

## SCHEDULE 1

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## **SCHEDULE 1**

### **PART 1 – CONTRACT SCOPE**

#### **1. DEFINITIONS AND INTERPRETATION**

##### **1.1 Definitions**

1.1.1 In this Contract the following words and expressions have the meanings hereby assigned to them except where the context otherwise requires.

"Access System" means a permanent or temporary moveable access gantry or platform together with associated runway beams, supports and associated fixings.

"Accident Investigation and Prevention Report" means a report, prepared by the Operating Company, containing proposals for remedial actions to address identified causes of accidents.

"Adjudicator" means the person referred to in Schedule 1, Annex 1.

"Agreement" means the executed and legally binding document that witnesses the agreement in writing of the parties for the 4<sup>th</sup> Generation Term Contract for Management and Maintenance of the Scottish Trunk Road network.

"All-Routes" means the term used within a Bid to define the application of a Scheme to the total Trunk Road network within a Unit.

"Annual Period" means the period of one year from 00.00 hours on the 1 April each year to 24.00 hours on the 31 March of the following year, except for the first Annual Period which is the period from 00.00 hours on the Commencement of Service Date to 24.00 hours on the 31 March of the following year and the last Annual Period which is the period from 00.00 hours on the 1 April of the preceding year to 24.00 hours on the Contract Termination Date.

"Annual Road Safety Review Report" means an annual report, prepared by the Operating Company, containing a programme of proposed road safety initiatives planned to contribute to achieving the Scottish Government's casualty reductions targets.

"Area Network Manager" means the Transport Scotland official who directs the management and maintenance of individual routes.

"Assignment of Rights Agreement" means an assignment of the Scottish Ministers' rights to pursue a claim in respect of damage to Crown Property in the form contained in Schedule 4 Part 4, Annex 4.4/E.

"Automated Diary Facility" means a web-based software application supplied by Transport Scotland to the Operating Company for the input, editing and dissemination of information on all planned roadworks, traffic management, lane closures, lane occupations and events likely to cause traffic delays or disruption on the Unit.

"Base Index Figure" has the meaning given to it in Clause 10.7.2 of this Schedule.

"Base Lending Rate" means the base lending rate published by the Royal Bank of Scotland, as varied from time to time.

"Bid" means the submission by the Operating Company in accordance with the process used within the Annual Cycle containing the requisite operational and

financial information to the Director in order to seek his approval for inclusion of a Scheme within the one and three year programmes.

"Bond and Undertaking" means the bond and undertaking, to be provided by the Operating Company to the Scottish Ministers, described in this Schedule.

"Bridge Assessment" has the meaning given to it in the *Design Manual for Roads and Bridges: BD 21: The Assessment of Highways Bridges and Structures*.

"Carbon Management System" means Transport Scotland's computerised system for calculating and managing greenhouse gas emissions.

"Carbon Management System Annual Account" means Transport Scotland's computer spreadsheet programme that is designed to collect operational activity data for Transport Scotland's greenhouse gas inventory.

"Carbon Management System Road Infrastructure Projects Tool" means Transport Scotland's computer programme that calculates project greenhouse gas emissions resulting from structural maintenance and construction of new road infrastructure.

"Category 1 Defect" means a Defect that necessitates prompt attention because it presents:

- (i) an immediate or imminent hazard, or
- (ii) a risk of rapid structural deterioration to the affected element.

"Category 2 Defect" means any Defect which is not a Category 1 Defect.

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

"Central Office" means the Operating Company's central office to be established and located as referred to in Schedule 5 Part 7.

"Certificate" means any document that formally attests the fulfilment of requirements of this Contract.

"Claim Notification" means the notice in writing to the Scottish Ministers by the Operating Company of an intention to claim additional payment in accordance with the provisions of Clause 10.8.2 of this Schedule.

"Commencement of Service Date" means 01 April 2013.

"Conditions of Contract" means this Schedule.

"Confirmation of Oral Order" means a retrospective Order raised using the contract control and management function of the Integrated Roads Information System in response to an oral Order raised by the Director.

"Consolidated Operations Instruction" means an Operations Instruction raised by the Operating Company in order to undertake a number of Operations related to different Scheme Identifiers at the same location.

"Constructional Plant" means all appliances and things required for carrying out the Operations but does not include materials or other things intended to form or forming part of the Unit.

"Contemporary Records" means those Records to be produced by the Operating Company in accordance with the requirements of this Contract.

"Contract" has the meaning given in the Agreement.

"Contract Commencement Date" means the date notified by the Scottish Ministers notwithstanding the date or dates of execution of this Contract.

"Contract Expiry Date" means the later of:

- (i) the Initial Contract Expiry Date, and
- (ii) the date specified in the last Notice of Extension.

"Contract Termination Date" means the earlier of:

- (i) the Contract Expiry Date, and
- (ii) the date on which this Contract is terminated in terms of this Contract.

"Contract Period" means the period between the Contract Commencement Date and the expiry of the Non-Conformance Liability Period.

"Contract Price" means the sum of money set out in, or calculated in accordance with, this Contract properly payable to the Operating Company in accordance with the provisions of this Contract in respect of its performance of this Contract.

"Contract Price Fluctuation" means the index linked adjustment to the Schedule of Rates and Prices applied to payment to take account of inflation.

"Contract Personnel" means employees and workers of the Operating Company (and/or contractors and subcontractors of any tier of the Operating Company) employed or engaged in the performance of the Operations from time to time.

"Contract Personnel Information" means any information about the employment and the employment terms and conditions of Contract Personnel requested by the Scottish Ministers.

"Core Management Team" means the core management team appointed by the Operating Company or their replacements subsequently agreed under the terms of this Contract.

"Core Operations" means the Operations which are not stated as being subject to an Order.

"Core Operations Closure Date" means the date logged into the contract control and management function of the Integrated Roads Information System as the date on which all amounts for the relevant Core Operation for the preceding Financial Year have been included in a Statement and after which no further amounts will be claimed by the Operating Company.

"Crown Property" means everything included in the Unit.

"Current Index Figure" has the meaning given to it in Clause 10.7.2 of this Schedule.

"Damage to Crown Property" means any damage that reduces the lifespan, or impairs the usefulness or appearance, of anything in the Unit.

"Data Capture Device" means any portable electronic device that can be used by the Operating Company for entry and storage of data in digital form.

"Default" means:

- (i) any breach of the obligations of either party to this Contract (including but not limited to any breach of any undertaking or warranty given under or in terms of this Contract),

- (ii) any failure to perform or the negligent performance of any obligation under this Contract,
  - (iii) any breach of any Legislation, or
  - (iv) any negligence or negligent or fraudulent mis-statement or any other default,
- in all cases by either party, its employees, agents, contractors, subcontractors of all tiers or representatives.

"Defect" means any defect or fault on the Unit.

"Defects Correction Period" means the period for correction of any Defects in a Scheme, commencing on the date of completion of that Scheme and expiring on the earlier of:

- (i) the date falling 52 weeks later, and
- (ii) the Contract Termination Date.

"Defects Correction Operations" means any works to correct Defects.

"Design" means any Operations so described in and instructed to be undertaken by the Operating Company under an Order, including:

- (i) all work necessary for the preparation and completion of drawings, including carrying out all procedures and checks stipulated by this Contract to be undertaken by the Operating Company, and
- (ii) specifications and all other information,

from which the Operations or Works are executed, including the design input necessary for all maintenance activities.

"Design Element" means a part of a Design identified in an Order.

"Detailed Inspection" means the inspection referred to in Schedule 7 Part 1.

"Director" means the Director of Transport Scotland Trunk Road and Bus Operations Directorate or any other person named by the Scottish Ministers from time to time to act on behalf of the Scottish Ministers.

"Dispute" means a difference or dispute of any nature between the Scottish Ministers and the Operating Company arising out of or concerning this Contract, described in a Notice of Dispute and notified to the other Party.

"Disruption Risk Management Plan" means the document maintained by the Operating Company to record the processes and activities to manage all identified risks of disruption to the Trunk Road network through Incidents.

"Disruption Risk Site" means a site where there is a history of or potential for unplanned disruption in the form of a lane, carriageway or full road closure or some other temporary restriction to normal movement, excluding disruption due to congestion.

"Drawings" means the drawings:

- (i) prepared by the Operating Company and its Designer in pursuance of or in connection with a Design together with any subsequent modification of such drawings received by the Scottish Ministers, and
- (ii) also such other drawings as may from time to time be provided by the Scottish Ministers or the Operating Company.



"Effective Value" has the meaning given to it in Clause 10.7.2 of this Schedule.

"Electronic Copy" means a copy of any document provided or received by e-mail, internet or on a CD-ROM or DVD-ROM, in a standard software format, or a specified software format, in accordance with the provisions of this Contract in a format acceptable to, and confirmed in writing by, the Director.

"Emergency Services" means the ambulance service, police force, coast guard and fire brigade.

"Engineer" means the person consented to by the Director in accordance with Clause 4.11.2 of this Schedule.

"Estimated Bid Value" means the estimate of the value of a Scheme submitted with the Bid.

"Final Index Figure" has the meaning given to it in Clause 10.7.2 of this Schedule.

"Financial Year" means Transport Scotland's financial year, which starts on 01 April and ends on the following 31 March.

"Further Detailed Direction" means the response raised within the contract control and management function of the Integrated Roads Information System by the Director to a Further Detailed Enquiry raised by the Operating Company in respect of Orders previously issued.

"Further Detailed Enquiry" means an enquiry raised within the contract control and management function of the Integrated Roads Information System by the Operating Company to the Director in respect of Orders previously issued.

"General Inspection" has the meaning given to it in the *Design Manual for Roads and Bridges*.

"Hazard Notice" means a notice issued to the Operating Company by the Performance Audit Group identifying a situation which represents an immediate hazard requiring action by the Operating Company.

"HB" means type HB loading as defined in the *Design Manual for Roads and Bridges: BD 37/01: Loads for Highway Bridges*.

"Health and Safety Plan" means the plan prepared by virtue of the *Construction (Design and Management) Regulations 2007*.

"Historical Records" means those records held by the previous operating company for the Unit and which the previous operating company is contractually required to hand over to the Operating Company.

"Incident" means an unplanned event on or near the Unit that has given rise to, or is likely to give rise to, disruption to traffic flow, harm to the environment or harm to the safety or welfare of road users, the public, or those working on or close to the Unit.

"Incident Response" means all operational activities undertaken by the Operating Company to co-ordinate, direct and execute an effective response after notification of an Incident.

"Incident Response Operations" means all operational activities undertaken by the Operating Company to execute an effective response after notification of an Incident.

"Incident Response Plan" means a written plan containing the Operating Company's arrangements for executing its Incident Response Operations, including details of resources, roles and responsibilities and communication arrangements.

"Incident Response Resources" means personnel, equipment, supplies, facilities and other resources utilised by the Operating Company to execute its Incident Response Operations.

"Incident Support Unit" means all Operating Company's vehicle and personnel responding to Incidents occurring on the Trunk Road network outwith the Trunk Road Incident Support Service geographical coverage areas and on all Trunk Road Incident Support Service Routes as required.

"Information Acts" has the meaning given to it in Clause 19.13.1 of this Schedule.

"Information and Communication Technology System Plan" means the plan to be prepared by the Operating Company as referred to in Schedule 5 Part 2.

"Initial Contract Expiry Date" means 31 March 2018.

"Integrated Roads Information System" means the road information system used by Transport Scotland and the Welsh Government referred to in Schedule 4 Part 2.

"Intellectual Property Rights" means all intellectual property rights of any kind which may subsist or be enforceable, at present or in the future, in any part of the world, including but not limited to all forms of copyright, design, right, goodwill, know-how, moral right, performing right, service mark, trade mark, patents, domain names, database rights, trade secrets, confidential information and other similar rights or obligations, whether or not registered or able to be registered in any country, or any applications for such registered rights.

"Item Category" means the category assigned in Schedule 1, Annex 4 to any particular item in Schedule 2 Part 2 or subsequently derived that shall be used when calculating the increase or decrease in respect of Contract Price Fluctuations to amounts otherwise payable to the Operating Company in accordance with this Contract.

"Key Staff" means the key staff appointed by the Operating Company or their replacements subsequently agreed under the terms of this Contract.

"Landscape Areas" means vegetated areas of the Unit listed in the landscape inventory.

"Landscape Development Plan" means the plan to be prepared by the Operating Company as referred to in Schedule 7 Part 4.

"Lane" means a delineated running lane or a hard shoulder of a road within the Unit.

"Lane Occupation" means the occupation of a Lane by the Operating Company, in connection with the Operating Company's Operations, resulting in the Lane becoming unavailable for use by any permitted classes of vehicles.

"Lane Occupation Charge" means a charge levied for occupying a Lane under the circumstances stated in Clause 15.5 of this Schedule.

"Legislation" means any legislation as from time to time enacted, amended, extended, or re-enacted that applies in the United Kingdom, including, without prejudice to the generality of the foregoing:

- (i) any subordinate legislation,

- (ii) any legislation applying in a part of the United Kingdom only, and
- (iii) any legislative act of the European Union or the Commission of the European Community which without further enactment has legal effect in the United Kingdom.

"Lump Sum Quotation" means a fully inclusive, fixed price quotation provided by the Operating Company to the Scottish Ministers for the execution of all the Operations proposed in respect of the execution of an Order, including a detailed breakdown of resources, quantities, rates and prices.

"Management System" means the system for the management of health and safety, quality, and environment, to be provided by the Operating Company.

"Mass Action Programme" has the meaning given to it in Chapter 8 of Transport Scotland's *Strategic Road Safety Plan*.

"Mobilisation Period" means the period commencing on the Contract Commencement Date and ending at 00.01 hours on the Commencement of Service Date.

"Monitoring Indicator" means a numerical measure of service provision as stated in Schedule 5 Part 6, Annex 5.6/B.

"Mutual Aid" means the provision of assistance and resources to Operational Partners in exceptional circumstances as determined by the Director.

"National Street Gazetteer" has the meaning given to it in Schedule 7 Part 5.

"Network Operations" means a branch within Transport Scotland managed by the Director.

"Non-Conformance" means any:

- (i) Default by the Operating Company, or
- (ii) defect in Operations, including but not limited to any defect in Design or resulting from defective Design, defect resulting from defective materials or defective workmanship, failure of any part of the Operations to meet or continue to meet the provisions of this Contract, and damage, destruction or other effect consequential on any default, or
- (iii) failure, as shown by the value of a Performance Indicator, to achieve the required standard of service, or
- (iv) failure by the Operating Company to professionally ensure the adequacy of the insurances offered by a Works Contractor in respect of a Works Contract.

"Non-Conformance Liability Period" means the period for correction of any Non-Conformances, commencing on the Contract Termination Date and expiring on the date falling 52 weeks later.

"Non-Execution Adjustment" means the sum of money that the Scottish Ministers are entitled to receive from the Operating Company, in addition to the compensation, costs and expenses that the Scottish Ministers are otherwise entitled to recover in respect of Default by the Operating Company, as stated in Clause 15.4.6 of this Schedule.

"Normal Working Hours" means 0700 to 1900 hours on Working Days.

"Notice of Adjudication" has the meaning given to it in Schedule 1, Annex 1.

"Notice of Arbitration" has the meaning given to it in Clause 18.3.1 of this Schedule.

"Notice of Assignment of Rights" means a notice, given by the Operating Company to a person or organisation causing Damage to Crown Property, of the Scottish Ministers' assignation to the Operating Company of their rights against the person or organisation.

"Notice of Dispute" has the meaning given to it in Clause 18.1.1 of this Schedule.

"Notice of Extension" has the meaning given to it in Clause 6.2.2 of this Schedule.

"Notice of Non-Conformance" means a notice issued by the Performance Audit Group to the Operating Company recording an Operating Company Default.

"Observation Resulting from Inspection" means a notice issued to the Operating Company by the Performance Audit Group identifying circumstances requiring action by the Operating Company.

"Operating Company" means the person or persons, firm or firms or company or companies with whom the Scottish Ministers have completed and signed the Agreement, including the Operating Company's personal representatives, successors and permitted assignees. All references to the Operating Company are deemed to include reference to its employees, agents, subcontractors or representatives, unless the context otherwise requires.

"Operating Company Change Proposal" means any change to the Scottish Ministers' Requirements proposed by the Operating Company in accordance with Clause 14.1 of this Schedule.

"Operating Company's Representative" means the person appointed by the Operating Company pursuant to Clause 2.5.4 of this Schedule.

"Operating Company's Submission" means the Tender and all documents forming part of the Operating Company's offer, together with such modifications and additions thereto as may be agreed in writing between the parties prior to the Contract Commencement Date and included in this Contract.

"Operating Company's Hold Point" means a point incorporated in the Management System beyond which work shall not proceed until all work up to that point has been demonstrated under the Management System as complying with the requirements of this Contract.

"Operational Items" means:

- (i) any Design forming part of the Operations,
- (ii) any materials, plant or equipment forming part of the Operations and for incorporation within the Unit,
- (iii) the Unit (insofar as the Unit is within the control of the Operating Company), or
- (iv) any person on the Unit, including but not limited to users of the Unit (insofar as the Unit is within the control of the Operating Company).

"Operational Partners" means those organisations which are involved in the operation of any part of the Trunk Road network and may work in partnership with the Operating Company. Operational Partners are:

- (i) branches within Trunk Roads and Bus Operations Directorate and other Directorates in Transport Scotland and Transport Directorate,

- (ii) the Traffic Scotland Operator,
- (iii) the Performance Audit Group,
- (iv) the Police Services and the Association of Chief Police Officers (Scotland),
- (v) the Emergency Services,
- (vi) the Scottish Roads Traffic Database Operator,
- (vii) Transport Scotland's customers,
- (viii) local roads authorities,
- (ix) local authorities,
- (x) local authority emergency planning departments,
- (xi) bridge authorities,
- (xii) the Traffic Customer Care Line Service,
- (xiii) Operating Companies in adjacent units,
- (xiv) Design Build and Finance Operators in adjacent units,
- (xv) the Trunk Road Incident Support Service patrols in adjacent units,
- (xvi) the Scottish Environment Protection Agency,
- (xvii) the Highways Agency service providers,
- (xviii) the Department for Transport,
- (xix) Authorised contractors, notified to the Operating Company by the Scottish Ministers,
- (xx) Undertakers,
- (xxi) Statutory Authorities,
- (xxii) Network Rail, and
- (xxiii) any other organisation notified to the Operating Company by the Scottish Ministers.

"Operations" means the operations, activities, duties and responsibilities of the Operating Company set out in this Contract, together with such other operations, activities, duties and responsibilities of the Operating Company as may be the subject of an Order issued from time to time in accordance with the Contract.

"Operations Instruction" means the Operating Company's internal instruction to its personnel in respect of an Order.

"Order" means an instruction issued from time to time by the Scottish Ministers to the Operating Company specifying Operations to be undertaken under this Contract by the Operating Company.

"Ordered Operations" means Operations instructed by an Order.

"Overseeing Organisation" means the Director or, if waived in writing by the Director, the Operating Company.

"Part" means a part of a Schedule.

"Parties" means the Scottish Ministers and the Operating Company. (A Party is either one of them as the context dictates.)

"Payment Adjustment Factor" means a factor to be applied in the measurement of items in the Schedule of Rates and Prices as stated in Schedule 2 Part 1.

"Payment Notified Record" means the record produced by the contract control and management function of the Integrated Roads Information System to document those items paid within the payment of a monthly Statement.

"Payment Received Record" means the record raised by the Operating Company to acknowledge receipt of its monthly payment under this Contract.

"Performance Audit Group" means Halcrow Group Limited, of City Park, 368 Alexandra Parade, Glasgow G31 3AU, or its successors or assignees or any other person or persons, firm or company that the Director may from time to time appoint.

"Performance Indicator" means a numerical measure of the Operating Company's compliance with a requirement of this Contract.

"Pollution" means any pollution or contamination of any part of the Operations or the Unit or outwith the Unit in connection with the Operations or of water or land or the atmosphere and all losses, damage and bodily injury, however caused, arising from or as a consequence of such pollution.

"Possession" means planned safety arrangements which control or prevent the normal movement of rail traffic between defined locations and for a predetermined period.

"Press Transport Scotland" means the team in Transport Scotland that are responsible for the management, answering and issue of media and press enquiries on behalf of Transport Scotland.

"Principal Contractor" has the meaning given to it in the CDM Regulations.

"Principal Inspection" is as defined in the *Design Manual for Roads and Bridges*, as added to and amended by Schedule 7 Part 6.

"Professional Services" means Operations undertaken by the Operating Company in accordance with Schedule 9 Series 6200.

"Project Manager" means the person consented to by the Director in accordance with Clause 4.11.2 of this Schedule.

"Quality Plan" means the quality plan to be provided by the Operating Company pursuant to Schedule 5 Part 1.

"Records" means Contemporary Records and Historical Records.

"Records Register" means a schedule of Records to be held by the Operating Company.

"Records Retention Period" means the periods referred to in Schedule 5 Part 2.

"Reference Date" means the date 42 days prior to the final Tender submission date stated in the *Invitation to Submit Final Tender*.

"Relevant Organisation" means an organisation as referred to in Clause 23.1 of this Schedule.

"Remedial Action Plan" means the plan which may be requested by the Scottish Ministers from the Operating Company to address a Non-Conformance.

"Remedial Notice" means a notice of a Default given by the Scottish Ministers to the Operating Company, stating requirements for remedial action.

"Remedial Period" means the period stipulated in a Remedial Notice for remedying the relevant Default.

"Route" means a pre-numbered section of Trunk Road within the Unit.

"Route Accident Reduction Plan" means a document containing proposals for reduction of road accidents, based upon consideration of accident patterns and rates along routes or parts of routes.

"Route Safety File" means a file containing information about a route that includes details of its overall safety performance.

"Route Safety Group" means a group, consisting of representatives from organisations with an interest in road safety (such as local authorities, police forces, Emergency Services, safety camera partnerships and others), formed to develop a sound knowledge base made up of five key components: route information and contacts; accident analysis; stakeholder and community issues; scheme programmes (safety, minor and major improvements, etc); and technical projects and initiatives.

"Safety Inspection" means the inspection referred to in Schedule 7 Part 1.

"Safety Patrol" means the patrol referred to in Schedule 7 Part 1.

"Schedule" has the meaning given in the Agreement.

"Scheme" means a discrete element of work carried out as Operations or as a Works Contract and subject to a Bid and an Order.

"Scheme Closure Date" means the date logged onto the contract control and management function of the Integrated Roads Information System on which all amounts for a Scheme have been included in a Statement and after which no further amounts will be claimed by the Operating Company.

"Scheme Completion Date" means the date logged onto the contract control and management function of the Integrated Roads Information System on which all Operations within each individual Scheme have been completed.

"Scheme Identifier" means the unique scheme identifying number allocated by the contract control and management function of the Integrated Roads Information System.

"Scottish Ministers' Hold Point" means a point notified by the Scottish Ministers at any time to the Operating Company for incorporation in the Management System, beyond which point the Operating Company is not permitted to proceed without demonstrating under its Management System to the Scottish Ministers' satisfaction that it has complied with the requirements of this Contract up to that point.

"Scottish Ministers' Requirements" means Schedules 3 to 9.

"Scottish Road Works Register" means the register of roadworks that provides the means for the Scottish Ministers and local roads authorities to meet their obligations in relation to *the New Roads and Streetworks Act 1991* and any successor register notified at any time to the Operating Company by the Scottish Ministers.

"Scottish Roads Traffic Database" means the system used to collect, validate, store and disseminate traffic count data for the Trunk Road network and limited parts of the non-trunk network.

"Scottish Roads Traffic Database Operator" means the organisation responsible for operating and maintaining the Scottish Roads Traffic Database on the Director's behalf.

"Scour Assessment" has the meaning given to it in the *Design Manual for Roads and Bridges*, as added to and amended by Schedule 7 Part 6.

"Scour Inspection" has the meaning given to it in the *Design Manual for Roads and Bridges*, as added to and amended by Schedule 7 Part 6.

"SEAS" means the Scottish Government's accounting system that is the financial ledger used by Transport Scotland.

"Severe Weather" means adverse weather conditions that disrupt, or are likely to disrupt, driving conditions and traffic movements on the Unit.

"Site" means the land or place where the work activity or part of the work activity of the Operations is executed.

"Site Operations Instruction" means a copy of an Operations Instruction issued to Operating Company personnel, or subcontractors of the Operating Company, for the carrying out of Operations.

"Site Waste Management Plan" means a plan for management, reuse, recycling and disposal of waste produced in connection with a Scheme.

"Special Inspection" is as defined in the *Design Manual for Roads and Bridges*, as added to and amended by Schedule 7 Part 6.

"Special Requirements" means the published requirements of the Relevant Organisations which are current at the time of undertaking Operations.

"Specification" means Schedule 9.

"Specified Person" means the Director, who shall be the "specified person" as defined in section 110A(6) of the *Housing Grants, Construction and Regeneration Act 1996* (as amended).

"Standard Incident Diversion Route" means existing roads designated by the Director as temporary routes for maintaining traffic around sections of the Trunk Road network temporarily closed due to roadworks, incidents, Severe Weather events or special events.

"Standard Reports" means reports generated by the contract control and management function of the Integrated Roads Information System in a fixed or variable format on a routine or ad hoc basis in accordance with the Director's specification as to period covered and level of detail.

"Statement" means the documentation provided by the Operating Company each month to support its request for payment.

"Statement of Intent" means a document prepared by the Operating Company which describes the scope of, and justification for, a Scheme.



"Statutory Authority" means an organisation constituted under statute which has duties or responsibilities which may affect or be affected by the Trunk Roads or Operations or Works on the Trunk Roads.

"Statutory Function" means any statutory function given to a Statutory Authority.

"Strategic Road Safety Unit" means the specialist accident investigation unit within Transport Scotland that manages the annual road safety programme and develops and implements a road safety strategy.

"Structure" means any:

- (i) bridge with span greater than 3.0 metres, over, under or alongside Trunk Roads,
- (ii) footbridge with span greater than 3.0 metres that carries pedestrians, cyclists or equestrians over or alongside Trunk Roads,
- (iii) culvert with span or diameter between 0.9 and 3.0 metres that conveys water, pedestrians or livestock under or alongside Trunk Roads,
- (iv) service duct that is a structure for database purposes,
- (v) underpass that allows pedestrians, cyclists, equestrians, livestock or farm vehicles to pass under a Trunk Road (such underpasses are deemed to be culverts if their span is between 0.9 and 3.0 metres),
- (vi) retaining wall constructed as a component of a Trunk Road that retains heights of material greater than 1.5 metres (ground level to ground level),
- (vii) sign or signal gantry over or adjacent to a Trunk Road, or sign or signal gantry that is the Scottish Ministers' responsibility at a specified location adjacent to a local road, supporting lighting, fixed signing, electronic signing, electrical equipment, or control equipment,
- (viii) high mast lighting over 20 metres high that supports demountable luminaires, or
- (ix) mast supporting closed circuit television equipment or other electronic equipment.

"Structures Safety Inspection" means the inspection defined in *Design Manual for Roads and Bridges Part 4 BD 63/07: Inspection of Highway Structures*, as added to and amended by Schedule 7 Part 6.

"Supervisor" means the person consented to by the Director in accordance with Clause 4.11.2 of this Schedule.

"Supplied Data" means any information, documents, designs and data supplied to the Operating Company, directly or indirectly, by or on behalf of the Scottish Ministers, whether by their consultants, agents, servants or other such personnel.

"Technical Approval" is as defined in the *Design Manual for Roads and Bridges*.

"Technical Approval Authority" is as defined in the *Design Manual for Roads and Bridges*.

"Technical Approval Schedule" is as defined in the *Design Manual for Roads and Bridges*.

"Temporary Diversion of Traffic" means:

- (i) a temporary carriageway onto which vehicular traffic is diverted from a road,
- (ii) a temporary footpath or bridleway onto which pedestrian or equestrian traffic is diverted from a road,
- (iii) a combination of (i) and (ii) or a temporary carriageway as in (i) with an associated footway or way for use of animals and equestrian traffic, or
- (iv) a temporary private means of access onto which traffic is diverted from a private means of access,

but in all cases does not include a central reserve crossover or other traffic management measures constructed to permit contraflow traffic on an existing carriageway.

"Tender" means the Operating Company's tender to and accepted by the Scottish Ministers for the management and maintenance of the Unit.

"Threshold Value" has the meaning given to it in Clause 7.2.6 of this Schedule.

"Total Order Value of Scheme" means the cumulative value of the individual Order values of Operations as contained in all Orders raised under individual Scheme Identifiers.

"Traffic Scotland Control Centre" means the location from which the operational element of the Traffic Scotland Service is provided and managed.

"Traffic Scotland Equipment" means the Scottish Ministers' intelligent transport system generally comprising of all equipment, transmission buildings located on the Trunk Road and part of the non-trunk road, associated communications equipment, computers and operator workstations operated, maintained and developed in the provision of the Traffic Scotland Service.

"Traffic Scotland Maintenance Contractor" is the company appointed by the Director to maintain the Traffic Scotland Service and notified as such to the Operating Company by the Director.

"Traffic Scotland Operator" is the company appointed by the Director to deliver the Traffic Scotland Service and notified as such to the Operating Company by the Director.

"Traffic Scotland Service" means the traffic control, network management and the distribution of information relating to the Trunk Road network provided by the Scottish Ministers.

"Transport Scotland Structures Workbank" means the scope of work defined by the Director relating to the maintenance of Structures on the Trunk Road network.

"Trunk Road" means a road as defined in the *Roads (Scotland) Act 1984* for which the Scottish Ministers are the roads authority including:

- (i) carriageways, hard shoulders, central reserves, interchanges, slip roads, connecting roads, access and service roads, roundabouts, junctions,
- (ii) lay-bys, traffic islands, police observation areas,
- (iii) cycle tracks, cycleways, footways, footpaths, pavements,
- (iv) Structures,

- (v) any associated infrastructure and amenities, including fences, barriers and restraint systems, kerbs, gullies, drainage systems outfalls and balancing ponds, grassed areas, hedges, trees, planted areas, traffic signs, traffic signals, authorised signs erected by, or for, any party other than the Scottish Ministers, road furniture, road lighting, loop detector systems, communications installations, picnic areas, environmental mitigation measures, embankments and cuttings, rock faces, coastal defences, erosion protection works, and
- (vi) any other item confirmed in writing from time to time by the Scottish Ministers.

"Trunk Road Incident Support Service" means all Operating Company's vehicle and personnel specifically designated to undertake standing patrols on defined sections of Trunk Road with the purpose of providing first line response to incidents and defects identified on the Trunk Road network.

"TUPE Regulations" means the *Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006* and *Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2009*.

"TUPE Information" means the information listed as such in Clause 22.1.5.

"Undertaker" means "undertaker" as defined in the *New Roads and Street Works Act 1991, Section 107*.

"Undisclosed Employees" has the meaning given to it in Clause 22.1.8.

"Undisclosed Agreements" has the meaning given to it in Clause 22.1.8.

"Unit" means the group of Scottish Trunk Roads to be managed and maintained according to the provisions of this Contract.

"Updated TUPE Information" has the meaning given to it in Clause 22.1.6.

"Value Added Tax" means value added tax as provided for in the Value Added Tax Act 1994 and in supplemental legislation (whether delegated or otherwise) or in any primary or secondary legislation promulgated by the European Community, or any official body or agency of the European Community and any similar sales, consumption or turnover tax introduced in addition to the foregoing and includes the charge to tax under paragraph 6 of Schedule 9A of the Value Added Tax Act 1994.

"Value for Money Assessment" means an assessment provided to the Director as part of a Bid to demonstrate the achievement of maximum effectiveness through efficient use of resources and at minimum cost.

"Winter Service Plant" means the Operating Company's plant and equipment used to deliver the Winter Service.

"Winter Service" means the service provided by the Operating Company in accordance with Schedule 7 Part 2.

"Winter Service Patrols" means the patrols that monitor road conditions to supplement weather information and carry out precautionary or de-icing treatments to deal with conditions that may arise during the Winter Service Period.

"Winter Service Period" means each period or part of period from 01 October to 15 May.

"Winter Service Plan" means the plan prepared by the Operating Company in accordance with Schedule 7 Part 2.

"Winter Service Records" means the records to be maintained by the Operating Company in accordance with Schedule 7 Part 2.

"Winter Service Report" means the report to be prepared by the Operating Company in accordance with Schedule 7 Part 2.

"Work Code" means the code for a Scheme within a Bid, in accordance with the system stated in Schedule 4 Part 1.

"Work Series" means a group of Work Codes, in accordance with the system stated in Schedule 4 Part 1.

"Working Day" means a day (other than a Saturday or Sunday or bank holiday or public holiday) on which banks are open for business in Scotland or would be open other than for the occurrence of an industrial dispute or force majeure event.

"Works" means the "Temporary Works" and the "Permanent Works" as specified in a Works Contract except that in Schedule 9 reference to the "Works" shall, where the context so requires, be taken to be reference to the Operations.

"Works Contract" means a contract between the Scottish Ministers and a Works Contractor for execution of a Scheme or part of a Scheme.

"Works Contract Instruction" means an instruction issued by the Director to the Operating Company to procure Works Contracts and to undertake related duties as provided by this Contract.

"Works Contractor" means the contractor for a Works Contract.

"9901 Activation" means the activation of a 9901 Bid by the Operating Company.

"9901 Bid" means a bid for the additional payment claimed within a claim submission following a Claim Notification.

## **1.2 Interpretation**

1.2.1 Words importing persons include companies, firms, partnerships, corporations and any other organisation having legal capacity.

1.2.2 Words importing the singular also include the plural and vice versa, where the context so requires.

Words importing the male also include the female and vice versa, where the context so requires.

