

41.2 **Notify Company**

If Clause 41.1 (Reason for Step-In) applies and the Scottish Ministers wish to take action, the Scottish Ministers shall notify the Company in writing of the following:

41.2.1 the action they wish to take;

41.2.2 the reason for such action;

41.2.3 the date they wish to commence such action;

41.2.4 the time period which they believe will be necessary for such action; and

41.2.5 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.

41.3 **Action by Scottish Ministers**

41.3.1 Following service of such notice, the Scottish Ministers shall take such action as notified under Clause 41.2 (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 Scottish Ministers while they are taking such Required Action.

41.3.2 In carrying out the Required Action, the Scottish Ministers shall act in accordance with Good Industry Practice.

41.4 **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:

41.4.1 the Company shall be relieved from its obligations to carry out such part of the Operations; and

41.4.2 in respect of the period in which the Scottish Ministers are taking the Required Action and provided that the Company provides the Scottish Ministers with reasonable assistance (such assistance to be at the expense of the Scottish Ministers to the extent incremental costs are incurred), the Unitary Charge due from the Scottish Ministers 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.

41.5 **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:

41.5.1 the Company shall be relieved of its obligations to provide such part of the Operations; and

41.5.2 in respect of the period in which the Scottish Ministers are taking Required Action, the Unitary Charge due from the Scottish Ministers 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 Scottish Ministers' costs of operation in taking the Required Action.

41.6 **Step Out**

41.6.1 The Scottish Ministers shall give the Company such notice as is reasonable in the circumstances if the Scottish Ministers consider that the Required Action is no longer required or has been completed.

41.6.2 The Scottish Ministers shall ensure that on the expiry of the notice served under Clause 41.6.1 the Sites and the Project Roads shall be in no worse condition than they were immediately before the Required Action was taken.

41.7 Indemnity

41.7.1 The Scottish Ministers 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 Scottish Ministers taking any Required Action where in taking the Required Action the Scottish Ministers have failed to act in accordance with Good Industry Practice.

42. TERMINATION ON COMPANY DEFAULT

42.1 Termination Notice

If a Company Default has occurred and the Scottish Ministers wish to terminate the Agreement, they must serve a Termination Notice on the Company.

42.2 Detail in Termination Notice

The Termination Notice must specify:

42.2.1 the type and nature of Company Default that has occurred, giving reasonable details; and

42.2.2 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 days after the date the Company receives the Termination Notice; or

42.2.3 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.

42.3 **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.

42.4 **Termination on Failure to Rectify**

If:

42.4.1 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 42.2.2(a) and the Company fails to rectify the Company Default within the time period specified in the Termination Notice; or

42.4.2 (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 Scottish Ministers may give notice stating that the Agreement will, subject to the terms of the Funders Direct Agreement, terminate on the date falling seven days after the date of receipt of such notice.

42.5 **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 Funders Direct Agreement, terminate on the date falling seven days after the date of notification by the Scottish Ministers to the Company of such failure to implement the rectification programme in accordance with its terms.

42.6 **No Event of Default**

No Company Default shall be deemed to have occurred and the Scottish Ministers 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.

42.7 **Compensation on Termination for Company Default**

Subject to Clauses 40 and 48, on termination of the Agreement under this Clause 42, the provisions of Part 4 of Schedule 11 (Termination Compensation) shall apply.

43. **TERMINATION ON SCOTTISH MINISTERS DEFAULT**

43.1 **Termination Notice**

If a Scottish Ministers Default has occurred and the Company wishes to terminate the Agreement, it must serve a termination notice on the Scottish Ministers within forty five (45) days of becoming aware of the Scottish Ministers Default.

43.2 **Detail in Termination Notice**

The termination notice must specify the type of Scottish Ministers Default which has occurred entitling the Company to terminate.

43.3 **Termination Date**

The Agreement will terminate on the day falling forty five (45) days after the date the Scottish Ministers receive the termination notice, unless the Scottish Ministers rectify the Scottish Ministers Default within 30 days of receipt of the termination notice.

43.4 **Compensation on Termination for Scottish Ministers Default**

On termination of the Agreement under this Clause 43, the provisions of Part 1 of Schedule 11 (Termination Compensation) shall apply.

44. **PERSISTENT BREACH**

44.1 **Persistent Breach Warning Notice**

If a particular breach (other than one for which Performance Deductions, Restricted Services Deductions and/or Lane Availability Failure Charges 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 Scottish Ministers may serve a notice (**Persistent Breach Warning Notice**) on the Company:

44.1.1 specifying that it is a formal warning notice;

44.1.2 giving reasonable details of the breach; and

44.1.3 stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Agreement.

44.2 **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 6 month period after the date of service, then the Scottish Ministers may serve a Persistent Breach Final Notice on the Company:

44.2.1 specifying that it is a Persistent Breach Final Notice;

44.2.2 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

44.2.3 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.

44.3 **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.

45. **FORCE MAJEURE**

45.1 **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 45.5 or 45.7), the Scottish Ministers shall not be entitled to terminate this Agreement for a Company Default if such Company Default arises from a Force Majeure Event.

45.2 Deductions

Nothing in Clause 45.1 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.

45.3 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.

45.4 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.

45.5 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 45.6, either Party may terminate the Agreement by giving thirty (30) days' written notice to the other Party.

45.6 Consequences of Termination

If the Agreement is terminated under Clause 45.5 (Ability to Terminate) or Clause 45.7:

45.6.1 compensation shall be payable by the Scottish Ministers in accordance with Clause 45.10; and

45.6.2 the Scottish Ministers may require the Company to transfer its right, title and interest in and to any Assets to the Scottish Ministers.

45.7 Company Notice of Termination

If the Company gives notice to the Scottish Ministers under Clause 45.5 that it wishes to terminate the Agreement, then the Scottish Ministers have 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 they require the Agreement to continue. If the Scottish Ministers give the Company such notice, then:

45.7.1 the Scottish Ministers shall pay to the Company the Unitary Charge from the day after the date on which the Agreement would have terminated under Clause 45.5 as if the Operations were being fully provided; and

45.7.2 the Agreement will not terminate until expiry of written notice (of at least thirty (30) days) from the Scottish Ministers to the Company that they wish the Agreement to terminate.