1.2.3 Except in Schedules 2 and 9, the headings in this Contract are provided for ease of reference only and are deemed not to be part of, and not to be taken into consideration in the interpretation or construction of, this Contract.

1.2.4 All references in this Contract to "Clauses" in:

- (i) Schedules 1 to 8, and Schedule 10 unless otherwise provided, are references to Clauses numbered in Schedule 1, and
- (ii) Schedule 9 are, unless otherwise provided, references to Clauses numbered in Schedule 9.

1.2.5 All references in this Contract to "Schedules" are, unless otherwise provided, references to Schedules to this Contract.

1.2.6 Any reference to any Act of Parliament or Act of the Scottish Parliament shall be construed as a reference to that Act of Parliament or Act of the Scottish Parliament

as from time to time amended, extended or re-enacted and shall include a reference to any bye-laws, statutory instruments, rules, regulations and orders, notices, directions, consents or permissions made or given thereunder from time to time.

Any reference to any statutory instrument, rule, regulation, order, notice, direction, consent or permission shall be construed as a reference to that statutory instrument, rule, regulation, order, notice, direction, consent or permission as from time to time amended, extended or re-enacted.

- 1.2.7 A reference to any person or organisation includes the successors (statutory or otherwise) and assignees or successors in title of such person or organisation, irrespective of whether such succession or assignment has occurred before or after the Contract Commencement Date.
- 1.2.8 The word "cost", when used in these Conditions of Contract, means all expenditure properly incurred or to be incurred, whether on or off the Unit, including overhead costs, except as expressly stated otherwise.
- 1.2.9 Every reference in documents referred to in this Contract to:
- (i) "British Railways",
  - (ii) "British Railways Board",
  - (iii) "Railtrack",
  - (iv) "Network Rail", and
  - (v) "Railway",
- is deemed to be a reference to "Network Rail Infrastructure Limited" or their successors.
- 1.2.10 Every reference in documents referred to in this Contract to "public holiday" and "Public Holiday" is deemed to be a reference to 25 December, 26 December, 01 January and 02 January in any year.
- 1.2.11 Every reference in this contract to "day" is deemed to be a reference to a calendar day.
- 1.2.12 References within Schedule 9 and the *Design Manual for Roads and Bridges* to:
- (i) "defect" means "Defect",
  - (ii) "category (i) defect" means "Category 1 Defect", and
  - (iii) "category (ii) defect" means "Category 2 Defect",
- unless the context otherwise requires or implies.
- 1.2.13 Every reference in Schedule 2 Parts 1 and 2 to "Plant" is deemed to be a reference to Constructional Plant.
- 1.2.14 Any requirement on the Operating Company under this Contract to "consult" any firm, organisation or person shall be construed as a requirement also to allow a sufficient period for that consultee to comment on the matter in question.
- 1.2.15 Any consent or approval given by the Scottish Ministers or the Director to the Operating Company pursuant to the terms of this Contract shall not be held to relieve the Operating Company of any of its obligations under this Contract.

- 1.2.16 All obligations contained in this Contract are deemed to be obligations on the Operating Company unless any such obligation has been specifically stated otherwise.

## **2. SCOPE OF CONTRACT, OPERATING COMPANY OBLIGATIONS, CONTRACT ADMINISTRATION AND APPLICABLE LAW**

### **2.1 Scope of Contract**

- 2.1.1 The Operating Company acknowledges that it has not entered into this Contract in reliance on the accuracy or sufficiency of any Supplied Data. This Contract sets out the entire rights and liabilities of the Operating Company and the Scottish Ministers relating to the subject matter of this Contract and except where it may be expressly referred to or referenced herein supersedes all prior representations, understandings, agreements, and documents between or by the Operating Company and the Scottish ministers in regard to the Operations and to any other matters covered by this Contract except in respect of any fraudulent misrepresentations made by either party.

- 2.1.2 The Operating Company is deemed:

- (i) to have inspected and examined the Unit and its surroundings and information available in connection therewith,
- (ii) to have satisfied itself, before submitting its Tender, as to the form and nature of the Unit, the extent and nature of the work, and the materials and all other resources necessary for the completion of the Operations in accordance with the provisions of this Contract,
- (iii) to have satisfied itself, before submitting its Tender, as to the means of communication with and access to the Unit,
- (iv) to have satisfied itself, before submitting its Tender, as to the accommodation that it may require,
- (v) generally to have obtained for itself, before submitting its Tender, all necessary information as to risks, contingencies and all other circumstances that might have influenced or affected its obligations and any payment received,
- (vi) to have satisfied itself of the correctness and sufficiency of the rates and prices included in the Contract, before submitting its Tender.

- 2.1.3 Unless otherwise stated in this Contract, the rates and prices in this Contract cover all of the Operating Company's risks and obligations under this Contract.

- 2.1.4 The Scottish Ministers neither warrant nor take responsibility for the accuracy of any information in connection with the matters referred to in Clauses 2.1.1, 2.1.2 and 2.1.3 that may have been provided by, or on behalf of, the Scottish Ministers or any other source. The Operating Company is deemed not to have relied on any information referred to in Clauses 2.1.1 to 2.1.3 except to the extent that it has satisfied itself under Clause 2.1.2 as to the accuracy of such information for the purposes of the Operations.

The Scottish Ministers do not warrant that any condition or circumstance prevails at the Unit and its surroundings, whether a condition applying generally or to the particular parts or positions.

- 2.1.5 The Operating Company shall, in return for having undertaken and performed the Operations in accordance with this Contract, be paid the Contract Price.
- 2.1.6 The Operating Company shall execute all Operations with due expedition and without delay.
- 2.1.7 Subject to the other provisions of this Contract, the Operating Company shall not make any alteration in, addition to or omission from any Order issued under this Contract.
- 2.1.8 The Operating Company does not have the exclusive right to undertake work within the Unit.

## **2.2 Operating Company Obligations**

- 2.2.1 The Operating Company shall be responsible for the acts, Defaults, omissions and negligence of its employees, agents, contractors and subcontractors (of all tiers), representatives and other persons engaged by it in any capacity whatsoever, as if they were the acts, Defaults, omissions or negligence of the Operating Company.

## **2.3 Operating Company Knowledge**

- 2.3.1 Without limitation to its actual knowledge, the Operating Company shall for the purposes of this Contract be deemed to have such knowledge in respect of the Operations as is held by:
- (i) the Designer,
  - (ii) the Checker,
  - (iii) the Road Safety Manager, and
  - (iv) any other persons engaged by it in any capacity.

## **2.4 Delegation of Statutory Functions**

- 2.4.1 The Director may from time to time delegate to the Operating Company any additional Statutory Functions which are allowed to be contracted out in accordance with the:
- (i) *Roads (Scotland) Act 1984,*
  - (ii) *The Secretary of State's Trunk Road Functions (Contracting Out) (Scotland) Order 1996* (Statutory Instrument 1996 No 878 (S99)) made under Section 69 of the *Deregulation and Contracting Out Act 1994,* and
  - (iii) *New Roads and Street Works Act 1991,*

subject to the Scottish Ministers giving the Operating Company not less than four weeks' prior written notice.

The Director may from time to time delete or vary the existing delegation of any Statutory Function to the Operating Company.

To the extent that such delegation, deletion or variation is in respect of any of the Statutory Functions specified in this Contract, no compensation is due or shall be paid to or by either the Scottish Ministers or the Operating Company for such addition, deletion or variation.

## **2.5 Arrangements for the Administration of this Contract**

2.5.1 The Director is empowered to act on behalf of the Scottish Ministers in respect of all their powers and duties under this Contract. He is responsible for administering this Contract on behalf of the Scottish Ministers.

2.5.2 The Director may from time to time in writing authorise any person to carry out any duty of the Director under this Contract on behalf of the Director.

Prior notice in writing of any such authorisation shall be given by the Director to the Operating Company. Such authorisation shall continue in force until such time as the Director notifies both the Operating Company and the authorised individual in writing of its cessation.

2.5.3 If the Operating Company is dissatisfied with any Order given by a person authorised to carry out duties of the Director, the Operating Company may refer the matter in writing to the Director, who shall thereupon confirm, reverse or vary such Order in writing.

2.5.4 The Operating Company shall appoint and provide an Operating Company's Representative, who shall have full authority to act as agent of the Operating Company in relation to all matters arising out of, or in connection with, the Contract.

The Operating Company's Representative shall be appointed to act on a full-time basis as the Operating Company's representative in respect of all matters pertaining to this Contract.

The Operating Company's Representative shall be the Operating Company's principal point of contact for the Scottish Ministers, their representatives and the Core Management Team throughout the Contract Period. All communications between the Scottish Ministers and the Operating Company or any of its members shall be made through the Operating Company's Representative.

The Operating Company's Representative shall ensure that the Operating Company executes all Operations in accordance with the requirements of this Contract, and that the Management System demonstrates the fulfilment of those requirements.

2.5.5 Following the establishment of the Central Office, the Operations shall be coordinated, planned, managed and maintained by the Operating Company from the Central Office for the remainder of the Contract Period.

2.5.6 The Operating Company shall establish and maintain within the Unit such additional subordinate offices, depots, and other facilities as required to enable the Operating Company to execute the Operations.

2.5.7 The Operating Company's Representative and the Core Management Team shall be responsible to the Operating Company and shall act independently of any other part of their organisation that may be carrying out work related in any way to this Contract.

2.5.8 This Contract provides for the Performance Audit Group to audit the performance of the Operating Company and to undertake various related duties and obligations.

The Director may from time to time substitute for the existing Performance Audit Group a new person, persons, firm, or company, provided that on each such occurrence the Director shall in writing notify the Operating Company of the identity of the substitute person, persons, firm or company appointed.



The Performance Audit Group is responsible for administering specified parts of this Contract on behalf of the Scottish Ministers.

The Scottish Ministers may from time to time change the duties, responsibilities and authority of the Performance Audit Group. The Director shall notify the Operating Company in writing of any such changes at least three days before they take effect.

## **2.6 Assignment and Subcontracting**

2.6.1 This Contract shall be personal to the Operating Company.

The Operating Company shall not assign, novate, or otherwise transfer, by any means whatsoever, any right, interest or obligation which it may have in or under this Contract without the prior written consent of the Scottish Ministers and any Default in respect of this requirement shall entitle the Scottish Ministers to terminate this Contract in accordance with the provisions of this Schedule.

2.6.2 Except where otherwise provided by this Contract, the Operating Company shall not subcontract any part of the Operations without the prior written consent of the Scottish Ministers.

2.6.3 The provision of labour on a labour-only basis does not require the written consent of the Scottish Ministers under the provisions of Clause 2.6.2.

2.6.4 No assignment, subcontracting or other transfer of any duty, function, liability, obligation or other responsibility (or any part thereof) incumbent upon the Operating Company in terms of this Contract by any means whatsoever to any third party by the Operating Company shall have the effect of relieving the Operating Company of any such duty, function, liability, obligation, or responsibility (or any part thereof) owed to the Scottish Ministers in terms of this Contract, notwithstanding that the Scottish Ministers have consented to such assignment, subcontracting or other transfer and the Operating Company shall at all times be bound fully to implement this Contract.

2.6.5 The Operating Company shall provide to the Scottish Ministers, when they so request, a copy of the agreement or other document that records any permitted assignment, subcontracting, or other transfer arrangements with a third party of any of the Operations under or in terms of this Contract.

## **2.7 Giving of Notices and Payment of Fees**

2.7.1 The Operating Company shall give all notices, take all actions, and pay all fees required to be given, taken or paid by any Legislation in relation to the execution of the Operations and by the rules and regulations of all Statutory Authorities, companies and Undertakers whose property or rights may be affected in any way by the Operations.

## **2.8 Legislation**

2.8.1 The Operating Company shall, in undertaking and performing the Operations and all other obligations incumbent upon it under this Contract, ascertain and comply in all respects with the provisions of all Legislation that applies to the Operations and with the rules and regulations of Statutory Authorities, companies and Undertakers.

The Operating Company shall indemnify the Scottish Ministers against all penalties and liability of every kind for breach of any Legislation or such rules and regulations.

Provided always that:

- (i) except in the case of a Design, the Operating Company is not required to indemnify the Scottish Ministers against the consequences of any such breach that is the unavoidable result of complying with any Order of the Scottish Ministers,
- (ii) where an Order is at any time found not to comply with any such Legislation, rules or regulations, the Scottish Ministers shall issue such further Order as necessary to secure compliance, and
- (iii) the Operating Company is responsible for obtaining any planning permission, consents or other permissions of any nature which may be necessary in respect of the Operations or any completed Operations undertaken under any Order.

Such obligations shall include obtaining any such permissions and consents necessary in respect of any Design and any Works Contract forming part of an Order.

- 2.8.2 The Operating Company shall comply with the statutory and other procedures, rules and regulations specified in this Contract, or contained in, or which form the subject of, any Order.

## **2.9 Scots Law to Apply**

- 2.9.1 This Contract shall be governed by and interpreted in accordance with Scots Law. The Parties hereto hereby submit to the exclusive jurisdiction of the Scottish Courts.

## **2.10 Language**

- 2.10.1 All documents to be produced for, or to be provided to, the Scottish Ministers in accordance with this Contract shall be in English.

- 2.10.2 All:

- (i) operating and maintenance instructions and identification labels appearing on Constructional Plant and all other written and printed matter required for the Operations, and
- (ii) notices to the public and third parties given by the Operating Company in the course of executing the Operations,

shall be in English and in such other language or languages as required by the other provisions of this Contract or ordered in writing by the Scottish Ministers.

## **2.11 Notices**

- 2.11.1 Except where otherwise provided in this Contract, any document, notice or other communication required or permitted to be given or served in terms of this Contract may be given or served personally or by sending by first class recorded delivery post at or to:

- (i) in the case of the Scottish Ministers:  
The Director, Trunk Road and Bus Operations  
Transport Scotland  
Buchanan House  
8<sup>th</sup> floor  
58 Port Dundas Road  
Glasgow  
G4 0HF
- (ii) in the case of the Operating Company, its registered office or Central Office,
- (iii) and, in the case of the Performance Audit Group:  
Halcrow Group Limited  
City Park  
368 Alexandra Parade  
Glasgow  
G31 3AU
- (iv) or, in all three cases at or to such other address as last notified in writing.

2.11.2 Subject to evidence to the contrary, any document, notice or other communication (other than an Order) given or served by first class recorded delivery post in accordance with the provisions of this clause is deemed to be given or served on the second Working Day after posting.

Subject to evidence to the contrary, proof of proper addressing and posting as stated above is deemed to be proof of such giving or service.

2.11.3 Notwithstanding the other provisions of this Clause 2.11, Orders shall generally be issued by transmission through the contract control and management function of the Integrated Roads Information System and shall be deemed to have been received when the Order has so been transmitted by the Scottish Ministers to the Operating Company.

### **3. CONTRACT DOCUMENTS**

#### **3.1 Interpretation of Contract Documents**

3.1.1 The documents forming this Contract are to be taken as mutually explanatory of one another. For the purposes of interpretation, the priority of the documents shall be in accordance with the following sequence:

- (i) the Agreement,
- (ii) the Conditions of Contract (Schedule 1),
- (iii) the Scottish Ministers' Requirements (Schedules 3 to 9),
- (iv) Method of Measurement and Schedule of Rates and Prices (Schedule 2),
- (v) clarifications that have not been captured elsewhere issued between 4 April 2011 (the date of issue of the invitation to participate in dialogue) and 8 February 2012 (the date of final tender submission) (Schedule 10),
- (vi) contractual documents required under the invitation to participate in dialogue and the invitation to submit final tender, including the final tender submission submitted by the Operating Company together with other

relevant documentation and correspondence between the parties to the Agreement between 8 February 2012 (the date of final tender submission) and execution of the Agreement (Schedule 11), and

(vii) any other documents forming part of this Contract.

- 3.1.2 In the case of any conflict between the provisions of this Contract and the provisions of British Standard EN ISO 9001, British Standard EN ISO 14001, British Standard EN ISO 27001 and Occupational Health and Safety Management Systems Specification OHSAS 18001, the provisions of this Contract shall prevail.
- 3.1.3 The Operating Company shall notify, and shall ensure and procure that all others for whom it is responsible (including the Designer, the Checker and the Road Safety Manager) notify, the Scottish Ministers of conflicts within or between documents forming this Contract.
- 3.1.4 Where there is any conflict within or between any of the documents forming the Scottish Ministers' Requirements, the Scottish Ministers shall provide an interpretation which in their opinion ensures the safest and most conservative result. The Scottish Ministers shall notify the Operating Company of that interpretation.
- 3.1.5 The Scottish Ministers shall resolve any conflict notified to them within or between the *Design Manual for Roads and Bridges* and any other document forming part of the Scottish Ministers' Requirements.
- 3.1.6 In the case of any conflict within or between any documents supplied by the Operating Company for the purposes of this Contract, the Scottish Ministers shall resolve such conflict after consultation with the Operating Company.
- 3.1.7 The Scottish Ministers shall confirm to the Operating Company in writing their decision as to any interpretation of documents or any resolution of conflict within or between documents. Any such decision shall be binding upon the Operating Company. Any consequential alteration to the Operations shall be subject to the written consent of the Scottish Ministers.
- 3.1.8 The Operating Company is deemed to have made due allowance in the rates and prices contained in this Contract for complying with the requirements of this Clause 3.1 and no financial adjustment shall be made in respect of the application of or compliance with such requirements.

## **3.2 Provision of Documents**

- 3.2.1 Following the execution of this Contract, the Scottish Ministers shall provide to the Operating Company one copy of this Contract.
- 3.2.2 The Operating Company shall submit to the Scottish Ministers and the Performance Audit Group, in the manner and at the times detailed in this Contract, all documentation and other information (including files, reports, drawings, calculations, data, and records), whether provided by the Scottish Ministers or obtained or made by or on behalf of the Operating Company, including documentation and information held as Electronic Copy.
- 3.2.3 For the purposes of this Contract, all Electronic Copies to be provided by the Operating Company to the Director for archive purposes shall be provided in both the original software format and portable document format (pdf) on DVD-ROMs.

### **3.3 Drawings and Information**

- 3.3.1 The Operating Company shall provide to the Scottish Ministers such information and Drawings concerning the Operating Company's proposals in respect of any Order as are, in the Scottish Ministers' opinion, necessary for the proper execution of the Operations in accordance with this Contract. The Operating Company shall be bound by the information and Drawings so provided.

The Operating Company shall provide such information and Drawings as soon as practicable following any request or requirement to do so, and in any case at the time required in an Order or this Contract.

- 3.3.2 The Operating Company shall at all times keep in its Central Office at least one copy of all information and Drawings. Such information and Drawings shall be available at all times for inspection and use by any person authorised under this Contract.

## **4. CONTRACT OBLIGATIONS**

### **4.1 General Obligations**

- 4.1.1 The Operating Company shall undertake and complete all Operations in respect of the Unit in accordance with the terms of this Contract.

The Operating Company shall provide everything necessary, whether of a temporary or permanent nature, including all resources required in and for such Operations, so far as the necessity for such provision is specified in or can reasonably be inferred from any Order and this Contract.

Such resources shall include without limitation:

- (i) the provision of all personnel of appropriate level of skill, competence and where necessary holding the appropriate formal qualifications,
- (ii) the provision of all Constructional Plant,
- (iii) the provision of all materials,
- (iv) the provision of all offices, depots, stores and other such facilities, and
- (v) the provision and maintenance of all temporary traffic management arrangements.

- 4.1.2 The Operating Company shall immediately take such action as necessary for the:

- (i) saving of life,
- (ii) protection of property,
- (iii) safety of the Operations,
- (iv) safety of users of the Unit, and
- (v) safety and protection of the Unit.

- 4.1.3 During each Winter Service Period, all vehicles actively involved in maintenance and management Operations shall be fitted with winter tyres on all wheels.

- 4.1.4 If at any time the Scottish Ministers consider that any arrangements of the Operating Company are insufficient for the proper discharge of its obligations under this Contract, they shall in writing notify the Operating Company, explaining why such a view is held. The Operating Company shall thereupon, at its own expense, take such remedial actions as necessary.

- 4.1.5 The Operating Company shall provide to the Director all reasonable access, facilities, and resources to permit the Director to undertake such audits and inspections of the Operating Company's financial accounts, and other financial and cost records relating to this Contract, as the Director may consider necessary from time to time.

## **4.2 Operating Company Staff**

- 4.2.1 Prior to the Commencement of Service Date, the Operating Company shall prepare a register listing each member of the Operating Company's staff who is available to carry out Professional Services. Each such member of staff shall be allocated a title as referred to in Schedule 9 Part 2, Appendix 62/1.

The Operating Company shall submit the register of Professional Services staff to the Director for written consent.

- 4.2.2 Prior to the Commencement of Service Date, the Operating Company shall prepare a register listing each member of the Operating Company's staff who may be utilised and paid for under the time work schedule - Series 6500 of Schedule 2 Parts 1 and 2.

Each member of staff shall be allocated a relevant title as referred to in Table 1 in Series 6500 of Schedule 2 Part 1.

- 4.2.3 The Operating Company shall maintain and update the two registers referred to in Clauses 4.2.2 and 4.2.3 for the duration of the Contract Period.

The registers shall show the start and end dates of the period during which each member of staff was allocated each title.

The Operating Company shall, within five Working Days of the amendment being made, submit to the Director, for written consent, any amendment to the register of Professional Services staff.

## **4.3 Operating Company Responsibilities**

- 4.3.1 The Operating Company shall exercise reasonable professional skill, care and diligence in undertaking the Operations and shall secure that the Operations meet the requirements of this Contract.

- 4.3.2 The Operating Company is responsible for the adequacy and safety of all Design, Site Operations, Defects Correction Operations, and other activities forming part of the Operations.

- 4.3.3 No claim by the Operating Company is admissible on the ground that the Operating Company or any of its employees, agents, subcontractors (of any tier) or representatives relied upon any audit, inspection or supervision conducted, or any consent or approval issued, by or on behalf of the Scottish Ministers when signing any Certificate required to be provided under this Contract or when discharging any of its other obligations in accordance with this Contract.

- 4.3.4 The Operating Company is not entitled to rely on any such audit, inspection, supervision, consent or approval of the Scottish Ministers:

- (i) when signing any Certificate required to be provided under this Contract,
- (ii) when discharging any of its other obligations in accordance with this Contract, or

- (iii) as a justification for failure to sign any such Certificate or discharge any of its other obligations in accordance with this Contract.

#### **4.4 Addition and Removal of Things to and from the Unit**

- 4.4.1 The Operating Company shall carry out Core Operations on any additions to the Unit made during the Contract Period. There shall be no adjustment to payments under this Contract either in respect of such additions or in respect of removal of things during the Contract Period, apart from those provided for under Schedule 2, Series 6700.

#### **4.5 Design, Design Checks and Certification**

- 4.5.1 Where the requirement for a Design or a part of a Design is included in an Order, or part of an Order, the Operating Company shall undertake a Design. Such Design shall be carried out in accordance with the Scottish Ministers' Requirements.

- 4.5.2 The Operating Company shall bear responsibility for a Design as if it had carried out the whole of the Design itself, whether or not it has carried out the whole or any part of the Design itself.

If the Designer and Checker fail to agree on any matter relating to the Design or this Contract, the Operating Company shall, subject to the prior written consent of the Scottish Ministers, appoint and employ a person of appropriate professional skill expeditiously to resolve the matter.

The Director shall consent to, or object to, such proposed appointment within 14 days of being requested to do so in writing by the Operating Company.

In the event that the Director so objects to such a proposed appointment, the Operating Company shall nominate another person, the appointment being subject to the foregoing provisions of this clause.

- 4.5.3 The Operating Company shall complete, register and retain within the Central Office all Certificates (including associated data) and information (including drawings, calculations and all other associated documents) required by this Contract in respect of the Operations for which the Operating Company has produced a Design.

No part of any Site Operations in respect of a Design shall be commenced unless such completion and registration of Certificates has been effected.

The Director may require the Operating Company from time to time to provide to him and the Performance Audit Group copies of registers and other evidence of:

- (i) registration,
- (ii) Certificates (including associated data), and
- (iii) information (including drawings, calculations and all other associated documents).

- 4.5.4 Where, during the carrying out of any Operations for which the Operating Company has undertaken a Design, the Operating Company encounters anything which invalidates any of its Design assumptions, or requires amendments to its method of Site Operations in respect of such Design, it shall immediately notify the Director in writing of the matter.

As soon as practicable thereafter, the Operating Company shall submit in writing to the Director details of any such amendments proposed to be made to such Design

or Site Operations, and shall obtain an amending Order from the Director prior to making the proposed amendment. Such Order shall have no value.

The Operating Company shall provide any further information required or requested by the Director prior to, or as a condition of, any such grant of written consent before such written consent is granted.

All risks, including to all costs, time and Operations, in connection with and resulting from any such amendment to a Design or Operations pursuant to this clause shall be borne by the Operating Company.

4.5.5 To the extent that any Certificate requires the Operating Company and the Designer to certify that Operations for which the Operating Company has undertaken the Design have been constructed, completed and maintained in accordance with this Contract, the Operating Company shall in undertaking the Operations ensure and procure that:

- (i) both the Operating Company and the Designer supervise such Operations, including sampling and testing required by this Contract, in such a manner and to such extent as may be considered reasonable by the Director,
- (ii) the Designer notifies the Operating Company in writing (providing copies simultaneously to the Director and the Performance Audit Group) of any change in the Operating Company's arrangements which are necessary in the opinion of the Designer for the proper discharge of the Operating Company's Design obligations in respect of this Contract, and
- (iii) the Designer notifies the Operating Company in writing (providing copies simultaneously to the Director and the Performance Audit Group) of any sample and test which the Designer considers necessary in connection with this Contract and the Operating Company thereafter, as soon as reasonably practicable after such notification, executes any such sample, test and record and preserves in the Central Office all results thereof.

The Operating Company shall at any time make available unrestricted access to the Director and the Performance Audit Group in the Central Office for inspection or audit and, on the written request of the Director or the Performance Audit Group, provide a copy of any records to either or both parties within seven days of such request.

4.5.6 Where additional work of Design arises as the unavoidable result of any Order, the Operating Company is bound to undertake and is responsible for such additional work of Design. The provisions of this Contract concerning Design apply to any such additional work of Design.

All costs in connection with and resulting from such additional Design shall be borne by the Operating Company, where resulting from a Default by the Operating Company.

## **4.6 Sureties**

4.6.1 The Operating Company shall, not later than 30 days prior to the Commencement of Service Date, provide a validly executed Bond and Undertaking by an insurance company or bank which shall be jointly and severally bound with the Operating Company in the sum of £1,300,000 for the due performance of this Contract under the terms of such Bond and Undertaking.



The Bond and Undertaking shall be provided by an insurance company or bank acceptable to the Scottish Ministers and shall be in the form of the Bond and Undertaking contained in and forming Schedule 1, Annex 2, or otherwise acceptable to the Scottish Ministers.

The Bond and Undertaking shall be in place until the end of the Contract Period or the settlement of the final account, whichever is the later.

Prior to preparing the execution of the Bond and Undertaking, the Operating Company shall submit the proposed Bond and Undertaking, including the name of the guarantor, for the prior written acceptance of the Scottish Ministers.

The obtaining of the Bond and Undertaking and all costs incurred thereby are the responsibility of the Operating Company.

#### **4.7 Inspection of the Unit**

4.7.1 The Operating Company shall make and keep itself familiar with the Unit.

#### **4.8 Operations to the Satisfaction of Scottish Ministers**

4.8.1 Everything to be provided by the Operating Company in respect of this Contract, including the mode, manner and speed of executing the Operations, shall be of a kind and conducted in such a manner as is to the satisfaction of the Scottish Ministers.

#### **4.9 Setting Out**

4.9.1 The Operating Company shall be responsible for:

- (i) the proper setting-out of work executed in carrying out the Operations,
- (ii) the correctness of the position, levels, dimensions and alignment of all parts of such work, and
- (iii) the provision of all necessary resources in connection therewith.

If, at any time during the Contract Period, any error appears or arises in the position, levels, dimensions or alignment of any part of such work, the Operating Company shall at its own cost rectify such error and any consequences whatsoever of such error.

Any monitoring by the Scottish Ministers of any setting-out or of any line or level shall not in any way relieve the Operating Company of its responsibility for the correctness of such setting-out or of any line or level in accordance with this Contract.

#### **4.10 Safety and Security**

4.10.1 The Operating Company shall, throughout the progress of the Operations, ensure the safety of all persons entitled to be upon the Unit (so far as such safety is under its control). Accordingly, the Operating Company shall keep the Unit (so far as the Unit is under its control) in an orderly and tidy state, in order to avoid danger to such persons.

4.10.2 The Operating Company shall, in connection with the Operations, provide and maintain, at its own cost, all lights, guards, fencing, warning signs and watching, when and where deemed necessary by the Scottish Ministers, Undertakers, any Statutory Authorities or any other authority for the protection of the Operations or for

the safety and convenience of the public and all other persons, companies, firms and other organisations entitled to be on the Unit.

4.10.3 Where the Scottish Ministers execute work themselves or employ other contractors and similar organisations to execute work on the Unit, they shall, in respect of such work:

- (i) ensure and procure that any such contractors and similar organisations ensure the safety of all persons entitled to be upon the Unit,
- (ii) ensure and procure that any such contractors and similar organisations liaise with the Operating Company in respect of their activities on the Unit, and
- (iii) keep and procure that any such contractors and similar organisations keep the Unit in an orderly and tidy state appropriate to the avoidance of danger to such persons.

#### **4.11 Operating Company's Superintendence**

4.11.1 The Operating Company shall provide all necessary superintendence during the execution of Operations and as long thereafter as required by this Contract.

Such superintendence shall be undertaken by a sufficient number of persons, all of whom shall have sufficient knowledge of the Operations to be executed (including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents) for the satisfactory execution of the Operations.

4.11.2 The Operating Company shall nominate to the Director in writing, for written consent, competent and available persons of appropriate professional skill to act as the Engineer, or Project Manager and Supervisor or equivalent, in accordance with the form of Works Contract used, in all Works Contracts.

#### **4.12 Clearance During and on Completion of Operations**

4.12.1 The Operating Company shall, in the course of undertaking Operations, take all necessary measures to keep the Unit free from all Constructional Plant and vehicles not required for the Operations, surplus materials, rubbish and any obstruction to the free flow of pedestrian and vehicular traffic.

On the completion of Operations, the Operating Company shall clear away and remove from the Unit all Constructional Plant, surplus materials, rubbish, temporary works of every kind and traffic management equipment, and leave the whole of the Unit clean and in a workmanlike condition, to the satisfaction of the Scottish Ministers.

#### **4.13 Discrimination**

4.13.1 The Operating Company shall not discriminate unlawfully in any matter relating to discrimination in employment.

4.13.2 The Operating Company shall take all reasonable steps to secure that none of its contractors, agents, employees and other persons engaged by it in any capacity whatsoever in the execution of this Contract discriminates unlawfully in any matter relating to discrimination in employment.

#### **4.14 Motorway Passes and Keys**

- 4.14.1 In recognition of the potential danger of the environment, Operations on motorways shall generally be undertaken within the protection of traffic management arrangements.

However, in some situations, Operations off the carriageways of motorways can be undertaken safely without traffic management arrangements. In such situations, the Operating Company shall apply in advance to the Director for special authority for any persons so to work. Such authority will be given by the Scottish Ministers by the issue of a motorway pass.

The Operating Company shall take responsibility for:

- (i) training of any of its employees, and any of the employees of its subcontractors, who are to work on motorways within the Unit,
- (ii) the planning and management of any activity on such motorways, and
- (iii) the actions of such employees when working on such motorways.

All applications from the Operating Company for motorway passes shall be made on a standard proforma provided by the Director. Such requests shall specifically identify:

- (iv) the name of the person for whom the application is made,
- (v) the activity to be undertaken and the section of motorway to which it relates,
- (vi) the start and end dates of the period for which the application is made,
- (vii) the reason why the activity is being proposed without traffic management,
- (viii) how the individual shall operate when on the motorway, and
- (ix) the specific training on the health and safety risks that has been given to that person.

Motorway passes issued by the Director allow relaxation under *Motorways Traffic (Scotland) Regulations 1995* in accordance with the terms of the application and the pass. The Operating Company shall ensure and procure that no other motorway working without traffic management arrangements is undertaken.

All Operations accessed using a motorway pass shall be planned and logged. The local police control room shall be informed prior to any such Operations being undertaken.

- 4.14.2 Where the Operating Company requires access to unattended locked premises within the Unit, it shall apply to the Director in writing for such access. The Director shall provide keys to the Operating Company, which is thereafter responsible for their safe keeping.

Such keys shall be surrendered immediately upon written request from the Director and in any event at the Contract Termination Date. Loss of a key shall be reported immediately to the Director, to enable security precautions to be implemented.

## **5. ACCESS, INSPECTION PROCESS, COMPLETION OF ORDERS AND DEFECTS CORRECTION**

### **5.1 Access and Provision of Facilities**

- 5.1.1 The Scottish Ministers, the Performance Audit Group and any other person authorised by the Scottish Ministers (including other contractors and other third parties) shall at all times have unrestricted access to the Operations and to the Unit and to all files, documents, information and all other data produced by the Operating Company as part of, or in connection with, the execution of the Operations.

Such access shall at all times include access to the Central Office, subordinate offices, depots and workshops belonging to, or under the control of, the Operating Company and all such places where work is being prepared, materials are being manufactured or articles and machinery are being obtained for, or in connection with, the Operations.

The Operating Company shall afford every facility for, and every assistance in obtaining, such access.

### **5.2 Rate of Progress**

- 5.2.1 Where, for any reason that does not entitle the Operating Company to an extension of time, the rate of progress of all or any of the Operations is at any time in the opinion of the Scottish Ministers too slow to ensure completion of the relevant Operations by the time prescribed in this Contract or any Order or by the extended time for completion referred to in this Contract, the Scottish Ministers shall so notify the Operating Company in writing.