45.8 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.

45.9 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.

45.10 Compensation on Termination for Force Majeure

On termination of the Agreement under Clause 45.5, the Scottish Ministers shall pay to the Company the Force Majeure Termination Sum in accordance with Part 2 of Schedule 11 (Termination Compensation).

46. CORRUPT GIFTS AND FRAUD

46.1 Company Warranty

The Company warrants that in entering into this Agreement it has not committed any Prohibited Act.

46.2 Powers of the Scottish Ministers

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 Scottish Ministers shall be entitled to act in accordance with Clauses 46.3 to 46.7 below.

46.3 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 Scottish Ministers may terminate the Agreement by giving notice to the Company.

46.4 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 Scottish Ministers 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.

46.5 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 Scottish Ministers 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.

46.6 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 Scottish Ministers 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.

46.7 Termination Following Action of Third Party

If the Prohibited Act is committed by any other person not specified in Clauses 46.3 to 46.6 above, then the Scottish Ministers 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.

46.8 Termination Notice

Any notice of termination under this Clause shall specify:

- 46.8.1 the nature of the Prohibited Act;
- 46.8.2 the identity of the Party whom the Scottish Ministers believe has committed the Prohibited Act;
- 46.8.3 the date on which the Agreement will terminate, in accordance with the applicable provisions of this Clause; and
- 46.8.4 the Scottish Ministers' chosen option under Clause 46.9.

46.9 Compensation on Termination for Corrupt Gifts and Fraud

On termination of the Agreement in accordance with this Clause 46, then the provisions of Part 3 of Schedule 11 (Termination Compensation) shall apply.

47. VOLUNTARY TERMINATION BY THE SCOTTISH MINISTERS

47.1 Scottish Ministers Ability to Terminate

The Scottish Ministers may terminate the Agreement at any time before its Expiry Date by complying with their obligations under Clauses 47.2 to 47.4 below.

47.2 Notice of Termination

If the Scottish Ministers wish to terminate the Agreement under this Clause, they must give notice to the Company stating:

- 47.2.1 that the Scottish Ministers are terminating the Agreement under this Clause 47;
- 47.2.2 that the Agreement will terminate on the date specified in the notice, which must be a minimum of 30 days after the date of receipt of the notice; and
- 47.2.3 whether the Scottish Ministers have chosen to exercise their option under Clause 47.3 below.

47.3 Assets

On termination, the Scottish Ministers shall have the option to require the Company to transfer its right, title and interest in and to the Assets to the Scottish Ministers or as directed by the Scottish Ministers.

47.4 Termination Date

The Agreement will terminate on the date specified in the notice referred to in Clause 47.2 above.

47.5 Compensation on Voluntary Termination

On termination under Clause 47.4 above, the provisions of Part 1 of Schedule 11 (Termination Compensation) shall apply.

48. TERMINATION ON BREACH OF NPD REQUIREMENTS

48.1 Breach by the Company

If the Company breaches Clause 58 (Payment of Surpluses and Compliance with NPD Requirements) then the Scottish Ministers may terminate this Agreement at any time within 18 months of becoming aware of such breach in accordance with Clause 48.2 below. The Scottish Ministers 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 Scottish Ministers to so inform Company shall not constitute a breach of this Agreement by the Scottish Ministers and shall not prejudice the exercise of its rights under Clause 48.2.

48.2 Notice of Termination

If the Scottish Ministers wish to terminate this Agreement under this Clause 48.2, it must first give the Company written notice stating:

48.2.1 that the Scottish Ministers are terminating this Agreement under this Clause 48;

48.2.2 that this Agreement will terminate on the date falling thirty days after the receipt of the notice,

and this Agreement will terminate on the date falling thirty days after the Company receives the notice unless the Company demonstrates to the satisfaction of the Scottish Ministers (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.

48.3 Compensation

On termination of the Agreement in accordance with this Clause 48, then the provisions of Part 3 of Schedule 11 (Termination Compensation) shall apply.

49. CONSEQUENCES OF TERMINATION

49.1 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:

49.1.1 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 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 Scottish Ministers in such removal and sale;

49.1.2 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

49.1.3 deliver to the Scottish Ministers:

- (a) all outstanding records, drawings and information which the Company is obliged to deliver to the Scottish Ministers 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;
- (c) lifting keys for all types of chamber covers held by the Company;

49.2 **Legal Effect of Termination**

On termination of this Agreement (irrespective of the cause) the obligations of the Company and the Scottish Ministers hereunder shall cease, other than under Clauses 52 (Indemnities), 59 (Confidentiality), 64 (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 Scottish Ministers and the Company in respect of any antecedent breaches as at the date of termination.

49.3 **Assignment of Agreements**

To the extent required by the Scottish Ministers, on or prior to termination of this Agreement (irrespective of the cause), the Company shall immediately upon instruction of the Scottish Ministers, assign or novate, or procure the assignment or novation of any of the Company's interests, in any of the following agreements to the Scottish Ministers:

- 49.3.1 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 assignment; and
- 49.3.2 any warranties or guarantees in respect of any works carried out by the Company as part of the Operations.

This Clause 49.3 shall not apply in respect of the New Works Agreement and the O&M Works Agreement.

50. **FINAL SURVEY**

50.1 **Final Survey**

Thirty (30) months prior to the Expiry Date, the Scottish Ministers 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.

50.2 **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).

50.3 **Notification of Survey**

The Scottish Ministers shall notify the Company in writing a minimum of five (5) Business Days in advance of the date they wish to carry out the final survey and shall afford the Company reasonable opportunity to attend. The Scottish Ministers 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.

50.4 **Minimise Disruption**

When carrying out the final survey, the Scottish Ministers 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 Scottish Ministers (free of charge) any reasonable assistance required by the Scottish Ministers during the carrying out of the final survey. The cost of the final survey shall be borne by the Scottish Ministers.

50.5 **Results of Survey**

If the final survey shows that the Company has not complied with or is not complying with the Handback Requirements, the Scottish Ministers shall:

- 50.5.1 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

50.5.2 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.

50.6 **Retention Fund**

If the Company has been notified under Clause 50.5.1 that Renewal Works are required and those Renewal Works have not been carried out to the Scottish Ministers' reasonable satisfaction, then twenty four (24) months prior to the Expiry Date the Scottish Ministers 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**).

50.7 **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 Scottish Ministers stating that it considers that the Handback Requirements have been met (a **Handback Certificate**). The Company shall afford the Scottish Ministers such reasonable opportunities as they may require to confirm the validity of the Handback Certificate in accordance with paragraph 2.5 of Part 3 of Schedule 4.

50.8 **Costs**

If and to the extent that the Company carries out the Renewal Works to the Scottish Ministers' 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 Scottish Ministers shall reimburse the Company's costs of so doing no later than 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.

50.9 **Failure to Carry Out Work**

If and to the extent that the Company fails to carry out the Renewal Works to the Scottish Ministers' reasonable satisfaction within the period specified in the revised Renewal Programme referred to in Clause 50.8, the Scottish Ministers shall be entitled to carry out themselves, 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.

50.10 **Balance of Fund**

If:

50.10.1 the Renewal Works identified by the Scottish Ministers have been carried out to the Scottish Ministers' reasonable satisfaction;

50.10.2 all such work has been paid for by the Company or, where the Scottish Ministers have carried out or procured the carrying out of the works pursuant to Clause 50.8, by the Scottish Ministers; and

50.10.3 no termination notice given in accordance with this Agreement is outstanding,

then the Scottish Ministers 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.

51. **TRANSITION TO ANOTHER COMPANY**

51.1 **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 51 the meaning of the term **co-operate** shall include:

51.1.1 liaising with the Scottish Ministers and/or any New Company, and providing reasonable and timely assistance and advice concerning the Operations and their transfer to the Scottish Ministers or to such New Company;

51.1.2 complying with any instructions given by the Scottish Ministers pursuant to Clause 50.3 or 50.4 of this Agreement;

51.1.3 allowing the Scottish Ministers 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;

51.1.4 providing to the Scottish Ministers 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;

51.1.5 making its sub-contractors like bound by the provision of Clauses 51.1 and 51.2 with a third party right of direct enforcement by the Scottish Ministers.

51.2 **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 Scottish Ministers, 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.

51.3 **Minimise Disruption**

The Company shall take all reasonable steps and shall co-operate fully with the Scottish Ministers 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 Scottish Ministers and members of the public.

51.4 **Treatment of Assets at Expiry Date**

51.4.1 On or before a date falling no later than twelve (12) months prior to the Expiry Date the Scottish Ministers shall notify the Company in writing whether they wish to retender the provision of the Operations.

51.4.2 If the Scottish Ministers wish 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 Scottish Ministers pursuant to Clause 49.3 of this Agreement; and
- (c) the Scottish Ministers will bear all costs of any retendering of the Agreement on expiry.

51.4.3 If the Scottish Ministers do not wish to retender the Operations then the Assets shall transfer to the Scottish Ministers on the Expiry Date and the Company shall do any necessary acts (including entering into any contracts) to ensure that the Scottish Ministers obtains all of their rights, title and interest in the Assets with effect on and from the Expiry Date.

51.5 **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.

52. **INDEMNITY**

52.1 **Company's Indemnity**

The Company shall, subject to Clause 52.2, be responsible for, and shall release and indemnify the Scottish Ministers, their employees, agents and contractors on demand from and against, all liability for:

52.1.1 death or personal injury;

52.1.2 loss of or damage to property (including property belonging to the Scottish Ministers or for which they are responsible (**Scottish Ministers Property**));

52.1.3 breach of statutory duty; and

52.1.4 actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis),

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 or the presence on the Scottish Ministers' Property of the Company, a Company Related Party, their employees or agents.

52.2 **Company Not Responsible under Clause 52.1**

The Company shall not be responsible or be obliged to indemnify the Scottish Ministers under Clause 52.1 for:

- 52.2.1 any of the matters referred to in Clauses 52.1.1 to 52.1.4 above which arises as a direct result of the Company acting on the instruction of the Scottish Ministers;
- 52.2.2 any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Scottish Ministers, their employees, agents or contractors or by the breach by the Scottish Ministers of their obligations under this Agreement;
- 52.2.3 any liability or compensation payable to third parties as a consequence of the acquisition by the Scottish Ministers of land and rights necessary for the Scottish Ministers to comply with their obligations to provide the Access Rights; or
- 52.2.4 in respect of any liability arising under Clauses 52.1.3 and 52.1.4 (other than claims arising as a consequence of any breach by the Company of Clause 12.4.12) to the extent that the Company's Uninsured Losses exceed:
- (a) £[REDACTED] per annum during the New Works Period;
 - (b) £[REDACTED] per annum during the Service Period; and
 - (c) £[REDACTED] in aggregate during the Service Period.
- 52.2.5 For the purposes of this Clause 52 **Uninsured Losses** means any claim, liability or Loss which either:
- (a) is not covered by the insurances which the Company is required to take out and maintain in accordance with Clauses 53.1 and/or 53.2 (Insurance); or
 - (b) exceeds the maximum sum insured under such insurances.

52.3 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.

52.4 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.

52.5 **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.

52.6 **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.

52.7 **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.

52.8 **Human Rights**

52.8.1 The Scottish Ministers 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 38 (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.

52.8.2 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.

53. **INSURANCE**

53.1 **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 Scottish Ministers 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.

53.2 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.

53.3 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.