The Operating Company shall thereupon take such measures as necessary and to which the Scottish Ministers consent to expedite progress to allow completion of those Operations by the prescribed time or extended time.

The Operating Company is not entitled to any additional payment for taking measures required under this clause.

### **5.3 Completion Certificates and Notification of Completion of Schemes**

- 5.3.1 For each Scheme, the Operating Company shall, within seven days of:

- (i) completion of the whole of the Operations required for a Scheme, and
- (ii) these Operations having passed any final test required by this Contract,

issue to the Scottish Ministers a Certificate, in the form shown in Schedule 6 Part 4, stating the date on which the Operating Company has, in its opinion, completed its obligations, for that Scheme, to execute Operations covered by the relevant Order in accordance with this Contract.

- 5.3.2 For each Scheme, the Operating Company shall, within seven days of:

- (i) completion of the whole of the Operations required for a Scheme, and
- (ii) these Operations having passed any final test required by this Contract,

record such completion and passage of final tests within the contract control and management function of the Integrated Roads Information System.

## **5.4 Examination of Work before Covering Up**

- 5.4.1 Where required in writing by the Director, the Operating Company shall ensure that no part of the Operations is covered up or put out of view without the prior written consent of the Director.

The Operating Company shall afford every opportunity to the Director to:

- (i) examine or measure any work which is about to be covered up or put out of view, and
- (ii) examine foundations and other constructed elements before permanent work is placed on them.

The Operating Company shall provide written notice to the Director whenever any such work or foundation is ready or about to be ready for such examination. On receipt of such notice, the Director shall, if he wishes to make such examination, without unreasonable delay and in writing notify the Operating Company accordingly, and make such examination.

- 5.4.2 The Operating Company shall, when required by the Scottish Ministers under any Order:

- (i) uncover any part or parts of the Operations,
- (ii) make openings in or through the such part or parts,
- (iii) carry out searches, inspections, investigations, tests and trials, and
- (iv) reinstate and make good such part or parts to the satisfaction of the Scottish Ministers.

If any such part or parts have been covered up or put out of view and are found to have been executed in accordance with this Contract, the cost of such uncovering, making of openings, carrying out searches, inspections, investigations, tests or trials, reinstating and making good shall be borne by the Scottish Ministers but in all other cases all such costs shall be borne by the Operating Company.

## **5.5 Operating Company to Determine Cause of Defects**

- 5.5.1 The Operating Company shall, where required by the Director under any Order during the Mobilisation Period, Annual Periods, and Non-Conformance Liability Period, execute such searches, inspections, investigations, tests and trials as necessary to determine the cause of any Defect and to carry out such Defects Correction Operations as required by the Scottish Ministers.

Where such Defect is a Non-Conformance, the cost of all such searches, inspections, investigations, tests, trials and Defects Correction Operations shall be borne by the Operating Company.

Where such Defect is not a Non-Conformance, the value of all such searches, inspections, investigations, tests, trials and Defects Correction Operations executed by the Operating Company shall be ascertained in accordance with Clause 10 of this Schedule for payment to the Operating Company in accordance with this Contract.

## **5.6 Urgent Repairs**

- 5.6.1 Where at any time, in the opinion of the Scottish Ministers, any Defects Correction Operations or other action, work or repair needs to be urgently executed in connection with or arising out of the Operations (including where the Scottish

Ministers deem there to be any immediate threat to public safety), the Scottish Ministers are entitled, subject to the provisions of Clause 5.6.4, to execute themselves, or to employ other persons to execute, such Defects Correction Operations or other action, work or repair.

- 5.6.2 The Scottish Ministers shall, as soon as reasonably practicable following their decision to exercise their entitlement under Clause 5.6.1, notify the Operating Company in writing of such decision and provide details within any such notice of the Defects Correction Operations or other action, work or repair to be executed or which has already been executed by them, or on their behalf.

Any such notice shall not be deemed to be a Remedial Notice, whether or not the requirement for such Defects Correction Operations or other action, work or repair occurs because of the Default of the Operating Company.

- 5.6.3 Where the Scottish Ministers execute, or arrange for the execution of, Defects Correction Operations or other action, work or repair under Clause 5.6.1 or Clause 5.6.5 and in their opinion the Operating Company was liable to execute it at its own expense, all costs and expenses properly incurred by the Scottish Ministers in the execution shall be, at the option of the Scottish Ministers, either:

- (i) paid by the Operating Company to the Scottish Ministers on demand, or
- (ii) deducted by the Scottish Ministers from any amounts due, or which may become due, to the Operating Company under this Contract.

The Scottish Ministers shall notify the Operating Company in writing of such costs and expenses prior to any such demand or deduction by them.

- 5.6.4 The Scottish Ministers are only entitled to execute, or employ other persons to execute, any Defects Correction Operations or other action, work or repair required under Clause 5.6.1 if in their opinion (acting reasonably in all the circumstances) the Operating Company is unable or unwilling to execute the same within the timescales which the Scottish Ministers deem to be necessary in the particular circumstances.

- 5.6.5 If, in the event of circumstances arising to which the provisions of Clause 5.6.1 apply, the Scottish Ministers either do not opt to, or pursuant to Clause 5.6.4 are not entitled to, exercise their option in terms of Clause 5.6.1 to execute or employ other persons to execute any Defects Correction Operations or other action, work or repair required, they shall issue an Order to the Operating Company requiring the Operating Company to execute and complete the Defects Correction Operations or other action, work or repair required.

In respect of any such Order, the Operating Company is not entitled to any extension of time under Clause 8. If the Operating Company does not execute and complete the Defects Correction Operations or other action, work or repair required in terms of such Order, the Scottish Ministers are entitled, without further notice to the Operating Company, themselves to execute, or employ other persons to execute, such Defects Correction Operations, other action, work, or repair, and to demand of, or deduct from amounts due to the Operating Company, the whole costs and expenses incurred by the Scottish Ministers in terms of Clause 5.6.3.

## **5.7 Removal of Improper Work and Materials**

- 5.7.1 The Scottish Ministers may, during the progress of the Operations, issue an Order requiring:

- (i) the removal from the Unit within such time or times as may be specified in such Order of any materials that, in the opinion of the Scottish Ministers, are not in accordance with this Contract and the substitution of proper and suitable materials for such non-compliant materials, or
- (ii) the removal and proper re-execution (notwithstanding any previous test thereof or interim payment therefore) of any work that, in the opinion of the Scottish Ministers, in respect of materials or workmanship is not in accordance with this Contract.

All costs in relation to such Orders shall be borne by the Operating Company.

- 5.7.2 The failure of the Scottish Ministers, or any person acting for them pursuant to the other provisions of this Contract, to reject or disapprove any work or materials shall not prejudice the power of the Scottish Ministers, or any person acting for them, subsequently to reject or disapprove such work or materials.

## **5.8 Correction of Defects**

- 5.8.1 To ensure that the Operations executed under the Contract are in the condition required by this Contract (fair wear and tear excepted) at the expiry of the relevant Defects Correction Period, or as soon as practicable thereafter, the Operating Company shall:

- (i) search for, undertake inspections and investigations concerning, and record, in accordance with the Scottish Ministers' Requirements, all Defects that occur during the relevant Defects Correction Period and execute and record all Defects Correction Operations in accordance with the other provisions of this Contract,
- (ii) execute and record, in accordance with the Scottish Ministers' Requirements, any Defects Correction Operations that, within 14 days after expiration of the relevant Defects Correction Period, are required of, and notified to, the Operating Company in writing by the Scottish Ministers,
- (iii) maintain, in accordance with the Scottish Ministers' Requirements, records and registers of all the activities referred to in this clause, and
- (iv) provide from time to time, to the Director and the Performance Audit Group, copies of such records and registers, within 21 days of any request.

- 5.8.2 Defects Correction Operations shall be carried out by the Operating Company at its own expense where, in the opinion of the Scottish Ministers, the relevant Defect is a Non-Conformance.

Otherwise, the value of such Defects Correction Operations shall be ascertained and paid for as if they were additional work forming the requirements of an Order.

- 5.8.3 Where the Operating Company fails to execute any necessary Defects Correction Operations required by this Contract or the Scottish Ministers, the Scottish Ministers are entitled to:

- (i) execute such Defects Correction Operations themselves, or
- (ii) arrange for the execution of the Defects Correction Operations by other contractors.

Where such Defects Correction Operations relate to a Non-Conformance, the Scottish Ministers are entitled, at their option, either to:

- (iii) recover from the Operating Company the costs incurred by the Scottish Ministers in connection with execution of the Defects Correction Operations, or
- (iv) deduct the amount of these costs from any amounts due, or that become due, to the Operating Company from the Scottish Ministers.

## **5.9 Defects Correction Certificate**

- 5.9.1 Upon the expiry of each Defects Correction Period, and when all relevant Defects Correction Operations referred to in Clause 5.5.1 and Clauses 5.8.1 to 5.8.3 have been completed, the Operating Company shall issue to the Scottish Ministers, in the form shown in Schedule 6 Part 4, a Certificate stating the date on which the Operating Company has, in its opinion, completed its obligations to execute Defects Correction Operations in connection with the Operations covered by the relevant Order in accordance with this Contract.
- 5.9.2 The issue of this Certificate does not relieve either the Operating Company or the Scottish Ministers from any liability arising out of, or in any way connected with, the performance of their respective obligations under this Contract.

## **5.10 Non-Conformance Liability Period**

- 5.10.1 During the Non-Conformance Liability Period, the Scottish Ministers may make their own investigations and employ their own workmen and other contractors to execute searches, inspections and investigations for all Non-Conformances, and may execute any necessary Defects Correction Operations themselves or arrange for execution by other contractors. The execution of such searches, inspections and investigations shall be audited by the Performance Audit Group or such other person or body as authorised from time to time by the Scottish Ministers.
- 5.10.2 The Scottish Ministers shall give at least 14 days' notice in writing to the Operating Company, stating the intended dates, times and locations of any such searches, inspections or investigations. The Operating Company has the right to witness these searches, inspections or investigations.
- 5.10.3 Within a reasonable period after the date of completion of each such search, inspection or investigation, the Scottish Ministers shall deliver to the Operating Company a list of any resulting necessary Defects Correction Operations.
- 5.10.4 The value of the work undertaken in searching, inspecting, or investigating for Non-Conformances and undertaking any Defects Correction Operations under Clauses 5.10.1 to 5.10.3 shall be ascertained by the Scottish Ministers as if, for such purpose, such work had been the requirements of an Order issued under Clause 5.5.1.
- 5.10.5 The Scottish Ministers shall provide the valuation of such work to the Operating Company within seven days of completion of any such Defects Correction Operations. The amounts of all such valuations are recoverable by the Scottish Ministers from the Operating Company under this Contract.

## **5.11 Removal of Operating Company's Employees**

- 5.11.1 The Operating Company shall employ or cause to be employed only persons who are careful, skilled and experienced in their several trades and callings.

The Scottish Ministers are entitled to object to, and may at any time require the Operating Company to remove from the execution of the Operations by written



notice to such effect to the Operating Company, any person employed thereon who, in the opinion of the Scottish Ministers, has:

- (i) misconducted himself,
- (ii) been incompetent,
- (iii) been negligent in the performance of his duties,
- (iv) failed to conform with any particular provisions with regard to safety set out in this Contract, or
- (v) persisted in any conduct that is prejudicial to safety or health.

5.11.2 The Operating Company:

- (i) shall immediately comply with any such requirement (or, where appropriate, ensure and procure that any contractor, subcontractor (of any tier) of, or supplier (of any tier) to the Operating Company complies with such requirement), and
- (ii) shall ensure and procure that such person is not again engaged by the Operating Company (or any contractor, subcontractor (of any tier) of, or supplier (of any tier) to the Operating Company) in any capacity upon the Unit or in respect of the Operations, without the prior written permission of the Scottish Ministers.

5.11.3 In the event of any such removal, the Operating Company shall not delay, suspend, terminate or withhold the performance of any of its obligations under this Contract and shall remain bound to implement its obligations in full.

5.11.4 The Scottish Ministers shall have no liability to the Operating Company in respect of any costs or expenses incurred by the Operating Company as a result of any requirements of the Scottish Ministers pursuant to Clauses 5.11.1 to 5.11.3.

**5.12 Responsibility for Loss or Damage**

5.12.1 The Operating Company shall be liable for any loss or damage to the Operations occasioned by it in the course of any activity carried out by it for the purpose of completing any outstanding Operations or of complying with its obligations under Clauses 5.5 and 5.8.

## **SCHEDULE 1**

### **PART 2 – PERIODS AND PROGRAMMES**

#### **6. PERIODS AND PROGRAMMES**

##### **6.1 Mobilisation Period**

6.1.1 During the Mobilisation Period the Operating Company shall:

- (i) acquire the capacity to execute the Operations in accordance with the provisions of this Contract and of any issued Orders, and
- (ii) carry out the Mobilisation Period requirements of this Contract.

6.1.2 The Scottish Ministers are entitled to issue Orders to the Operating Company during the Mobilisation Period.

Any Orders issued prior to the availability of the contract control and management function of the Integrated Roads Information System shall be:

- (i) issued in writing independently of the contract control and management function of the Integrated Roads Information System, and
- (ii) subsequently transmitted to the Operating Company by the Director via the contract control and management function of the Integrated Roads Information System after it becomes operational.

6.1.3 The Operating Company shall not later than 60 days prior to the Commencement of Service Date establish within the geographical area served by the Unit, at the locations required by this Contract:

- (i) the temporary central office,
- (ii) all subordinate offices, depots and other facilities necessary to allow the Operating Company to execute Operations under this Contract, and
- (iii) a Core Management Team,

all in terms of this Contract.

##### **6.2 Execution of Operations**

6.2.1 The Operating Company shall execute the Operations from the Contract Commencement Date until the Contract Termination Date.

The Operating Company shall from 00.00 hours on the Commencement of Service Date until 00.00 hours on the day after the Contract Termination Date take full responsibility for:

- (i) the care of the Unit,
- (ii) the care of the Operations, and
- (iii) the safety of all persons entitled to be upon the Unit (so far as such safety is within the control of the Operating Company).

6.2.2 The Scottish Ministers may at their discretion extend the period of this Contract beyond the Initial Contract Expiry Date, to a later Contract Expiry Date, by a period or periods as stated below, up to a total extension not exceeding five years, by giving written notice to the Operating Company.

The first such period of extension shall be of two years' duration. Subsequent periods of extension shall each be of one year's duration.

Such a notice shall be termed a "Notice of Extension".

Where the Scottish Ministers wish to exercise their discretion to extend the period of this Contract, they shall issue a Notice of Extension in writing to the Operating Company:

- (i) no later than 24 months before the Initial Contract Expiry Date, or
- (ii) if the period of this Contract has already been extended by the giving of a Notice of Extension in accordance with this clause, no later than 24 months before the Contract Expiry Date,

specifying within such Notice of Extension the period by which this Contract is extended.

- 6.2.3 The Operating Company may at its option waive the requirements stated in Clause 6.2.2 for 24 months' notice.

### **6.3 Preparation of Programmes**

- 6.3.1 The Operating Company shall prepare programmes for the Operations and submit them to the Scottish Ministers in accordance with the other requirements of this Contract.

### **6.4 Revision of Programmes**

- 6.4.1 If at any time the Scottish Ministers consider that the actual progress of any part of the Operations does not comply with any programmes, times, or dates forming part of any Order or of any requirement of this Contract, the Scottish Ministers shall issue an Order to the Operating Company requiring it to produce a revised programme or times showing the modification to the original programme or times necessary to ensure the completion of the Operations in accordance with such programmes or times.

Any costs associated with such revisions to programme or times shall be borne by the Operating Company.

### **6.5 Methods**

- 6.5.1 Where required by the Scottish Ministers, the Operating Company shall submit, at such times as the Scottish Ministers may require, all information pertaining to the proposed methods for execution of the Operations.

Any such submission shall be sufficiently detailed to enable the Scottish Ministers to assess whether the proposed methods are adequate for execution of the Operations in accordance with this Contract.

### **6.6 Scottish Ministers' Consent**

- 6.6.1 Within a reasonable period after receipt of any submission in accordance with Clause 6.5.1, the Scottish Ministers shall notify the Operating Company in writing whether or not they consent to the Operating Company's proposed methods for the execution of the Operations.

6.6.2 In the event that the Scottish Ministers do not consent to any such proposed methods, they shall:

- (i) with their notice withholding consent, notify the Operating Company of the respects in which (in the opinion of the Scottish Ministers) the proposed methods fail to meet the requirements of this Contract, and
- (ii) subsequently issue an Order to the Operating Company to make such changes in the methods as may be necessary to meet the Scottish Ministers' Requirements and to obtain their consent.

The costs for executing any such Order shall be borne by the Operating Company.

## **SCHEDULE 1**

### **PART 3 – ORDERS, EXTENSIONS OF TIME, MEASUREMENT AND PAYMENT PROVISIONS**

#### **7. BIDS, SCHEMES, ORDERS AND THRESHOLD VALUES**

##### **7.1 General**

- 7.1.1 Subject to the other provisions of this Contract, including but not limited to Clauses 7.1.1 to 7.3.4, Bids shall also comply with the requirements of Schedule 4 Part 1.
- 7.1.2 Bids shall be in the form specified by the Scottish Ministers within this Contract and, when ordered by the Scottish Ministers, in accordance with the Order to which they relate.
- 7.1.3 Bids shall be valued in accordance with Clause 10.1 of this Contract, and provided irrespective of the value of work involved and the Threshold Values given in this Contract.
- 7.1.4 Bids shall remain open for acceptance by the Scottish Ministers for 63 days from the date of receipt of the Bid by the Scottish Ministers.
- 7.1.5 The Scottish Ministers may issue an Order to the Operating Company requiring the Operating Company to provide a Bid for Operations under consideration but not yet ordered. The Bid shall be provided within the time period given in the Order or when no time period is given in an Order, the Bid shall be submitted within 28 days.

##### **7.2 Orders, Schemes, Threshold Values, Bids**

- 7.2.1 The Scottish Ministers may from time to time during the Contract Period issue Orders to the Operating Company under this Contract.

Such Orders shall relate to the Unit and may include, without prejudice to the generality of the following:

- (i) executing work,
- (ii) making additions, omissions, substitutions, alterations or changes in quality, form, character, timing or kind, relative to those referred to in the Scottish Ministers' Requirements,
- (iii) making additions, omissions, substitutions, alterations or changes to the extent of the Unit,
- (iv) making changes to the Scottish Ministers' Requirements pursuant to Clause 14.1,
- (v) executing Non-Conformance Operations,
- (vi) entering into a contract with a third party (or parties) for the execution of work or of supply, and
- (vii) executing such other Operations, activities, duties and responsibilities by the Operating Company as the Scottish Ministers may require to place on the Operating Company.

- 7.2.2 Subject to the other provisions of this Contract, for any Scheme with an Estimated Bid Value of not more than £5,000,000, the Scottish Ministers may from time to time

issue Order(s) to the Operating Company to execute Operations and the Operating Company shall execute such Operations for any such Scheme.

Subject to the other provisions of this Contract, Operations for any such Scheme may include any operations, activities, duties and responsibilities in connection with the management and maintenance of the Trunk Road network as the Scottish Ministers may at their discretion place on the Operating Company.

7.2.3 For Schemes with an Estimated Bid Value of less than £350,000, following an Order from the Scottish Ministers, the Operating Company may undertake the ordered Operations without competitive tendering. Operations undertaken without competitive tendering will be valued according to the principles in Clause 10.1.

7.2.4 For Schemes with an Estimated Bid Value of more than £350,000 and less than £5,000,000, the Scottish Ministers may proceed with one of the following procurement options:

- (i) issue an Order or Orders to the Operating Company to undertake the works, which will be valued according to the principles in Clause 10.1, or
- (ii) issue an Order to the Operating Company to provide Professional Services and/or undertake all work necessary for procurement of the works by the Scottish Ministers under a Works Contract, or
- (iii) issue an Order to the Operating Company to provide all assistance to third parties to enable the Scottish Ministers to procure the Scheme using third parties.

Where a Scheme is to be procured by a Works Contract under Clause 7.2.4 (iii), the Operating Company, in addition to its other obligations under the Contract, shall if so ordered:

- (iv) assist the Director to undertake a pre-qualification process,
- (v) prepare all necessary tender documentation, and
- (vi) undertake the role of Engineer or equivalent role(s), according to the form of contract used, during the construction stage.

7.2.5 For Schemes with an Estimated Bid Value of more than £5,000,000 the Scottish Ministers at their discretion may:

- (i) order the Operating Company to provide Professional Services necessary for a subsequent Works Contract procured by the Scottish Ministers,
- (ii) order the Operating Company to undertake the work as Operations,
- (iii) procure the Scheme or similar works under separate contracts with others,
- (iv) not proceed with the Scheme.

7.2.6 The values given in Clauses 7.2.2, 7.2.3, 7.2.4 and 7.2.5 above are Threshold Values which may be revised from time to time by the Scottish Ministers.

7.2.7 The Scottish Ministers may at their discretion issue Order(s) that combine individual Schemes, or combine individual Schemes with potential individual Schemes, or combine potential individual Schemes.

Where individual schemes are combined into a new single Scheme and their combined Estimated Bid Value falls within the Threshold Values stated in Clause 7.2.3 or 7.2.4, the Scottish Ministers may proceed in accordance with Clause 7.2.3

or 7.2.4 as appropriate for the single Scheme. The Operating Company shall execute Operations for the single Scheme in compliance with the Orders of the Scottish Ministers.

7.2.8 The Scottish Ministers may, at their discretion, issue Order(s) for the Operating Company to execute Operations, activities, duties and responsibilities in any other part of the Scottish Trunk Road network outside the boundary of the Unit.

Such operations, activities, duties and responsibilities outside the Unit are likely to be ordered at and require execution at little or no notice by the Operating Company and such Operations may require:

- (i) resources to be provided within the timescale stated in the Order by the Operating Company, and
- (ii) immediate diversion of part of the Operating Company's existing resources employed elsewhere in the Unit.

For the purposes of this clause and operation of the Contract, all such operations, activities and responsibilities which are the subject of an Order under this clause shall be deemed to be Operations.

7.2.9 Unless subject to an Order, the Operating Company shall not be permitted to undertake the work when the Estimated Bid Value of a Scheme exceeds the higher Threshold Value stated in Clause 7.2.4. The Scottish Ministers shall within 28 days of the date of receipt of a Bid notify the Operating Company in writing of the actions proposed, with respect to such Scheme.

7.2.10 The Scottish Ministers may, at their discretion, issue Order(s) pursuant to the other provisions of this Contract for the Operating Company to execute any or all of the following:

- (i) feasibility studies,
- (ii) technical investigations including but not limited to further investigations as defined in the *Design Manual for Roads and Bridges*,
- (iii) Structures assessments, and
- (iv) Design,

for any such Operations activities duties and responsibilities that shall be the subject of a separate competitive tender as referred to in Clause 7.2.4 (ii).

7.2.11 In consideration of the issue of any potential Order for any Scheme in accordance with the provisions of Clause 7.2.1, the Scottish Ministers, at their discretion, may decide that:

- (i) if a potential Order for any Scheme contains any rate (or rates) contained in Schedule 2 Part 2, and
  - (ii) the potential Order does not give value for money to the Scottish Ministers,
- the Scottish Ministers may instruct the Operations, activities, duties and responsibilities associated with such Order to be executed in accordance with the provisions of Clauses 7.2.4 (ii) and 7.2.4 (iii) irrespective of the value of any such Scheme or potential Scheme.

7.2.12 Subject to the other provisions of this Contract, any Order may be issued via the contract control and management function of the Integrated Roads Information

System, in writing, or in exceptional circumstances orally, subject to the requirements of Schedule 4 Part 1.

Any such oral Order shall be followed up by the Operating Company submitting a Bid within two Working Days.

- 7.2.13 The Scottish Ministers may, subject to agreement with the Operating Company, Order Schemes as a Lump Sum Quotation. The Lump Sum Quotation shall be derived from the applicable Schedule of Rates items adjusted for Contract Price Fluctuations at the estimated time of Scheme execution.

### **7.3 Commencement and Completion of Schemes and Times of Working**

- 7.3.1 Within any Order the Scottish Ministers may specify for any Scheme:

- (i) the date for commencement of all or any part of the Operations,
- (ii) the time or date for completion of all or any part of the Operations, or
- (iii) the time or date for commencement or completion of all or any part of the Works,

required to be undertaken by the Operating Company or the Works Contractor as relevant under any such Order.

- 7.3.2 The Operating Company on receipt of any Order shall proceed with the Operations with due expedition and without delay in accordance with the Order and this Contract.

- 7.3.3 Each part of the Operations for any Scheme shall be completed within the time or date for completion stated in each Order (or such extended time or date as may be allowed under Clause 8.1 in respect of such part of the Operations).

- 7.3.4 Operations for any Scheme shall be undertaken on whatever days and at whatever time or times of day as shall be permitted under this Contract taking account of any restrictions specified in the Scottish Ministers' Requirements or exceptionally on such other days or other time or times of day as may be specified in any Order for any such Scheme.

### **7.4 Cancellation of Orders**

- 7.4.1 The Scottish Ministers at their discretion may cancel any Order, or part of an Order by issuing a written notice of cancellation. On receipt of a notice of cancellation, the Operating Company shall take all possible steps to terminate, at the earliest possible date and on the best possible terms, any commitments and liabilities it has entered into, or incurred for the purposes of carrying out its obligations under the relevant Order or cancelled part of the Order.

- 7.4.2 Following cancellation of an Order, or part of the work within an Order, the Scottish Ministers will pay the Operating Company the following amounts:

- (i) any amount due for completed work assessed in accordance with the Contract,
- (ii) the cost of equipment and materials purchased and accepted by the Operating Company for the Order and not included in the work and in respect of which equipment and materials the Operating Company demonstrates to the reasonable satisfaction of the Scottish Ministers that title will pass to the Scottish Ministers upon payment. Payment will only be



- made for equipment and materials that cannot be used for other Operations ordered at the time of, or within one month of, the notice of cancellation,
- (iii) other costs reasonably and directly incurred in the expectation of completing the whole of the Order,
  - (iv) the cost of removing plant, equipment and surplus materials which were properly on Site for the purposes of carrying out the Order, from the relevant Site,
  - (v) an allowance for overheads and profit calculated by applying the percentages stated in Schedule 2 Part 2 Series 6900 as follows:
    - (a) to costs stated in Clauses 7.4.2 (ii) and (iii), the percentage adjustment stated in Series 6900 items 03.002 and 03.003, and
    - (b) to costs stated in Clause 7.4.2 (iv), the percentage adjustment stated in Series 6900 item 03.003,
  - (vi) any amounts retained by the Scottish Ministers in respect of the cancelled Order, subject to there being no Defects and uncorrected Non-Conformances in respect of work already completed for the Order.

The Operating Company shall include details of any amounts it considers due for payment under this Clause 7.4.2 in the Statements submitted in accordance with Clause 10.3.

Subject to proper substantiation by the Operating Company, the Scottish Ministers shall pay to the Operating Company the amount which, in the opinion of the Scottish Ministers on the basis of such a Statement, shall be due to the Operating Company pursuant to this Clause 7.4.2 following the timings and procedures given in Clause 10.3.

All amounts considered due for payment must be included in Statements within three months of the notice of cancellation. Amounts notified to the Scottish Ministers in later Statements will be not be eligible for payment unless prior agreement by the Scottish Ministers is given within two months of the notice of cancellation.

## **8. EXTENSION OF TIME PROVISIONS**

### **8.1 Extension of Time for Completion of Operations for any Scheme within an Order**

- 8.1.1 Where for any Scheme, or part of a Scheme identified within an Order (other than an Order issued pursuant to Clause 5.6.5), any cause of delay occurs which is referred to in this Contract, exceptional adverse weather conditions or other special circumstances which delays Operations, the Operating Company shall be entitled to an extension of time for completion of the Operations within the Order.

Where any of such events occur which in the opinion of the Operating Company (acting reasonably) entitle the Operating Company to an extension of time for the completion of any such Operations or a Scheme or part of any such Scheme identified within an Order, the Operating Company shall within seven days after the cause of the delay notify the Scottish Ministers that a delay has occurred and state the timing and reason for such delay. Within 14 days of the cause of the delay or as soon thereafter as shall be reasonable in the circumstances, the Operating Company shall deliver to the Scottish Ministers full and detailed particulars of any

claim for extension of time to which it may consider itself entitled in order that such claim may be considered by the Scottish Ministers.

- 8.1.2 After receipt of full and detailed particulars of the extension of time claim from the Operating Company the Scottish Ministers shall as soon as practicable in the circumstances grant in a notice in writing to the Operating Company the extension of time (if any) to which they consider the Operating Company shall be entitled for the completion of the said Operations or any such Scheme or part of any such Scheme within the Order concerned.

Where the Scottish Ministers do not consider that any extension of time is due to the Operating Company in respect of the said Operations or any such Scheme or part of any such Scheme within the Order concerned, the Scottish Ministers shall as soon as practicable in the circumstances notify the Operating Company accordingly.

- 8.1.3 Any extended time for completion granted under Clause 8.1.2:

- (i) shall not extend beyond the Contract Termination Date, and
- (ii) shall not entitle the Operating Company to any additional payment under this Contract,

and there shall be no affect on the value of the said Scheme within the Order and the Order concerned.

## **9. MEASUREMENT PROVISIONS**

### **9.1 Measurement**

- 9.1.1 Any error in description in Schedule 2 Parts 1 and 2 or omission therefrom shall not vitiate this Contract nor release the Operating Company from the execution of the whole or any part of the Operations according to the relevant Order and the Scottish Ministers' Requirements, or any of its other obligations or liabilities under this Contract.

Subject to the other provisions of this Contract, the Scottish Ministers shall correct any such error or omission. If as a result of such a correction the Operating Company believes that a new rate or price should be used, the Operating Company shall follow the procedures given in Schedule 4 Part 1.

Notwithstanding the foregoing, there shall be no rectification of any errors, omissions, or wrong estimates in the rates or prices inserted by the Operating Company in the Schedule of Rates and Prices in Schedule 2 Part 2.

- 9.1.2 Except where any statement or general or detailed description of the work for the Operations contained in Schedule 1 or Schedule 2 expressly shows to the contrary, quantities shall be deemed to be measurable and measurements shall be made according to the procedure set forth in Schedule 2 Part 1, notwithstanding any general or local custom.

### **9.2 Measurement of Operations Executed**

- 9.2.1 Subject to the other provisions of this Contract, the Operating Company shall measure and value the Operations executed in accordance with this Contract.

- 9.2.2 If the Scottish Ministers require any part of the Operations to be measured by themselves or by the Performance Audit Group, they shall give not less than five days' notice to the Operating Company who shall attend and assist in making such

measurement and shall provide all particulars required by either the Scottish Ministers or the Performance Audit Group.

Where the Operating Company does not for any reason attend, then the measurement made by or on behalf of the Scottish Ministers shall be taken to be the correct measurement of such Operations.

- 9.2.3 Orders placed following an acceptance of a Lump Sum Quotation are not remeasurable.

## **10. VALUATION AND PAYMENT PROVISIONS**

### **10.1 Valuation of Operations and Orders**

- 10.1.1 The value of the Operating Company's Operations shall be determined by the following five principles in descending order of consideration for determination namely:

- (i) No value. Where any Order requires the Operating Company to rectify or remedy any Operating Company Default, or consequence of any Operating Company Default, the Order shall be valued as having no value.
- (ii) Remeasured and valued in accordance with the applicable rates and prices in Series:
  - (a) 100 to 700,
  - (b) 1100 to 1500,
  - (c) 1700,
  - (d) 2000,
  - (e) 2300 to 2400,
  - (f) 3000,
  - (g) 3300,
  - (h) 5000,
  - (i) 6100 to 6500,
  - (j) 6700 to 6800, and
  - (k) 7000,

of Schedule 2, adjusted in accordance with the provisions of Clause 10.7.

- (iii) where in the opinion of the Scottish Ministers the rates and prices in Series:
  - (a) 100 to 700,
  - (b) 1100 to 1500,
  - (c) 1700,
  - (d) 2000,
  - (e) 2300 to 2400,
  - (f) 3000,
  - (g) 3300,
  - (h) 5000,

- (i) 6100 to 6500,
- (j) 6700 to 6800, and
- (k) 7000,

of Schedule 2 do not apply, then by remeasurement and valuation using rates or prices deduced from the appropriate rates or prices in Series:

- (l) 100 to 700,
- (m) 1100 to 1500,
- (n) 1700,
- (o) 2000,
- (p) 2300 to 2400,
- (q) 3000,
- (r) 3300,
- (s) 5000,
- (t) 6100 to 6400, and
- (u) 6700 to 6800,

of Schedule 2, so far as shall be reasonable to do so and adjusted in accordance with the provisions of Clause 10.7.

- (iv) If the Scottish Ministers accept a Lump Sum Quotation submitted by the Operating Company for work, and have issued an Order for that work which states that the work is to be valued at the amount of the corresponding Lump Sum Quotation, the Order is valued accordingly. The value of the Order shall not be changed if the assumptions upon which the Lump Sum Quotation is based are shown by recorded information to have been wrong.
- (v) Where in the opinion of the Scottish Ministers none of the principles in Clauses 10.1.1 (i) to (v) apply, then by measurement and valuation in accordance with fair rates and prices in Series 6900 of Schedule 2.

10.1.2 Where the Scottish Ministers require the Operating Company to pay for supplementary services or payment of accounts, the Scottish Ministers may issue an Order for such Operations whereby all or any part of such an Order to pay for supplementary services or payment of accounts shall be valued in accordance with the applicable rates and prices in Schedule 2 Series 6500 and/or Series 7000.