53.4 Nature of Insurances

With the exception of any insurances required by law the insurances referred to in Clauses 52.1 and 52.2 shall:

- 53.4.1 subject to Clause 53.5 below, name the Company as co-insured with any other party maintaining the insurance;
- 53.4.2 provide for non-vitiation protection in respect of any claim made by the Scottish Ministers as co-insured in accordance with Endorsement 2 in Part 3 of Schedule 10 (Required Insurances);
- 53.4.3 contain a clause waiving the insurers' subrogation rights against the Scottish Ministers, their employees and agents in accordance with Endorsement 2 in Part 3 of Schedule 10 (Required Insurances);
- 53.4.4 provide for thirty (30) days' prior written notice of their cancellation, non-renewal or amendment to be given to the Scottish Ministers in accordance with Endorsement 1 in Part 3 of Schedule 10 (Required Insurances); and
- 53.4.5 in respect of the Physical Damage Policies provide for payment of any proceeds received by the Company to be applied in accordance with Clause 55 (Reinstatement).

53.5 Co-Insured

As required in Parts 1 and 2 of Schedule 10 (Required Insurances), the insurers shall name the Scottish Ministers as a co-insured for their separate interest.

53.6 Evidence of Policies

The Company shall provide to the Scottish Ministers:

53.6.1 copies on request of all insurance policies referred to in Clauses 53.1 and 53.2 (together with any other information reasonably requested by the Scottish Ministers relating to such insurance policies) and the Scottish Ministers shall be entitled to inspect them during ordinary business hours; and

53.6.2 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 53 and Schedule 10 (Required Insurances).

53.7 Renewal Certificates

Renewal certificates in relation to the insurances referred to in Clauses 53.1 and 53.2 shall be obtained as and when necessary and copies (certified in a manner acceptable to the Scottish Ministers) shall be forwarded to the Scottish Ministers as soon as possible but in any event on or before the renewal date.

53.8 Breach

If the Company is in breach of Clauses 53.1 and 53.2 above, the Scottish Ministers may pay any premiums required to keep such insurance in force or themselves 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 53.2 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 53.2 and the premiums paid by the Scottish Ministers to take out and maintain the said insurances.

53.9 Notification of Claims

The Company shall give the Scottish Ministers 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 Scottish Ministers in respect of fatalities.

53.10 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.

53.11 Premiums

The insurance premiums in respect of the insurances referred to in Clauses 53.1 and 53.2 shall be the responsibility of the Company.

53.12 Scottish Ministers Approval

The insurance policies referred to in this Clause shall be effected with insurers approved by the Scottish Ministers, such approval not to be unreasonably withheld or delayed.

53.13 Risk Management

With effect from the Date of this Agreement, the Scottish Ministers 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:

53.13.1 be responsible for dealing with all risk management matters on behalf of their appointing or designating Party including (without limitation) ensuring compliance by that Party with this Clause 53;

53.13.2 advise and report to its appointing or designating Party on such matters; and

53.13.3 subject to Clause 58, 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.

53.14 Claims

The Company, where it is obliged to effect insurance under this Agreement, shall not bring any claim or action against 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).

53.15 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.

54. SERVICE PERIOD INSURANCES

54.1 Subject to Clause 54.2, the Company may include the premiums paid by the Company to take out and maintain the Insurances described in Part 2 of Schedule 10 (Required Insurances) in the Monthly Unitary Charge in accordance with paragraph 2.1.1(d) of Schedule 6 on the basis of the cost incurred by the Company and supported by any appropriate premium notices from the relevant insurer.

54.2 There shall be excluded from the premiums referred to in Clause 54.1 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.

54.3 The Company must comply with the provisions of Clauses 54.4 to 54.7 when placing or renewing the Service Period Insurances.

54.4 Not less than sixty (60) Business Days prior to the Full Services Commencement Date and each subsequent renewal date in respect of each of the Service Period Insurances, the Company shall inform the Scottish Ministers' Representative of the forthcoming requirement to place or renew any Service Period Insurance and 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 Scottish Ministers as payer of the premiums for such insurance. In considering which insurers to approach, the Company shall consider whether 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 54.4.

54.5 Within ten (10) Business Days of receiving a notice from the Company pursuant to Clause 54.4, the Scottish Ministers may provide the Company with details of any other insurers that they wish the Company to invite to quote for provision of the relevant Service Period Insurance.

54.6 Not less than thirty (30) Business Days prior to the Full Services Commencement Date and each subsequent renewal date for any of the Service Period Insurances, the Company shall forward to the Scottish Ministers' 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 Scottish Ministers pursuant to Clause 54.5, including (i) a reasoned recommendation as to which quote the Company views as offering best value for money for the Scottish Ministers, 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 Scottish Ministers to any non-compliance with the requirements of Schedule 10 prior to renewing any of the Service Period Insurances.

54.7 Within ten (10) Business Days of receiving a recommendation from the Company pursuant to Clause 54.6, the Scottish Ministers 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.

55. REINSTATEMENT

55.1 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.

55.2 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.

55.3 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):

55.3.1 the Company shall deliver as soon as practicable and in any event within 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 55.4 (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 Scottish Ministers; 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 Scottish Ministers, which approval shall not be unreasonably delayed;

55.3.2 provided that the Scottish Ministers are satisfied that the Reinstatement Plan will enable the Company to comply with Clause 55.4 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 Scottish Ministers;
- (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 55.3.2(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 Scottish Ministers may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Works;

- (d) the Scottish Ministers agree and undertake 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 55.3.2(b), they shall not exercise any right which they might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;
- (e) the Scottish Ministers undertake to use reasonable endeavours to assist the Company in the carrying out of the Reinstatement Plan; and
- (f) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Scottish Ministers and in accordance with Clause 55.4 (Works Carried Out) below the Scottish Ministers shall permit withdrawal by the Company of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under Clause 55.3.2(c) above, in respect of the Relevant Incident, together with any interest accrued; and
- (g) subject to the provisions of Clause 52 (Indemnity) the Company shall be solely responsible for the payment of any deficiency.

55.4 **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 Scottish Ministers' Requirements so that on completion of the work, the provisions of this Agreement are complied with.

56. **UNINSURABLE RISKS**

Nothing in Clause 53 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.

56.1 **Risks Become Uninsurable**

If a risk usually covered by contractor's 'all risks' insurance, property damage insurance, third party liability insurance, delay in start-up and business interruption insurance (but not loss of profits) or statutory insurances becomes Uninsurable other than in respect of any non-vitiation provision in any insurance policy then:

56.1.1 the Company shall notify the Scottish Ministers of any risk becoming Uninsurable within five (5) Business Days of becoming aware of the same and in any event at least 5 Business Days before expiry or cancellation of any existing insurance in respect of that risk; and

56.1.2 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 Scottish Ministers 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 they 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).

56.2 Management of Risk

If the requirements of Clause 56.1 are satisfied, but the Parties cannot agree as to how to manage or share the risk, then:

56.2.1 in respect of such third party liability insurance only the Scottish Ministers shall (at the Scottish Ministers' option) either pay to the Company an amount equal to the amount calculated in accordance with Clause 45.10 (Compensation on Termination for Force Majeure) and the Agreement will terminate, or elect to allow the Agreement to continue and Clause 56.2.2 below shall thereafter apply in respect of such risk;

- 56.2.2 in respect of such contractor's 'all risks' insurance, property damage insurance, third party liability insurance (if the Scottish Ministers elect to allow the Agreement to continue in accordance with Clause 56.2.1) 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 Scottish Ministers shall (at the Scottish Ministers' 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 45.10 (Compensation on Termination for Force Majeure) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon the Agreement will terminate;
- 56.2.3 where pursuant to Clauses 56.2.1 and/or 56.2.2 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;
- 56.2.4 where pursuant to Clause 56.2.1 and/or 56.2.2 this Agreement continues the Company shall approach the insurance market at least every four 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;
- 56.2.5 in respect of any period between the Scottish Ministers receiving notification in accordance with Clause 56.1.1 that a TPL Risk has become Uninsurable and the Scottish Ministers' notification to the Company in accordance with Clause 56.2.1 in respect of such risk then, provided it is ultimately agreed or determined that the requirements of Clause 56.1.2 are satisfied in respect of the Uninsurable TPL Risk and subject to Clause 56.2.6 below, Clause 56.2.2 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.

56.2.6 Clause 56.2.5 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 56.1.2 are satisfied in respect of the Uninsurable TPL Risk and/or (b) meeting with the Scottish Ministers to discuss the means by which the risk should be managed.

Where this Clause 56.2 applies and this Agreement continues, the Company shall, subject to Clause 56.2.4, be relieved of its obligations to maintain insurance in respect of the relevant Uninsurable risk.

56.3 If, pursuant to Clause 56.2.2, the Scottish Ministers elect 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 20 Business Days of the date of such election by the Scottish Ministers (the **Option Period**)) to pay to the Scottish Ministers 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 Scottish Ministers), 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.

56.4 During the Services Period, the Scottish Ministers 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 56.1.2 to 56.3 (except Clause 56.1.2 (b)) shall apply as if the Company has issued a notice under Clause 56.1.1.

57. **TERMS AND CONDITIONS WHICH BECOME UNAVAILABLE**

57.1 If, upon the renewal of any insurance which the Company is required to maintain or to procure the maintenance of pursuant to this Agreement:

57.1.1 any Insurance Term is not available to the Company in the worldwide insurance market with reputable insurers of good standing; and/or

57.1.2 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 57.2 shall apply.

- 57.2 If it is agreed or determined that Clause 57.1 applies then the Scottish Ministers shall waive the Company's obligations in Clause 53 (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 57.1 continue to apply to such Insurance Term.
- 57.3 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.
- 57.4 The Company shall notify the Scottish Ministers as soon as reasonably practicable and in any event within five days of becoming aware that Clause 57.1.1 and/or Clause 57.1.2 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 Services Period the Scottish Ministers shall be entitled to notify the Company that Clause 57.1.2 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 Scottish Ministers with such information as the Scottish Ministers reasonably request 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.
- 57.5 In the event that Clause 57.1.1 and/or Clause 57.1.2 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 57.1.1 and/or Clause 57.1.2 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 57.1.1 and/or Clause 57.1.2 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.

58. PAYMENT OF SURPLUSES AND COMPLIANCE WITH NPD REQUIREMENTS

58.1 The Company shall:

58.1.1 subject to the provisos, obligations and restrictions referred to in Article 8.1.2 of the Articles of Association and the right to postpone payments referred to in Article 8.2 of the Articles of Association, notify the Scottish Ministers, no later than ten (10) Business Days after each Surplus Payment Date, of the Surplus available as at that Surplus Payment Date and:

- (a) subject to (b) below, the Scottish Ministers 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 32.6;
- (b) 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, the Company shall pay as a direct payment said Surplus to the Scottish Ministers (or such other party as the Scottish Ministers may, in their absolute discretion direct) as a rebate of the previous Monthly Unitary Charges within thirty (30) Business Days of that Surplus Payment Date; and

58.1.2 comply with the NPD Requirements at all times throughout the Contract Period.

59. CONFIDENTIALITY

59.1 The Scottish Ministers shall, subject to Clause 59.2 be entitled to make the documents and information listed in this Clause 59.1 freely available to the public (which may include, without limitation, publication on the Scottish Ministers' website):

59.1.1 this Agreement;

59.1.2 the SM Direct Agreements; and

59.1.3 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 59.2, the provision or publication of the documents and information listed in this Clause 59.1 shall not give rise to any liability under the terms of this Agreement or otherwise. The Scottish Ministers 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 59.1.

59.2 The Parties agree that provisions of this Agreement and each Project Document shall, subject to Clause 59.3 below, not be treated as Confidential Information and may be disclosed without restriction and the Company acknowledges that the Scottish Ministers shall, subject to Clause 59.3 below, be entitled to make this Agreement and each Project Document available in the public domain.

59.3 Clause 59.2 shall not apply to provisions of this Agreement or a Project Document designated as Commercially Sensitive Information and listed in Schedule 17 (Commercially Sensitive Information) to this Agreement which shall, subject to Clause 59.5, be kept confidential for the periods specified in that Schedule.

59.4 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.