10.1.3 For any Operations executed on the basis of Series 6200 and Series 6500 of Schedule 2, the Operating Company shall for such Operations produce and retain:

- (i) daily records of the hours worked by each employee,
- (ii) a verifiable register of the annual salaries of all employees engaged in such Operations,
- (iii) daily records showing the hours worked by Constructional Plant and the quantities of materials used in such Operations,
- (iv) invoices for materials used in such Operations, and
- (v) for works executed by supplementary service contractors, ensure that such supplementary service contractors produce and retain daily records of the

hours worked by each of its employees and shall provide a copy of such at any time to the Operating Company.

All such information, records, registers and all other like information referred to in this Clause 10.1.3 shall be retained and maintained in the Central Office during the Contract Period for inspection or audit at any time by the Scottish Ministers or the Performance Audit Group.

- 10.1.4 Notwithstanding the provisions of Clauses 10.1.1 to 10.1.3, the Scottish Ministers shall in exceptional circumstances and at their discretion be entitled to value Operations by any of the principles contained within the provisions of Clauses 10.1.1 to 10.1.3, providing the method of valuation is contained within the relevant Order. The provisions of this clause may not be used to value Operations for which a valuation can be correctly made under Clause 10.1.1 (ii) using existing rates and prices contained in Schedule 2 Part 2.
- 10.1.5 If requested in writing by the Scottish Ministers, the Operating Company shall provide to the Scottish Ministers such information as may be necessary to satisfy the Scottish Ministers in respect of any amount to be paid or to subsequently verify any payment previously made by the Scottish Ministers under the other provisions of this Contract.
- 10.1.6 For any part of the Operations executed in accordance with the provisions of Clause 7.2.1 (vi), the Operating Company shall, subject to the other provisions of this Contract, be reimbursed in respect of the price payable by it to the sub-contractor or third party or supplier after the deduction of any discount, rebate or allowance to which the Operating Company shall be entitled (whether at that time or subsequently) with the addition of the applicable Operating Company's Percentage Adjustment. The Operating Company's Percentage Adjustment shall be applied after discounts or rebates have been deducted.
- Any payment is subject to the Scottish Ministers being satisfied that the price payable to such sub-contractor or third party or supplier is fair and reasonable in all the circumstances.
- 10.1.7 The value of any Order shall not be determined in accordance with the rates and prices in Series 6500 unless the Scottish Ministers have notified the Operating Company of such method of valuation as part of the Order or have notified the Operating Company of such method of valuation in writing prior to such Operations commencing.
- 10.1.8 Subject to any other provisions of this Contract, the amount paid to the Operating Company for executing Operations during the Contract Period shall be the value of Operations determined in accordance with the applicable rates and prices in this Clause 10.1.

## **10.2 Payments to Sub-Contractors**

- 10.2.1 Before making any payment under Clauses 10.3 the Scottish Ministers shall be entitled to receive from the Operating Company reasonable proof that all sums (less contractual deductions including but not limited to retentions provided for in the sub-contract) included in previous payments for the Operations provided by any sub-contractors of the Operating Company have been paid to such sub-contractors or discharged by the Operating Company.

In the absence of such proof, unless the Operating Company:

- (i) provides written details to the Scottish Ministers of any reasonable cause it may have for withholding, paying less or refusing to make such payment, and
- (ii) provides written proof to the Scottish Ministers that it has so notified in writing any such sub-contractor,

the Scottish Ministers shall be entitled to pay direct to any sub-contractor all payments (less contractual deductions including but not limited to retentions provided for in the sub-contract) which the Operating Company has failed to make to sub-contractors of the Operating Company.

- 10.2.2 The Scottish Ministers shall be entitled to deduct by way of retention or set-off the amount so paid by the Scottish Ministers from any sums due or which become due from the Scottish Ministers to the Operating Company.

### **10.3 Payments under this Contract**

- 10.3.1 Subject to the other provisions of this Contract and or unless otherwise agreed in writing by the Scottish Ministers, the Operating Company shall submit the first Statement to the Scottish Ministers between the eighth and twelfth day of the first calendar month following the Commencement of Service Date and thereafter within 14 days after the end of each calendar month. Each Statement shall be in such form as may be prescribed in the Scottish Ministers' Requirements, shall set out the sum that the Operating Company considers will become due on the payment due date for that Statement and the basis on which that sum is calculated and show the actual value of the Operations executed up to the end of the calendar month in question and shall contain the following information:

- (i) the amounts to which the Operating Company considers itself entitled in connection with all other matters for which provision is made under this Contract separately identified for each Order,
- (ii) subject to compliance with Clause 10.3.2 below, the value of materials delivered to the Unit but not incorporated into the works,
- (iii) the amounts paid to date for each Order,
- (iv) the amount now considered due for payment for each Order,
- (v) the amounts paid to date for Core Operations separately identified for each Work Code,
- (vi) the amount now considered due for payment for Core Operations separately identified for each Work Code,
- (vii) deductions for retention,
- (viii) any other deductions made in accordance with this Contract,
- (ix) any amount under Clause 7.4.2, and
- (x) summary totals for all Orders under the above headings.

- 10.3.2 For payment of goods or materials included in Clause 10.3.1 (ii) above, the Statement shall include a list of any such goods or materials and their value that have not yet been delivered to the Unit, but of which the property has vested in the Scottish Ministers pursuant to Clauses 11.2.1 to 11.2.6. The property of goods and

materials delivered to the Unit must be vested in the Scottish Ministers to qualify for payment.

10.3.3 Within any Statement, the Operating Company shall only include items in respect of which:

- (i) all supporting measurement records are lodged within the contract control and management function of the Integrated Roads Information System,
- (ii) all inspection and testing stipulated in the relevant inspection and test plan has been completed,
- (iii) all results of such inspection and testing show that the work is fully compliant with the requirements of this Contract,
- (iv) all records of such inspection and testing are lodged within the contract control and management function of the Integrated Roads Information System,
- (v) rates and prices contained in Schedule 2, and
- (vi) rates and prices fixed or determined by the Director subsequent to the Contract Commencement Date and added to the contract control and management function of the Integrated Roads Information System.

10.3.4 Subject to the provisions of Clause 10.3.1, payment for the provision of:

- (i) the Management System and Quality Plan as consented to in writing by the Scottish Ministers, and
- (ii) the contract control and management function of the Integrated Roads Information System,

will only be made on first acceptance of same by the Scottish Ministers.

10.3.5 Within 28 days of the date of delivery of the Operating Company's Statement to the Scottish Ministers in accordance with Clause 10.3.1, the Scottish Ministers shall pay to the Operating Company the amount which, in the opinion of the Scottish Ministers on the basis of such Statement, shall be due to the Operating Company pursuant to Clause 10.3.1 less a retention as provided for in Clause 10.3.10.

10.3.6 The Scottish Ministers shall not be bound to make a payment for a sum less than £50,000 in payment against any Statement during any Annual Period.

10.3.7 The date on which a payment becomes due under this Clause 10.3 shall be 16 days after submission of the Statement in accordance with the provisions of Clauses 10.3.1 to 10.3.3 ("payment due date"), with the final date for payment being 28 days after the date of delivery of the Operating Company's monthly statement under Clause 10.3.1.

Not later than five days after the payment due date under this Clause 10.3.7 the Scottish Ministers or the Specified Person shall give a notice ("payment notice") to the Operating Company which payment notice shall, in respect of the relevant Statement, specify the sum that the Scottish Ministers or the Specified Person considers to have been due at the payment due date and the basis on which that sum has been calculated ("the notified sum"). It is immaterial that the notified sum may be zero.

Not later than one day before the final date for payment under this Clause 10.3.7 the Scottish Ministers or Specified Person may give a notice to the Operating Company

of the Scottish Ministers' intention to pay less than the notified sum ("pay less notice"). The pay less notice shall set out the sum due on the date the notice is served and the basis on which that sum is calculated. It is immaterial that the sum set out as due in the pay less notice may be zero.

The payment notice and the pay less notice are separate notices and shall not be combined.

Subject to any pay less notice given under this Clause 10.3.7, the Scottish Ministers shall, no later than the final date for payment, pay the Operating Company the notified sum.

10.3.8 Any additional payments sought under Clause 10.8 shall be listed separately against each Order and submitted at the same time as the Statement. Any such listing on a Statement is not a notification meeting the requirement of Clause 10.8.2.

10.3.9 Within 64 weeks of the Contract Termination Date, the Operating Company shall issue to the Scottish Ministers a Statement which in their opinion is the final value of the Operations executed under this Contract. The Statement shall set out the sum that the Operating Company considers will become due on the payment due date for that Statement and the basis on which that sum is calculated and show:

- (i) all amounts previously paid by the Scottish Ministers under this Contract,
- (ii) the amount of retention (if any) held by the Scottish Ministers,
- (iii) the value (if any) of any Non-Conformance Operations executed by the Scottish Ministers pursuant to Clauses 5.8.1 to 5.8.3,
- (iv) all sums due to the Scottish Ministers from the Operating Company to which the Scottish Ministers are entitled under this Contract, and
- (v) the balance (if any) due by the Scottish Ministers to the Operating Company or by the Operating Company to the Scottish Ministers as the case may be. Such balance shall, subject to the other provisions of this Contract, be paid to or by the Operating Company as the case may require.

The date on which payment becomes due shall be the date of notification in writing to the Scottish Ministers of the Statement by the Operating Company under this Clause 10.3.9 ("payment due date").

Not later than five days after the payment due date with under this Clause 10.3.9 the party by whom the balance is payable ("paying party") shall give a notice ("payment notice") to the other party which payment notice shall, in respect of the Statement, specify the sum that the paying party considers to have been due at the payment due date and the basis on which that sum has been calculated ("the notified sum"). It is immaterial the notified sum may be zero.

The final date for payment either to or by the Operating Company shall be the date falling 28 days following the date of such notification.

Not later than one day before the final date for payment under this Clause 10.3.9 the paying party may give a notice to the other party of its intention to pay less than the notified sum ("pay less notice"). The pay less notice shall set out the sum due on the date the notice is served and the basis on which that sum is calculated. It is immaterial that the sum set out as due in the pay less notice may be zero.

The Statement and the pay less notice are separate notices and shall not be combined.



Subject to any pay less notice given under this Clause 10.3.9, the paying party shall, no later than the final date for payment, pay the other party the notified sum.

10.3.10 Subject to the other provisions of this Contract, no retention shall be made pursuant to Clause 10.3.3 in respect of Operations.

However, where the Operating Company fails to deliver the Bond and Undertaking to the Scottish Ministers by the due date referred to in Clause 4.6.1, or where the Bond and Undertaking is not acceptable to the Scottish Ministers, the Scottish Ministers shall immediately accumulate a retention fund in their favour in lieu of the provisions of the Bond and Undertaking from any amount due to the Operating Company on and after the said date. The total of the retention fund accumulated shall not exceed £1,300,000.

Any such fund retained pursuant to this Clause 10.3.11 shall not be released until either:

- (i) the Operating Company provides the Bond and Undertaking pursuant to Clause 4.6.1, or
- (ii) if no Bond and Undertaking is provided, the later of the end of the Contract Period and the settlement of the final account pursuant to Clause 10.3.9.

Subject to the provisions of Clauses 10.3.10 and 10.3.11, the said retention fund referred to in this Clause 10.3.10 shall be retained from the Operating Company for the same period of time as that which would have been required from the guarantor under the Bond and Undertaking or until such time as the Operating Company provides a Bond and Undertaking in the terms set out in Clause 4.6.1 and that such Bond and Undertaking is acceptable to the Scottish Ministers.

Notwithstanding the other provisions of this Contract, the Operating Company shall not receive any further payments from the Scottish Ministers until such time as the aggregate payments due to the Operating Company under the other provisions of this Contract exceed the amount of the said retention fund retained by the Operating Company under this Clause 10.3.10.

Such retention fund held by the Scottish Ministers shall be used by the Scottish Ministers as if it was the sum of money referred to within the Bond and Undertaking and shall be drawn from by the Scottish Ministers in the event of every circumstance described within the terms of the Bond and Undertaking that would have required the guarantor of the Bond and Undertaking to pay money to the Scottish Ministers.

Within fourteen days of the:

- (iii) Scottish Ministers having received a proper and acceptable Bond and Undertaking pursuant to Clause 4.6.1, or
- (iv) issue to the Operating Company of the final value of the Operations pursuant to Clause 10.3.9,

and subject to the other provisions of this Contract, the Scottish Ministers shall pay any remaining balance of the retention fund to the Operating Company.

10.3.11 If the Scottish Ministers fail to make payment to the Operating Company in accordance with Clause 10.3.5 or payment (if any) in accordance with Clause 10.3.4 or if the Operating Company fails to make a payment (if any) to the Scottish Ministers in accordance with Clause 10.3.4, the party in Default shall pay to the other interest upon any payment overdue at a rate per annum equivalent to three

per cent above the Base Lending Rate. Interest shall be calculated daily and compounded annually on 31 March.

In the event of any variation in the said Base Lending Rate being announced whilst such payment remains overdue, the interest payable by the party in Default of payment to the other shall be correspondingly varied from the date of each change in Base Lending Rate.

Notwithstanding any other provision of this Contract, a payment due to be made by the one party to the other shall only be overdue for the purposes of this Clause 10.3.11 where such payment has not been made prior to the final date for such payment.

If the Operating Company fails to provide the Bond and Undertaking to the Scottish Ministers in terms of Clause 4.6.1 or where the Bond and Undertaking is not acceptable to the Scottish Ministers by the due date under that clause then any payment due to the Operating Company by the Scottish Ministers pursuant to the provisions of Clause 10.3, but is retained in a retention fund in lieu of an acceptable Bond and Undertaking under Clause 10.3.10, shall not be construed as being a late payment for the purposes of Clause 10.3.11.

10.3.12 Without prejudice to the other provisions of this Contract, the Scottish Ministers may, by means of a pay less notice under Clause 10.3.7 or Clause 10.3.9 (as appropriate), deduct from any payment due to the Operating Company the value of any part of the Operations with which they are dissatisfied and for that purpose (or for any other reason which in their opinion may seem proper) may deduct, correct or modify any sum previously paid by them to the Operating Company.

10.3.13 Payment by the Scottish Ministers of any sum due to the Operating Company shall be without prejudice to any rights that the Scottish Ministers may have against the Operating Company.

Such payment shall not constitute or be deemed to constitute any admission by the Scottish Ministers as to the performance by the Operating Company of any of its obligations under this Contract.

10.3.14 The Operating Company shall, from the Contract Commencement Date until the Contract Termination Date (howsoever arising), keep and maintain until the later of five years after the Contract Termination Date or five years after the final date of the final payment of any sums due to the Operating Company under this Contract have been made by the Scottish Ministers:

- (i) financial accounts and records of all expenditures incurred and payments received in executing the Operations,
- (ii) the contract control and management function of the Integrated Roads Information System, and
- (iii) all data entered on, or generated by, the contract control and management function of the Integrated Roads Information System,

all to the satisfaction of the Scottish Ministers.

10.3.15 On request, the Operating Company shall allow and permit the Scottish Ministers, any auditors of the Scottish Ministers or any other organisation or body which may from time to time have right and cause to audit the Scottish Ministers accounts, and

the Performance Audit Group, at any time during the period referred to in Clause 10.3.14:

- (i) inspect all such books of account and records as referred to in Clause 10.3.14, and
- (ii) have unrestricted access to the contract control and management function of the Integrated Roads Information System.

The Operating Company shall provide such further explanation in writing as may be required in relation to any matter arising out of or in connection with any such:

- (iii) inspection of such account and records, and
- (iv) unrestricted access to the contract control and management function of the Integrated Roads Information System,

as the Scottish Ministers, any auditor or the Performance Audit Group may require.

10.3.16 Nothing contained in this Clause 10.3 shall relieve the Operating Company of any of its obligations under this Contract.

10.3.17 If the Scottish Ministers fail to pay the Operating Company in full by the final date for payment as required by this Contract and the failure continues for 14 days after the Operating Company has given notice to the Scottish Ministers of his intention to suspend the performance of any or all his obligations under this Contract and the ground or grounds on which it is intended to suspend performance, the Operating Company may suspend such performance until payment is made in full. Where the right conferred by this Clause 10.3.17 is exercised, the Scottish Ministers shall be liable to pay the Operating Company a reasonable amount in respect of costs and expenses reasonably incurred by the Operating Company as a result of the exercise of the right.

#### **10.4 Prompt Payment**

10.4.1 Any sub-contract for Site Operations entered into by the Operating Company shall provide for timely payment of the sub-contractor on terms comparable to those detailed in Clause 15 of the *Civil Engineering Contractors Association Form of Sub-Contract for Use in Conjunction with the ICE Conditions of Contract 5th Edition* ('The Blue Form') dated October 1998, but subject always to the following modifications:

- (i) in sub-clause (3)(a), delete the words 'or otherwise as agreed',
- (ii) delete sub-clause (3)(b)(iv) in its entirety and replace by 'Not Used',
- (iii) in sub-clause (3)(c) line 1 delete "(iv)",
- (iv) in sub-clause (3)(f) line 2 delete the words "or in the event of payment being withheld pursuant to sub-clause 15(3)(b)(iv)",
- (v) delete sub-clause (3)(g).

10.4.2 For any other sub-contract for any part of the Operations, the Operating Company shall pay its sub-contractors within 30 days of the receipt by the Operating Company of a valid demand for payment.

#### **10.5 Overpayment**

10.5.1 Where payment has been made for any Statement and it is found that the payment includes any amount that is in excess of that to which the Operating Company is

entitled, the Operating Company shall deduct from the next Statement that it submits to the Scottish Ministers:

- (i) the difference between that amount and the due amount, and
- (ii) interest upon that difference, at the rate stated in Clause 10.3, calculated from the date of that payment until the date of repayment.

## **10.6 Money Recoverable under other Contracts**

10.6.1 Wherever under this Contract any sum of money shall be recoverable from or payable by the Operating Company, without prejudice to the other provisions of this Contract and in addition to any other right or remedy that the Scottish Ministers may have, such sum may be deducted from or reduce the value of the amount of any sum or sums then due or which at any time thereafter may become due to the Operating Company under this Contract, or under any other contract with:

- (i) the Scottish Ministers,
  - (ii) any department,
  - (iii) office,
  - (iv) agency,
  - (v) authority, or
  - (vi) other such like organisations,
- of the Crown.

## **10.7 Contract Price Fluctuations**

10.7.1 The amount payable by the Scottish Ministers to the Operating Company in any payment under this Contract (other than amounts due under this clause) shall only be increased or decreased in accordance with the provisions of Clause 10.7 to where there shall be any changes in the *Bulletin of Indices "Civil Engineering Formula - 1990 Series" and "Structural Steelwork Formula – 1990 Series"* published by the Building Cost Information Services (BICS). These are monthly indices used in conjunction with the Formula Methods of adjusting building, specialist engineering and civil engineering contracts to allow for changes in the costs of labour, plant and materials. Any adjustments arising from application of these indices are the Contract Price Fluctuation (CPF) amounts. Schedule 1, Annex 4 details the proportion of indices applicable to item categories as well as the CPF Item Category assigned for each type of work carried out under this Contract.

The net total of such increases and decreases shall be given effect to in determining any sums payable to the Operating Company.

10.7.2 For the purpose of this Contract:

- (i) Final Index Figure means any Index Figure appropriate to Clause 10.7.1 not qualified in the said Bulletin as provisional,
- (ii) Base Index Figure means the appropriate Final Index Figure applicable to the date 42 days prior to the latest date for the return of tenders, and
- (iii) Current Index Figure means the appropriate Final Index Figure to be applied to any payment made or due to be made by the Scottish Ministers pursuant to Clause 10.3 and shall be the appropriate Final Index Figure applicable to the date 42 days prior to the last day of the period to which the

payment relates. For any payments made after the earlier of the Contract Termination Date or Contract Expiry Date, the Current Index Figure shall be the appropriate Final Index Figure applicable to the date 42 days prior to the earlier of the Contract Termination Date or Contract Expiry Date. The Effective Value in respect of the whole or any part (for each Item Category) shall be the difference between:

- (a) the amounts in the appropriate categories given in Schedule 1, Annex 4 to which Contract Price Fluctuation applies and that in the opinion of the Scottish Minister, is due to the Operating Company either under Clause 10.3.1 (i), or in the case of the final payment, the amount (if any) due to the Operating Company under Clause 10.3.9 (but in each case before deducting sums previously paid on account), less any amounts for other items based on actual cost or current prices and any sums for increases or decreases in the Contract Price under this Clause 10.7, and
- (b) the amount calculated in accordance with Clause 10.7.2 (iii) (a) and included in the last preceding interim payment made by the Scottish Ministers in accordance with Clauses 10.3.1 to 10.3.10,

provided that in the case of the first payment, the Effective Value shall be the amount calculated in accordance with Clause 10.7.2 (iii) (a).

- 10.7.3 Any increase or decrease in the amounts otherwise payable under Clause 10.3 for items in each Item Category pursuant to Clause 10.7.2 shall be calculated by multiplying the Effective Value by a price fluctuation factor.

This shall be the net sum of the products obtained by multiplying each of the proportions given in Schedule 1, Annex 4 by a fraction, the numerator of which is the relevant Current Index Figure minus the relevant Base Index Figure and the denominator of which shall be the relevant Base Index Figure.

Where in Schedule 1, Annex 4 there is no Item Category assigned to a particular item in Schedule 2 Part 2, such item shall not be subject to adjustment in accordance with the provisions of Clause 10.7.

- 10.7.4 Provisional Index Figures in the bulletin referred to in Clause 10.7.1 may be used for the provisional adjustment of interim valuations but such adjustments shall be subsequently recalculated on the basis of the corresponding Final Index Figures.
- 10.7.5 Contract Price Fluctuation adjustment under Clause 10.7.1 shall not apply to any settled amounts arising from the settlement of disputes under Clause 18.
- 10.7.6 Contract Price Fluctuation adjustment under Clause 10.7.1 shall not apply to any adjustments to the Contract Price made under Clause 21.1 of this Schedule.
- 10.7.7 This Clause 10.7 shall not apply when valuing Orders based on Lump Sum Quotations.

## **10.8 Additional Payments and Claims**

- 10.8.1 Where the Operating Company considers that the items within the Schedule of Rates and Prices are not applicable to the Operations undertaken or to be undertaken and considers that additional payment should be made, it shall:

- (i) comply with the requirements in Schedule 4 Part 1, and

- (ii) keep such Contemporary Records as may be necessary to substantiate any claim.

For the purposes of this clause, a new rate or price is one which is:

- (iii) neither described in Schedule 2 part 2,
- (iv) nor fixed nor determined by the Scottish Ministers subsequent to the Contract Commencement Date.

10.8.2 Where the Operating Company considers that any other additional payment should be made, or if the Operating Company is not satisfied with the rates fixed by the Scottish Ministers in accordance with Schedule 4 Part 1, the Operating Company shall:

- (i) submit a Claim Notification to the Scottish Ministers, and
- (ii) keep such contemporary records as may be necessary to substantiate any claim.

The Claim Notification shall be given as soon as is practicable and not later than 28 days after the Operating Company became aware, or should have become aware, of the event or circumstance.

If the Operating Company fails to submit a Claim Notification within such period of 28 days, the Operating Company shall not be entitled to additional payment and the Scottish Ministers shall be discharged from all liability in connection with the claim.

10.8.3 A Claim Notification shall be sent separately from any other communication.

10.8.4 Within 91 days of the Claim Notification, or such other period agreed in writing by the Scottish Ministers, the Operating Company shall submit to the Scottish Ministers a full and detailed claim which includes all supporting information and a justification of its entitlement to the additional payment and the amount considered due. Compliance in full by the Operating Company with the terms of this Clause 10.8.4 shall be a condition precedent to the payment of any claim for additional payment.

10.8.5 On receipt of the detailed claim, supporting information and justification of the additional payment considered due, together with any other information subsequently requested and received within the timescales given by the Scottish Ministers, the Scottish Ministers shall review and discuss the submissions with the Operating Company.

Within the later of 182 days of the Claim Notification or 42 days of the latest date for receipt of information specified by the Scottish Ministers, the Scottish Ministers shall state what (if any) additional payment they consider is due or to be paid in accordance with the Contract on completion of the relevant Operations and notify the Operating Company accordingly. Any such additional payment shall become due 16 days after the date of the Scottish Ministers notification pursuant to this Clause 10.8.5 with the final date for payment being 28 days after the date of the Scottish Ministers notification pursuant to this Clause 10.8.5.

10.8.6 The additional payment (if any) notified will be in the form of determined rates and prices and corresponding quantities. Alternatively payments may be stated as lump sums.

The notification shall also include the item descriptions for the new rates, prices and lump sums. Unless the item description specifically states otherwise, the new rates and prices will be applicable for Operations anywhere in the Unit.

The notification shall be accompanied by full supporting particulars demonstrating the reasoning behind the Scottish Ministers' determination of the contract provisions.

- 10.8.7 Each Party shall give effect to the notification unless and until it is revised under Clause 18 of this Schedule.
- 10.8.8 The Scottish Ministers may upon receipt of a Claim Notification instruct the Operating Company to keep such Contemporary Records or further Contemporary Records as the case may be as are reasonable and may be material to the claim. The Operating Company shall keep such Records and shall permit the Scottish Ministers to inspect all Records kept pursuant to this clause and shall supply the Scottish Ministers with copies thereof as and when they shall so instruct.
- 10.8.9 Any instruction given under this Clause 10.8 is not an admission of liability by the Scottish Ministers.
- 10.8.10 The requirements of this clause are in addition to those of any other clauses which may apply to a claim. If the Operating Company fails to comply with this Clause 10.8 or any other clause relating to any claim then any additional payment shall take account of the extent (if any) to which failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the last paragraph of Clause 10.8.2.
- 10.8.11 If the Scottish Ministers do not make the notification required by Clause 10.8.5, within the timescales stated, the Operating Company may notify a Dispute using the procedures given in Clause 18 of this Schedule.

## **10.9 Valuation of Claims**

- 10.9.1 Any additional payment due shall be determined by the Scottish Ministers in accordance with the following principles, in the following order of application, to individual elements of work contained within the claim:
- (i) where work is of the same character and carried out under similar conditions to items within the contract control and management function of the Integrated Roads Information System, by using rates and prices contained in Schedule 2 Part 2 or rates and prices fixed or determined subsequent to the Contract Commencement Date,
  - (ii) where work is not of a similar character or not carried out under similar conditions the rates and prices contained in Schedule 2 Part 2 or rates and prices fixed or determined subsequent to the Contract Commencement Date shall be used as a basis for valuation of the amount due as far as is reasonable,
  - (iii) where there are no items contained in Schedule 2 Part 2 or rates and prices fixed or determined subsequent to the Contract Commencement Date to form the basis for valuation, by a fair valuation.

Series 6500 in Schedule 2 Part 2 may only be used in the valuation of the amount due if an Order so states or the Scottish Ministers notifies the Operating Company in writing before Operations commence.

## **10.10 On-Account Payments**

- 10.10.1 Normally the Operating Company will not be entitled to any on-account payment of any disputed amounts prior to the fixing or determination of rates and prices by the Scottish Ministers.

10.10.2 The Operating Company will not be entitled to interest on any claimed amounts between the date of completion of the relevant Operations and the date of determination by the Scottish Ministers.

**10.11 Scheme Completion Date and Scheme Closure Date**

10.11.1 Not later than 56 days after the Scheme Completion Date the Operating Company shall enter the Scheme Closure Date within the contract control and management function of the Integrated Roads Information System.

By entering a Scheme Closure Date in the contract control and management function of the Integrated Roads Information System, the Operating Company certifies that:

- (i) the payment claimed for any such Scheme is the final and conclusive payment claimed, and
- (ii) subject to the provisions of Clause 10.3.12, no further payment of whatsoever nature will be claimed in respect of or in connection with the Scheme, and
- (iii) any such final and conclusive payment claimed for such Scheme:
  - (a) is based on accurate final quantities (where applicable),
  - (b) has full supporting documentation, and
  - (c) has been properly claimed in accordance with this Contract.

10.11.2 If at any time subsequent to the Scheme Closure Date the Scottish Ministers reasonably believes that the basis of the final and conclusive payment claimed or paid may be incorrect, he may, after notifying the Operating Company, open up and review the final Scheme value due or paid by the Scottish Ministers.

10.11.3 For Core Operations, the Operating Company shall enter a Core Operation Closure Date for each of the Core Operations within 14 days of the end of the Financial Year.

By entering a Core Operation Closure Date in the contract control and management function of the Integrated Roads Information System, the Operating Company certifies that:

- (i) the payment claimed for the Core Operation for the preceding Financial Year is the final and conclusive payment claimed,
- (ii) subject to the provisions of Clause 10.3.12, no further payment of whatsoever nature will be claimed in respect of or in connection with the Core Operation, and
- (iii) any such final and conclusive payment claimed for such Core Operation:
  - (a) has full supporting documentation, and
  - (b) has been properly claimed in accordance with this Contract.

10.11.4 If at any time subsequent to the Core Operation Closure Date the Scottish Ministers reasonably believe that the basis of the final and conclusive payment claimed or paid may be incorrect, the Scottish Ministers may, after notifying the Operating Company, open up and review the final annual Core Operation value due or paid by the Scottish Ministers.



- 10.11.5 The Scottish Ministers shall be entitled at any time to recover from the Operating Company as a debt under this Contract any value that has been incorrectly claimed by the Operating Company and, subject to the other provisions of this Contract, the Scottish Ministers may deduct this debt from any payments due to the Operating Company.
- 10.11.6 Interest shall be paid by the Operating Company in accordance with Clause 10.3.11 on any incorrectly claimed amounts.
- 10.11.7 If the Operating Company does not enter either a Scheme Closure Date or a Core Operations Closure Date into the contract control and management function of the Integrated Roads Information System within the prescribed period, the closure dates shall be 56 days or 14 days respectively after the Scheme Completion Date or end of the Financial Year in which the Core Operations in question were undertaken. In these circumstances:
- (i) the final payment claimed shall be that recorded in the contract control and management function of the Integrated Roads Information System on the Closure Date and shall not be changed by the Operating Company after that date, and
  - (ii) the Scottish Ministers are not obliged to consider any supporting documentation submitted by the Operating Company after the Closure Date in their assessment of the final Scheme value.

## **11. PROPERTY IN MATERIALS AND PLANT AND VESTING OF GOODS AND MATERIALS AND CARE OF PROPERTY BELONGING TO THE SCOTTISH MINISTERS**

### **11.1 Property in Materials and Plant**

11.1.1 For the purpose of Clauses 11.1.1 to 11.1.9 inclusive:

- (i) the expression "Plant" shall mean any Constructional Plant, plant, equipment, temporary works materials and equipment, appliances and things required for carrying out Operations but excluding any vehicles engaged solely in transporting any labour, Constructional Plant, plant, equipment or materials to or from the Unit. "Plant" does not include things intended to form, or forming, part of the Unit, and
  - (ii) the expression "agreement for hire" excludes any agreement for hire purchase.
- 11.1.2 All Plant, goods and materials owned by the Operating Company or by any company in which the Operating Company has a controlling interest shall, when on the Unit or being used for the execution of the Operations, be deemed to be the property of the Scottish Ministers.
- 11.1.3 In the event of a forfeiture and with a view to securing the continued availability of any hired Plant for the purpose of executing the Operations, the Operating Company shall not bring on to the Unit any hired Plant unless the agreement for the hire of such Plant contains a provision that the owner of such Plant shall:
- (i) on request in writing made by the Scottish Ministers within seven days after the date on which any forfeiture has become effective, and

- (ii) on the Scottish Ministers undertaking to pay all hire charges in respect of such Plant from such date,

hire such Plant to the Scottish Ministers on the same terms as such Plant was hired to the Operating Company, except that the Scottish Ministers shall be entitled to permit the use of such Plant by any other contractor employed by them for the purpose of completing the Operations under the other terms of this Contract.

11.1.4 Where the Scottish Ministers enter into any agreement for the hire of Plant pursuant to Clause 11.1.3, all sums properly paid by the Scottish Ministers under the provisions of any such agreement and all expenses incurred by them (including stamp duties) in entering into such agreement, are deemed for the purpose of the other provisions of this Contract to be part of the cost of completing the Operations.

11.1.5 Upon any written request made at any time by the Scottish Ministers in relation to any item of Plant, the Operating Company shall forthwith in writing notify to them the name and address of the owner thereof, provide a copy of the terms under which such Plant was hired to the Operating Company and, in the case of hired Plant, certify in writing that the agreement for the hire thereof contains a provision in accordance with the requirements of Clause 11.1.3.

11.1.6 If the Operating Company shall fail to remove any Plant, goods or materials as required pursuant to Clause 4.12.1 within such reasonable time after execution of the Operations as may be allowed by the Scottish Ministers, then the Scottish Ministers may at their option:

- (i) sell or otherwise dispose of any such items which are the property of the Operating Company, and
- (ii) return any such items that are not the property of the Operating Company to the owner thereof at the Operating Company's expense,

provided always that the Scottish Ministers shall, after deducting from any proceeds of any sale the costs, charges and expenses in connection with such sale or return as aforesaid, pay the balance (if any) to the Operating Company.

To the extent that the proceeds of any such sale are insufficient to meet all such costs, charges and expenses of the Scottish Ministers, the excess shall be a debt due from the Operating Company to the Scottish Ministers. The debt due shall be deductible or recoverable from any monies due or that may become due to the Operating Company under this Contract or may be recovered by the Scottish Ministers from the Operating Company at law.