59.5 **Permitted Disclosure**

Clauses 59.3 and 59.4 shall not apply to:

59.5.1 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;

59.5.2 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;

59.5.3 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;

59.5.4 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 any of such Party's Affiliates 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;
- 59.5.5 any disclosure of information which is already lawfully in the possession of the receiving Party, prior to its disclosure by the disclosing Party;
- 59.5.6 any provision of information to the Parties' own professional advisers or insurance advisers or to the Senior Creditors or the Senior Creditors' professional advisers, agents 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 and/or the Issuer 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;
- 59.5.7 any disclosure by 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 Scottish Ministers decide to retender the Agreement;
 - (b) any registration or recording of the Consents and property registration required;
- 59.5.8 any disclosure of information by the Scottish Ministers to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Scottish Ministers for any purpose related to or ancillary to the Agreement;
- 59.5.9 any disclosure for the purpose of:
- (a) the examination and certification of 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 Scottish Ministers have used 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 59.5.4 compliance with the FOISA and/or the Environmental Information (Scotland) Regulations,

59.5.10 disclosure pursuant to Clause 59.1; and

59.5.11 any disclose to the extent required by Clause 59.7,

provided that, for the avoidance of doubt, neither Clauses 59.5.9(b), 59.5.9(d) nor 59.5.4 shall permit disclosure of Confidential Information otherwise prohibited by Clause 59.4 above where that information is exempt from disclosure under section 36 of the FOISA.

59.6 **Obligations Preserved**

Where disclosure is permitted under Clause 59.5, other than Clause 59.5.2, 59.5.4, 59.5.5, 59.5.7(b) and 59.5.9, 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.

59.7 **Audit**

For the purpose of:

59.7.1 the examination and certification of the Scottish Ministers' accounts; or

59.7.2 any examination pursuant to section 23 of the Public Finance and Accountability (Scotland) Act 2000 of the economy, efficiency and effectiveness with which the Authority has used its 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 or the Issuer (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 or the Issuer to produce such oral or written explanations as he considers necessary.

59.8 Exploitation of Information

The Company shall not (and shall procure that the Issuer shall not) make use of the Agreement or any Confidential Information issued or provided by or on behalf of the Scottish Ministers in connection with the Agreement otherwise than for the purpose of the Agreement, except with the written consent of the Scottish Ministers.

59.9 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 (and shall procure that the Issuer 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 Scottish Ministers.

59.10 Expiry

On or before the Expiry Date, the Company shall (and shall procure that the Issuer shall) ensure that all documents or computer records in its possession, custody or control, which contain information relating to the Scottish Ministers' customers including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to the Scottish Ministers.

59.11 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.

59.12 Official Secrets

The provisions of this Clause are without prejudice to the application of the Official Secrets Act 1911 to 1989.

60. FREEDOM OF INFORMATION

60.1 FOISA and Environmental Information (Scotland) Regulations

The Company acknowledges that the Scottish Ministers are subject to the requirements of the FOISA and the Environmental Information (Scotland) Regulations and shall facilitate the Scottish Ministers' compliance with their Information disclosure requirements pursuant to the same in the manner provided for in Clause 60.2 to 60.7 (inclusive).

60.2 Request for Information

Where the Scottish Ministers receive a Request for Information in relation to Information that the Company or the Issuer is holding on its behalf and which the Scottish Ministers do not hold themselves the Scottish Ministers shall refer to the Company such Request for Information that they receive as soon as practicable and in any event within five (5) Business Days of receiving a Request for Information and the Company shall (and as applicable shall procure that the Issuer shall):

60.2.1 provide the Scottish Ministers with a copy of all such Information in the form that the Scottish Ministers require as soon as practicable and in any event within ten Business Days (or such other period as the Scottish Ministers acting reasonably may specify) of the Scottish Ministers' request; and

60.2.2 provide all necessary assistance as reasonably requested by the Scottish Ministers in connection with any such Information, to enable the Scottish Ministers 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.

60.3 Representations by the Company

Following notification under Clause 60.2 and up until such time as the Company (or, as applicable, the Issuer) has provided the Scottish Ministers with all the Information specified in Clause 60.2.1, the Company (or, as applicable, the Issuer) may make representations to the Scottish Ministers 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 Scottish Ministers shall be responsible for determining at their absolute discretion:

60.3.1 whether Information is exempt from disclosure under the FOISA and the Environmental Information (Scotland) Regulations;

60.3.2 whether Information is to be disclosed in response to a Request for Information, and

in no event shall the Company or the Issuer respond directly, or allow its Subcontractors to respond directly, to a Request for Information unless expressly authorised to do so by the Scottish Ministers.

60.4 **Retention of Information**

The Company shall ensure that all Information held on behalf of the Scottish Ministers is retained for disclosure for at least five (5) years (from the date it is acquired) and shall permit the Scottish Ministers to inspect such information as requested from time to time.

60.5 **Transfer of Request for Information**

The Company shall transfer to the Scottish Ministers any Request for Information received by the Company as soon as practicable and in any event within two (2) Business Days of receiving it.

60.6 **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 Scottish Ministers may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of the FOISA and the Environmental Information (Scotland) Regulations.

60.7 **Costs of Compliance**

In the event of a request from the Scottish Ministers pursuant to Clause 60.2 above, the Company shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Scottish Ministers of the Company's estimated costs of complying with the request to the extent those would be recoverable if incurred by the Scottish Ministers under Section 12(1) of the FOISA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Scottish Ministers' 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 Scottish Ministers shall inform the Company in writing whether or not they still require the Company to comply with the request and where they do 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 Scottish Ministers are entitled to under Section 10 of the FOISA. In such case, the Scottish Ministers 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 they themselves are entitled to reimbursement of such costs in accordance with their own FOISA policy from time to time.

60.8 Disclosure of Information

The Company acknowledges that (notwithstanding the provisions of Clause 59) the Scottish Ministers may, acting in accordance with the Scottish Ministers' Code of Practice on the Discharge of Functions of Public Authorities under the Freedom of Information (Scotland) Act 2002 (the **Code**), be obliged under the FOISA or the Environmental Information (Scotland) Regulations to disclose Information concerning the Company, the Issuer or the Project:

60.8.1 in certain circumstances without consulting with the Company; or

60.8.2 following consultation with the Company and having taken the Company's views into account,

provided always that where Clause 60.8.1 above applies the Scottish Ministers shall, in accordance with the recommendations of the Code, draw this to the attention of the Company prior to any disclosure.

60.9 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 Scottish Ministers before disclosing Information about them or any agreement entered into between the Scottish Ministers and the Company.

61. 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).

62. NOT USED

63. DATA PROTECTION

63.1 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.

63.2 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.

63.3 No Disclosure

The Company shall not disclose Personal Data to any third parties other than:

63.3.1 to employees and Sub-Contractors to whom such disclosure is reasonably necessary in order for the Company to carry out the Operations; or

63.3.2 to the extent required under a court order,

provided that disclosure under Clause 63.3.1 is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this Clause 63 (Data Protection) and that the Company shall give notice in writing to the Scottish Ministers of any disclosure of Personal Data it or a Sub-Contractor is required to make under Clause 63.3.2 immediately it is aware of such a requirement.

63.4 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.

63.5 Scottish Ministers Requests for Details of Measures

The Scottish Ministers 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 63.4 (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 Scottish Ministers can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.

63.6 Indemnity

The Company shall indemnify and keep indemnified 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 63 by the Company and/or any act or omission of any Sub-Contractor.

64. **INTELLECTUAL PROPERTY RIGHTS**

64.1 **Company to Make Available Project Data**

The Company shall make available to the Scottish Ministers free of charge (and hereby irrevocably licences the Scottish Ministers to use) all Project Data that might reasonably be required by the Scottish Ministers 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 Scottish Ministers on these terms, for the purposes of:

64.1.1 the Scottish Ministers discharging their obligations under this Agreement and/or any statutory duties which the Scottish Ministers may have; and

64.1.2 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 64.1 shall be free of charge and non-exclusive.

64.2 **Licence to Use Intellectual Property Rights**

The Company:

64.2.1 hereby grants to 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

64.2.2 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 64.2.1 above to the Scottish Ministers,

in both cases, solely for the Approved Purposes.

64.3 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 64.3 shall not apply to moral rights, which are not transferable.

64.4 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:

64.4.1 use all reasonable endeavours to procure for the benefit of the Scottish Ministers, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Scottish Ministers or their nominee to access and otherwise use (subject to the payment by the Scottish Ministers 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

64.4.2 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.

64.5 Safe Storage Data

The Company shall ensure the back-up and storage in safe custody of the Project Data referred to in Clause 64.4 (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 Scottish Ministers for approval of its proposals for the back-up and storage in safe custody of the data, materials and documents and the Scottish Ministers 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 Scottish Ministers have given their approval. The Company may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Scottish Ministers, who shall be entitled to object on the basis set out above.

64.6 Infringement of Rights

Where a claim or proceeding is made or brought against the Scottish Ministers by a third party on grounds that 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 Scottish Ministers otherwise than in accordance with the terms of this Agreement or the relevant licence, the Company shall indemnify the Scottish Ministers at all times from and against all such claims and proceedings and the provisions of Clause 52.5 (Conduct of Claims) shall apply.

64.7 Traffic Data

64.7.1 Without prejudice to any rights which the Company may have in any traffic data collected by the Company in connection with the Project, the Scottish Ministers shall be entitled without further consent from the Company:

- (a) to use such traffic data for the purposes of exercising their rights or carrying out their 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 Scottish Ministers 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.

64.7.2 Without prejudice to any rights which the Scottish Ministers may have in any traffic data collected by the Scottish Ministers in connection with the Project, the Company shall be entitled without further consent from the Scottish Ministers:

- (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.

65. **ASSIGNATION AND SUB-CONTRACTING**

65.1 **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 all other Project Documents to which the Scottish Ministers are a party 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 all other Project Documents to which the Scottish Ministers are a party being:

65.1.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975; or

65.1.2 any other public body whose obligations under this 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.

65.2 **Restriction on the Company**

Subject to Clause 65.3 and subject always to the provisions of the Funders 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 Scottish Ministers (which the Scottish Ministers may in their absolute discretion refuse). The provisions of this Clause 65.2 shall not apply to any assignment 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.

65.3 **Exception**

Subject to the provisions of Clauses 5 and 18, nothing in this Clause 65 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 Scottish Ministers by the Company and approved by the Scottish Ministers 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.

65.4 Company's Obligations

The Company shall perform its obligations under and observe all the terms of any Sub-Contract.

65.5 Sub-Contractors

Nothing in this Agreement shall prohibit or prevent any Sub-Contractor employed by the Company from being employed by the Scottish Ministers.

65.6 Replacement of a non-performing Sub-Contractor

65.6.1 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 65.6.5 and provided that at the time of making such election no Termination Notice has been served under this Agreement, that for the purposes of Clause 42 (Termination on Company Default) only, all Performance Deductions incurred and/or notices served under Clause 44 (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 65.6.2 below.

65.6.2 If the Company makes an election pursuant to Clause 65.6.1 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 44 (Persistent Breach) prior to that date and in each case relating to the O&M Works shall be disregarded for the purposes of Clause 42 (Termination on Company Default). For the avoidance of doubt, the Scottish Ministers 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.

65.6.3 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 65.6.5 and provided that at the time of making such election no Termination Notice has been served under this Agreement, that for the purposes of Clause 42 (Termination on Company Default) only, all notices served under Clause 44 (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 65.6.4 below.

65.6.4 If the Company makes an election pursuant to Clause 65.6.3 above then, with effect from the date of substitution or replacement of the New Works Contractor, all notices served under Clause 44 (Persistent Breach) prior to that date and in each case relating to the New Works shall be disregarded for the purposes of Clause 42 (Termination on Company Default).

65.6.5 The Company shall be entitled to make an election pursuant to this Clause 65 on a maximum of two occasions during the Contract Period.

66. **AUDIT AND REGULATORY ACCESS**

Notwithstanding the provisions of Clause 77 (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 Scottish Ministers 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.