11.1.7 Subject to the provisions of Clauses 12.1.1 and 12.1.3 and Clauses 17.2.1 to 17.3.2, the Scottish Ministers shall not at any time be liable for the loss of, or damage to, any of the:

- (i) Plant,
- (ii) goods, or
- (iii) materials,

which have been deemed to become the property of the Scottish Ministers.

11.1.8 The Operating Company shall, where entering into any sub-contract for the execution of any part of the Operations, incorporate in such sub-contract the provisions of Clauses 11.1.1 to 11.1.9 inclusive in relation to Plant, goods or materials brought on to the Unit by the sub-contractor.

**11.1.9 Clauses 11.1.1 to 11.1.9 inclusive:**

- (i) shall not be deemed to imply any consent or approval or acceptance by the Scottish Ministers of the materials or other matters referred to therein, and
- (ii) shall not prevent the rejection of any such materials at any time by the Scottish Ministers.

**11.2 Vesting of Goods and Materials not on the Unit**

11.2.1 Where an Order identifies goods or materials for which payment may be made before the same are delivered to the Unit, the Operating Company may with a view to securing payment pursuant to Clause 10.3 for any such goods and materials, transfer the title in the same to the Scottish Ministers before delivery to the Unit provided that such goods and materials have been:

- (i) manufactured,
- (ii) passed any specified factory testing,
- (iii) prepared, or
- (iv) made substantially ready for incorporation in the Site Operations and that the said goods and materials:
  - (a) shall be the property of the Operating Company, or
  - (b) the Contract for the supply of the same expressly provides that the property therein shall pass unconditionally to the Operating Company.

11.2.2 The intention of the Operating Company to transfer the property in any goods or materials to the Scottish Ministers pursuant to Clause 11.2 shall be evidenced by the Operating Company taking or causing the supplier of the said goods or materials to take the following actions, namely:

- (i) provide to the Scottish Ministers documentary evidence that the property in the said goods or materials has been vested in the Operating Company,
- (ii) suitably mark or otherwise plainly identify the said goods and materials in order to show that:
  - (a) their destination is the Unit,
  - (b) that they are the property of the Scottish Ministers, and
  - (c) (where they are not stored at the premises of the Operating Company) to whose order they are held,
- (iii) set aside and store the said goods and materials so marked or identified to the satisfaction of the Scottish Ministers, and
- (iv) deliver to the Scottish Ministers a schedule listing and giving the value of every item of the goods and materials so set aside and stored and inviting them to inspect the same.

11.2.3 When the Scottish Ministers shall consent in writing, ownership of the said goods and materials for the purposes of this Clause 11.2 shall vest in and become the absolute property of the Scottish Ministers.

Thereafter such goods and materials shall be in the possession of the Operating Company for the sole purpose of delivering them to the Scottish Ministers and incorporating them in the Operations, provided always that:

- (i) consent by the Scottish Ministers for the purposes of Clause 11.2 or any payment made by them for goods and materials pursuant to Clause 10.3:
  - (a) shall be without prejudice to the exercise of any power of the Scottish Ministers contained in this Contract to reject any goods or materials which are not in accordance with the provisions of this Contract, and
  - (b) upon any such rejection, the property in the rejected goods or materials shall immediately revert in the Operating Company,
- (ii) notwithstanding any other provisions of this Contract, the Operating Company shall be responsible for:
  - (a) any loss or damage to such goods and materials,
  - (b) for the cost of storing, handling and transporting the same, and
  - (c) effecting such additional insurance as may be necessary to cover the risk of such loss or damage from any cause.

11.2.4 Neither the Operating Company nor a sub-contractor nor any other person shall have a lien on any goods or materials which have vested in the Scottish Ministers under Clause 11.2.3 for any sum due to the Operating Company, sub-contractor or other person.

The Operating Company shall take all such steps as may reasonably be necessary to ensure that the title of the Scottish Ministers and the exclusion of any such lien shall be brought to the notice of sub-contractors and other persons dealing with any such goods or materials.

11.2.5 Upon cessation of the employment of the Operating Company under this Contract before the completion of the Operations for any reason, the Operating Company shall deliver to the Scottish Ministers any goods or materials the property in which has vested in the Scottish Ministers by virtue of Clause 11.2.3.

Where the Operating Company shall fail to do so, the Scottish Ministers may:

- (i) enter any premises of the Operating Company or of any sub-contractor,
- (ii) remove such goods and materials, and
- (iii) recover the cost of so doing from the Operating Company.

11.2.6 The Operating Company shall incorporate provisions equivalent to those provided in Clause 11.2 in every sub-contract in which provisions are made for payment in respect of goods or materials before the same have been delivered to the Unit.

### **11.3 Care of Property Belonging to the Scottish Ministers**

11.3.1 Where the Operating Company has taken possession of any goods, plant or materials that are the property of the Scottish Ministers including any goods, plant or materials that have been temporarily taken down or removed then notwithstanding any other provision of this Contract, the Operating Company shall be responsible for:

- (i) any loss or damage to such goods, plant and material, and
- (ii) effecting such additional insurance as may be necessary to cover the risk of such loss or damage from any cause.

## **SCHEDULE 1**

### **PART 4 – INDEMNITIES AND INSURANCE**

#### **12. CARE OF THE UNIT, OPERATIONS, INDEMNITY AND INSURANCE**

##### **12.1 Care of the Unit and the Operations**

12.1.1 Where the Scottish Ministers execute work on the Unit with their own or other contractors' workpeople, they shall for such work:

- (i) have regard for the safety of all persons upon the Unit, including but not limited to users of the Unit,
- (ii) keep the Unit in an orderly state appropriate to the avoidance of danger to such persons, and
- (iii) require such other contractors to have the same regard for safety and the avoidance of danger.

12.1.2 The excepted risks that the Operating Company shall not be liable for under this Clause 12.1 are any loss or damage to the extent that the same is due to:

- (i) riot, war, invasion, act of foreign enemies, or hostilities (whether war be declared or not),
- (ii) civil war, rebellion, revolution, insurrection, or military or usurped power,
- (iii) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste, from the combustion of nuclear fuel, radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof,
- (iv) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,
- (v) the use or occupation by the Scottish Ministers, their agents or servants, any contractor other than the Operating Company (not being employed by the Operating Company), or the public, of any part of the Unit and subject to the other provisions of this Contract, and
- (vi) any defect in the design, construction or maintenance of the Unit but excluding loss or damage resulting from a Non-Conformance by the Operating Company.

12.1.3 In the event of any loss, damage or injury from any cause whatsoever (except loss, damage or injury due to any of the excepted risks set out in Clause 12.1.2) to Operational Items while the Operating Company is responsible for the care of any Operational Items or during the execution of the Operations, the Operating Company shall at its own cost replace, repair, rectify, or indemnify and keep indemnified the Scottish Ministers against such loss, damage or injury so that, at completion of relevant Orders and in any case at the Contract Expiry Date, the Unit is in good order and condition and complies with the other provisions of this Contract, and so that the Scottish Ministers have no liability in relation to the loss, damage or injury referred to in this Clause 12.1.3.

12.1.4 In the event of loss, damage or injury arising from any of the excepted risks set out in Clause 12.1.2, the Operating Company shall, subject to an Order, repair and make good the same as aforesaid at the expense of the Scottish Ministers.

12.1.5 Notwithstanding any other provisions of this Contract, the Operating Company shall indemnify the Scottish Ministers against any costs, losses and damages arising as a consequence of any Default by the Operating Company that results in the occurrence of an Incident.

12.1.6 The Operating Company shall be liable for any loss or damage to the Operations occasioned by it in the course of any activity carried out by it for the purpose of completing any outstanding Operations or of complying with its obligations under Clauses 5.5 and 5.8.

## **12.2 Damage to Persons and Property**

12.2.1 Notwithstanding any other term of this Contract and without prejudice and in addition to any other right or remedy that the Scottish Ministers may have, the Operating Company shall, except if and insofar as this Contract expressly provides otherwise, and subject to the exceptions set out in Clause 12.2.2, indemnify and keep indemnified the Scottish Ministers against all losses, actions, proceedings, claims, costs, damages, demands and expenses (including but not limited to all legal costs and disbursements), incurred by or made against the Scottish Ministers in respect of any injury to or death of any person, or loss of use of or damage to any property (other than the Operations), including surface or other damage to land adjacent to the Unit suffered by any persons who own or occupy such land, that may arise out of, in connection with or in consequence (whether directly or indirectly) of the execution of the Operations and the remedying of any Defects therein.

12.2.2 The exceptions referred to in Clause 12.2.1 that are the responsibility of the Scottish Ministers are:

- (i) death of, or injury to, persons and loss of, or damage to, property that results from any negligent act of, or omission or breach of any statutory duty by, the Scottish Ministers or any contractor, subcontractor, or supplier of any tier, (but not the Operating Company and not a contractor being employed by the Operating Company),
- (ii) any claims, demands, proceedings, damages, costs, charges and expenses in respect of or in relation to (i) above,
- (iii) damage to crops adjacent to the Unit (but only insofar as possession or access has not been given to the Operating Company),
- (iv) the use or occupation of land provided by the Scottish Ministers for the purposes of the execution of the Operations (including consequent losses of crops) or interference, whether temporary or permanent, with any right of way, light, air or water or any other form of servitude or wayleave that are the unavoidable result of the execution of the Operations in accordance with this Contract,
- (v) the right of the Scottish Ministers to execute any part of the Operations on, over, under, in or through any land, and
- (vi) damage that is the unavoidable result of the execution of the Operations (except where the Operating Company executes a Design as part of an Order and where subsequently the Site Operations and Defects Correction Operations for such Design are executed either by the Operating Company or under a Works Contract).

- 12.2.3 The Scottish Ministers shall, subject to the provisions of Clauses 12.2.5 and 12.2.6, indemnify the Operating Company from and against all claims, demands, proceedings, damages, costs, charges and expenses for the exceptions referred to in Clause 12.2.2.
- 12.2.4 The Operating Company's liability to indemnify the Scottish Ministers pursuant to Clause 12.2.1 shall be reduced in proportion to the extent that the negligent act or omission of the Scottish Ministers, or any contractor other than the Operating Company (not being employed by the Operating Company), may have contributed to the said death, injury, loss or damage.
- 12.2.5 The Scottish Ministers' liability to indemnify the Operating Company pursuant to Clause 12.2.3 shall be reduced in proportion to the extent that the act or neglect of the Operating Company may have contributed to the said death, injury, loss or damage.
- 12.2.6 The Scottish Ministers shall not be liable for, or in respect of, any damages or compensation payable at law in respect or in consequence of any accident or injury to any work person or person in the employment of the Operating Company, or any contractor, subcontractor, or supplier of any tier, except to the extent that such accident or injury results from, or has been contributed to, by the negligent act, omission or Default of the Scottish Ministers.

### **12.3 Insurance Generally**

- 12.3.1 Upon execution of this Contract and prior to the Operating Company commencing the execution of any Operations, and without limitation to its liability under any other provisions of this Contract or at law, the Operating Company shall take out and maintain the insurances specified in Clause 3.1 of Schedule 1, Annex 5.
- 12.3.2 The Operating Company shall not take any action or fail to take any action (including failure to disclose any fact) or permit anything to be done or not to be done that would entitle any insurer to:
- (i) refuse to pay any sum, or
  - (ii) delay payment of any claim under any of the insurance, or
  - (iii) render any sum paid out under any of the insurance repayable in whole or in part.
- 12.3.3 All insurances shall insofar as is possible be subject to Scots Law and the exclusive jurisdiction of the Scottish Courts.

### **12.4 Underwriting Information, Placing Documents, Insurance Policies and Copies**

- 12.4.1 The Operating Company shall, if requested by the Scottish Ministers, provide within seven days of such request copies of all information given to insurers at any time during the placement, alteration or currency of any insurance policy.
- 12.4.2 The Operating Company shall provide to the Scottish Ministers all insurance policies, endorsements, attachments, brokers' placing slips, market reform contracts, market reform contract endorsements and any other documents necessary, or reasonably requested by the Scottish Ministers, to evidence that the required insurances are in place.

Each document shall be stamped, initialled and dated by all underwriters. Copies of original documents shall be certified in a manner acceptable to the Scottish Ministers.



- 12.4.3 The insurance documents specified in Clause 12.4.2 shall be provided:
- (i) within one day of the Contract Commencement Date,
  - (ii) prior to the expiry of an existing insurance, and
  - (iii) within seven days of receiving a written request.
- 12.4.4 The requirements in Clause 12.4.2 for the provision of documents do not apply to professional indemnity insurance, for which a cover note issued by the insurance broker to the Operating Company detailing the period of insurance, limit of indemnity, participating insurers and their shares of the insurance, that the specific requirements of Table 3.1.1/A contained in Schedule 1, Annex 5 are catered for and any unusual terms and conditions is sufficient evidence of the existence of the insurance.
- 12.4.5 The Operating Company shall provide to the Scottish Ministers any amendments and replacements of any of the insurance documents referred to in this Clause 12.4 and of other relevant documents previously given to the Scottish Ministers. The amended or replacement documents shall be provided within seven days of issue, whether or not requested by the Scottish Ministers.
- 12.4.6 The Operating Company shall provide to the Scottish Ministers evidence from the insurers that the premiums payable have been paid to the insurers and that the insurances are in full force and effect.
- 12.4.7 The Operating Company shall provide, and take all steps and give all necessary instructions to procure the provision of:
- (i) the said policies and the other documents referred to in this Clause 12.4, and
  - (ii) such additional evidence of compliance with this Clause 12 as may be required by the Scottish Ministers.
- 12.4.8 The Operating Company shall procure, and take all steps necessary to ensure, that any information given and received in relation to any insurance policy required under this Contract (and any information held by third parties acting on behalf of the Operating Company) is retained for a period of not less than five years after the end of the Contract Period.
- 12.5 Rights of Subrogation, Non-Vitiation, Changes to Policy Provisions, Waiver of Disclosure Obligation and Notice of Cancellation**
- 12.5.1 Except for the professional indemnity insurance requirement, the employers' liability insurance requirement and the motor insurance requirement, all of the insurance required under the provisions of this Contract shall be subject to:
- (i) the waiver of all duties of disclosure, and
  - (ii) the waiver of any rights of subrogation,
- insofar as the Scottish Ministers and their servants, agents and suchlike persons are concerned.
- 12.5.2 Except for the contractors' all risks insurance requirement, professional indemnity insurance requirement, the employers' liability insurance requirement and the motor insurance requirement all of the insurance required under the provisions of this Contract shall allow that actions between the insured parties shall be treated as though a separate insurance had been issued to each of them.

- 12.5.3 Except for the professional indemnity insurance requirement, all of the insurance required under the provisions of this Contract shall be subject to a non-vitiation provision, in order that the actions of the Operating Company or any other insured shall not prejudice the insurance, insofar as the Scottish Ministers are concerned.
- 12.5.4 All of the insurance required under Clause 3 of Schedule 1, Annex 5 shall be subject to undertakings from the insurers and the Operating Company:
- (i) to notify the Scottish Ministers in writing of any intention or request to amend the terms and conditions of the said insurance,
  - (ii) to obtain confirmation of the acceptance of these amendments from the Scottish Ministers, such acceptance not to be unreasonably withheld,
  - (iii) to provide to the Scottish Ministers in writing not less than 30 days' notice of cancellation or non-renewal of the said insurance, and
  - (iv) in the case of non-renewal by the Operating Company, to allow the Scottish Ministers the opportunity to renew the insurances in accordance with Clause 12.6.

## **12.6 Failure to Provide Suitable Evidence of Insurance**

- 12.6.1 If, pursuant to Clause 12.4, the Operating Company fails to produce, when required, satisfactory evidence to the Scottish Ministers that there is in force any of the insurance required under this Contract, the Scottish Ministers may:
- (i) effect and keep in force any such insurance,
  - (ii) secure the renewal of such insurance,
  - (iii) pay any such premium as may be necessary for such purpose, and
  - (iv) deduct any amount so paid from any monies due, or which may become due, to the Operating Company or recover the same as a debt due to the Scottish Ministers from the Operating Company, together with all recovery costs and expenses whatsoever incurred by the Scottish Ministers and their agents, servants and suchlike persons.
- 12.6.2 Where the Operating Company fails to comply with any condition imposed by any insurance policy taken out pursuant to this Clause 12, or Schedule 1, Annex 5, or any other provisions of this Contract, the Operating Company shall indemnify the Scottish Ministers against all losses and claims arising from such failure.
- 12.6.3 Notwithstanding any other provisions of this Contract, the Scottish Ministers will take action in accordance with Clause 15 of this Schedule if the Operating Company fails to provide the Scottish Ministers with suitable evidence of insurance satisfying the requirements stated in this Clause 12, or in Schedule 1, Annex 5, or in any other provisions of this Contract.

## **SCHEDULE 1**

### **PART 5 – MANAGEMENT SYSTEM AND CHANGE PROPOSALS**

#### **13. MANAGEMENT SYSTEM**

##### **13.1 Management System**

- 13.1.1 For the term of this Contract, the Operating Company shall establish, document, implement, maintain and continually improve the effectiveness of the Management System in accordance with the requirements of Schedule 5 Part 1 and the other provisions of this Contract.

The purpose of the Management System is to ensure and demonstrate that all aspects of the Operations and all other matters for which the Operating Company is responsible under the terms of this Contract are executed in accordance with the terms of this Contract. Documented procedures in the Management System shall be such that, when followed, they ensure the effective management of the Operations.

- 13.1.2 The Operating Company shall provide a Quality Plan that meets but is not limited by the requirements of Schedule 5 Part 1 to the Scottish Ministers for their written consent when produced or updated or when requested by the Scottish Ministers.
- 13.1.3 By no later than 60 days prior to the Commencement of Service Date and prior to any Site Operations commencing, whichever is the earlier, the Operating Company shall submit its developed and detailed:

- (i) Management System, and
- (ii) Quality Plan,

to the Scottish Ministers for their written consent. At the time of submission, any software and computer programmes to be used by the Operating Company that are necessary for the operation of the systems shall be ready for use in the manner and detail required as stated in other provisions of this Contract.

- 13.1.4 The Operating Company shall periodically, as necessary for continued compliance with the provisions of this Contract, amend the Management System and Quality Plan and submit such amendments to the Scottish Ministers for their written consent.
- 13.1.5 During the execution of Operations, the Operating Company's performance under the Management System, including the Quality Plan, shall be examined and thereafter audited by the Performance Audit Group.

The Performance Audit Group will undertake regular and periodic:

- (i) inspection,
- (ii) monitoring,
- (iii) spot checking,
- (iv) auditing, and
- (v) other examination and audit processes as it deems necessary,

of the Management System, the Quality Plan and all procedures and systems contained therein.

- 13.1.6 The Operating Company shall not commence, or permit the commencement of, any aspect of the Operations or any other matters for which the Operating Company is responsible under this Contract before those parts of the Management System which concern any such aspect of the Operations or such other matters have been completed.

For the purposes of this clause, a part of the Management System shall be considered complete when it has been consented to in writing by the Scottish Ministers. Such consent shall not be unreasonably delayed and a response to submissions under Clause 13 of this Schedule shall be given by the Scottish Ministers within 21 days of receipt.

### **13.2 Failure by Operating Company to Perform its Obligations**

- 13.2.1 Notwithstanding any other provisions of this Contract, where, in the opinion of the Scottish Ministers, the Operating Company fails satisfactorily to execute all or any of its obligations described in Clause 13.1, the Scottish Ministers shall notify the Operating Company of the Default in writing.

- 13.2.2 Where, in the opinion of the Scottish Ministers, the Operating Company does not within a reasonable time take reasonable steps to rectify a Non-Conformance, the Scottish Ministers shall notify the Operating Company in writing.

Where the Scottish Ministers have so notified the Operating Company pursuant to this clause, they may thereupon make such arrangements and incur such costs and expenses as they consider reasonable for rectifying such Non-Conformance of the Operating Company and for securing compliance with the requirements of this Contract.

Notwithstanding any other provisions of this Contract, where audits by the Scottish Ministers or the Performance Audit Group identify a Non-Conformance by the Operating Company, the Scottish Ministers shall be entitled to carry out additional audits of the Operations.

- 13.2.3 Such actions by the Scottish Ministers pursuant to this clause shall not entitle the Operating Company to any extra payment, or any extension of time, for completion of the Operations.

The Operating Company shall be liable for such actions of the Scottish Ministers under this clause as though, for such purpose, the Operating Company had taken such actions itself.

- 13.2.4 The Scottish Ministers shall particularise and notify in writing to the Operating Company on a monthly basis the amounts of any costs and expenses whatsoever incurred by the Scottish Ministers or by persons authorised to act on their behalf pursuant to this clause.

All such amounts shall be recoverable as sums of money due from the Operating Company to the Scottish Ministers. Such sums shall be deducted from the next payment due to the Operating Company pursuant to the other provisions of this Contract.

- 13.2.5 Where the Operating Company fails to submit changes to the Management System required pursuant to Clause 13.1 of this Schedule, the Scottish Ministers may in writing notify the Operating Company of changes that are necessary for compliance with the requirements of this Contract.

In any such event, the Operating Company shall introduce such changes into the Management System forthwith.

In any such event, the Scottish Ministers shall be entitled to recover from the Operating Company:

- (i) all costs and expenses whatsoever (including professional fees, staff costs, overheads and administrative costs),
- (ii) all abortive costs, and
- (iii) other sums,

that have been incurred where they have been acting as though they were the Operating Company.

All consequences on the Operating Company arising from the actions of the Scottish Ministers pursuant to this clause shall be the responsibility of the Operating Company.

Where the Performance Audit Group has given written notice to the Operating Company, pursuant to the provisions of Schedule 5 Part 5 of this Contract, of an intention to execute an audit of any aspect of the Operations and where the Operating Company fails to provide the necessary staff, access, records and facilities, the Scottish Ministers shall be entitled to recover from the Operating Company all abortive costs and expenses and any other sums properly incurred by the Performance Audit Group and the Scottish Ministers.

Without prejudice to the other rights and remedies that the Scottish Ministers may have, the Scottish Ministers shall be entitled to recover such costs and expenses from the next payment or any subsequent payment thereafter due to be paid to the Operating Company pursuant to Clause 10 of this Schedule.

- 13.2.6 In taking any actions under Clause 13.2 of this Schedule, the Scottish Ministers shall for the Operating Company's Default as described therein be entitled to act as though they were the Operating Company.

### **13.3 Application to Subcontracts**

- 13.3.1 The Operating Company shall ensure that a condition is inserted in each subcontract and order for goods and services forming part of the Operations whereby subcontractors and suppliers shall institute, maintain and operate, for the term of this Contract, a Management System complying with the requirements of Schedule 5 Part 1 and the other provisions of this Contract, for the purpose of ensuring and demonstrating that such goods and services comply with this Contract.
- 13.3.2 The Operating Company shall also ensure that a condition is inserted in each subcontract to provide for the Scottish Ministers access and facilities meeting the requirements of Clause 5.1.1 and of a standard sufficient to enable them to take such actions as they may consider necessary under this Clause 13 of this Schedule.

### **13.4 Laboratories and Testing Schedules**

- 13.4.1 All materials and workmanship shall be of the respective kinds described in any Order and in accordance with the Scottish Ministers' Requirements.

Such materials and workmanship shall be subjected to the samples and tests required or reasonably implied by the terms of this Contract and set out in the method statements forming part of the Management System or any Order.

13.4.2 Except as may be provided otherwise by this Contract, every sample and test required by this Contract shall be undertaken by a laboratory holding accreditation granted in respect of such sampling and testing:

- (i) by the United Kingdom Accreditation Service (UKAS), or
- (ii) by the European co-operation for Accreditation of Laboratories (EAL).

13.4.3 By no later than 60 days prior to the Commencement of Service Date, the Operating Company shall provide to the Scottish Ministers a schedule of the tests and inspections that the Operating Company then considers to be necessary for the anticipated execution of Operations.

Within 21 days of receipt of the schedule of tests and inspections, the Scottish Ministers shall either accept the schedule or inform the Operating Company of reasons why the coverage of the schedule is not adequate to ensure achievement of the requirements of the Scottish Ministers. In the latter event, the Operating Company shall submit a revised schedule for acceptance within 14 days of the Scottish Ministers' reply.

If no reply is received from the Scottish Ministers within 21 days of receipt of any submission of a schedule of tests and inspections, the Operating Company may remind the Scottish Ministers accordingly. If, seven days after the reminder is issued, no reply has been received from the Scottish Ministers, the schedule is deemed to be acceptable.

Thereafter, the said schedule shall be maintained by the Operating Company and supplemented as necessary from time to time to include such additional tests and inspections as may be required for compliance with any Order.

13.4.4 Inspection and test schedules and documentation for recording compliance shall be provided under the Quality Plan and relevant copies of such schedules and documentation shall be provided to the Scottish Ministers prior to commencement of the activity concerned.

13.4.5 Where work items are required to be sampled, tested and/or inspected in accordance with this Contract then such sampling, testing and/or inspection is acknowledged by the Operating Company to be and is deemed for all purposes to be a material and essential part of the work item and the Operating Company shall become entitled to include within any Statement under Clause 10.3.1 the relevant work item only when the relevant sampling, testing and/or inspection has been carried out and the test results demonstrate that the work item has been completed and is in accordance with this Contract. The Operating Company acknowledges that it is important for the Scottish Ministers to have records which demonstrate that work items have been carried out in accordance with this Contract.

The Scottish Ministers shall be under no obligation to pay for and the Operating Company shall not seek payment for a work item which is required to be sampled, tested and/or inspected in accordance with this Contract and which work item is either untested or has not yet passed the relevant test.

The Operating Company shall not carry out a work item that covers up an untested work item or which would make an untested work item inaccessible. In order for the untested work item to be tested the Scottish Ministers shall be entitled to instruct the Operating Company (at the Operating Company's cost) to remove or open up any such offending work item that the Operating Company carries out. The Scottish

Ministers shall be under no obligation to pay for and the Operating Company shall not seek payment for any such offending work item until the untested work item has passed its test (provided always that the cost of opening up or removing the offending work item and repairing or reinstating the offending work item shall be met by the Operating Company).

13.4.6 Where the Scottish Ministers consider it necessary to undertake any tests under their own direction, independently of the Operating Company, the Operating Company shall provide such assistance, instruments, machines, labour, materials, temporary traffic management and safety measures and other resources as required for examining, measuring and testing any work and the quality, weight and quantity of any materials used, and shall supply samples of materials before incorporation in the Operations for testing as may be selected and required by the Scottish Ministers.

13.4.7 The provision of samples and testing shall be the responsibility of the Operating Company where such test is required by the other provisions of this Contract.

Such tests shall include, but shall not be limited to, tests under load and tests to ascertain whether the Design of any finished or partially finished work is fit for the purposes that it was intended to fulfil.

13.4.8 Where any test is instructed by the Scottish Ministers which is in addition to the requirements of this Contract, or is specifically instructed as part of an Order, the Scottish Ministers will only be responsible for the costs of the testing if the test shows the workmanship or materials to be in accordance with both the provisions of this Contract and the relevant Order.

### **13.5 Operating Company Weekly Non-Conformance Reports**

13.5.1 The Operating Company shall produce a report, to be issued to the Performance Audit Group at weekly intervals from the commencement of the Mobilisation Period to the Contract Expiry Date, which shall schedule:

- (i) the number,
  - (ii) the nature, and
  - (iii) details (sufficient to explain the nature and extent of the Non-Conformance),
- of the Non-Conformances which have been recorded in the Management System by the Operating Company.

The weekly report shall also include the accumulated total of outstanding Non-Conformances which have not been closed out by the Operating Company in accordance with the requirements of the Management System at the time of preparing the report.

## **14. OPERATING COMPANY PROPOSALS FOR CHANGE TO THE SCOTTISH MINISTERS' REQUIREMENTS**

### **14.1 Process**

14.1.1 The Operating Company may submit to the Scottish Ministers an Operating Company Change Proposal in relation to the Scottish Ministers' Requirements at any time following the first anniversary of the Commencement of Service Date.

Such Operating Company Change Proposal shall be in writing and refer expressly to this clause.

An Operating Company Change Proposal shall either:

- (i) improve the efficiency of the Operations with a financial saving to the Scottish Ministers, or
- (ii) improve the efficiency of the Operations at no additional cost to the Scottish Ministers, or
- (iii) improve the efficiency of the Operations at additional cost to the Scottish Ministers.

14.1.2 Any Operating Company Change Proposal shall be accompanied by a full and detailed:

- (i) explanation of the reasons for the proposed change,
- (ii) explanation of how any risks associated with the proposed change shall be allocated,
- (iii) explanation of how any trials of any proposed innovation shall be financed,
- (iv) statement of any consideration that the Operating Company is seeking for making the innovation available to the Scottish Ministers, including but not limited to the release of any Intellectual Property Rights in the innovation,
- (v) explanation of the benefits arising to the Scottish Ministers from the proposed change,
- (vi) demonstration that such proposed change has no detrimental effect on the:
  - (a) environmental impact,
  - (b) safety,
  - (c) quality, and
  - (d) performance,of the Operations and the Unit,
- (vii) demonstration that such proposed change is not prejudicial in any way to the safety of users of the Unit, or any other person affected by, or involved in, the performance of the Operations,
- (viii) explanation of any consequential changes required to any of the Scottish Ministers' Requirements, and
- (ix) substantiation that such proposed change would be acceptable to any third party whom the Operating Company is obliged to consult in regard to, or whose consent is required for the implementation of, such proposed change.

14.1.3 Any Operating Company Change Proposal shall also include proposed changes to the Schedule of Rates and Prices in Schedule 2 Parts 1 and 2. The proposed changes submitted shall only be related to the Operating Company Change Proposal submitted.

Each rate or price change or additional rate or price proposed shall be accompanied by a submission detailing its evaluation and assessment.



If an Operating Company Change Proposal leads to cost savings resulting from a change to the Scottish Ministers' Requirements, the savings shall be shared equally between the Scottish Ministers and the Operating Company.

Any additional costs of Operations resulting from the acceptance of an Operating Company Change Proposal shall be borne by the Scottish Ministers.

For the purpose of this Clause 14 of this Schedule, costs mean the costs to the Scottish Ministers as calculated by application of the principles referred to in Clause 10.1 of this Schedule, together with other expenses incurred by the Scottish Ministers as a result of the Operating Company Change Proposal.

14.1.4 In the case of a proposal where the savings are shared equally between the Operating Company and the Scottish Ministers, the proposed new rates and prices shall include the share of the savings due to the Operating Company.

14.1.5 All the costs and expenses of whatsoever nature associated with the preparation and implementation of any proposed change to the Scottish Minister's Requirements as a result of an Operating Company Change Proposal shall be the responsibility of the Operating Company.

Such costs shall include any costs and expenses incurred by the Scottish Ministers in coming to a decision whether or not to accept the proposal.

All such costs incurred by the Scottish Ministers will be deducted by the Scottish Ministers from payments due to the Operating Company.

14.1.6 The acceptance of an Operating Company Change Proposal shall be at the discretion of the Scottish Ministers. If the Scottish Ministers do not accept the Operating Company Change Proposal, they shall inform the Operating Company in writing within 14 days of receipt of all satisfactory supporting information or the completion of any trials or demonstrations, whichever is the later.

Where the Scottish Ministers are prepared to accept any such change to the Scottish Ministers' Requirements, an Operating Company Change Proposal is implemented following the unconditional acceptance by the Operating Company of an Order from the Scottish Ministers issued under this Clause 14 of this Schedule.

14.1.7 The Order issued to implement a change to the Scottish Ministers' Requirements may include:

- (i) reference to this sub-clause,
- (ii) a statement of the changes made to the Scottish Ministers' Requirements,
- (iii) the effective date for such changes to the Scottish Ministers' Requirements,
- (iv) changes made to the Schedule of Rates and Prices in Schedule 2 Parts 1 and 2, and
- (v) a statement that the Order is not effective until either the effective date stated in the Order or the date when the Scottish Ministers receive unconditional acceptance in writing from the Operating Company, whichever is the later.

## **SCHEDULE 1**

### **PART 6 – DEFAULT, TERMINATION AND FRUSTRATION**

#### **15. DEFAULT AND STEP-IN RIGHTS PROVISIONS**

##### **15.1 Rights on Default without Prejudice to Termination Rights**

- 15.1.1 The Scottish Ministers' rights under this clause shall be without prejudice to, and in addition to, the provisions of, and their rights under, Clauses 13 and 16.

##### **15.2 Remedial Notices**

- 15.2.1 Where the Operating Company commits any Default which is capable of remedy, the Scottish Ministers may, subject to the provisions of Clauses 5.6.1 and 5.6.2, issue a Remedial Notice requiring the Operating Company to remedy such Default.

The Scottish Ministers, having reasonable regard to the nature of the Default, shall specify in a Remedial Notice the Remedial Period during which the Default shall be remedied.

The Operating Company shall remedy the Default during the Remedial Period.

- 15.2.2 The Operating Company shall only be entitled to dispute a Remedial Notice or the reasonableness of the Remedial Period if it gives written notice of such a Dispute to the Scottish Ministers within 14 days of receipt of such Remedial Notice.

##### **15.3 Notices of Non-Conformance**

- 15.3.1 In addition to the rights of the Scottish Ministers under Clauses 15.2 of this Schedule, the Performance Audit Group may issue to the Operating Company a Notice of Non-Conformance in respect of any Non-Conformance, provided that the Scottish Ministers, in exercise of their discretion, have not at that time issued a Remedial Notice in respect of that Non-Conformance.

A Notice of Non-Conformance shall contain details of the Non-Conformance, a reference to the contractual basis of the Non-Conformance, a period of time or a date by which the Non-Conformance is to be corrected, and, if appropriate, other information and requirements of the Scottish Ministers applicable to the correction of the Non-Conformance.

A Notice of Non-Conformance will be valid if it contains a description of the Non-Conformance and the date when the existence of the Non-Conformance became known to either the Scottish Ministers or the Performance Audit Group.

- 15.3.2 On receipt of a Notice of Non-Conformance, the Operating Company shall within any timescale referred to in such Notice of Non-Conformance:

- (i) remedy the Default,
- (ii) correct the Defect,
- (iii) take action to achieve the required standard of service,
- (iv) perform its obligation in accordance with the Contract in a timely manner and without delay, or
- (v) process the Non-Conformance in accordance with the Management System,

whichever is relevant to the Notice of Non-Conformance. The Operating Company shall, within any timescale referred to in such Notice of Non-Conformance, submit a report of the resolution of the Non-Conformance to the Performance Audit Group for its consideration.

- 15.3.3 Where a Non-Conformance has not been resolved to the satisfaction of the Performance Audit Group or the Performance Audit Group considers the Operating Company's report of the resolution of the Non-Conformance to be unsatisfactory, the Performance Audit Group shall give its reasons to the Operating Company within 14 days of receipt of the unsatisfactory report. Within seven days of the Performance Audit Group's notification, the Operating Company shall notify the Performance Audit Group of the further action that the Operating Company will take in relation to the Non-Conformance, together with the timescales for such action.

If the Performance Audit Group remains dissatisfied by the Operating Company's proposals or the resolution of the Non-Conformance, the Performance Audit Group shall so advise the Director.

The Director shall consider the report of the Performance Audit Group and, if satisfied that the Operating Company has committed a Default, the Scottish Ministers shall issue a Remedial Notice. If the Default has been remedied by the Scottish Ministers and further remedial action is not required, a Remedial Notice may nevertheless be issued to record the Default.

- 15.3.4 The Operating Company shall maintain a register of Notices of Non-Conformance.

A copy of the register shall be provided by the Operating Company at weekly intervals to the Director together with a report on the progress made by the Operating Company in resolving each Non-Conformance.

The rights of the Scottish Ministers under Clause 15.2 to issue a Remedial Notice shall not be affected by the issue, or the absence of issue, of a Notice of Non-Conformance in relation to any matter or to any action taken or not taken by the Operating Company.

#### **15.4 Scottish Ministers' Step-in Rights – Defaults**

- 15.4.1 Where, by the expiry of the Remedial Period specified in a Remedial Notice, the Operating Company has failed to remedy the Default and the Scottish Ministers do not opt to exercise their option to terminate this Contract under Clause 16.1.3, the Scottish Ministers shall be entitled to remedy such Default themselves or to employ other persons to remedy such Default, provided that they first notify the Operating Company in writing of their intention to do so.

- 15.4.2 If the Scottish Ministers opt to remedy an Operating Company's Default, they may take such actions as they consider prudent or necessary as a consequence of such Default. Such action may include instructing others to remedy the Default on behalf of the Scottish Ministers.

- 15.4.3 The Scottish Ministers shall be entitled to recover from the Operating Company all and any proper and reasonable costs and expenses incurred by the Scottish Ministers, or incurred on their behalf, to remedy such Default under this Clause 15.4. Costs payable by the Operating Company under this clause include any payments made by the Scottish Ministers to third parties as a result of the Operating Company's Default. If the Operating Company's Default leads the Scottish Ministers to believe that there may be further Defaults by the Operating Company which at the

time have not been discovered by the Scottish Ministers or the Performance Audit Group, the Scottish Ministers may take such other additional actions, or instruct others to take such additional actions on their behalf, as they consider prudent or necessary to establish the extent of any further Defaults.

- 15.4.4 For the purpose of this Clause 15.4, the additional actions may include actions taken for an indefinite period as a result of the Scottish Ministers' concern that a Default or Defaults may otherwise occur or continue to occur.

Any costs and expenses properly incurred by the Scottish Ministers, or on their behalf, as a consequence of such additional actions shall be payable by the Operating Company.

- 15.4.5 Any compensation, costs and expenses properly incurred by the Scottish Ministers, or on their behalf, as a result of their breach of an obligation to others, arising as a consequence of the Operating Company's Default, shall be payable by the Operating Company.

- 15.4.6 In addition to any payments due to the Scottish Ministers under this Clause 15.4 as a consequence of a Default by the Operating Company, the Operating Company shall pay to the Scottish Ministers "the Non-Execution Adjustment".

The Non-Execution Adjustment is calculated by multiplying the sum of all other amounts due under this Clause 15.4 by the Non-Execution Adjustment percentage.

The Non-Execution Adjustment percentage is 12.5%.

## **15.5 Lane Occupation Charges**

- 15.5.1 Where, during the execution of any part of the Site Operations, the Operating Company has in place temporary traffic management schemes resulting in Lane Occupation and has either:

- (i) abandoned the execution of the Site Operations for a period exceeding 24 hours to the extent that no material progress has (in the opinion of the Scottish Ministers) been achieved in that period in the execution of the Site Operations, or
- (ii) not (in the opinion of the Scottish Ministers) progressed with due skill, care and diligence and this has (in the opinion of the Scottish Ministers) resulted in a delay to the execution of the Site Operations,

the Scottish Ministers shall be entitled to charge the Operating Company a Lane Occupation Charge, for each calendar day or part thereof that the said Site Operations have been abandoned or delayed, at the appropriate charge rates as set out in Schedule 1, Annex 3.

## **15.6 Scottish Ministers' Redress – Failure to Comply with Audit Requirements**

- 15.6.1 Notwithstanding any other failure by the Operating Company in the performance of its obligations under this Contract, where, in accordance with the requirements of Schedule 5 Part 5, the Scottish Ministers or the Performance Audit Group:

- (i) have served due notice of an intention to execute an audit, or
- (ii) execute an ad-hoc unannounced audit,

and the Operating Company:

- (iii) fails to allow access to the Scottish Ministers or the Performance Audit Group on any date identified in such notice, or
- (iv) fails to provide suitable resources (including but not limited to staff), or
- (v) fails to provide the information required under this Contract to be available for the audit, or
- (vi) fails to provide and make available information that should be available in accordance with the provisions of this Contract, or
- (vii) withholds information from the Scottish Ministers or the Performance Audit Group, or
- (viii) provides information that is found to be incorrect in that it does not comply with the requirements of this Contract,

the Operating Company shall be liable for all abortive and additional costs, including but not limited to the costs of:

- (ix) carrying out additional audits, and
- (x) procuring additional audit resources to re-execute such audits, and
- (xi) procuring all necessary information that should be properly made available by the Operating Company at such audits,

incurred by the Scottish Ministers and the Performance Audit Group associated with any such failure.

## **15.7 Recovery of Scottish Ministers' Costs**

- 15.7.1 The Scottish Ministers shall be entitled to recover from the Operating Company all losses, expenses, abortive costs and additional costs referred to in this Clause 15.

Without prejudice to the other rights and obligations that the Scottish Ministers may have, the Scottish Ministers shall be entitled to and shall recover such losses, costs and expenses from the next payment or subsequent payments thereafter due to be paid to the Operating Company pursuant to the other provisions of this Contract.

## **15.8 No Waiver**

- 15.8.1 A waiver by the Scottish Ministers of any Default of the Operating Company shall not constitute a waiver of any subsequent Default.

Failure by the Scottish Ministers at any time to enforce any provisions of this Contract, to require strict performance by the Operating Company of any of the provisions of this Contract or to exercise any right or remedy to which they are entitled hereunder shall not be construed as a waiver of any such provision. Such failure shall not affect the validity of this Contract or any part thereof or the right of the Scottish Ministers to enforce any provision in accordance with its terms.

## **15.9 Other Rights**

- 15.9.1 The rights of the Scottish Ministers under this Clause 15 are in addition and without prejudice to any other right the Scottish Ministers may have to claim the amount of any loss or damage suffered by the Scottish Ministers on account of the acts or omissions of the Operating Company (whether or not pursuant to any bond, guarantee or surety held by the Scottish Ministers) in connection with any part of the

execution of the Operations or on account of any other matter for which it is liable in connection with this Contract.

## **16. TERMINATION PROVISIONS**

### **16.1 Termination of this Contract**

16.1.1 The Scottish Ministers may at any time, by notice in writing to the Operating Company, terminate this Contract with immediate effect in the event that any one of the following occurs:

- (i) there has been a change of control, including but not limited to a cumulative change of ownership as defined in Section 719 of the *Corporation Tax Act 2010*, in the Operating Company or any company that is the ultimate holding company of the Operating Company,
- (ii) the Operating Company passes a resolution that it be wound up or it calls a meeting to consider such resolution, or a petition is presented or a court makes an order that the Operating Company be wound up or that a provisional liquidator be appointed to the Operating Company,
- (iii) the Operating Company has proposed, made or implemented any composition or arrangement with, or for the benefit of, any or all of its creditors,
- (iv) a liquidator, administrator, receiver, receiver and manager, administrative receiver, has been appointed (whether on an interim basis or otherwise) to manage its affairs or in respect of any part of the property that may from time to time have comprised the property and undertaking of the Operating Company,
- (v) circumstances arise which would entitle a court, a secured creditor or any other party to appoint such a liquidator, administrator, receiver and manager, administrative receiver to manage its affairs or in respect of any part of the property that may from time to time have comprised the property and undertaking of the Operating Company,
- (vi) a petition has been presented or an application has been made to court for an administration order in respect of the Operating Company or a notice of intention to appoint an administrator of the Operating Company has been given or filed,
- (vii) proceedings have been commenced under any law, regulation or procedure relating to the reconstruction or adjustment of debts of the Operating Company,
- (viii) the Operating Company has stopped or suspended payment of its debts or the Operating Company is unable or capable of being deemed unable to pay its debts within the meaning of Section 123 of the *Insolvency Act 1986*,
- (ix) diligence or any other process is levied on an asset of the Operating Company or a judgement, order or award is granted against the Operating Company, and
- (x) action is taken by the Registration of Companies to strike the Operating Company off the register under Sections 1000, 1002 or 1003 of the *Companies Act 2006*.

- 16.1.2 When the Operating Company is a partnership (a "Partnership Operating Company"), the Scottish Ministers may at any time, by notice in writing to the Partnership Operating Company, terminate this Contract with immediate effect where:
- (i) sequestration or steps taken to commence sequestration proceedings in relation to the Partnership Operating Company have been effected whether under or in terms of Sections 6 and 7 of the *Bankruptcy (Scotland) Act 1985* or otherwise,
  - (ii) any of the events, are applicable to the Partnership Operating Company specified in Clauses 16.1.1 (iii) and 16.1.1 (ix) have occurred in respect of any partner in the Partnership Operating Company, or
  - (iii) the Partnership Operating Company is otherwise dissolved or wound up, whether under or in terms of Sections 19, 26, 32, 33, 34 or 35 of the *Partnership Act 1890* or otherwise.
- 16.1.3 Without prejudice to any other right or remedy which the Scottish Ministers may have, the Scottish Ministers may at any time by notice in writing terminate this Contract with immediate effect in the event that:
- (i) the Operating Company has failed to remedy a Default within the Remedial Period specified in any relevant Remedial Notice issued by the Scottish Ministers, or
  - (ii) the Operating Company commits a Default that is not capable of remedy.
- 16.1.4 If the Operating Company fails to submit to the Scottish Ministers, in acceptably documented form:
- (i) the Management System, and
  - (ii) the contract control and management function of the Integrated Roads Information System,
- no later than 60 days before the Commencement of Service Date and prior to any Operations commencing on Site, the Scottish Ministers shall be entitled to terminate this Contract at any time thereafter by written notice to the Operating Company.
- For the purposes of this clause, an acceptable Management System and an acceptable contract control and management function of the Integrated Roads Information System is one that is immediately available for use in the manner and detail stated elsewhere in this Contract.
- 16.1.5 In addition to any other right or power to terminate this Contract stated elsewhere in the Contract, the Scottish Ministers may at their discretion terminate this Contract by issuing a written notice of termination to the Operating Company. The effective date of termination shall be stated on the notice of termination and shall not be earlier than 85 days after the date of receipt of the notice of termination by the Operating Company.
- 16.1.6 Nothing in Clauses 16.1.1 to 16.1.5 shall affect or prejudice in any way any right to terminate this Contract that the Scottish Ministers may have by virtue of any other term of this Contract, statute, or remedy at law.
- 16.1.7 Where this Contract is terminated pursuant to any of Clauses 16.1.1 to 16.1.4 and the Scottish Ministers then make other arrangements for the execution of the

Operations, the Scottish Ministers shall be entitled to recover from the Operating Company and the Operating Company shall pay the cost of:

- (i) making those arrangements (including but not limited to the full costs of the preparation of tendering documents and the running of the tendering procedure and award process), and
- (ii) any additional expenditure incurred by the Scottish Ministers in procuring the execution of the Operations over and above that which would reasonably have been expected to be incurred under this Contract in obtaining the execution of the Operations during the unexpired portion of this Contract.

In the event that the Scottish Ministers have extended the Contract Period as provided for elsewhere in this Contract, the Operating Company shall pay to the Scottish Ministers such costs and additional expenditure in respect of such extended period or periods.

16.1.8 Following the issue of a notice of termination, the Scottish Ministers shall not be liable to pay to the Operating Company any sums due in accordance with this Contract until the later of the Contract Expiry Date and the date when the Scottish Ministers have established and calculated to their satisfaction:

- (i) the sums that may be due from the Operating Company to the Scottish Ministers in accordance with the provisions of this Clause 16.1, including the costs of completion of the Operations,
- (ii) damages for delay in completion (if any), and
- (iii) all other expenses incurred by or on behalf of the Scottish Ministers.

Thereafter, the Operating Company shall be entitled to receive any sums that would otherwise have been due to the Operating Company less any amounts payable to the Scottish Ministers under this Contract.

Any such sums due under this Clause 16.1.8 shall become payable on the later of the Contract Expiry Date and the date on which the sum due was established in accordance with this Clause 16.1.8. The final date for payment shall be the date falling 28 days following the date that has been so ascertained.

If such amount exceeds the sum that would otherwise have been payable upon demand, the Operating Company shall pay to the Scottish Ministers the amount of such excess. The sum shall be deemed to be a debt due by the Operating Company to the Scottish Ministers, and such sum shall be recovered accordingly in terms of this Clause 16.1.8.

Any monies due from the Operating Company to the Scottish Ministers pursuant to the provisions of this Clause 16.1 shall, subject to the other provisions of this Contract, take account of the value of any monies remaining to the Scottish Ministers in relation to the Bond and Undertaking, and retention in lieu, in accordance with the other provisions of this Contract.

16.1.9 All depots and areas leased, or made available, to the Operating Company by the Scottish Ministers shall be vacated promptly on termination and returned to the Scottish Ministers within 14 days, after which time the Scottish Ministers may enter the depots and areas and take possession of all remaining Constructional Plant, equipment and materials. Any costs incurred by the Scottish Ministers in clearing



such depots and areas of rubbish, unsuitable materials, equipment and Constructional Plant shall be reimbursed by the Operating Company.

16.1.10 The provisions of any clause of this Contract necessary for its interpretation or enforcement shall survive the expiry or termination of this Contract.

## **17. FRUSTRATION AND WAR PROVISIONS**

### **17.1 Frustration**

17.1.1 Where this Contract is frustrated by any supervening event other than war that may occur independently of the will of the Parties, the Operating Company may abandon the Contract if execution of the Operations is not possible for 28 days from the start of the supervening event. In such an event the sum payable by the Scottish Ministers to the Operating Company for Operations executed shall be the same as that which would have been payable under Clause 17.4 in the event of abandonment pursuant to Clause 17.2.

### **17.2 War**

17.2.1 Where during the currency of this Contract there is an outbreak of war (whether war is declared or not) in which the United Kingdom is engaged on a scale involving general mobilisation of the armed forces of the Crown:

- (i) the Operating Company shall for a period of 28 days, reckoned from 00.01 hours on the day after the order for general mobilisation is given, continue so far as reasonably possible to execute the Operations in accordance with this Contract, and
- (ii) if the execution of the Operations has not been achieved before the said period of 28 days has expired, the Operations shall thereupon be deemed to be abandoned, unless the Operating Company and the Scottish Ministers otherwise in writing agree.

### **17.3 Removal of Constructional Plant**

17.3.1 Upon such abandonment of the Operations pursuant to Clauses 17.1 or 17.2, the Operating Company shall with all due diligence remove from the Unit all Constructional Plant.

17.3.2 Where the Operating Company fails to remove all such Constructional Plant from the Unit, the Scottish Ministers shall be entitled to remove and dispose of it at the cost of the Operating Company.

### **17.4 Payment on Abandonment of Operations**

17.4.1 Upon abandonment of the Operations pursuant to Clauses 17.1 or 17.2, the Scottish Ministers shall pay to the Operating Company (except where such amounts have not already been the subject of earlier payments made to the Operating Company):

- (i) the Contract value of all parts of the Operations carried out before the date of abandonment,
- (ii) the sums payable for any mobilisation or setting up costs for any Operations, so far as such part of the Operations have been executed,
- (iii) the cost of materials and goods properly ordered for the Operations which have been delivered to the Operating Company or of which the Operating Company has a liability to accept delivery (such materials shall become the

property of the Scottish Ministers once such payment has been effected by the Scottish Ministers),

- (iv) an amount of any expenditure properly incurred by the Operating Company in the expectation of executing the whole of the Operations for any Order, where such expenditure has not already been recovered by any other payments referred to in this Clause 17.4,
- (v) an amount of any expenditure properly incurred by the Operating Company in the expectation of executing the whole of the Core Operations, where such expenditure has not already been recovered by any other payments referred to in Clause 17.4, and
- (vi) all proper costs of removal referred to in Clause 17.3.

To this end and without prejudice to the provisions of this Clause 17.4, the provisions of Clause 10.3 shall apply to this clause as if the date of such abandonment was the date of expiry of the Non-Conformance Liability Period.

- 17.4.2 Where, at any time before the end of the 28 day period referred to in Clause 17.2, any part of the Operations has been executed so far as to be usable, all provisions of this Contract shall have full force and effect except that the Operating Company, in lieu of fulfilling its obligations under Clauses 5.5 and 5.8, shall be entitled at its option to allow against the sum due to it under the provisions of this Contract the cost (calculated at the prices ruling at the beginning of the said period of 28 days) as notified in writing to the Operating Company by the Scottish Ministers that the Operating Company would have been liable for under the said clauses had they continued to be applicable.
- 17.4.3 The Scottish Ministers shall not be entitled, pursuant to this Clause 17.4, to withhold payment under Clause 10.3 of the retention money or any part thereof.
- 17.4.4 Except as stated in Clause 17.4.2, this Contract shall continue to have full force and effect.

## **SCHEDULE 1**

### **PART 7 – DISPUTES RESOLUTION**

#### **18. DISPUTES RESOLUTION**

##### **18.1 Disputes**

18.1.1 As soon as the Scottish Ministers or Operating Company become aware of any matter which if not resolved might become a dispute, they shall so notify the other party in writing.

The Director and the Operating Company shall meet at the earliest opportunity and no later than seven days after such notification to try to resolve the matter.

If the matter is not resolved within a reasonable period of time the parties shall define in writing those parts of the matter that remain unresolved.

If Notice of Dispute is thereafter to be served by either party, the serving of such Notice shall not be unreasonably delayed.

18.1.2 Disputes shall be resolved in accordance with the provisions set out in this Clause 18. The disputes resolution procedures are adjudication and arbitration.

Where any dispute or difference arises between the Parties either Party may serve notice in writing (hereinafter referred to as a "Notice of Dispute") at any time on the other to refer the Dispute to a disputes resolution procedure. Either Party may then refer such dispute to adjudication.

18.1.3 The Notice of Dispute shall contain but not be limited to the following:

- (i) date of the notice,
- (ii) a concise summary of the nature and background of the dispute and the issues arising,
- (iii) the relevant clauses in the conditions of contract which the party giving notice believes gives the basis of entitlement,
- (iv) a statement of the relief claimed,
- (v) the date of the relevant Claim Notification (if relevant),
- (vi) if not previously appointed, suggested name (or names) for an Adjudicator.

18.1.4 Within 21 days of the issue of the Notice of Dispute the Party issuing the Notice of Dispute shall provide the other Party with the following information to the extent that it is in their possession:

- (i) the date of any Scottish Ministers' determination of the relevant claim,
- (ii) a reference to any agreed record of a meeting between the Scottish Ministers and the Operating Company in which the subject matter of the Dispute has been raised,
- (iii) a statement of any matters that the Scottish Ministers and the Operating Company have already agreed in relation to the procedure for determination of the Dispute, and

- (iv) two copies of all documents that have an important and direct bearing on issues in relation to the Dispute and on which the claimant to the Dispute intends to rely.
- 18.1.5 For the purposes of this Contract the Dispute shall be that stated in the Notice of Dispute and for the purposes of all matters arising concerning this Contract the word "Dispute" shall be construed accordingly.
- 18.1.6 Unless the Contract has already been terminated or abandoned pursuant to the other provisions of this Contract, the existence of a Dispute shall not alter the obligations of the Parties under this Contract.
- 18.1.7 The Dispute shall be referred to and decided in the first instance by the Adjudicator acting as an independent Adjudicator but not as an arbiter.
- 18.1.8 Any decision of the Adjudicator shall be final and binding upon the Parties, unless and until there is either:
  - (i) a final determination by legal proceedings, or
  - (ii) a subsequent amicable settlement between the parties specifically setting aside the decision of the Adjudicator, or
  - (iii) the Dispute is referred to arbitration and an arbitral award has been made.
- 18.1.9 Unless this Contract has already been terminated by the Scottish Ministers the Operating Company shall in every case continue to proceed with the Operations with all due diligence regardless of the nature of any Dispute.
- 18.1.10 Where either Party intends to register any decision of an Adjudicator in the Books of Council and Session for preservation and execution the other party, shall on being requested to do so, forthwith consent to such registration by subscribing the decision before a witness.
- 18.2 Adjudication**
  - 18.2.1 The Adjudication Procedure is given in Schedule 1, Annex 1.
  - 18.2.2 Unless the Parties agree otherwise in writing:
    - (i) any concessions made by one Party to the Adjudicator, or
    - (ii) any concessions or agreements (other than a settlement agreement) that are made in the course of discussions pursuant to settlement of a Dispute,shall be without prejudice and shall not be raised by either Party in any subsequent arbitration or other legal proceedings.
- 18.3 Arbitration**
  - 18.3.1 If the Parties agree a dispute may be settled directly by arbitration and the requirements of Clauses 18.2 and 18.2 concerning adjudication may be waived. In which case, either Party may serve a notice in writing on the other to refer the Dispute to the arbitration of a single arbiter. Such notice shall be referred to as a "Notice of Arbitration".
  - 18.3.2 Where the Adjudicator's decision pursuant to Clause 18.2:
    - (i) is not accepted by either of the Parties, or
    - (ii) where the Adjudicator has failed to make a decision in accordance with the procedure and timescales set out in Schedule 1, Annex 1, or

- (iii) where, subsequent to the Adjudicator's decision concerning the Dispute, where the Adjudicator's decision is not accepted by one of the Parties and the Parties have failed to reach an amicable settlement between themselves,

either Party may serve a notice in writing on the other to refer the Dispute to the arbitration of a single arbiter by a Notice of Arbitration.

18.3.3 The Notice of Arbitration shall contain the following:

- (i) date of the notice,
- (ii) description of the dispute,
- (iii) the relevant findings in the in the adjudicator's decision which the party giving notice disputes,
- (iv) the amount disputed,
- (v) the date of the relevant adjudicator's decision,
- (vi) if not previously appointed, suggested name (or names) for an arbiter, and
- (vii) if applicable, the date of agreement between the parties that the dispute shall be settled directly by arbitration.

18.3.4 The arbiter shall be agreed in writing between the Parties or (failing such written agreement between the Parties, within 30 days of either Party serving on the other a written notice to concur in the appointment of an arbiter) a person to be appointed on the application of either Party to the President for the time being of the Institution of Civil Engineers.

18.3.5 If an arbiter:

- (i) declines the appointment, or
- (ii) after appointment shall be removed by order of a competent court, or
- (iii) shall be incapable of acting, or
- (iv) dies,

and the Parties do not within 30 days of the vacancy arising fill the vacancy then the President of the Institution of Civil Engineers may on the application in writing of either Party appoint an arbiter to fill the vacancy.

18.3.6 Any such reference to arbitration shall be deemed to be a submission to arbitration within the meaning of the *Arbitration (Scotland) Act 2010* as the case may be or any statutory re-enactment or amendment thereof of the time being in force.

18.3.7 The award of the arbiter shall be final and binding on the Parties.

18.3.8 The Adjudicator shall not be eligible for appointment as an arbiter unless the Parties both agree otherwise in writing.

## **SCHEDULE 1**

### **PART 8 – STATUTORY, CONTRACTUAL AND LEGAL REQUIREMENTS**

#### **19. STATUTORY, CONTRACTUAL AND LEGAL REQUIREMENTS**

##### **19.1 New Roads and Street Works Act 1991**

- 19.1.1 For the purposes of this Contract all expressions common to the *New Roads and Street Works Act 1991* and Clauses 19.1.1 to 19.1.3 shall have the same meaning as that assigned to them by the *New Roads and Street Works Act 1991* unless the context otherwise shall require a different meaning.
- 19.1.2 In respect of the *New Roads and Street Works Act 1991* the Scottish Ministers have delegated and do hereby delegate to the Operating Company those Statutory Functions in respect of the *New Roads and Street Works Act 1991* as stated in Schedule 7 Part 5 of this Contract.
- 19.1.3 Thereafter the Scottish Ministers shall notify the Operating Company from time to time in writing of any changes required in respect of such delegated Statutory Functions.
- 19.1.4 The changes to the Statutory Functions referred to in Clause 19.1.3 are deemed to be incorporated into Schedule 7 Part 5 of this Contract.

##### **19.2 Patent Rights**

- 19.2.1 The Operating Company shall indemnify and hold the Scottish Ministers harmless against all liability, loss, damage, costs, expenses and claims suffered or incurred by the Scottish Ministers or any third party arising from use of any Intellectual Property Rights arising from or in association with this Contract including, but not limited to, any claims or proceedings raised against the Scottish Ministers for infringement of Intellectual Property Rights owned by a third party.
- 19.2.2 The Operating Company shall obtain and maintain all necessary licences and permissions associated with Intellectual Property Rights owned or used by the Operating Company under this Contract.

##### **19.3 Royalties**

- 19.3.1 Subject to the other provisions of this Contract the Operating Company shall pay all:
- (i) tonnage royalties and other such payments,
  - (ii) other royalties,
  - (iii) rent,
  - (iv) other payments, and
  - (v) compensation (if any),
- for supplying materials required for Operations.

##### **19.4 Interference with Adjoining Land and Properties**

- 19.4.1 The Operations shall be executed so as not to interfere with:
- (i) the convenience of the public,
  - (ii) access to public or private roads, footpaths or properties,

- (iii) occupation of adjoining land or properties,  
whether in possession of the Scottish Ministers or any other person.

19.4.2 The Operating Company shall take all necessary measures to prevent damage, loss, injury or nuisance caused by, or in connection with, the Operations.

19.4.3 All parts of the Operations shall be carried out without unreasonable noise and disturbance and the Operating Company shall be responsible for any liability on account of noise or other disturbance or nuisance created whilst executing Operations under this Contract.

19.4.4 The Operating Company shall take all necessary precautions in connection with any watercourses, drains, waterways and bodies of water to prevent any:

- (i) interference with the supply to or abstraction from such sources,
- (ii) silting,
- (iii) erosion of their beds or banks, and
- (iv) pollution of the water,

which would affect adversely the quality or appearance thereof or cause injury or death to animal, aquatic or plant life.

19.4.5 The Operating Company shall indemnify and keep indemnified the Scottish Ministers against any claims, demands, proceedings, damages, costs, charges and expenses whatsoever in relation to any of the matters, liabilities and responsibilities referred to in, and/or in respect of breach of Clauses 19.4.1 to 19.4.4, 19.5.1 and 19.5.2.

## **19.5 Avoidance of Damage to Roads**

19.5.1 The Operating Company shall use all reasonable means to prevent any of the roads and bridges on the routes leading to the Unit from being subjected to extraordinary traffic within the meaning of Section 96 of the *Roads (Scotland) Act 1984* by any traffic of the Operating Company or any of its contractors, agents, representatives, suppliers and sub-contractors of any tier.

19.5.2 The Operating Company shall be liable for all claims for damage to any road or bridge on routes leading to, or within, the Unit caused by extraordinary traffic, as defined in Clause 19.5.1.

Such liability shall include any claims as may be made by any competent authority directly against the Scottish Ministers pursuant to any Legislation and the Operating Company shall negotiate and pay all claims arising wholly out of such damage.

19.5.3 In undertaking Operations, the Operating Company shall select routes and use vehicles and restrict and distribute loads so that:

- (i) any extraordinary traffic, as defined in Clause 19.5.1, as shall inevitably arise from the moving of manufactured articles, fabricated articles, equipment, and material to or from and to the Unit shall be limited as far as reasonably possible, and
- (ii) no unnecessary damage or injury is caused to such roads and bridges.

19.5.4 The Operating Company is responsible for, and paying the cost of, the strengthening of bridges and altering or improving any road to facilitate the movement of Construction Plant and associated Operations.

19.5.5 Should any damage occur to any bridge or road in the execution of the Operations, the Operating Company shall notify the Scottish Ministers in writing of the event as soon as it becomes aware of such damage or of a claim from an authority entitled to make such claim.

19.5.6 Where under any Legislation a haulier is required to indemnify the relevant authority against damage, the Scottish Ministers shall not be liable for any claim in respect hereof or in relation thereto.

In all other cases the Scottish Ministers shall negotiate the settlement of and pay all sums due in respect of such claim. The Scottish Ministers shall indemnify the Operating Company in respect thereof and shall be liable for all associated claims.

Should any claim, in the opinion of the Scottish Ministers, be due to any failure on the part of the Operating Company to observe and perform its obligations under Clause 19.5.1, then the amount notified in writing to the Operating Company by the Scottish Ministers to be due to such failure shall be paid by the Operating Company to the Scottish Ministers or deducted from any sum due, or that may become due, to the Operating Company.

19.5.7 Without prejudice to the provisions of Clauses 19.5.1 to 19.5.4, the Operating Company shall comply with, and ensure that its contractors, agents, representatives, suppliers and sub-contractors of any tier, shall comply with the requirements of the relevant road order for routeing of vehicles.

In specifying routeing requirements, the Scottish Ministers do not warrant in any way that such Route(s) shall be available in full or in part for the whole or any part of the Contract Period.

The Operating Company shall provide, erect and maintain in good condition traffic signs of a type consented to by the Scottish Ministers giving effect to these routeing requirements.

## **19.6 Fossils and Antiquities**

19.6.1 All fossils, coins, articles of value or antiquities, and structures or other remains or things of geological or archaeological interest discovered in the Unit by the Operating Company or its contractors, agents, representatives, suppliers and sub-contractors of any tier are deemed to be the absolute property of the Scottish Ministers.

The Operating Company shall take reasonable precautions to prevent its work people or any other persons from removing or damaging any such article or thing. Immediately upon discovery thereof and before removal, the Operating Company shall notify the Scottish Ministers in writing of such discovery and shall execute at the expense of the Scottish Ministers any Order for the treatment or disposal of same.

## **19.7 Operations within Government or Local Authority establishments**

19.7.1 Where Operations are undertaken within the boundaries of a Government or local authority establishment, the Operating Company shall comply with any statutory and other procedures, rules and regulations of such establishment that apply to such Operations.



## **19.8 Data Protection Act – Operating Company's Indemnity**

- 19.8.1 The Operating Company shall (and shall ensure that its contractors and sub-contractors (of all tiers) shall) comply in all respects with the *Data Protection Act 1998* and any related legislation.
- 19.8.2 Where the Operating Company has obtained, without the consent of the Scottish Ministers, personal data within the meaning of the *Data Protection Act 1998* and where it has directly or indirectly breached the Act, it shall indemnify the Scottish Ministers against all resulting losses and claims.

## **19.9 Non Corrupt Practices**

- 19.9.1 The Operating Company shall not:
- (i) offer or give or agree to the giving to any person any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or execution of this Contract or any other contract with the Scottish Ministers or for showing or forbearing to show favour or disfavour of any person in relation to this Contract or any other contract with the Scottish Ministers, or
  - (ii) enter into this Contract or any other contract with the Scottish Ministers in connection with which commission has been paid or agreed to be paid by it or on its behalf or to its knowledge unless before the contract is made particulars of any such commission and of the terms and conditions of any agreement for the payment thereof have been disclosed in writing to the Scottish Ministers.
- 19.9.2 Any breach of the prohibitions referred to in this Clause 19.9 or the commission of any offence under the *Prevention of Corruption Acts 1889 to 1916* and the *Bribery Act 2010* by the Operating Company in relation to this or any other contract with the Scottish Ministers shall entitle the Scottish Ministers to terminate the Contract in accordance with Clause 16 of this Schedule.

Thereupon the provisions of Clause 16 of this Schedule shall have effect as if such breach or offence was expressed as a reason for termination by the other provisions of this Contract. The termination shall be as if made under Clause 16.1.2 and the subsequent procedures and entitlements shall be the same as that for termination under Clause 16.1.2.

In that case the Operating Company shall not be entitled to payments on this Contract or contracts beyond those (if any) provided for by the other provisions of this Contract.

In addition to the costs and expenses recoverable by the Scottish Ministers as provided for in the other provisions of this Contract, the Scottish Ministers shall also be entitled to recover from the Operating Company any other costs or losses incurred by the Scottish Ministers consequent upon such termination under Clause 19.9 and to receive from the Operating Company such sums that, in the opinion of the Scottish Ministers, represents the amount or value of any gift consideration paid or agreed to be paid in breach of this Clause 19.9.

19.9.3 In every sub-contract for any part of the Operations the Operating Company shall incorporate provisions that:

- (i) impose on the sub-contractor liabilities substantially similar to those imposed on the Operating Company by Clauses 19.9.1 and 19.9.2, and
- (ii) entitle the Operating Company to determine the sub-contract on terms equivalent to those contained in the other provisions of this Contract.

19.9.4 The Operating Company will be held liable for the actions or lack of action of any sub-contractor of any tier should a sub-contractor breach the requirements of this Clause 19.9.

19.9.5 In the event of any breach by any sub-contractor of any tier of any of the liabilities referred to in Clause 19.9.3, the Operating Company shall without prejudice to any of its obligations under this Contract take action in accordance with the terms of the sub-contract to exercise its rights against the sub-contractor.

Failure by the Operating Company to take action shall be a reason for termination of this Contract by the Scottish Ministers in accordance with Clause 16 of this Schedule.

When the Operating Company exercises its rights against a sub-contractor in accordance with this Clause 19.9, it shall make no claim nor agree to any claim being made on its behalf against the Scottish Ministers for any consequential delays and extra costs arising from the terms of this Contract.

19.9.6 Any dispute as to the amount recoverable by the Scottish Ministers from the Operating Company under this Clause 19.9 shall be settled in the manner provided by Clause 18 of this Schedule.

#### **19.10 Privacy of Information**

19.10.1 The Operating Company shall only give information concerning this Contract for publication in accordance with the provisions of this Contract as stated in Schedule 3 Part 5.

#### **19.11 Secrecy**

19.11.1 Notwithstanding any other provisions of this Contract, the provisions of the *Official Secrets Acts 1911 to 1989* shall apply to this Contract and to the Operating Company.

The Operating Company shall use all reasonable endeavours to ensure that all persons employed by it in connection with this Contract are aware that these statutory provisions apply to them during the continuance and after the completion or earlier termination of this Contract.

19.11.2 Information concerning this Contract and any information obtained either by:

- (i) the Operating Company in the course of the execution of this Contract, or
- (ii) by any person employed by it in connection with this Contract in the course of such employment,

shall be confidential and shall be used by the Operating Company and by any such person solely for the purpose of this Contract.

Subject to the provisions of Clause 19.10, such information shall not at any time be disclosed by the Operating Company or by any such person without the prior written consent of the Scottish Ministers.

## **19.12 Intellectual Property Rights and Ownership of the Information**

19.12.1 For the purposes of this Clause 19.12, "Information" means all Intellectual Property Rights in and ownership of all data, Designs, drawings, inventions, ideas, photographs, reports, software, specifications, and other materials or works, Operations or activities, of whatsoever nature, both existing and occurring during the Contract:

- (i) conceived,
- (ii) developed,
- (iii) made, or
- (iv) otherwise produced,

by the Operating Company (or its contractors, agents, representatives, suppliers and sub-contractors of any tier) or given to the Operating Company by anyone or brought to the attention of the Operating Company (or its contractors, agents, representatives, suppliers and sub-contractors of any tier) by anyone (whether in electronic form, on paper or in any other form) in the course of or arising from the execution of the Operations.

The Information includes the other information referred to or specified in the other provisions of this Contract.

The Information is hereby assigned to and vests in and is the property of the Scottish Ministers.

19.12.2 By entering into this Contract, the Operating Company shall (and shall procure that all of its contractors, agents, representatives, suppliers and sub-contractors of any tier) assign, make over and transfer all right, title, and interest, present and future, to the Information and the Intellectual Property Rights in the Information to the Scottish Ministers.

The Operating Company shall execute or procure the execution of any deed or document and do all other things necessary to ensure that all such right, title, and present and future interest in and to the Information and the Intellectual Property Rights in such vest in the Scottish Ministers.

19.12.3 The Operating Company shall assist the Scottish Ministers in connection with any application to record or register any Intellectual Property Rights in respect of this Contract or any of the Information and shall do all such acts and things as the Scottish Ministers shall require in writing in connection with any such assistance.

19.12.4 The Operating Company irrevocably appoints the Scottish Ministers to be its agent and in its name and on its behalf to do all such acts and things and to sign all such deeds and documents as may be necessary in order to provide to the Scottish Ministers the full benefit of the provisions of this Clause 19.12.

19.12.5 The Operating Company hereby confirms that, it shall procure that any third parties it may appoint as contractors, agents, representatives, suppliers or sub-contractors, shall appoint the Scottish Ministers to act as agent on behalf of such third parties in accordance with the provisions of this Clause 19.12. For the purposes of this Clause 19.12.5, a certificate signed by the Director shall be conclusive evidence that:

- (i) any act or thing done by the Scottish Ministers, or
- (ii) any deed or document executed by the Scottish Ministers,

falls within the authority of the Scottish Ministers to act as agent in accordance with the provisions of this Clause 19.12.

The Operating Company shall (and shall procure that all of its contractors, agents, representatives, suppliers and sub-contractors) warrant and undertake that they shall:

- (iii) be free to assign all right, title and interest, present and future in and to such Information and the Intellectual Property Rights therein to the Scottish Ministers in accordance with this Clause 19.12 without any third party claims, liens, charges or encumbrances of any kind, and
- (iv) be free of any duties or obligations to third parties that may conflict with the terms of this Clause 19.12.

19.12.6 The Operating Company shall warrant that the Information shall not infringe any Intellectual Property Rights of which a third party is the proprietor.

19.12.7 Notwithstanding and without prejudice to any other provision of this Contract, or to the application of the *Official Secrets Acts 1911 to 1989*, the Operating Company shall keep and shall ensure that its agents, employees, and representatives, keep the Information secret and confidential and shall:

- (i) not at any time for any reason whatsoever disclose them to any third party,
- (ii) use them, or
- (iii) permit them to be so disclosed or used,

except as shall be permitted by the other provisions of this Contract to enable the Operating Company to execute the Operations.

19.12.8 Notwithstanding the other provisions of this Contract, the Operating Company shall indemnify and keep indemnified the Scottish Ministers and any employee or representative of the Scottish Ministers against all actions, charges, claims, costs, demands, expenses, losses, and suits incurred by or brought against the Scottish Ministers, or any employee or representative of the Scottish Ministers, arising from or in connection with, or incurred by reason of, any breach of this Clause 19.12 by the Operating Company and any infringement or alleged infringement of any Intellectual Property Rights by reason of the use or possession of the Information, or any part of it, by the Scottish Ministers, or any employee or representative of the Scottish Ministers, including without prejudice to the generality of the foregoing:

- (i) any legal expenses incurred by the Scottish Ministers or any member, employee or representative of the Scottish Ministers,
- (ii) any sums paid to any third party by way of damages or in settlement of any claim by a third party in respect of any such infringement or alleged infringement, and

- (iii) the actual cost of any such substitute or replacement for any item that the Scottish Ministers are unable to use in consequence of any such infringement or alleged infringement.

19.12.9 The Scottish Ministers shall permit the Operating Company to use all data, reports, drawings, specifications, Designs, photographs, ideas, inventions, software, and any other materials or works in respect of which the Intellectual Property Rights are vested in it but only for the purposes of and to the extent necessary for the proper provision of the Operations in accordance with this Contract and for no other purpose whatsoever, unless the Scottish Ministers shall have given consent in writing to the Operating Company that permits the use of such for another purpose.

19.12.10 The rights and obligations of the Parties under this Clause 19.12 shall survive the expiry or the termination of this Contract howsoever arising.

### **19.13 Freedom of Information**

19.13.1 The Scottish Ministers may need to disclose or publish all information submitted to them.

Without prejudice to the foregoing generality, the Scottish Ministers may disclose information in compliance with the *Freedom of Information (Scotland) Act 2002*, the *Environmental Information Regulations (Scotland) 2004* and judicial orders and any similar or related legislation that may exist in other jurisdictions ("Information Acts"). The decisions of the Scottish Ministers regarding the disclosure, or otherwise, of information shall be final and conclusive under the terms of the Information Acts.

Additionally, the Scottish Ministers may also disclose all information submitted to them in accordance with this Contract to the Scottish and United Kingdom parliaments and to any other department, office or agency of Her Majesty's governments in Scotland and the United Kingdom and their servants and agents. The Operating Company acknowledges that, when making such disclosures, the Scottish Ministers are unable to impose any restriction upon the information that they provide and that such disclosure shall be deemed not to be a breach of this Contract.

19.13.2 Information regarding the Intellectual Property Rights of each of the Parties shall be deemed commercially sensitive information for the purposes of the Information Acts.

19.13.3 The Operating Company shall (and shall procure that all of its contractors, agents, representatives, suppliers and sub-contractors of any tier) assist the Scottish Ministers at no additional charge in meeting any reasonable requests for information in relation to this Contract which are made to the Scottish Ministers in connection with the Information Acts. The Scottish Ministers may, from time to time, serve on the Operating Company an information notice requiring the Operating Company within such time and in such form as is specified in the information notice, to furnish to the Scottish Ministers such information as the Scottish Ministers may reasonably require relating to such requests for information. The Operating Company acknowledges that in responding to such requests for information, the Scottish Ministers shall be entitled to provide information relating to this Contract.

## **20. THE CONSTRUCTION (DESIGN AND MANAGEMENT) REGULATIONS**

### **20.1 The Construction (Design and Management) Regulations**

20.1.1 For the purpose of this Clause 20 of this Schedule the terms "client", "CDM Co-ordinator", "construction phase plan", "designer" and "Principal Contractor" shall have the meanings assigned to them in the CDM Regulations and associated *Approved Code of Practice*.

20.1.2 The Operating Company shall employ a suitable person, approved by the Scottish Ministers, to act as a single point of contact for the client for the purposes of the CDM Regulations, who shall be known as the Client's Representative, in accordance with the requirements of Schedule 6 Part 2.

20.1.3 This shall be a named person within the Operating Company's management team who shall act independently of the Operating Company's commercial management of the Contract. The Operating Company shall respect the need for independence and ensure that the Client's Representative can act independently.

The Client's Representative may not be changed without prior agreement of the Scottish Ministers. Such agreement shall be sought by the Operating Company not less than 28 days prior to the proposed date of the change.

20.1.4 If subsequent to the appointment of the Client's Representative the Scottish Ministers are dissatisfied with the work of the Client's Representative, the Operating Company shall procure a replacement within 28 days of the Scottish Ministers notification. If the Operating Company fails to procure a replacement, the Scottish Ministers may make their own appointment and the costs of such appointment will be deducted from amounts payable to the Operating Company under Clause 10 of this Schedule.

20.1.5 The Operating Company shall be responsible for acting as designer and CDM Coordinator or shall appoint other organisations to be designer(s) or CDM Coordinator(s) as shall be required during the Contract Period.

20.1.6 The Operating Company shall notify the Scottish Ministers in writing of the appointment of designer(s) and CDM Coordinator(s) and any changes made during the Contract Period in accordance with the requirements of Schedule 5 Part 4.

20.1.7 Where the CDM Regulations apply to the Operations undertaken by a Works Contractor, the Operating Company is appointed to act in the role of CDM Co-ordinator for Works Contracts. Such appointment is deemed to be accepted by the Operating Company by the signing of this Contract.

20.1.8 When taking any actions in any role for which it is responsible under the CDM Regulations, the Operating Company shall record in writing that such actions are being taken in accordance with the provisions of the CDM Regulations and the role under which the actions are taken.

20.1.9 Any action required by the Principal Contractor or the CDM Co-ordinator pursuant to Clauses 20.1.5 to 20.1.8, with particular reference to any alteration or amendment to the construction phase plan, shall not entitle the Operating Company to any additional payment or extension of time for such provision and action.

## **SCHEDULE 1**

### **PART 9 – TAX MATTERS INCLUDING VAT**

#### **21. TAX PROVISIONS**

##### **21.1 Tax Matters**

21.1.1 The rates and prices contained in the Schedule of Rates and Prices, in Schedule 2 Part 2, are deemed to take account of the levels and incidence 42 days prior to the date for the return of Tenders of:

- (i) the taxes, levies, contributions, premiums, or refunds, which shall be by law payable by or to the Operating Company in respect of their workpeople engaged on this Contract,
- (ii) any landfill tax payable by the Operating Company pursuant to the *Finance Act 1996* and *Landfill Tax Regulations* thereof for the time being in force, and
- (iii) any aggregates levy payable by the Operating Company or his sub-contractors pursuant to the *Finance Act 2001* or any statutory re-enactment or amendment thereof for the time being in force.

The rates and prices contained in the Schedule of Rates and Prices shall not take account or be deemed to take account of any level or incidence of the matters, referred to in paragraphs (i), (ii) and (iii) above, foreseeable or known to take effect at some later date.

21.1.2 If after the date 42 days prior to the date for return of Tenders there shall occur any change in the level or incidence of any such taxes, levies, contributions, premiums, or refunds, (but excluding income tax and any levy payable under the *Industrial Training Act 1982* thereof for the time being in force) the Operating Company shall so notify in writing the Scottish Ministers.

Notwithstanding any other provisions of this Contract the Operating Company shall provide all the necessary information which in the opinion of the Scottish Ministers is necessary to demonstrate any proposed adjustment to the Contract Price resulting from any such change. Such information shall include, but should not be limited to, proof of payments actually made before and after the change for which the Operating Company seeks additional reimbursement.

All payments to the Operating Company by the Scottish Ministers after the provision of such information shall take account of the net amount of such additions or deductions to which such information relates.

21.1.3 Clause 21.1.2 shall only apply to a matter whose effect on prices is not be included in the calculation of any of the indices referred to in Clause 10.7 of this Schedule.

##### **21.2 Value Added Tax**

21.2.1 The Operating Company is deemed not to have allowed in the Schedule of Rates for any Value Added Tax that may be chargeable on any taxable supplies made to the Scottish Ministers made under this Contract.

21.2.2 The Operating Company shall not include in any Statement submitted under Clause 10 any element on account of Value Added Tax in any item or claim contained in or submitted with any such Statement.

- 21.2.3 Without prejudice to the provisions of Clause 21.2.4, the Operating Company shall concurrently with the submission of every Statement referred to in Clause 21.2.2 provide to the Scottish Ministers a written assessment showing those supplies of goods and services and the values thereof included in each said Statement and on which Value Added Tax is properly chargeable by Her Majesty's Revenue and Customs on the supply to the Scottish Ministers of any goods or services by the Operating Company under this Contract at a rate other than zero.
- 21.2.4 In addition to the payments due to the Operating Company by the Scottish Ministers pursuant to the other provisions of this Contract, the Scottish Ministers shall separately identify and pay to the Operating Company any Value Added Tax properly chargeable by the Operating Company on the supply to the Scottish Ministers of any goods or services by the Operating Company under this Contract.
- 21.2.5 If any dispute arises between either the Scottish Ministers or the Operating Company and Her Majesty's Revenue and Customs and in connection with any Value Added Tax chargeable or alleged to be chargeable in connection with this Contract, including but not limited to the execution of the Operations, the Scottish Ministers and the Operating Company shall provide each other with any support and assistance as may be necessary to resolve such dispute.
- 21.2.6 Clause 18 does not apply to any disputes arising under Clauses 21.2.1 to 21.2.3.

### **21.3 Construction Industry Scheme**

- 21.3.1 The Operating Company is deemed a Construction Industry Scheme contractor and shall be required to register accordingly with Her Majesty's Revenue and Customs.
- 21.3.2 In accordance with the requirements of the Construction Industry Scheme, the Operating Company shall verify the employment status of all subcontractors employed by it during the Contract Period in order to pay such subcontractors correctly.
- 21.3.3 The Operating Company shall record the gross amount of:
- (i) each payment it makes to a subcontractor, excluding any Value Added Tax,
  - (ii) the amount of any deduction it makes from a payment before it is paid to the subcontractor, and
  - (iii) if a deduction was made, the amount of any materials costs, excluding any Value Added Tax.
- 21.3.4 The Operating Company shall keep such records for at least six years after the end of the tax year to which they relate. If requested by the Scottish Ministers during the period stated in this clause, the Operating Company shall make such records available to the Scottish Ministers.



## **SCHEDULE 1**

### **PART 10 – TUPE**

#### **22. TRANSFER OF UNDERTAKINGS**

##### **22.1 Transfer of Undertakings**

22.1.1 Employees of the operating company engaged by the Scottish Ministers before the Commencement of Service Date, who performed operations which are equivalent or substantially similar to the Operations to be undertaken by the Operating Company (and/or any contractor or subcontractor of any tier), are eligible to transfer to the Operating Company by operation of the TUPE Regulations.

22.1.2 The Parties acknowledge that, at the Contract Commencement Date, the "TUPE Regulations" are likely to apply to this contract so that the transferring employees become the employees of the Operating Company on the Commencement of Service Date.

Before and with effect from the Commencement of Service Date the Operating Company warrants that it will (and it will procure that any contractor or subcontractor of any tier will) comply with its obligations under the TUPE Regulations.

The Parties acknowledge that where the TUPE Regulations apply at the Contract Termination Date the Operating Company (and/or any contractor or subcontractor of any tier) has further obligations under the TUPE Regulations and the Operating Company warrants that it will (and it will procure that any contractor or subcontractor of any tier will) comply with those obligations.

22.1.3 The Scottish Ministers shall not be liable for any failure of the Operating Company or any contractor or sub-contractor (of any tier) to fulfil its obligations under the TUPE Regulations prior to the Contract Commencement Date.

The Operating Company will pay, provide and settle in full all remuneration and benefits of any kind which are due to the Contract Personnel. These will be paid or provided no later than the date such remuneration and/or benefits are due, or if such remuneration and/or benefits are due after the Contract Termination Date, the Operating Company shall make a payment to the Scottish Ministers equivalent to such remuneration and/or benefits on the Contract Termination Date.

22.1.4 At any time during the existence of this Contract or after its expiry or termination, the Operating Company shall provide to the Scottish Ministers in writing such Contract Personnel Information as the Scottish Ministers may require.

Such information shall be provided within eight weeks of receipt of any request, or such other reasonable period as agreed by the Scottish Ministers, and in such formats as may be specified by the Scottish Ministers.

22.1.5 The Operating Company shall supply the TUPE Information as described in Table 22.1.5/A, whether requested or not to the Scottish Ministers in writing (or in such format as may be specified by the Scottish Ministers), at least 24 months before the end of the Contract Expiry Period. The TUPE Information is only to include details relating to those of the Contract Personnel who are employees of the Operating Company (and/or any contractor or subcontractor of any tier) and will be organised by reference to the particular employer.

**Table 22.1.5/A – TUPE Information Required**

<b>Required Information</b>
Number of employees
Each employee post title
Location of each employee post
Written Statement of Employee Particulars (as defined in TUPE Regulations) for each employee
Salary or wage, including additional benefits and earnings (e.g. overtime and bonuses)
Accommodation and travel allowances paid as part of employment package (excludes information on reimbursement of "as incurred expenses")
Frequency of salary or wage payments
Date of commencement of last period of service
Period of notice for each employee to terminate employment
Pension scheme terms and conditions
Training records and qualifications
Long term sick leave records
Disciplinary records
Details of any entitlement to enhanced rights on being made redundant (whether it is an entitlement to a cash payment or a pension benefit)
Details of the percentage of the total time employed that each employee is engaged in performance of the Operations
Continuous service date
Copies of rules of any pension scheme which any employee is a member of
Maternity leave, paternity leave and parental leave records
Details of any current, outstanding or anticipated grievances or disputes.

- 22.1.6 After the TUPE Information has been provided, the Operating Company shall notify the Scottish Ministers in writing of any change to any part of the TUPE Information and shall co-operate with any reasonable requests made by the Scottish Ministers or any prospective tenderer or incoming operating company concerning the TUPE Information both within 14 days of a change or receipt of a request, whichever is the earlier (such information described as the Updated TUPE Information).
- 22.1.7 The Operating Company warrants that the TUPE Information, the Updated TUPE Information and Contract Personnel Information, will be complete and accurate as at the date it is disclosed.
- 22.1.8 The Operating Company irrevocably waives, and procures that its contractors, and subcontractors of any tier, irrevocably waive, the right of confidentiality and any other right that it or they may have in respect of the TUPE Information, the Updated TUPE Information, or the Contract Personnel Information.

22.1.9 The Scottish Ministers may disclose any of the TUPE Information, Updated TUPE Information and Contract Personnel Information to any prospective tenderer and incoming operating company and will ensure that, prior to such disclosure, the prospective tenderer or the incoming operating company undertakes not to disclose (unless required by law to do so) such information to any other person other than a person who:

- (i) is a servant, agent or legal adviser of the prospective tenderer or incoming operating company, and
- (ii) has undertaken not to disclose that information unless required by law to do so.

If after the Contract Termination Date:

- (iii) any contract of employment relating to an individual who is named in the TUPE Information provided under Clause 22.1.13 but who has been identified by the Operating Company as not being eligible to transfer, or who has incorrectly been identified as being eligible to transfer by the Operating Company under Clause 22.1.13, shall have effect as if originally made between the Scottish Ministers (or an incoming operating company) and the individual or any individual claims that their contract has this effect (together "the Undisclosed Employees"), or
- (iv) any collective agreement shall have effect as if originally made between the Scottish Ministers (and/or an incoming operating company) and any party to the collective agreement or any party claims that a collective agreement has this effect (together "the Undisclosed Agreements"),

the Scottish Ministers (or an incoming operating company) may forthwith terminate the Undisclosed Agreements and/or employment of the Undisclosed Employees.

22.1.10 The Operating Company shall indemnify and keep indemnified the Scottish Ministers or (if the Scottish Ministers so direct) any incoming operating company in respect of any claims, costs (including Scottish Ministers' costs), expenses, payments, damages, compensation awards and liabilities arising from:

- (i) any claim by any person that the transfer of his employment at the Commencement of Service Date to the Operating Company (or any contractor or subcontractor of any tier) involves or would involve a substantial change in working conditions to his material detriment or a claim that it gives or would give him grounds to claim constructive dismissal or any objection to the transfer by a Transferring Employee,
- (ii) the employment of the Contract Personnel and the Undisclosed Employees by the Operating Company (or any contractor or subcontractor of any tier),
- (iii) the employment of the Undisclosed Employees, the termination of the employment of the Undisclosed Employees or the termination of the Undisclosed Agreements, in each case by the Scottish Ministers or an incoming operating company,
- (iv) any act or omission by the Operating Company (or any contractor or subcontractor of any tier) in relation to the Contract Personnel,
- (v) any claim (including any entitlement of any Contract Personnel or Undisclosed Employee consequent on such a claim) by any trade union or

staff association or employee representative arising from or connected with any failure by the Operating Company (or any contractor or subcontractor of any tier) to comply with any legal obligation to such trade union or staff association or employee representative (whether under the TUPE Regulations or otherwise),

- (vi) any failure by the Operating Company (and/or any contractor or subcontractor of any tier) to comply with its obligations under Clause 22 of this Schedule, and
- (vii) any failure by the Operating Company or any contractor or subcontractor of any tier, to comply with its obligations under regulations 11 and 13 of the TUPE Regulations whether on or before the Contract Commencement Date or on or before the end of the Contract Period.

22.1.11 The Operating Company shall indemnify the Scottish Ministers and be liable for any additional employment costs incurred by the Scottish Ministers and any successor organisation to the Operating Company resulting from inaccurate or incomplete information submitted to the Operating Company under this Clause 22. Employment costs referred to in this clause shall also include costs of terminating employment of individuals and costs resulting from the Scottish Ministers' and the successor's organisation's representation at employment tribunals.

22.1.12 The Operating Company shall be liable for any costs incurred by the Scottish Ministers and any successor organisation to the Operating Company due to the non-disclosure by the Operating Company of any collective agreements that are subject to TUPE Regulations.

22.1.13 Within the period six months prior to the Contract Expiry Date, the Operating Company shall not (and shall procure that any contractor or sub-contractor of any tier) shall not (a) alter the terms and conditions of the Contract Personnel (b) other than with the consent of the Scottish Ministers, increase the number of total Contract Personnel assigned to the Operations or (c) change the identity of the Contract Personnel unless such person is replaced with an individual of equivalent or greater level or skill and experience within six months prior to the Contract Expiry Date without the agreement of the Scottish Ministers. The requirements of this clause shall also apply following:

- (i) any event given in Clause 16.1 which enables the Scottish Ministers to terminate the contract, or
- (ii) following the issue of a notice of termination under Clause 16.1 of Schedule.

The requirements of this clause do not apply to changes arising in order to comply with nationally agreed settlements or legal requirements.

22.1.14 Within 21 days of any notice of termination the Operating Company shall provide the Scottish Ministers with the Contract Personnel Information and the TUPE Information. The Operating Company shall identify those employees whose details are included in the TUPE Information but who are not eligible to transfer by operation of the TUPE Regulations to the Scottish Ministers or an incoming operating company.

22.1.15 The provisions of this Clause 22 shall apply during the existence of this Contract and after its expiry or termination, howsoever arising.

## SCHEDULE 1

### PART 11 – SPECIAL REQUIREMENTS OF RELEVANT ORGANISATIONS

#### 23. SPECIAL REQUIREMENTS OF RELEVANT ORGANISATIONS

##### 23.1 Relevant Organisations

23.1.1 "Relevant Organisation" means any of the authorities, undertakers and other organisations listed in Table 23.1.1/A and includes their successor organisations and any subsidiary or parent undertakings (within the meaning of Section 1162 of the *Companies Act 2006* save that for the purposes of subsection (2) of that Section an undertaking shall be treated as a member of another undertaking if any shares in that other undertaking are held by a person or that person's nominee by way of security or in connection with the taking of security granted by the undertaking) of such organisations.

**Table 23.1.1/A – Relevant Organisations**

British Waterways
British Telecommunications Group plc
The Civil Aviation Authority
The Coal Authority
Government establishments
The Health and Safety Executive
Historic Scotland
National Grid plc
Network Rail Infrastructure Limited
Scotia Gas Networks plc
Scottish and Southern Energy plc
Scottish Environment Protection Agency
Scottish Government Rural and Environment Directorate
Scottish Natural Heritage
Scottish Power Ltd
Scottish Water Limited
Thus Group plc
Traffic Scotland
Virgin Media Ltd

##### 23.2 Compliance with Relevant Organisation's Requirements

23.2.1 The Operating Company shall be responsible for making its own arrangements for undertaking Operations which involve or impinge upon the interests of any Relevant Organisation.

When making arrangements for, and when undertaking, such Operations the Operating Company shall comply with the Special Requirements of all applicable Relevant Organisations.

23.2.2 The Operating Company shall be responsible for making all necessary applications for track Possessions, canal stoppages and closures of public rights of way.

23.2.3 The Operating Company shall also comply with any reasonable requirements of the Relevant Organisation that are specific to any particular Order.

23.2.4 Compliance with the requirements referred to in Clause 23.2.3 shall not relieve the Operating Company of any of its other obligations and liabilities under this Contract.

Fulfilment of such other obligations and liabilities shall not relieve the Operating Company of its responsibility to comply with the Special Requirements of the Relevant Organisation.

This is Annex 1 to Schedule 1 referred to in the foregoing Agreement between Scottish Ministers and BEAR Scotland Limited.

## **SCHEDULE 1**

### **SCHEDULE 1 ANNEX 1 – Adjudication Procedure**

#### **1. ADJUDICATION PROCEDURE**

- 1.1.1 Where an Adjudicator has been named in the Contract, or agreed by the Scottish Ministers and the Operating Company prior to the issue of the Notice of Dispute, the Party issuing the Notice of Dispute shall at the same time send to the Adjudicator a copy of the Notice of Dispute and a request for confirmation, within two days of the date of issue of the Notice of Dispute, that the Adjudicator is able and willing to act.

Where an Adjudicator has not been so named or agreed, the Party issuing the Notice of Dispute may include with the Notice of Dispute the names of one or more persons with their addresses who have agreed to act, any one of whom would be acceptable to the Party issuing the Notice of Dispute, for selection by the other Party. The other Party shall select and notify the Party issuing the Notice of Dispute and the selected Adjudicator within two days of the date of issue of the Notice of Dispute.

If a request for confirmation is not received or a selection is not made, both as described above, or the Adjudicator does not accept or is unable to act, then either Party may request the Institution of Civil Engineers to nominate an Adjudicator within five days of receipt of the request. The request shall be in writing, accompanied by a copy of the Notice of Dispute and the appropriate fee.

- 1.1.2 The Adjudicator shall have power to open up, review, and revise any:

- (i) decision,
- (ii) opinion,
- (iii) instruction,
- (iv) direction,
- (v) notice (with the exception of statutory notices),
- (vi) objection, or
- (vii) certificate,

of any person given or made pursuant to this Contract relating in any way to the Dispute save as otherwise expressly provided within this Contract.

- 1.1.3 The Adjudicator shall have power to appoint suitably qualified and experienced independent professional advisors as he may reasonably require (and any necessary secretarial assistance as is necessary) to advise him on any issues and the Adjudicator shall have proper regard to such advice in reaching his decision.

- 1.1.4 Where after consideration of the written submissions of the Scottish Ministers and the Operating Company the Adjudicator shall be of the opinion that:

- (i) such written submissions shall be insufficient for him to reach a decision, or

- (ii) clarification of the precise question that is being addressed to him is required,

then he shall so notify in writing the Scottish Ministers and the Operating Company forthwith and in that event he shall be entitled to determine the further procedures which he considers necessary to enable him to resolve the Dispute.

The Adjudicator shall be required to reach a decision in writing in accordance with the timetable hereinafter provided.

In the event of the Adjudicator failing to do so either the Scottish Ministers or the Operating Company may serve a fresh notice in terms of paragraph 1.1.1 of this Schedule 1, Annex 1 and request another Adjudicator to act in accordance with the provisions of this Schedule 1, Annex 1. Such Adjudicator shall provide a reasoned decision in writing to the Scottish Ministers and the Operating Company.

1.1.5 The Adjudicator shall have power:

- (i) to hold a hearing or other such meeting to take oral evidence from the Scottish Ministers and the Operating Company,
- (ii) to fix the date time and place of any meetings, hearings or inspections that he deems appropriate giving the Scottish Ministers and the Operating Company reasonable notice thereof and declaring that the Scottish Ministers and the Operating Company may appoint representatives to appear on their behalf at any hearing,
- (iii) to examine any witness or conduct an inspection of any property or thing relevant to the Dispute in the absence of any other representative of the Scottish Ministers or the Operating Company or any other person,
- (iv) to allow at his discretion refuse or limit the appearance of witnesses whether witnesses of fact or expert witnesses,
- (v) to allow any witness who gives oral evidence at a hearing to be questioned by the Scottish Ministers and the Operating Company under the control of the Adjudicator.

The Adjudicator may put questions at any stage of the examination of the witness and such witness shall be obliged to answer:

- (vi) to allow at his discretion the evidence of any witness to be presented in written form either as a signed statement or by a duly sworn affidavit. Either the Scottish Ministers or the Operating Company may make representations that such a witness shall attend for oral examinations at a hearing.

If the Adjudicator so orders and if the witness thereafter fails to attend the Adjudicator may place such weight on the evidence as he considers fit or exclude it altogether.

The Adjudicator shall:

- (vii) at any time permit either the Scottish Ministers or the Operating Company to amend any submission,
- (viii) continue with the reference to the adjudication in default of appearance or of any act by either the Scottish Ministers or the Operating Company in like



manner as a Judge of the Court of Session may continue with proceedings in that Court when either the Scottish Ministers or the Operating Company shall fail to comply with an order of that Court or requirement of rules of Court including power to strike out any claim defence counter claim or other submission and to make any decision consequent upon any such striking out in the event that either the Scottish Ministers or the Operating Company shall fail within the timescale specified in this procedure or in any order to do any act required by this procedure or to comply with any order of the Adjudicator,

- (ix) order either the Scottish Ministers or the Operating Company to produce to the other and to the Adjudicator for inspection and to supply copies of any documents in that party's possession custody or power which in the event of a Dispute the Adjudicator determines to be relevant.

Subject to the rules of privilege and in the event of privilege being claimed the Adjudicator shall have power hereunder to decide this question:

- (x) to order either the Scottish Ministers or the Operating Company to answer interrogations on the application to the other party,
- (xi) to require the Scottish Ministers or the Operating Company to submit if required in advance of any meeting or hearing or inspection a list of questions that they require him to treat with special attention,
- (xii) to order the inspection preservation storage or interim custody of any property or thing relevant to the Dispute under the control of either Scottish Ministers or the Operating Company,
- (xiii) to order samples to be taken observations to be made and experiments to be tried that may in the Adjudicator's discretion be necessary or expedient for the purpose of obtaining full information or evidence,
- (xiv) to require the Scottish Ministers and the Operating Company to provide written statements of their respective cases in relation to particular issues to provide written answers and to provide reasons for any disagreement,
- (xv) to award simple interest to the successful party to the adjudication on any sums held to be due from one party to the other from any date including any date prior to the date of reference to adjudication.

The rate of interest shall be at the discretion of the Adjudicator:

- (xvi) to ensure that all meetings hearings or inspections shall be in private unless the Scottish Ministers and the Operating Company agree otherwise, and
- (xvii) to allow the Scottish Ministers and the Operating Company to appoint representatives to appear on their behalf subject to such proof of authority as the Adjudicator may require.

1.1.6 Notwithstanding any of the foregoing nothing in this procedure shall be taken as conferring power upon the Adjudicator to order:

- (i) either the Scottish Ministers,
- (ii) the Operating Company, or
- (iii) a representative of either the Scottish Ministers or the Operating Company,

to give evidence (whether in person or by way of documentary or similar evidence) that could not be ordered if the proceedings were before the Court of Session.

1.1.7 The Adjudicator may correct his decision so as to remove a clerical or typographical error arising by accident or omission.

1.1.8 The Dispute shall be referred to the Adjudicator within seven days of the notice referred to in paragraph 1.1.1 of this Schedule 1, Annex 1. The Adjudicator shall issue his decision in writing to both the Scottish Ministers and the Operating Company within 28 days of referral of the Dispute to him or such longer period after referral as shall be agreed by the Scottish Ministers and the Operating Company. The period of 28 days may be extended by up to 14 days with the consent of the Party that issued the Notice of Dispute.

The Adjudicator may make separate decisions on different issues at different times.

1.1.9 The Adjudicator's decision shall be binding until the Dispute shall be finally determined by legal proceedings by agreement or by arbitration as provided in Clause 18.3 of this Schedule 1.

1.1.10 The Adjudicator shall act impartially and may take the initiative in ascertaining the facts and the law necessary to determine the Dispute.

1.1.11 The Adjudicator shall not be liable for anything done or omitted in the discharge of his functions as Adjudicator unless the act of omission shall be in bad faith and any employee or agent of the Adjudicator shall similarly not be liable.

1.1.12 The costs of and incidental to retaining the Adjudicator and any referral in terms of this procedure and the appointment of the Adjudicator shall be within his award and failing which shall be borne equally between the Scottish Ministers and the Operating Company.

1.1.13 Unless otherwise ordered by the Adjudicator or agreed between the Scottish Ministers and the Operating Company all notices required for the adjudication procedure shall be in writing.

All notices required by this procedure shall be issued in accordance with Clause 2.11 of Schedule 1 Part 1.

1.1.14 Unless the intended recipient shall prove otherwise:

- (i) documents sent by first class post shall be deemed to have been received two working days after posting,
- (ii) Electronic Copy faxes or deliveries shall be deemed to have been received at the time transmission ceases, and
- (iii) hand delivered documents shall be deemed to have been received at the time of delivery to the address stated on their face.

References in the adjudication procedure to receipt of documents shall be construed accordingly.

1.1.15 Notices shall be effective from the time of receipt.

Periods of time measured with reference to the giving sending or serving of a document shall be measured with reference to the time that the document shall have been received.

- 1.1.16 Unless otherwise ordered by the Adjudicator or agreed in writing between the Scottish Ministers and the Operating Company all notices and other documents received on a day which is not a Working Day or after 17:00 hours on any Working Day shall be deemed to have been received on the following Working Day.
- 1.1.17 Unless otherwise agreed by both the Scottish Ministers and the Operating Company any meetings called by the Adjudicator at which both the Scottish Ministers and the Operating Company shall be in attendance shall be held in Scotland.
- 1.1.18 In relation to this Schedule 1, Annex 1 – Adjudication Procedure, time periods stated in days exclude Christmas Day, Good Friday and bank holidays in Scotland. Saturdays and Sundays are included.



This is Annex 2 to Schedule 1 referred to in the foregoing Agreement between Scottish Ministers and BEAR Scotland Limited.

## SCHEDULE 1

### SCHEDULE 1 ANNEX 2 – Form of Model Bond and Undertaking

#### BOND AND UNDERTAKING

by

***To be inserted***

(hereinafter referred to as the "Guarantor")

to

**The Scottish Ministers**

#### WHEREAS

*[to be inserted]* (hereinafter referred to as the "Operating Company") and the Scottish Ministers have entered into a contract dated *[to be inserted]* for the management and maintenance of the Scottish Trunk Road Network for the <Name of Unit> Unit (hereinafter referred to as "the Contract");

NOW THEREFORE *[to be inserted]* AND THE SCOTTISH MINISTERS HAVE AGREED AS FOLLOWS:

1. Subject to Clause 4 hereof, we, *[to be inserted]* (hereinafter referred to as the "Guarantor") give you The Scottish Ministers our guarantee and undertake and bind and oblige ourselves to pay to you The Scottish Ministers within 10 Working Days of your first demand:
  - (a) in the event of termination of the Contract, the sum of up to £1,300,000 except in the event of termination pursuant to Clause 16.1.4 of Schedule 1 where such termination shall not be as a result of a Default by the Operating Company, or
  - (b) in the event of any failure by the Operating Company to pay to you when due any sum or sums due under the Contract, the full amount of such sum or sums,

provided that such demand for payment in writing, delivered by hand, by post or by courier service, shall be accompanied by notification by you or on your behalf that such termination has occurred and that the amount of loss incurred or likely to be incurred by you resulting from such termination, or that such sum or sums have not been paid, or that such sum or sums are due to The Scottish Ministers as the case may be.

2. The Bond and Undertaking shall expire and the Guarantor's liability hereinafter shall be released and discharged absolutely, at the end of the Contract Period or settlement of the final account whichever is the later except in respect of any demand in writing made before such date.

3. This Bond and Undertaking shall not be prejudiced by any alteration or variation in the terms of the Contract or any time or indulgence given by The Scottish Ministers to the Operating Company.
4. The Guarantor's liability under this Bond and Undertaking shall not exceed in aggregate the sum of £1,300,000.
5. This Bond and Undertaking and the benefit thereof shall not be assigned by any of the parties hereto without the prior written consent of all the parties hereto.
6. This Bond and Undertaking shall be governed by and construed in accordance with the laws of Scotland and the parties hereto submit to the jurisdiction of the Scottish Courts:

IN WITNESS WHEREOF these presents consisting of this page 2 of 2 and the preceding page 1 of 2 are duly signed and witnessed:

Dated this ..... day of .....

Signature ..... in the capacity of .....

Name ..... (print in BLOCK CAPITALS)

Witness signature .....

Witness name ..... (print in BLOCK CAPITALS)

Duly authorised to sign a Bond Guarantee or Undertaking for and on behalf of:

.....

Postal Address .....

.....

Telephone No: ..... Facsimile No: .....

This is Annex 3 to Schedule 1 referred to in the foregoing Agreement between Scottish Ministers and BEAR Scotland Limited.

## **SCHEDULE 1**

### **SCHEDULE 1 ANNEX 3 – Lane Occupation Charges**

The Lane Occupation Charges that will be applied by the Scottish Ministers pursuant to Clause 15.5.1 are as follows:

<b>Trunk Road</b>	<b>Lane Occupation Charge (per calendar day or part thereof)</b>
All Trunk Roads on the Unit	£1,500.00

Any payments due to the Scottish Ministers from the Operating Company for Lane Occupation Charges shall be effected by means of a deduction from any sum due by the Scottish Ministers to the Operating Company pursuant to the other provisions of this Contract.

Lane occupation charges are not reduced for when the duration of the Lane Occupation is of less than a calendar day.





This is Annex 4 to Schedule 1 referred to in the foregoing Agreement between Scottish Ministers and BEAR Scotland Limited.

## SCHEDULE 1

### SCHEDULE 1 ANNEX 4 – Contract Price Fluctuations

#### 1. PROPORTION OF THE INDICES APPLICABLE TO ITEM CATEGORIES

1.1.1 For the purpose of calculating the Price Fluctuation Factor the proportions of each applicable index shall (irrespective of the actual constituents of the work) be obtained from the table below: The applicable indices are given in Clause 10.7.1 of Schedule 1.

**Table 1.1.1/A – Index Proportions applicable to Item Categories**

	<b>Item Category A</b>	<b>Item Category B</b>	<b>Item Category C</b>	<b>Applicable Index</b>
(i)	0.60	0.30	0.20	Index 1 in respect of labour and supervision costs subject to adjustment.
(ii)	0.25	0.30	0.25	Index 2 in respect of costs of provision and use of providing and maintaining Operating Company's equipment which shall be subject to adjustment.
(iii)	The following proportions for materials named which shall be subject to adjustment by reference to the relevant indices referred to in Clause 10.7.1.			
	<b>Item Category A</b>	<b>Item Category B</b>	<b>Item Category C</b>	
	0.00	0.02	0.00	for Aggregates (Index 3)
	0.00	0.05	0.00	for Bricks and Clay Products (Index 4)
	0.00	0.01	0.00	for Cements (Index 5)
	0.00	0.03	0.00	for Ready Mix Concrete (Index 6)
	0.00	0.02	0.00	for Cast and Spun Iron Products (Index 7)
	0.00	0.00	0.00	for Plastic Products (Index 8)
	0.00	0.02	0.35	for Coated Macadam (Index 9) and Bituminous Products
	0.05	0.05	0.05	for Derv Fuel (Index 10)
	0.00	0.05	0.05	for Gas Oil Fuel (Index 11)
	0.00	0.02	0.00	for Timber (Index 12)

Item Category A	Item Category B	Item Category C	
0.00	0.01	0.00	for Steel for Reinforcement (Index 13)
0.00	0.02	0.00	for Metal Sections (Index 14)
0.00	0.00	0.00	for Steel Sheet Piling (Index 15)
0.00	0.00	0.00	for Structural Steelwork (Index S3) for Civil Engineering Works
0.10	0.10	0.10	For all other costs which shall not be subject to any adjustment

Total	<u>1.00</u>	<u>1.00</u>	<u>1.00</u>	Note: The total of proportions must equal unity
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## 2. ITEM CATEGORY ASSIGNMENT

2.1.1 The following table shows the applicable item category for each type of work identified in Schedule 2. Contract price fluctuation is only applicable to item categorised as A, B, or C.

**Table 2.1.1/A – CPF Category Assignment to Work Series and Sections**

Series in Schedule 2	Section – (Item Number)	Item Description	Item Category
(1)	(2)	(3)	(4)
<b><u>Series 100</u></b>		<b>Preliminaries</b>	
	<b>01</b>	Recovery Vehicles	<b>A</b>
	<b>02</b>	Mobilisation	<b>A</b>
<b><u>Series 200</u></b>		<b>Site Clearance</b>	
	<b>01</b>	Site Clearance	<b>A</b>
	<b>02</b>	Take up or down and set aside for re- use or remove to store	<b>A</b>
	<b>03</b>	Take Up or Down and Remove to Licensed Facility	<b>A</b>
<b><u>Series 300</u></b>		<b>Fencing</b>	
	<b>01</b>	Fencing, Gates and Stiles	<b>B</b>

<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
(1)	(2)	(3)	(4)
	<b>02</b>	Remove from store and Re-erect Fencing, Gates and Stiles	<b>A</b>
	<b>03</b>	Repairs to Existing Fencing – Renew Components	<b>B</b>
<b><u>Series 400</u></b>		<b>Road Restraint Systems (Vehicle and Pedestrian)</b>	
	<b>01</b>	Safety Barriers and Transitions	<b>B</b>
	<b>02</b>	Terminals	<b>B</b>
	<b>03</b>	Reconstruction of Concrete Ramps at Terminal Sections	<b>B</b>
	<b>04</b>	Connection to Existing Systems	<b>B</b>
	<b>05</b>	Vehicle Parapets	<b>B</b>
	<b>06</b>	Pedestrian Parapets and Pedestrian Guardrails	<b>B</b>
	<b>07</b>	Remove from Store and Re-erect Safety Barriers, Vehicle Parapets, Pedestrian Parapets, Pedestrian Guardrails and Pedestrian Handrails.	<b>A</b>
	<b>08</b>	Concrete foundations to Re-erected Posts	<b>B</b>
	<b>09</b>	Remove from Store Wire Rope Safety Fence	<b>A</b>
	<b>10</b>	Concrete foundations to Re-erected Posts for Wire Rope Safety Fence	<b>B</b>

<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
(1)	(2)	(3)	(4)
	<b>11</b>	Renew Wire Rope Safety Fence Components	<b>B</b>
	<b>12</b>	Post Extension Units for Wire Rope Safety Fence	<b>B</b>
	<b>13</b>	Raising Existing Sockets for Posts for Wire Rope Safety Fence	<b>A</b>
	<b>14</b>	Repairs to Safety Barriers, Vehicle Parapets, Pedestrian Parapets and Pedestrian Guardrails	<b>Not Eligible</b>
	<b>15</b>	Temporary Safety Barriers	<b>B</b>
	<b>16</b>	Painting of Safety Barriers, Pedestrian Guardrails and Handrails	<b>B</b>
<b><u>Series 500</u></b>		<b>Drainage and Service Ducts</b>	
	<b>01</b>	Drains and Service Ducts	<b>B</b>
	<b>02</b>	Filter Drains	<b>B</b>
	<b>03</b>	Filter Material Contiguous with Filter Drain	<b>B</b>
	<b>04</b>	Fin Drains	<b>B</b>
	<b>05</b>	Connections	<b>B</b>
	<b>06</b>	Chambers and Gullies	<b>B</b>
	<b>07</b>	Headwalls and Outfall Works	<b>B</b>
	<b>08</b>	Soft Spots and Other Voids	<b>A</b>
	<b>09</b>	Renewal, Raising or Lowering of Covers and Gratings on Existing Chambers and Gullies	<b>A</b>

<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>
	<b>10</b>	Renewal of Rodding Eyes	<b>B</b>
	<b>11</b>	Grouting	<b>B</b>
	<b>12</b>	Excavation in Hard Material	<b>A</b>
	<b>13</b>	Concrete Bagwork	<b>B</b>
	<b>14</b>	Protection to Existing Sewer, Drain or Service Duct	<b>B</b>
	<b>15</b>	Drain Surveys	<b>A</b>
	<b>16</b>	Setting up Closed Circuit Television Equipment for Drain Survey	<b>A</b>
	<b>17</b>	Drain Survey by Closed Circuit Television Camera	<b>A</b>
<b><u>Series 600</u></b>		<b>Earthworks</b>	
	<b>01</b>	Excavation	<b>A</b>
	<b>02</b>	Excavation in Hard Material	<b>A</b>
	<b>03</b>	Deposition of Fill	<b>A</b>
	<b>04</b>	Disposal of Material	<b>A</b>
	<b>05</b>	Imported Fill	<b>B</b>
	<b>06</b>	Compaction of Fill	<b>A</b>
	<b>07</b>	Geotextiles	<b>B</b>
	<b>08</b>	Soft Spots and Other Voids	<b>A</b>
	<b>09</b>	Topsoiling and Storage of Topsoil	<b>B</b>
	<b>10</b>	Lining of Watercourses	<b>B</b>
	<b>11</b>	Gabion Walling and Mattresses	<b>B</b>
	<b>12</b>	Trial Pits	<b>A</b>
	<b>13</b>	Siding out of Carriageways, Footways and Paved Areas	<b>A</b>

<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>
<b><u>Series 700</u></b>		<b>Pavements</b>	
	<b>01</b>	Sub-base	<b>B</b>
	<b>02</b>	Pavement	<b>C</b>
	<b>03</b>	Regulating Course	<b>C</b>
	<b>04</b>	Surface Treatment	<b>C</b>
	<b>05</b>	Milling	<b>A</b>
	<b>06</b>	Reinstatement of Paved Areas	<b>C</b>
	<b>07</b>	Thin Bonded Repairs	<b>B</b>
	<b>08</b>	Full Depth Repairs and Joint Repairs to Existing Concrete Carriageway	<b>B</b>
	<b>09</b>	Pavement Reinforcement	<b>B</b>
	<b>10</b>	Grip Testing	<b>A</b>
<b><u>Series 1100</u></b>		<b>Kerbs, Footways and Paved Areas</b>	
	<b>01</b>	Kerbs, Channels, Edgings, Combined Kerbs and Channels, Combined Drainage and Kerb Blocks and Linear Drainage Channel Systems	<b>B</b>
	<b>02</b>	Additional Concrete for Kerbs, Channels, Edgings, Combined Kerbs and Channels, Combined Drainage and Kerb Blocks, and Linear Drainage Channel Systems	<b>B</b>

<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>
	<b>03</b>	Remove from Store and Relay Kerbs, Channels, Edgings, Combined Kerbs and Channels, Combined Drainage and Kerb Blocks, and Linear Drainage Channel Systems	<b>A</b>
	<b>04</b>	Footways and Paved Areas	<b>C</b>
	<b>05</b>	Remove from Store and Relay Paving Flags and Blocks	<b>A</b>
	<b>06</b>	Access Steps	<b>B</b>
	<b>07</b>	Cold Milling (Planing)	<b>A</b>
	<b>08</b>	Reinstatement of Footways and Paved Areas	<b>C</b>
	<b>09</b>	Patching of Footways	<b>C</b>
<b><u>Series 1200</u></b>		<b>Traffic Signs and Road Markings</b>	
	<b>01</b>	Traffic Sign Faces	<b>B</b>
	<b>02</b>	Traffic Sign Posts	<b>B</b>
	<b>03</b>	Traffic Sign Bases	<b>B</b>
	<b>04</b>	Sign Lighting Units	<b>B</b>
	<b>05</b>	Sign Bracket Arms	<b>B</b>
	<b>06</b>	Remove from Store and Re-erect Traffic Sign Faces, Traffic Sign Posts, Sign Lighting Units, Sign Bracket Arms	<b>A</b>
	<b>07</b>	Road Markings	<b>B</b>
	<b>08</b>	Removal of Road Markings	<b>A</b>
	<b>09</b>	Road Studs	<b>B</b>
	<b>10</b>	Remove from Store and Re-install Road Studs	<b>A</b>

<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>
	<b>11</b>	Marker Posts	<b>B</b>
	<b>12</b>	Permanent Bollards	<b>B</b>
	<b>13</b>	Remove from Store and Re-erect Bollards	<b>A</b>
	<b>14</b>	Passively Safe Chevrons	<b>B</b>
	<b>15</b>	Node Markers	<b>B</b>
	<b>16</b>	Numbering of Traffic Signs	<b>A</b>
	<b>17</b>	Snow Poles	<b>B</b>
<b><u>Series 1300</u></b>		<b>Road Lighting Columns And Brackets, CCTV Masts And Cantilever Masts</b>	
	<b>01</b>	Road Lighting Columns and, Brackets, Wall Mountings, CCTV Masts and Cantilever Masts	<b>B</b>
	<b>02</b>	Remove from Store and Re-erect Road Lighting Columns and Brackets, Wall Mountings, CCTV Masts and Cantilever Masts	<b>A</b>
	<b>03</b>	Luminaires	<b>B</b>
	<b>04</b>	Replace Lamps	<b>B</b>
	<b>05</b>	Numbering of Existing Road Lighting Columns	<b>A</b>
<b><u>Series 1400</u></b>		<b>Electrical Work for Road Lighting and Traffic Signs</b>	
	<b>01</b>	Trench for Cable or Duct	<b>A</b>
	<b>02</b>	Cable and Duct	<b>B</b>
	<b>03</b>	Terminations and Renew Terminations	<b>B</b>



<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
(1)	(2)	(3)	(4)
	<b>04</b>	Feeder Pillars	<b>B</b>
	<b>05</b>	Earth Electrodes	<b>B</b>
	<b>06</b>	Chambers	<b>B</b>
	<b>07</b>	Disconnection of Cables	<b>A</b>
	<b>08</b>	Equipotential Bonding	<b>B</b>
	<b>09</b>	Temporary Overhead Feed to Road Lighting Units	<b>B</b>
	<b>10</b>	Remove from Store and Re-erect any Type of Feeder Pillar	<b>A</b>
<b><u>Series 1500</u></b>		<b>Motorway Communications</b>	
	<b>01</b>	Loop Detector Installations	<b>B</b>
<b><u>Series 1700</u></b>		<b>Structural Concrete</b>	
	<b>01</b>	In situ Concrete	<b>B</b>
	<b>02</b>	Precast Concrete	<b>B</b>
	<b>03</b>	Surface Finish of Concrete – Formwork	<b>B</b>
	<b>04</b>	Steel Reinforcement for Structures	<b>B</b>
	<b>05</b>	Structural Concrete Repairs	<b>B</b>
	<b>06</b>	Backfilling to Structures with Foamed Concrete	<b>B</b>
<b><u>Series 2000</u></b>		<b>Waterproofing for Structures</b>	
	<b>01</b>	Waterproofing	<b>B</b>
	<b>02</b>	Surface Impregnation	<b>A</b>
	<b>03</b>	Removal of Existing Waterproofing	<b>A</b>

<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
(1)	(2)	(3)	(4)
<b><u>Series 2300</u></b>		<b>Bridge Expansion Joints and Sealing of Gaps</b>	
	<b>01</b>	Replacement of Bridge Deck Expansion Joints	<b>B</b>
	<b>02</b>	Sealing of Gaps	<b>B</b>
<b><u>Series 2400</u></b>		<b>Brickwork, Blockwork and Stonework</b>	
	<b>01</b>	Brickwork	<b>B</b>
	<b>02</b>	Blockwork and Stonework	<b>B</b>
	<b>03</b>	Remove from Store and Relay Brickwork, Blockwork and Stonework	<b>A</b>
	<b>04</b>	Rebedding Precast Concrete Copings	<b>B</b>
	<b>05</b>	Repointing	<b>B</b>
<b><u>Series 3000</u></b>		<b>Landscape and Ecology</b>	
	<b>01</b>	Ground Preparation and Cultivation	<b>A</b>
	<b>02</b>	Seeding and Turfing	<b>B</b>
	<b>03</b>	Planting Cell-Grown Stock	<b>B</b>
	<b>04</b>	Planting Trees	<b>B</b>
	<b>05</b>	Planting Shrubs	<b>B</b>
	<b>06</b>	Planting Wild Flowers	<b>B</b>
	<b>07</b>	Planting Bulbs	<b>B</b>
	<b>08</b>	Mulching	<b>B</b>
	<b>09</b>	Weed Control	<b>A</b>
	<b>10</b>	Thinning and Coppicing of Trees	<b>A</b>
	<b>11</b>	Scrub Control	<b>A</b>
	<b>12</b>	Tree Surgery	<b>A</b>

<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
(1)	(2)	(3)	(4)
	<b>13</b>	Removal of Branches	<b>A</b>
	<b>14</b>	Tree Felling	<b>A</b>
	<b>15</b>	Tree Guards, Tubes and Ties	<b>B</b>
<b><u>Series 3300</u></b>		<b>Site Investigation</b>	
	<b>01</b>	Rotary Coring of Existing Pavement	<b>A</b>
	<b>02</b>	Rotary Coring of Existing Structures	<b>A</b>
	<b>03</b>	Inspection Patches on Bridge Structures	<b>A</b>
	<b>04</b>	Structural Investigations	<b>A</b>
	<b>05</b>	Falling Weight Deflectometer Tests	<b>A</b>
	<b>06</b>	Dynamic Cone Penetrometer Tests	<b>A</b>
<b><u>Series 5000</u></b>		<b>Maintenance Painting of Steelwork</b>	
	<b>01</b>	Surface Preparation	<b>A</b>
	<b>02</b>	Protective System	<b>B</b>
<b><u>Series 6100</u></b>		<b>Core Operations</b>	
	<b>01</b>	Schedule 1	<b>A</b>
	<b>02</b>	Schedule 3	<b>A</b>
	<b>03</b>	Schedule 4	<b>A</b>
	<b>04</b>	Schedule 5	<b>A</b>
	<b>05</b>	Schedule 6	<b>A</b>
	<b>06</b>	Schedule 7	<b>A</b>
	<b>07</b>	Schedule 8	<b>A</b>
	<b>08</b>	Manage and Maintain Grip Tester	<b>A</b>
<b><u>Series 6200</u></b>		<b>Professional Services</b>	
	<b>01</b>	Professional Services	<b>A</b>

<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
(1)	(2)	(3)	(4)
<b><u>Series 6300</u></b>		<b>Procurement and Management of Works Contracts</b>	
	<b>01</b>	Procurement of Works Contracts	Not Eligible
	<b>02</b>	Management of Works Contracts	Not Eligible
<b><u>Series 6400</u></b>		<b>Adjustment to Schedule of Rates and Prices</b>	
	<b>01</b>	Adjustment for Time Bands	Category A, B or C as applied to the item being adjusted
	<b>02</b>	Adjustment for Works Within and Below Non-Tidal Open Water or Tidal Water	Category A, B or C as applied to the item being adjusted
<b><u>Series 6500</u></b>		<b>Time Work Schedule</b>	
	<b>01</b>	Labour	<b>A</b>
	<b>02</b>	Plant	<b>A</b>
	<b>03</b>	Materials	Not Eligible
	<b>04</b>	Supplementary Services	Not Eligible
<b><u>Series 6700</u></b>		<b>Changes in Scope of Operations</b>	
	<b>01</b>	Changes in the Extent of the Unit Impacting on Core Operation items in Series 6100	<b>A</b>
<b><u>Series 6800</u></b>		<b>Miscellaneous</b>	
	<b>01</b>	Anti-Graffiti Coatings	<b>B</b>
	<b>02</b>	Vehicle Restraint Systems	<b>B</b>
	<b>03</b>	Drainage	<b>A</b>
	<b>04</b>	Cleaning of Street Furniture	<b>A</b>

<b>Series in Schedule 2</b>	<b>Section – (Item Number)</b>	<b>Item Description</b>	<b>Item Category</b>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>
	<b>05</b>	Landscape Maintenance	<b>A</b>
	<b>06</b>	Validate Network Inventory	<b>A</b>
<b><u>Series 6900</u></b>		<b>Fair Rates and Prices</b>	
	<b>01</b>	Labour	Not Eligible
	<b>02</b>	Plant	Not Eligible
	<b>03</b>	On cost Uplift for Overheads, Profit/margin etc. (including allowance for traffic management)	Not Eligible
<b><u>Series 7000</u></b>		<b>Lump Sum Prices</b>	
	<b>01</b>	Payment of Accounts	Not Eligible
	<b>02</b>	Lump Sum Quotations	Not Eligible



This is Annex 5 to Schedule 1 referred to in the foregoing Agreement between Scottish Ministers and BEAR Scotland Limited.

## **SCHEDULE 1**

### **SCHEDULE 1 ANNEX 5 – Insurance Requirements**

#### **1. GENERAL**

1.1.1 Subject to the other provisions of this Contract this Annex specifies the:

- (i) indemnities that shall be provided by the Operating Company to the Scottish Ministers,
- (ii) minimum amount of insurance that the Operating Company shall be required to effect and maintain in force throughout the entirety of this Contract, and
- (iii) maximum excesses (that being the portion of each claim for which the Insurer(s) shall not be liable to the Operating Company or which the Operating Company shall pay to insurers in respect of a legal liability claim),

in respect of the insurance that shall be provided by the Operating Company under the other provisions of this Contract.

#### **2. INDEMNITY REQUIREMENTS**

2.1.1 In respect of each and every claim or series of claims arising out of any one incident and unlimited during the Contract Period an amount equal to the total costs and expenses of any and every kind arising out of an event that falls to be indemnified as a result of any indemnity that shall be required to be given by the Operating Company within this Contract including but not limited to the indemnities referred to in Schedule 1 Part 4.

#### **3. INSURANCE REQUIREMENTS**

3.1.1 Notwithstanding any other provisions of this Contract prior to the commencement of any Operations the Operating Company shall be required to provide evidence to the Scottish Ministers that the insurance referred to in Tables 3.1.1/A and 4.1.1/A of this Schedule 1, Annex 5 shall be in full force and effect.

**Table 3.1.1/A – Required Insurances**

<b>Reference Number</b>	<b>Description of Insurance</b>
1.	Contractor's all risks insurance shall be provided by the Operating Company (including terrorism cover) to the full replacement or reinstatement value of: <ul style="list-style-type: none"><li>(i) the permanent and temporary works forming any part of the Operations,</li><li>(ii) Constructional Plant used in the execution of the Operations,</li></ul>

Reference Number	Description of Insurance
	<p>(iii) any materials that shall be or are intended to be incorporated into the works whether on Site, off Site, or in transit to or from Site, anywhere in continental Europe, including roll on roll off ferries,</p> <p>(iv) any plant required for the works whether on Site, off Site, or in transit to or from Site, anywhere in continental Europe, including roll on roll off ferries,</p> <p>for the period of this Contract including any Defects Correction Period and/or any Defects Liability Period.</p> <p>The insurance that shall be provided by the Contractor shall be written in the names including but not limited to those of the Scottish Ministers and the Operating Company and shall include sub-contractors of any tier of the Operating Company.</p> <p>The insurance shall include the endorsements referred to in Clauses 5.1.1 and 5.1.3 of this Schedule 1, Annex 5.</p>
2.	<p>Public liability insurance in respect of loss or damage to any property, including that of the Scottish Ministers and for the avoidance of doubt including Crown Property or death or injury to any person.</p> <p>The minimum limit of indemnity provided by the Operating Company shall be £155,000,000 in respect of each and every occurrence and unlimited in the period of insurance.</p> <p>The insurance shall be written in the names including but not limited to those of the Scottish Ministers and the Operating Company and shall include the endorsements referred to in Clauses 5.1.1 to 5.1.3 inclusive of this Schedule 1, Annex 5.</p>
3.	<p>Professional indemnity insurance for all Operations including:</p> <p>(i) any Design executed by the Operating Company,</p> <p>(ii) any review of the insurances of a Works Contractor, as required by Schedule 6 Part 1, carried out by or on behalf of the Operating Company, and</p> <p>(iii) for the Operating Company's business in general.</p> <p>The minimum Limit of Indemnity provided by the Operating Company shall be £10,000,000 in respect of each and every occurrence and unlimited in the period of insurance but shall be limited to £10,000,000 in the aggregate in respect of Pollution losses including gradual pollution.</p>



Reference Number	Description of Insurance
	<p>The insurance that shall be provided by the Operating Company shall cover the acts of the Operating Company and the Operating Company's liability for the acts of any of its contractors and sub-contractors of any tier in accordance with the other provisions of this Contract.</p> <p>The insurance that shall be provided by the Operating Company shall include the endorsements referred to in Clause 5.1.1 of this Schedule 1, Annex 5.</p>
4.	<p>Employers' liability insurance with a Limit of Indemnity adequate to satisfy the requirements of the <i>Employers Liability Compulsory Insurance Act 1969</i> and any subsequent legislation.</p> <p>The insurance that shall be provided by the Operating Company shall include the endorsements referred to in Clause 5.1.1 of this Schedule 1, Annex 5.</p>
5.	<p>Contractor's pollution legal liability insurance including consequential clean-up of any part of the Unit.</p> <p>Such insurance shall be for a minimum Limit of Indemnity of £10,000,000 in respect of any one loss and in the aggregate in the period of insurance.</p> <p>The insurance shall be written in the names including but not limited to those of the Scottish Ministers and the Operating Company and shall include the endorsements referred to in Clauses 5.1.1 to 5.1.3 inclusive of this Schedule 1, Annex 5.</p>
6.	<p>Comprehensive motor insurance in respect of all vehicles used by the Operating Company and its sub contractors of any tier in the execution of this Contract.</p> <p>The insurance shall include the endorsements referred to in Clause 5.1.1 of this Schedule 1, Annex 5.</p>

#### 4. EXCESSES

- 4.1.1 In respect of each insurance that shall be provided by the Operating Company as required by this Contract the amount that the insurer for such insurance shall not be liable for in respect of each and every claims or series of claims arising out of one event shall not exceed.

**Table 4.1.1/A – Maximum Excesses**

Reference Number	Type of Insurance	Excess
1.	Contractors All Risks	<p>£10,000 in respect of each and every loss other than:</p> <p>(i) Defective Design Materials and Workmanship where the</p>

Reference Number	Type of Insurance	Excess
		amount shall be £150,000 in respect of each and every loss, and  (ii) Contractor's Plant where the amount shall be 10 percent of each and every loss (with a minimum in respect of each and every loss of £10,000).
2.	Public Liability (i) Personal Injury Claims (ii) Property Damage Claims	Nil  £10,000 in respect of each and every loss or series of losses arising out of one event.
3	Professional Indemnity	£250,000 in respect of each and every loss or series of losses arising out of one event.
4.	Employers Liability	Nil
5.	Contractors Pollution Legal Liability	£50,000 in respect of each and every loss or series of losses arising out of one event.
6.	Comprehensive Motor	£1,000

## 5. INSURANCE POLICY REQUIREMENTS

5.1.1 All the insurance referred to in Table 3.1.1/A of this Schedule 1, Annex 5 shall be endorsed by the insurers to the effect that:

- (i) such insurance shall be subject to Scots Law and the jurisdiction of the Scottish Courts, and
- (ii) the insurers for such insurance shall provide not less than 30 days written notice to the Scottish Ministers prior to any cancellation non-renewal or modification to any such policy for any such insurance.

5.1.2 The insurance referred to in reference numbers 2 and 5 of Table S1A6/3.1 of this Schedule 1, Annex 5 shall be endorsed to the effect that actions between the Insured parties shall be treated as though a separate insurance had been issued to each of them.

5.1.3 The insurance referred to in reference numbers 1, 2 and 5 of Table S1 A6/3.1 of this Schedule 1, Annex 5 shall be endorsed such that insurers for any such insurance accept the following provisions.

- (i) Waiver of Duty of Disclosure
  - (a) to waive their rights to receive from the Scottish Ministers disclosure of material circumstances or information,

- (b) to avoid the insurance for any non-disclosure of material circumstances or information by the Scottish Ministers or his servants or agents, and
  - (c) to avoid the insurance and/or claim damages against the Scottish Ministers for any misrepresentation made by or on behalf of the Scottish Ministers.
- (ii) **Waiver of Rights of Subrogation**

To waive all rights of subrogation and/or claims for contributory negligence against the Scottish Ministers.
- (iii) **Joint Insured Clause**

That all the provisions of the insurance (except the sums/insured limits of liability) shall operate as if there was a separate insurance policy with and covering each named insured without right of contribution from any other insurance which shall be carried by an insured.

Without limitation to the foregoing this shall be on the basis that including but not limited to the non-compliance with any insurance term condition or warranty or the non-disclosure and/or misrepresentation of material circumstances or information by the Operating Company or any other co-insured under any such insurance shall not affect the rights and/or interests of the Scottish Ministers under the insurance.
- (iv) **Non-Vitiation Clause**

That a vitiating act committed by one under any insurance shall not prejudice the right to indemnity of any other Insured who has an insurable interest in such insurance and who has not committed a vitiating act.