67. **CORPORATE STRUCTURES**

67.1 **Obligation to Inform**

67.1.1 The Company represents and warrants to the Scottish Ministers that at the Date of this Agreement, the legal and beneficial ownership of the Company, the Issuer and Holdco is as set out in Schedule 16 (Company's Details) and that, other than any Shareholder pre-emption rights and security granted to the Senior Creditors 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, the Issuer or Holdco.

67.1.2 The Company shall inform the Scottish Ministers as soon as reasonably practicable (and, in any event, within thirty (30) days) of any Change of Ownership of the Company, the Issuer and/or Holdco.

67.1.3 The Scottish Ministers 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 Scottish Ministers' request for details of any Change of Ownership.

67.1.4 The Company's obligations under Clauses 67.1.2 and 67.1.3 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.

67.2 No Change of Ownership

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.

67.3 Change of Ownership

67.3.1 The Company shall obtain the Scottish Ministers' 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 Scottish Ministers.

67.3.2 For the purposes of Clause 67.2:

- (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 Creditors 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, provided that any document conferring security over any shares has been approved by the Scottish Ministers (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 67.3 if the shares or interests which were the subject of the Original Transfer are not within 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.

68. **NO AGENCY**

68.1 **No Partnership**

Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Scottish Ministers and the Company.

68.2 **No Agency**

Save as expressly provided otherwise in this Agreement, the Company will not be, or be deemed to be, an agent of the Scottish Ministers and the Company shall not hold itself out as having authority or power to bind the Scottish Ministers in any way.

68.3 **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.

69. **ENTIRE AGREEMENT**

69.1 **Agreement Supersedes Prior Communications**

Except where expressly provided in this Agreement, this Agreement, the Funders 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 Funders Direct Agreement and the other Project Documents.

69.2 **Acknowledgement of the Parties**

Each of the Parties acknowledges that:

69.2.1 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

69.2.2 this Clause 69.2 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.

70. NOTICES

70.1 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	FAO Company Secretary Fulcrum Limited 105 Piccadilly London W1J 7NJ
If to the Scottish Ministers	Ainslie McLaughlin Transport Scotland Buchanan House 58 Port Dundas Road Glasgow G4 0HG

70.2 Submission of Information

Where any information or documentation is to be provided or submitted to the Scottish Ministers' 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	Precision House McNeil Drive Eurocentral Motherwell Lanarkshire ML1 4UR
If to the Scottish Ministers' Representative	Ainslie McLaughlin Transport Scotland Buchanan House 58 Port Dundas Road Glasgow G4 0HG

(copied in each case to the Scottish Ministers).

70.3 Change of Nominated Address

Either Party (and either Representative) may change its nominated address by prior notice to the other Party.

70.4 Effective Notices

Notices given by recorded delivery post shall be effective upon the earlier of (i) actual receipt and (ii) 2 Business Days after mailing. Notices delivered by hand shall be effective upon delivery.

70.5 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 70 and posted to the place to which it was addressed.

71. PUBLIC RELATIONS, PUBLICITY AND ADVERTISEMENTS

71.1 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 Scottish Ministers.

71.2 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 Scottish Ministers have given their prior written approval.

71.3 Reputation of the Scottish Ministers

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 Scottish Ministers into disrepute or attracting adverse publicity to the Scottish Ministers.

71.4 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 Scottish Ministers, save where otherwise required to comply with Legislation.

72. WAIVER

72.1 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.

72.2 No Future Waiver

No waiver under Clause 72.1 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.

73. 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.

74. LANGUAGE

74.1 All:

74.1.1 correspondence, Design Data, test reports, certificates, specifications and all other information to be provided to the Scottish Ministers in accordance with this Agreement; and

74.1.2 operating and maintenance instructions, identification labels appearing on plant and equipment; and

74.1.3 other written and printed matter required for the Operations;

shall be in English.

75. RECORDS AND LIAISON

75.1 Records and Reports

The provisions of Schedule 18 (Record Provisions) shall apply.

75.2 Liaison Committee

The Parties shall give effect to Schedule 19 (Liaison Committee).

76. PARTIES NOT TO PREVENT

76.1 Scottish Ministers 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 Scottish Ministers shall not deliberately do or omit to do any act which will prevent the Company from carrying out its obligations under this Agreement.

76.2 Company not to Hinder Scottish Ministers

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 Scottish Ministers:

76.2.1 using, or allowing others to use, any of the Project Roads;

76.2.2 from discharging their duties or functions; or

76.2.3 carrying out their obligations under this Agreement or their statutory duties.

76.3 Minor Infringements

Neither Party shall invoke the provisions of this Clause in respect of minor infringements of it by the other Party.

76.4 Interactive Nature of Activities

The phrase “deliberately do or omit to do any act” shall be construed in this Clause 76 having regard to the interactive nature of the activities of the Scottish Ministers and the Company, but shall exclude any acts or omissions carried out in the ordinary course of 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 Scottish Ministers are expressly precluded from acting in such a manner by another provision of this Agreement.

77. CO-OPERATION

77.1 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 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.

78. EXCLUSIVE REMEDIES

78.1 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.

78.2 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 Scottish Ministers.

78.3 Payment Mechanism: No Double Remedy

78.3.1 Subject to:

- (a) any other express right of the Scottish Ministers pursuant to this Agreement; and
- (b) the Scottish Ministers' right to claim, on or after termination of this Agreement, the amount of their reasonable costs, losses, damages and expenses suffered or incurred by 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 Scottish Ministers pursuant to this Agreement or has been taken into account to calculate any compensation payable by the Scottish Ministers pursuant to Schedule 11 (Termination Compensation);

the sole remedy of the Scottish Ministers in respect of a failure to provide the Operations in accordance with this Agreement shall be the operation of Schedule 6 (Payment Mechanism).

78.3.2 Nothing in this Clause 78.3 shall prevent or restrict the right of the Scottish Ministers to seek injunctive relief or a decree of specific performance or other discretionary remedies of the courts.

79. **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:

SCOTTISH MINISTERS

by

at

in the presence of:

EXECUTED for and on behalf of:

SCOT ROADS PARTNERSHIP PROJECT LTD

by

at

in the presence of: