

**A249 STOCKBURY (M2) TO SHEERNESS**

**DBFO Contract**

**THE SECRETARY OF STATE FOR TRANSPORT**

**AND**

**SHEPPEY ROUTE LIMITED**

## INDEX

<b>Part I - General</b>		<b>Page No</b>
1.	Definitions and Interpretation	1
2.	Documentation	50
3.	The Project	55
4.	Guarantees	62
 <b>Part II - Operations</b>		
6.	Pre-Commencement Period	64
7.	Commencement	68
8.	Land	70
9.	Partnering	78
10.	Security of the Site	79
11.	Design and Construction	81
12.	Programme	87
13.	Inspection and Completion	92
14.	Operation and Maintenance	101
15.	Traffic Management	108
16.	Signing and Communications	112
17.	Defects in the Existing Road	114
18.	Fossils and Antiquities	116
19.	Handback	119
21.	Secretary of State's Obligations	151
 <b>Part III - Relationships and Monitoring</b>		
22.	Representatives	152
23.	Management Systems	154
24.	Reports and Information	160
25.	Records	165
26.	Monitoring of Performance	167
27.	Statutory Powers	173
28.	Statutory Undertakers	176
29.	Other Functions of the Secretary of State	183
30.	Other Third Parties	189

## **Part V - Change, Liabilities and Termination**

34.	Change Procedure	212
35.	Change in Law	213
36.	Additional Works and Subsequent Schemes	215
37.	Force Majeure	217
38.	Warranties, Undertakings and Disclaimers	220
39.	Indemnities	223
40.	Default	
	230	
41.	Termination by the DBFO Co	238
42.	Non-Default Termination	240
43.	Effect of Termination	242
44.	Compensation on Termination	247

## **Part VI - Miscellaneous**

45.	Assignment, Sub-Contracting and Change in Control	261
46.	Notices	268
47.	Consents and Approvals	270
48.	Taxes	272
49.	Intellectual Property	277
50.	Confidentiality	280
51.	Agency	283
52.	Disputes Resolution Procedure	284
53.	Whole Agreement	285
54.	Waiver	286
55.	Amendments	287
56.	Conflicts of Interest	288
57.	Governing Law and Jurisdiction	289
58.	Contracts (Rights of Third Parties) Act	290
59.	Competition Act	291
60.	Counterparts	292
61.	Recycled Paper	293

## INDEX OF SCHEDULES

### **Schedule 2 Programme**

- Part 1 DBFO Co's Programme
- Part 2 Submission Requirements for DBFO Co's Programme and DBFO Co's Works Programme

### **Schedule 3 Land**

- Part 1 Existing Road
- Part 2 New Road
- Part 3 Connecting Roads
- Part 4 Shared Facilities
- Part 5 Not used
- Part 6 Scheme Orders
- Part 7 Drawings

### **Schedule 4 Construction and Handback Requirements**

- Part 1 Scheme Specific Core Construction Requirements
- Part 2 Construction Requirements

- Annex 1 Standards and Advice Notes
- Annex 2 Amendments to Standards and Advice Notes
- Annex 3 List of Circular Roads and Other Documents
- Annex 4 Amendments to Circular Roads and Other Documents
- Annex 5 Amendments to the Specification for Highway Works
- Annex 6 Roadworks and General Requirements
- Annex 7 Structures Requirements for New Structures
- Annex 8 Structures Requirements for Existing Structures
- Annex 10 Environmental Requirements

- Part 3 Design and Certification Procedure

- Section A General
- Section B Alternative Proposals
- Annex 1 Index of Certificates
- Annex 2(1) Model Technical Appraisal Form
- Annex 2(2) Model Strengthened Earthwork Appraisal Form
- Annex 3 Review Times for Technical Appraisal Forms  
(No Alternative Proposals)
- Annex 4 Review Times for Technical Appraisal Forms  
(Alternative Proposals Included)
- Annex 5 Review Times for Structures Certification

Annex 6      Review Times for Technical Appraisal Forms  
(Temporary Works)

- Part 4      Handback Requirements
- Part 5      Drawings
- Part 6      Noise Insulation Requirements
- Part 7      Preparation of Orders and Statutory Notices Required for the opening  
of the New Road

- Part 3      Environmental Management System Documentation
- Part 4      Health & Safety Management System Documentation

**Schedule 6      Operation and Maintenance**

- Part 1      Scheme Specific Core O&M Requirements
- Part 2      O&M Requirements

- Section 1   Provisions of General Application
  - Annex 1/1    Included Off-Site Equipment
  - Annex 1/2    Excluded On-Site Equipment
- Section 2   Roadworks
- Section 3   Routine Maintenance
  - Annex 3/1    Undertakings in Respect of Highway  
Drainage
  - Annex 3/2    Fences
- Section 4   Surveys and Remedial Maintenance Works
- Section 5   Winter Maintenance
- Section 6   Maintenance of Highway Structures
- Section 7   Environmental Requirements
  - Annex 7/1    Qualifications of Environmental Team  
Appointments

- Part 3      Drawings
- Part 4      O&M Standards

**Schedule 7      Representatives**

- Part 1      Department's Nominee
- Part 2      Review Procedure

**Schedule 8      Third Parties**

- Part 1      Relevant Authorities
- Part 2      Other Interested Parties
- Part 3      Requirements of Relevant Authorities
  
- Part 5      Network Rail Agreement

Part 2	Safety Performance Adjustment
	Annex 1 Safety Performance Boundary of the Project Road
	Annex 2 Comparator Roads
Part 3	Construction Payments
Part 4	Indexation
Part 5	Drawings

## **Schedule 11 Force Majeure**

## **Schedule 12 Change**

Part 1	Eligible Changes
	Annex 1 Department's Change
	Annex 2 Additional Works
	Annex 3 Compensation Events
	Annex 4 User Paid Tolls
	Annex 5 Classified Information
Part 2	General Change Procedure
	Annex 1 Relevant Change Notice
	Annex 2 Determination of Change Amounts
	Annex 3 Determination of Eligible Capital Costs
	Annex 4 Financing of Eligible Changes
	Annex 5 Determination of Change Figure
	Annex 6 Determination of Revised Value
	Annex 7 Mitigation
Part 3	Change Definitions

## **Schedule 13 Additional Works and Subsequent Schemes**

Part 1	Procedure for Additional Works
	Annex 1 Form of Additional Works Completion Certificate
Part 2	Payment for Additional Works Services
Part 3	Subsequent Schemes
	Annex 1 Pre-cleared Subsequent Schemes
	Annex 2 Form of Subsequent Scheme Completion Certificate
Part 4	Improvements

**Schedule 14 Records and Reports**

- Part 1 Records
- Part 2 Reports
- Part 3 DBFO Co's 5 Year Management Plan
  
- Annex 1 Department's Objectives
- Annex 2 Management Plan Checklist
  
- Part 4 Initial DBFO Co's 5 Year Management Plan
- Part 5 DBFO Co's 5 Year Environment Management Plan
- Part 6 Initial DBFO Co's 5 Year Environmental Management Plan

**Schedule 15 Disputes Resolution Procedure**

**Schedule 16 Liaison Procedures**

- Part 1 General Principles
- Part 2 Operations, Emergencies and Traffic Management
- Part 3 Publicity
- Part 4 A249 Environmental Group
- Part 5 Traffic Control Centre Company

**Schedule 19 Statutory Undertakers**

- Part 1 Authorised Functions
- Part 2 Services in Relation to the Secretary of State's Functions
- Part 3 Other Services

**Schedule 20 Contracted Out Functions of the Secretary of State**

**Schedule 21 Pre-Commencement Works**

- Part 1 Investigations and Surveys
- Part 2 Other Preparatory Works
- Part 3 Works by Relevant Authorities
- Part 4 Pre-Commencement Activities

**Schedule 22 Security of the Site**

**Schedule 23 The Network Board**

**Schedule 26 Appointments of TRACS Contractor and Traffic Signal Maintenance Contractor**

**THIS DBFO CONTRACT** (this "Agreement") is made the 19th February day of 2004

**BETWEEN:**

- (1) **THE SECRETARY OF STATE FOR TRANSPORT** of Great Minster House, 76 Marsham Street, London SW1P 4DR (the "Secretary of State"); and
- (2) **SHEPPEY ROUTE LIMITED**, a company organised and existing under the laws of England and Wales, registered under number 04918712 and having its registered office at Birch Street, Wolverhampton, West Midlands WV1 4HY (the "DBFO Co").

**WHEREAS:**

- (A) The Government of the United Kingdom desires to have the private sector invest and participate in the development of the nation's transport system.
- (B) In accordance with the foregoing policy, interested persons were invited to submit proposals for investing in the Project.
- (C) The Project will comprise the design, financing, construction and thereafter operation and maintenance of the A249 Iwade Bypass to Queenborough Improvement scheme, comprising a new dual carriageway road 5km long between the northern end of the existing Iwade Bypass and Brielle Way north of Queenborough Junction, including a new high level crossing of The Swale and also the operation and maintenance of the existing A249 between Junction 5 of the M2 and the docks entrance at the Port of Sheerness (but excluding any De-Trunked Segments following their release from this Agreement).
- (D) Proposals were submitted by the DBFO Co for the design and construction of the Works, the financing, operation and maintenance of the Project Facilities and the conduct of the other Operations during the Contract Period.
- (E) The agreements referred to in Clause 2.3.1 have been entered into on or prior to the date hereof.
- (F) The Secretary of State and the DBFO Co have reached agreement as set out in this Agreement.
- (G) The Secretary of State is satisfied that this Agreement would be of benefit to the public.
- (H) This Agreement is being entered into by the Secretary of State under the Private Finance Initiative and satisfies the conditions set out in Section 4(2) of the Construction Contract (England and Wales) Exclusion Order 1998.

**NOW IT IS HEREBY AGREED** as follows

**PART I**  
**GENERAL**

1. **DEFINITIONS AND INTERPRETATION**

1.1 Definitions

In this Agreement (including the recitals and Schedules), unless the context otherwise requires, the following expressions have the following meanings:

"A249 Environmental Group" means the group of that name established in accordance with Part 4 of Schedule 16 [A249 Environmental Group].

"Abnormal Load" means:

- (a) an abnormal indivisible load which does not comply with the restrictions as to laden weight and dimensions set out in Part IV of the Road Vehicles (Construction and Use) Regulations 1986 (S.I. 1986/1078); and
- (b) unusual vehicles, such as items of engineering plant or military vehicles, whose design and function prevents compliance with the Road Vehicles (Construction and Use) Regulations 1986 (S.I. 1986/1078).

"Acceptable Associated Company" means, in relation to any proposed change of control pursuant to the bona fide enforcement of the Holdco Security Agreement following an Event of Default, any Associated Company of the DBFO Co which:

- (a) was not responsible (whether by reason of any act or omission of, or any event or circumstance occurring in relation to, such Associated Company) for any Event of Default under the DBFO Contract which resulted in such enforcement of the Holdco Security Agreement; and
- (b) was not an Associated Company of any person who was responsible (whether by reason of any act or omission of, or any event or circumstance occurring in relation to, such Associated Company) for any Event of Default under the DBFO Contract which resulted in such enforcement of the Holdco Security Agreement.

"Accounts Agreement" means the accounts agreement dated on or about the date hereof between (1) the DBFO Co, (2) the Security Trustee, (3) the Senior Facility Agent and (4) the Mezzanine Facility Agent (as each such party, where the same is not defined in this Agreement, is defined therein).

"Accounts Mandate" means the accounts mandate dated on or about the date of this Agreement between the DBFO Co, the Account Bank, the Facility Agents and the Security Trustee (as each such party, where the same is not defined in this Agreement, is defined in the Credit Agreement).

"Additional Works" means any change, improvement or addition to the design, layout or structure of the Project Facilities made or proposed to be made on or after the following dates:

- (a) for the Existing Road (other than any Upgraded Section) at any time after the date of this Agreement; and
- (b) for the New Road (including, without limitation, any Upgraded Section) and Off-Site Facilities, at any time after the issue of the Completion Certificate.

but in each case excluding any Subsequent Scheme and any Improvement.

"Additional Works Completion Certificate" has the meaning given in paragraph 6 of Part 1 of Schedule 13 [Procedure for Additional Works].

"Additional Works Contract" has the meaning given in paragraph 3.1.4 of Part 1 of Schedule 13 [Procedure for Additional Works].

"Additional Works Contractor" has the meaning given in paragraph 3.1.4 of Part 1 of Schedule 13 [Procedure for Additional Works].

"Additional Works Notice" has the meaning given in paragraph 1.1 of Part 1 of Schedule 13 [Procedure for Additional Works].

"Additional Works Services" has the meaning given in paragraph 3.1 of Part 1 of Schedule 13 [Procedure for Additional Works].

"Adjacent Areas" means, subject to Clause 8.8 [Boundaries of Site and Adjacent Areas], areas, which do not form part of the Site but upon which part of the Operations are to be carried out, as shown or identified as such on the date hereof on drawings numbered A249/03/02-001 to 004 (inclusive) set out in Part 7 of Schedule 3 [Drawings], or as the Secretary of State may from time to time specify, provided that each part of the Temporary Adjacent Areas shall cease to be part of the Adjacent Areas from the date upon which a Taking Over Certificate is issued in respect of Local Facilities located on such part.

"Affected Contract Year" means each Contract Year in respect of which there is a Change in Costs or a Change in Revenue as a consequence of an Eligible Change.

"Alternative Proposal" has the meaning given in paragraph 1 of Section B of Part 3 of Schedule 4 [Design and Certification Procedure].

"Annual Performance Report" has the meaning given in paragraph 3.2 of Part 2 of Schedule 14 [Reports].

"Annual Performance Targets" has the meaning given in paragraph 2.5 of Part 3 of Schedule 14 [DBFO Co's 5 Year Management Plan].

"Annual Report" has the meaning given in paragraph 3.1 of Part 2 of Schedule 14 [Reports].

"Applicable Date" means:

- (a) with respect to any activity requiring a submission to be made in accordance with the Review Procedure, the date of such submission; or

- (b) with respect to any activity not requiring a submission to be made in accordance with the Review Procedure, the date of commencing such activity.

"Approval" has the meaning given in Clause 47.2 [Reasonableness].

"Approved Rescheduling" means any rescheduling of amounts outstanding under the Facilities (as defined in the Credit Agreement) which has been submitted to the Review Procedure pursuant to Clause 2.3.2 and in respect of which:

- (a) there has been no objection under the Review Procedure; and
- (b) the DBFO Co has complied with its obligations under paragraphs 2.2, 2.5, 2.6 and 2.7 of Schedule 25 [Refinancing] to the extent applicable.

"Archaeological Remains" has the meaning given in paragraph 1 of Annex 10/E to Part 2 of Schedule 4 [Construction Requirements].

"Archaeological Works" has the meaning given in paragraph 1 of Annex 10/E to Part 2 of Schedule 4 [Construction Requirements].

"Archaeologist" means John Samuels Archaeologist Consultants of The Manor, South Street, Nomanton-on-Trent, Nr Newark, Nottinghamshire NG23 6RQ acting through its Principal, Dan Slatcher, or such substitute (acting through its Principal who shall be a member of the Institute of Field Archaeologists or its equivalent with a minimum of 10 years' relevant post qualification experience) as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or 45.4.2 [Sub-Contracting].

"Area Manager" means Mark Kumar or such substitute as may be appointed by the Secretary of State for the time being and notified to the DBFO Co in writing.

"Area Network Board" means, in respect of a part of the motorway and trunk road network, the strategic partnering board established and maintained by (inter alios) the Secretary of State and the contractor responsible for the maintenance of such part of the network.

"Associated Company" means, in respect of a relevant company, a company which is a Subsidiary, a Holding Company or a company which is a Subsidiary of a Holding Company of that relevant company and, in the case of the DBFO Co, shall include each of Holdco, the Sponsor, the Contractor, the Operator and any company which is a Subsidiary, a Holding Company or a company which is a Subsidiary of a Holding Company of Holdco, the Sponsor, the Contractor or the Operator.

"Audit Team" has the meaning given in paragraph 2.1 of Section A of Part 3 of Schedule 4 [Design and Certification Procedure].

"Authorised Junior Security" means the security agreement dated on or about the date hereof between (1) the DBFO Co and (2) Holdco;

"Available Funding" means, at any time, the maximum amount available (including without limitation any amount which is or would be available subject to the giving of notice, the lapse of time or the satisfaction or waiver of any other condition, or any combination of these matters) to be borrowed under the Funding Agreements at or after such time.

"Availability Criteria" means the criteria in paragraphs 1.2.1 and 1.2.2 of Annex 3 to Part 1 of Schedule 9 [Congestion Management Payments].

"Average Spot Speed" means the average speed of all vehicles in a traffic lane measured as they pass over a specified location measured over a Payment Period.

"Base Annual Gross Congestion Management Payment" means the sum so described in paragraph 2.1 of Part 1 of Schedule 9 [Congestion Management Payments].

"Base Case" means the output from the Financial Model on the date of execution of this Agreement, as set out in Part 3 of Schedule 1 [Base Case].

"Carriageway Section" means each of the unidirectional sections of the Project Road, the limits of which are described in Annex 1 to Part 1 of Schedule 9 [Congestion Management Payments].

"Certificate" means any certificate to be issued pursuant to this Agreement and in particular:

- (a) "Alternative Proposal Certificate" means a certificate in the form set out in Annex 1(11) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (b) "Archaeology Certificate" means a certificate in the form set out in Annexes 1(21) and 1(22) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (c) "Assessment Certificate (Structures)" means a certificate in the form set out in Annex 1 (19) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (d) "Assessment Check Certificates (Structures) means a certificate in the form set out Annex 1(20) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (e) "Check Certificate (Structures/Strengthened Earthworks)" means a certificate in the form set out in Annex 1(4) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (f) "Commencement Certificate" means the certificate to be issued by or on behalf of the Secretary of State pursuant to Clause 7.3 [Commencement Certificate] in the form set out in Annex 1(18) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (g) "Compensation Party Surveyor's Certificate" means a certificate in the form set out in Annex 1 to Part 1 of Schedule 24 [CPA Works for Compensation Parties];
- (h) "Completion Certificate" means a certificate in the form set out in Annex 1(15) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (i) "Construction Certificate" means a certificate in the form set out in Annex 1(12) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (j) "DBFO Co's Change Certificate" means a certificate in the form set out in Annex 1(9) to Part 3 of Schedule 4 [Design and Certification Procedure];

- (k) "DBFO Co's Substantial Completion Certificate" means a certificate in the form set out in Annex 1(13) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (l) "Department's Change Certificate" means a certificate in the form set out in Annex 1(10) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (m) "Design Certificate (General)" means a certificate in the form set out in Annex 1(1) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (n) "Design Certificate (Geotechnical)" means a certificate in the form set out in Annex 1(2) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (o) "Design Certificate (Structures)" means a certificate in the form set out in Annex 1(3) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (p) "Ecology Certificate" means a certificate in the form set out in Annexes 1(25), 1(26) and 1(27) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (q) "Handback Certificate" means a certificate in the form set out in Annex 1(17) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (r) "Injurious Affection Party Surveyor's Certificate" means a certificate set out in Annex 1 to Part 2 of Schedule 24 [Land Acquisition and Claims for Injurious Affection].
- (s) "Landscaping Certificate" means a certificate in the form set out in Annexes 1(23) and 1(24) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (t) "Road Safety Audit Certificate (Stage 1, Stage 2, Stage 3 or Stage 4)" means a certificate in the form set out in Annex 1(8) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (u) "Taking Over Certificate" means a certificate in the form set out in Annex 1(16) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (v) "Temporary Works Check Certificate" means a certificate in the form set out in Annex 1(5) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (w) "Test Confirmation Certificate" means a certificate in the form set out in Annex 1(6) to Part 3 of Schedule 4 [Design and Certification Procedure];
- (x) "Traffic Management Certificate" means a certificate in the form set out in Annex 1(7) to Part 3 of Schedule 4 [Design and Certification Procedure].

"Change Figure" has the meaning given in Annex 5 to of Part 2 of Schedule 12 [General Change Procedure].

"Change in Capital Costs" has the meaning given in Part 3 of Schedule 12. [Change Definitions].

"Change in Costs" means any net increase or decrease in the DBFO Co's costs of performing the Operations in respect of a Contract Year as a consequence of an Eligible Change the subject of a Relevant Change Notice. For the avoidance of doubt, this includes any Change in Capital Costs but does not include any Change in Revenue. The Change in Costs (other than any Change in Capital Costs) shall be calculated on the assumption that all costs in respect of a Contract Year are incurred on the day which is the mid point of such Contract Year. For the avoidance of doubt, any increase in costs shall be a positive figure and any decrease in costs shall be a negative figure.

"Change in Law" means the coming into effect of:

- (a) any Legislation enacted after the date of execution of this Agreement; or
- (b) any modification of any Legislation existing on the date of this Agreement (where such modification comes into effect after the date of execution of this Agreement),

(but excluding in either such case any lawful requirements of any Relevant Authority and any change in the interpretation of any Legislation and also excluding any change in law resulting from the making of any New Orders) which is binding on the DBFO Co.

"Change in PIA" means any net increase or decrease in the number of Personal Injury Accidents occurring on the Project Road, as a consequence of an Eligible Change the subject of a Relevant Change Notice, in the period of 365 days from (and including) the date which, in accordance with paragraph 2 of Part 2 of Schedule 12 [General Change Procedure] is agreed or determined as being, in respect of such Eligible Change, the PIA Change Effective Date in respect of the Project Road. Any net increase in the number of Personal Injury Accidents shall be a positive figure and any net decrease in the number of Personal Injury Accidents shall be a negative figure.

"Change in Revenue" means any net increase or decrease in the Monthly Construction Payments or Congestion Management Payments receivable by the DBFO Co in respect of a Contract Year (as the case may be) as a consequence of an Eligible Change the subject of a Relevant Change Notice. The Change in Revenue shall be calculated on the assumptions that all Monthly Construction Payments or Congestion Management Payments (as the case may be) in respect of a Contract Year are receivable on the day which is the mid-point of such Contract Year. Any net decrease in revenue shall be a positive figure and any net increase shall be a negative figure.

"Change in the Scope of Value Added Tax" means any Change in Law whereby the whole or any part of the supplies to be made by the DBFO Co to the Secretary of State under this Agreement are exempt from value added tax such that the input tax incurred and attributable to such supplies ceases to be recoverable by the DBFO Co.

"CHART Section" means a length of road between adjacent nodes each of which has a unique CHART reference determined by the CHART referencing system set out in Volume 1 of the Highways Maintenance Code of TRMM.

"Checker" means Gifford Consulting Engineers of Carlton House, Ringwood, Woodlands, Southampton SO40 7HT acting through its Principal, Edmund Hollinghurst, who shall check a Category III Structure (as defined in paragraph 35 of Section A of Part 3 of Schedule 4 [Design and Certification Procedure]) or such substitute (acting through its Principal who shall be a chartered civil or structural engineer or the equivalent) as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or 45.4.2 [Sub-Contracting].

"Checking Team" has the meaning given in paragraph 2.3 of Section A of Part 3 of Schedule 4 [Design and Certification Procedure].

"Claim" means any claim, demand, proceedings or liability.

"Classified Information" means any information which the Secretary of State designates as such pursuant to Clause 50.7.1.

"Classified Information Notice" means a notice given by the Secretary of State to the DBFO Co directing the DBFO Co to treat or cease to treat any specified information as Classified Information or imposing, withdrawing or modifying a requirement that the DBFO Co complies with any Classified Information Guidelines.

"Commencement Date" means the date specified as such in the Commencement Certificate.

"Communications Requirements" means the requirements set out or identified or referred to in Part 2 of Schedule 17 [Monitoring System Requirements], as amended or supplemented from time to time by any DBFO Co's Change, Alternative Proposal or Department's Change or in accordance with Clause 14.2 [O&M Requirements].

"Company Security Agreement" means the security agreement dated on or about the date hereof between (1) the DBFO Co and (2) the Security Trustee;

"Comparator Roads" means the roads identified as such in Annex 2 to Part 2 of Schedule 9.

"Compensation Event" means any of the following:

- (a) an event within Clause 26.5.3;
- (b) a failure by the Secretary of State to issue the Commencement Certificate on or before the date for issue determined in accordance with Clause 7.3.1 (but only if and so long as such failure does not constitute a DBFO Co Termination Event);
- (c) a material breach by the Secretary of State of the provisions of Clause 8.1 [Access for DBFO Co] (but only if and so long as such breach does not constitute a DBFO Co Termination Event);
- (d) failure by the Department's Nominee to issue a Permit to Use, Completion Certificate or Taking Over Certificate when required to do so in accordance with Clause 13.1 [Permit to Use], 13.2 [Completion Certificate] or 13.3 [Local Facilities and De-Trunked Segments] respectively;

- (e) the occurrence of a Relevant Change in Law (but only if such Relevant Change in Law does not give rise to a right for either Party to terminate this Agreement in accordance with Clause 42.3.1); and
- (f) the exercise of any Rights in respect of land affecting the Site or any Adjacent Area provided that:
  - (i) such rights were not in existence at the date hereof and were not reasonably discoverable from:
    - (A) the Disclosed Data; or
    - (B) inspection of the Site or any Adjacent Area; or
    - (C) the making of such enquiries or searches as can be made of the relevant local authorities and other competent bodies; or
    - (D) any other information that would be revealed by such enquiries as it would be reasonable to expect a DBFO Co to make; or
  - (ii) such rights (whether coming into existence before or after the date of this Agreement) are not or (if already in existence at the date hereof) were not when they came into existence:
    - (A) necessary for the purpose of implementing the Project or the carrying out of the Operations or
    - (B) required to be granted by virtue of any of the Orders.
- (g) the taking of any action by Network Rail pursuant to clauses 2.8.1.5, 2.12, 3.7 and/or 3.9 of the Network Rail Agreement unless such action:
  - (i) is taken as a consequence of the performance or non-performance by the DBFO Co of any of its obligations under this Agreement and then only to the extent that such action is reasonable and proportionate having regard to all the circumstances at the time such action is taken; or
  - (ii) could have been taken or required pursuant to any statutory authority; or
  - (iii) could have been taken or required by the Secretary of State without breaching the terms of this Agreement (but without prejudice to any other rights that the DBFO Co may have as a result of any other Eligible Change that thereby arises by virtue of some other term of this Agreement); or
  - (iv) in the case of clause 2.12 could reasonably have been avoided by the design or manner of construction of the Bridge (as defined in the Network Rail Agreement) having regard to the matters that the DBFO Co should have reasonably foreseen in the course of performing such design or construction;

- (h) the exercise by Network Rail of its right to suspend performance of its obligations under the Network Rail Agreement pursuant to clause 4.4.1 of the Network Rail Agreement unless such action:
  - (i) is taken as a consequence of the performance or non-performance by the DBFO Co of any of its obligations under this Agreement and then only to the extent that such action is reasonable and proportionate having regard to all the circumstances at the time such action is taken; or
  - (ii) could have been taken or required pursuant to any statutory authority; or
  - (iii) could have been required by the Secretary of State without breaching the terms of this Agreement (but without prejudice to any other rights that the DBFO Co may have as a result of any other Eligible Change that thereby arises by virtue of some other term of this Agreement);
- (i) an event within Clause 30.9.12.

"Compensation Party" means any person entitled to Land Compensation Costs whose land, or whose Rights in respect of land (or any part thereof), is acquired or taken in connection with the Project.

"Compensation Party Accommodation Works" or "CPA Works" means the Specified CPA Works and the Unspecified CPA Works.

"Compensation Party Accommodation (CPA) Works Schedule" or "CPA Works Schedule" means a schedule submitted by the DBFO Co to the Secretary of State pursuant to paragraph 1.9 of Part 1 of Schedule 24 [CPA Works for Compensation Parties] in the form set out in Annex 2 to Part 1 of Schedule 24 [CPA Works for Compensation Parties].

"Condition Criteria" has the meaning given in paragraph 1 of Annex 2 to Part 1 of Schedule 9 [Congestion Management Payments].

"Confidential Information" has the meaning given in Clause 50.1 [Confidential Information].

"Confidential Schedules" means those Schedules or parts thereof which are stated therein to be confidential.

"Congestion Management Payment" means the amount determined in accordance with Part 1 of Schedule 9 [Congestion Management Payments] in respect of a Contract Year.

"Connecting Roads" means the lengths of trunk road or motorway described in Part 3 of Schedule 3 [Connecting Roads] which provide access to the Project Road and for which the Secretary of State is the highway authority.

"Construction Contract" means the contract so titled of even date herewith between the DBFO Co and the Contractor in respect of, inter alia, the design and construction of the Works.

"Construction Plant" means plant, materials and equipment used or to be used by the DBFO Co or its sub-contractors of any tier in the construction of the Project Facilities but does not include Plant.

"Construction Requirements" means the standards, specifications, procedures and other requirements for design and construction set out or identified or referred to in Part 2 of Schedule 4 [Construction Requirements], as amended or supplemented from time to time by any DBFO Co's Change, Alternative Proposal or Department's Change.

"Construction Review Period" has the meaning given in paragraph (a) of the definition of "Insurance Review Period".

"Contracting Associate" means the Designer, Contractor, Operator and any other Associated Company of the DBFO Co which performs any function in connection with this Agreement or the Operations or is a party to any Project Document.

"Contract Period" means the period commencing on the Commencement Date and expiring 30 years therefrom (subject to the provisions of Clauses 37.4.1 and 37.4.3) or on such other date as shall be the Termination Date.

"Contract Year" means a period of twelve months starting on 1st April, with the exception of the first Contract Year, which shall commence on the Commencement Date and end on the 31st March first occurring thereafter (the "First Contract Year"), and the last Contract Year, which shall commence on 1st April and end on the Termination Date (the "Last Contract Year").

"Contractor" means Carillion Construction Limited of Birch Street, Wolverhampton, West Midlands WV1 4HY or such substitute as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1. or 45.4.2.

"Contractor's Quality Documentation" has the meaning given in Clause 23.2.1.2.

"Core Communications Requirements" means the requirements set out or identified or referred to in Clause 3.7 [Core Communications Requirements] including, without limitation, the Scheme Specific Core Monitoring System Requirements.

"Core Construction Requirements" means the requirements set out or identified or referred to in Clause 3.5 [Core Construction Requirements] including, without limitation, the Scheme Specific Core Construction Requirements.

"Core O&M Requirements" means the requirements set out or identified or referred to in Clause 3.6 [Core O&M Requirements] including, without limitation, the Scheme Specific Core O&M Requirements.

"Counting Equipment" has the meaning given in Clause 31.2.3.1.

"Counting Measurement Point" means any point designated as such in Clause 31.2.1.

"Court" means any court of competent jurisdiction.

"Credit Agreement" means the credit agreement dated on or about the date hereof between (1) the DBFO Co, (2) Holdco, (3) the Arranger, (4) the Original Senior Lenders, (5) the Original Mezzanine Lender, (6) the Original Equity Bridge Lender[s], (7) the Issuing Bank, (8) the Senior Facility Agent, (9) the Mezzanine Facility Agent

and (10) the Security Trustee (as each such party, where the same is not defined in this Agreement, is defined therein).

"Custody Agreement" means the agreement for custody of the Financial Model and DVD Rom dated on or before the date hereof between the DBFO Co, the Secretary of State and the NCC Escrow International Limited.

"Data Validation" means, a process of monitoring Traffic Data and other relevant data to identify variations in such data that indicate anomalous operation of the Monitoring System.

"DBFO Co Loan Note Instrument" means the instrument issued by the DBFO Co of even date herewith authorising the issue of unsecured loan notes due 30 September 2033 of varying denominations and not exceeding £5,955,425.00 in the aggregate principal amount.

"DBFO Co Quality Director" means the person employed by the DBFO Co and appointed in accordance with Clause 23.8 [DBFO Co Quality Director].

"DBFO Co Termination Event" means any of the events set out in Clause 41.1 [DBFO Co Termination Events].

"DBFO Co's 5 Year Environmental Management Plan" has the meaning given in paragraph 1.1 of Part 5 of Schedule 14 [DBFO Co's 5 Year Environmental Management Plan].

"DBFO Co's 5 Year Environmental Performance Indicators" has the meaning given in paragraph 2.1 of Part 5 of Schedule 14 [DBFO Co's 5 Year Environmental Management Plan].

"DBFO Co's 5 Year Environmental Performance Targets" has the meaning given in paragraph 2.3 of Part 5 of Schedule 14 [DBFO Co's 5 Year Environmental Management Plan].

"DBFO Co's 5 Year Management Plan" has the meaning given in paragraph 1.1 of Part 3 of Schedule 14 [DBFO Co's 5 Year Management Plan].

"DBFO Co's 5 Year Performance Indicators" has the meaning given in paragraph 2.1 of Part 3 of Schedule 14 [DBFO Co's 5 Year Management Plan].

"DBFO Co's 5 Year Performance Targets" has the meaning given in paragraph 2.4 of Part 3 of Schedule 14 [DBFO Co's 5 Year Management Plan].

"DBFO Co's Change" means a variation in the design, quality or quantity of the Works initiated by the DBFO Co in accordance with Clause 11.4 [DBFO Co's Changes] and may include additions, omissions, substitutions, alterations in design and/or variations in or to the Construction Requirements or the Communications Requirements.

"DBFO Co's Programme" means the programme for the design and construction of the Works appearing in Part 1 of Schedule 2 [Programme] (as amended from time to time in accordance with this Agreement).

"DBFO Co's Quality Documentation" has the meaning given in Clause 23.2.1.1.

"DBFO Co's Representative" means the person appointed by the DBFO Co pursuant to Clause 22.2 [DBFO Co's Representative] or such substitute as may be appointed by the DBFO Co for the time being pursuant to Clause 22.3 [Change of Representatives].

"DBFO Co's Works Programme" means a detailed programme of design, investigations, construction and related works, based upon the DBFO Co's Programme, to be submitted by the DBFO Co in accordance with Clause 12.3.1 or any amended or varied version thereof submitted by the DBFO Co in accordance with Clause 12.3.2.2 and in respect of which there has been no objection under the Review Procedure.

"DBFO Payment" has the meaning given in Clause 32.1.1.

"Deemed Capacity" means in relation to a Link of a Carriageway Section, the number of PCUs per hour identified in Annex 1 to Part 1 of Schedule 9 [Congestion Management Payments] for that Carriageway Section.

"Deemed Department's Change" means any Change in Law which requires:

- (a) a variation in the design, quality or quantity of the Works; or
- (b) a variation in the design, quality or quantity of the Operations (other than as referred to in paragraph (a) above),

which, if it were instructed as such, would constitute a Department's Change and may in either such case include additions, omissions, substitutions, alterations in design and/or variations in or to the Technical Requirements.

"Deemed Department's Change Notice" has the meaning given in Clause 35.2.1.

"Defective Date" means the date on which the relevant item of Measuring Equipment became defective or (where that time cannot be established) the date which is the mid-point between the last Verification which indicated that the equipment was operating within the Measurement Limits of Accuracy and the Verification which indicated that it was not so operating.

"Defective Work" means any defective or negligent work by any Third Party Contractor prior to the date of this Agreement giving rise to a Latent Defect.

"Delay Period" has the meaning given in Clause 12.6.6.

"Department" or "DfT" or "DOT" or "DTp" or "MOT" or "DETR" or "DTLR" means the Department for Transport or, as the case may be any predecessor or successor government department.

"Department's Change" means:

- (a) a variation in the design, quality or quantity of the Works; or
- (b) a variation in the design, quality or quantity of the Operations (other than as referred to in paragraph (a) above),

initiated by the Department's Nominee in accordance with Annex 1 to Part 1 of Schedule 12 [Department's Change] and may in either such case include additions, omissions, substitutions, alterations in design and/or variations in or to the Technical Requirements.

"Department's Nominee means Peter Evans or such substitute or substitutes as may be appointed by the Secretary of State for the time being pursuant to Clause 22.3 [Change of Representatives].

"Department's Standards" means all standards and specifications issued by the Secretary of State from time to time in respect of the design, construction, operation and maintenance of highways, including, without limitation, the following:

- (a) the Design Manual for Roads and Bridges including all Department Technical Advice Notes and Technical Design Notes;
- (b) the Specification for Highway Works;
- (c) the Notes for Guidance;
- (d) the Highway Construction Details;
- (e) Circular Roads;
- (f) the Trunk Road Maintenance Manual;
- (g) Interim Advice Notes;
- (h) the Routine Maintenance Management Systems Manual;
- (i) the Highway Inspection Survey Site Inspectors Manual;
- (j) the Traffic Signs Manual;
- (k) the Signs Working Drawings;
- (l) Area Management Memos;
- (m) Chief Highway Engineer Memoranda; and
- (n) Internal Advice Notes.

"Departure from Standard" means one of, or a combination of, the following:

- (a) the use of technical design directives other than those in the DMRB;
- (b) the use of technical specifications for materials or workmanship other than those in the SHW and HCD;
- (c) the use of a set of requirements (or additional criteria) for any aspect of the Works for which requirements are not given in the Department's Standards in force at the date of execution of this Agreement; and
- (d) the use of a technical design directive or technical specification in a manner or circumstance which is not permitted or provided for in such directive or specification,

in any such case approved by the Secretary of State on or prior to the date of execution of this Agreement, and any relaxation in any of the Department's Standards in force at

the date of execution of this Agreement not requiring approval by the Secretary of State in accordance with the DMRB.

"Design and Certification Procedure" means the procedure set out in Part 3 of Schedule 4 [Design and Certification Procedure].

"Design Contract" means the contract so titled of even date herewith between the Contractor and the Designer in respect of, inter alia, the design and examination of the Works and, if applicable from time to time, any Subsequent Design Contract.

"Design Data" means all calculations, designs, design or construction information, standards, specifications, plans, drawings, (including, without limitation, fabrication drawings), graphs, sketches, models and other materials, including all eye readable or computer or other machine readable data, used, prepared or to be prepared by or on behalf of the DBFO Co (and/or any of the DBFO Co's agents, employees, contractors or sub-contractors of any tier) or the Secretary of State relating to the design or construction of the Works or any DBFO Co's Change, Alternative Proposal, Department's Change or Improvement or the operation, maintenance or improvement of the Project Facilities.

"Designer" means Symonds Group Limited of 24-30 Holborn, London EC1N 2LX acting through its Principal, Martin Beckett, or such substitute (acting through its Principal who shall be a chartered civil or structural engineer or equivalent) as may be appointed by the Contractor for the time being in accordance with Clause 45.4.1 or 45.4.2 [Sub-Contracting].

"Designer's Quality Documentation" has the meaning given in Clause 23.2.1.3.

"Design Manual for Roads and Bridges" or "DMRB" means the Design Manual for Roads and Bridges, published by The Stationery Office.

"Design Team" has the meaning given in paragraph 2.4 of Section A of Part 3 of Schedule 4 [Design and Certification Procedure].

"Detailed Design" means the detailed design to be developed (from the preliminary design, if any, shown in the Construction Requirements and the Communications Requirements) in respect of each part of the Permanent Works so as to allow construction of that part in accordance with the Construction Requirements and the Communications Requirements and so as to procure satisfaction of the Core Construction Requirements and the Core Communications Requirements.

"De-Trunked Segment" means any segment of the Existing Road described as such in Part 1 of Schedule 3 [Existing Road] and shown on drawing numbered A249/03/01-011 set out in Part 7 of Schedule 3 [Drawings] which is or is to be de-trunked in accordance with an order made pursuant to Section 10(2)(b) of the Highways Act.

"DfT Transport Statistics Division" means the Road and Traffic Directorate of the Department or any other subsequent or replacement body responsible for the collection and production of national statistics for traffic and road safety.

"Direct Agreement" means the agreement entered into or to be entered into between the Secretary of State, the Royal Bank of Scotland plc (for itself and as agent for and on behalf of the Credit Providers (as defined therein)) and the DBFO Co in the form set out in Part 4 of Schedule 1 [Form of Direct Agreement].

"Disclosed Data" has the meaning given in Clause 38.2.1.

"Dispute" means a difference or dispute of whatever nature between the Secretary of State (and/or the Department's Nominee) of the one part and the DBFO Co (and/or the DBFO Co's Representative) of the other part arising under, out of or in connection with this Agreement (including without limitation any question of interpretation of this Agreement).

"Disputes Resolution Procedure" means the procedure referred to in Clause 52 [Disputes Resolution Procedure] and set out in Schedule 15 [Disputes Resolution Procedure].

"Distributions" has the meaning given to such term in Schedule 25.

"Distributions Cap Amount" means:

(a) where all or any part of an Eligible Rescue Refinancing Amount is outstanding as at the Termination Date, the aggregate amount of all Eligible Rescue Refinancing Amounts; or

(b) where:

(i) no Eligible Rescue Refinancing Amount is outstanding as at the Termination Date; and

(ii) any amounts outstanding under the Funding Agreements were rescheduled as part of an Unapproved Rescue Refinancing,

an amount equal to the Original Senior Debt Differential as at the Termination Date; or

(c) where:

(i) no Eligible Rescue Refinancing Amount is outstanding as at the Termination Date; and

(ii) the circumstances referred to in paragraph (b)(ii) above do not apply,

an amount equal to zero.

"Diversionary Measures" means the use of signs or other measures to require or to seek to encourage the use of any alternative route away from the Project Road.

"DVD Rom" means the computer disk in DVD-R format containing material, documents and data relating to the Project which has been made available to the DBFO Co and which is to be lodged with NCC Escrow International Limited on the terms set out in the Custody Agreement.

"Earthworks" has the meaning given to it in British Standard 6100.

"Ecologist" means Symonds Group Limited of 24-30 Holborn, London EC1N 2LX acting through its Principal, Zofia Kubica, or such substitute (acting through its Principal who shall be a full member of the Institute of Ecology and Environmental Management or a full member of the Landscape Institute (Science Division) or their equivalent with a minimum of 10 years' relevant post qualification experience) as may

be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1. or 45.4.2 [Sub-Contracting].

"Eligible Change" means any of the following:

- (a) a Department's Change;
- (b) any Additional Works which result in any change in the costs of or revenues to the DBFO Co in the conduct of the Operations;
- (c) any Compensation Event;
- (d) the imposition or removal of User Paid Tolls or any change in User Paid Tolls; and
- (e) a change resulting from the implementation of the requirements of a Classified Information Notice or from the withdrawal or modification by the Secretary of State of the requirements of a Classified Information Notice, which, in each case:
  - (i) occurs after the date of this Agreement; and
  - (ii) increases or decreases the obligations to be observed and performed by the DBFO Co in relation to the relevant Classified Information and/or Classified Information Guidelines;
- (f) a change in the National Speed Limit on any part of the Project Road;
- (g) a change in the designation of or de-trunking of the Project Road resulting in a change in the applicable National Speed Limit on any part of the Project Road;
- (h) the conducting of a trial or survey referred to in Clause 14.4.1.2.3;
- (i) the creation of any Rights in respect of land consequent upon the implementation of any New Order necessary in connection with a Relevant Change where such rights:
  - (i) are created following, where the DBFO Co is the Proponent, the date on which the Relevant Change Notice is given or, otherwise, the date on which the Change in Costs which has resulted or will result from the Relevant Change is agreed or determined pursuant to paragraph 2.2 or paragraph 4 (as applicable) of Annex 2 to Part 2 of Schedule 12 [Change]; and
  - (ii) result in a change in the costs of the DBFO Co which would, if such rights had been created prior to the date set out in (i), have been taken into account in the calculation of the Change in Costs in respect of the Relevant Change and were not actually taken into account in such calculation.

"Eligible Force Majeure" has the meaning given to it in paragraph 2 of Schedule 11[Force Majeure].

"Eligible Rescue Refinancing" means any Rescue Refinancing as a result of which the Available Funding is increased in aggregate by an amount not exceeding the Maximum

Rescue Refinancing Compensation Amount applicable on the date of such Rescue Refinancing less an amount equal to the aggregate increases in Available Funding arising from all Unapproved Rescue Refinancings occurring prior to such Rescue Refinancing.

"Eligible Rescue Refinancing Amount" means, in respect of any Eligible Rescue Refinancing, the amount by which the Available Funding is increased as a result of such Eligible Rescue Refinancing and Eligible Rescue Refinancing Amounts shall be construed accordingly.

"Emergency Diversionary Measures" means the use of signs or other measures to require Users to use an alternative route away from the Project Road as a result of an emergency.

"Encumbrance" means any Rights in respect of land or any mortgage, charge, pledge, lien, assignment, option, right to acquire, right of pre-emption, security interest, trust arrangement, and any other equity or preferential right or any agreement or arrangement to create any of them.

"Environmental Management Systems" means the organisational structure, procedures, processes and resources for determining and implementing environmental policy.

"Environmental Management System Documentation" means the manuals, plans, procedures, work instructions or like documentation, as appropriate, which describe and define an Environmental Management System.

"Environmental Manager" means Cresswell Associates (Environmental Consultants) Limited of 12B High Street, Wendover, Bucks, HP22 6EA acting through its Principal, Dr Stephanie Wray, or such substitute (who shall be a full corporate member of one of the Landscape Institute (Management Division), the Institute of Ecology and Environmental Management or the Institute for Water and Environmental Management or their equivalent and who shall act through its Principal who shall have a minimum of 10 years relevant post qualification experience) as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or 45.4.2 [Sub-Contracting].

"Environmental Statement" means the environmental statements and reports referred to in Annex 10/D to Part 2 of Schedule 4 [Construction and Handback Requirements].

"Environmental Team" has the meaning given to it in paragraph 7.1.4 of Section 7 of Part 2 of Schedule 6 [O&M Requirements].

"Equity Bridge Guarantee" means (A) the guarantee of Carillion Private Finance Limited's obligations under the Equity Subscription Agreement dated on or about the date of the Credit Agreement between (1) the Equity Bridge Guarantor (as defined in the Credit Agreement) at the date of the Credit Agreement, (2) the DBFO Co and (3) the Security Trustee and (B) in respect of any Acceptable Transferee (as defined in the Credit Agreement), any replacement form of credit support (in form and substance satisfactory to the Global Facility Agent (as defined in the Credit Agreement), acting on the instructions of the Equity Bridge Lenders (as defined in the Credit Agreement).

"Equity Subscription Agreement" means the equity subscription agreement dated on or about the date hereof entered into by (1) Carillion Private Finance Limited, (2) Holdco, (3) the DBFO Co, (4) the Security Trustee and (5) the Global Facility Agent.

"Event of Default" means any of the events set out in Clause 40.1 [Events of Default].

"Excepted Off-Site Works" has the meaning given in Clause 13.2.9.

"Excepted Works" means all or any of:

- (a) the Excepted Off-Site Works;
- (b) (provided that, at all times prior to the date of issue of the Completion Certificate, the DBFO Co shall have complied with its obligations under Part 6 of Schedule 4 and without prejudice to Clause 13.2.8.5) any Traffic Noise Works which, in accordance with the provisions of Part 6 of Schedule 4 [Noise Insulation Requirements], fall to be completed after the date of issue of the Completion Certificate;
- (c) (for the purposes of Clause 13.2.6.1 only) any works required to repair damage arising as a result of either:
  - (i) an accident occurring after the issue of the Permit to Use; or
  - (ii) fair wear and tear

if, in each case such damage is required to be remedied by the DBFO Co pursuant to the O&M Requirements but the O&M Requirements do not require such damage to be remedied prior to the date that the Completion Certificate would otherwise be issued.

"Existing Road" means (subject to paragraph 6 of Part 1 of Schedule 13 [Procedure for Additional Works], paragraph 7 of Part 3 of Schedule 13 [Subsequent Schemes] and paragraph 3 of Part 4 of Schedule 13 [Improvements]) the lengths of trunk road or motorway described in Part 1 of Schedule 3 [Existing Road] and shown on drawings numbered A249/03/01-001 to 010 (inclusive) set out in Part 7 of Schedule 3 [Drawings] including without limitation:

- (a) all carriageways, hard shoulders, slip roads, side roads, access roads, bridges and other highway structures whether over or under such road (but excluding the bridges and other structures (if any) so specified in Part 1 of Schedule 3 [Existing Road] to the extent so specified); and
- (b) unless otherwise expressly provided, any Upgraded Sections,

together with all supporting infrastructure and amenity, including, without limitation, all fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, cycleways, road markings, road traffic signs, road traffic signals, road lighting, communications installations, public toilets, picnic sites, lay-bys, embankments and cuttings, but excluding any parts thereof which are excluded from this definition from time to time in accordance with Clause 13.3.5.2.

"Existing Road Damage" has the meaning given in Clause 14.1.5

"Expert" means any person appointed as such from time to time under and subject to the provisions of Schedule 15 [Disputes Resolution Procedure].

"Expiry Date" means the date which is 30 years from the Commencement Date (or the date of expiry of such other period as may be substituted therefor in accordance with Clauses 37.4.1 or 37.4.3).

"Financial Model" means the financial model provided by the DBFO Co embodied in its financial model software setting out the basis on which the financing of the Project and/or the costs of and revenue from the Project have been calculated by the DBFO Co (including without limitation the assumptions used, the cell logic network for the financial model software and any accompanying documentation necessary to operate the financial model), whether embodied on tape, disk or other electronic storage medium.

"Financial Terms" means the financial terms set out in the Funding Agreements.

"First Contract Year" has the meaning given in the definition of "Contract Year".

"First Insurance Review Date" means the first Review Date to occur after the date of issue of the Completion Certificate.

"Force Majeure" means any of those events referred to in Schedule 11 [Force Majeure].

"Fossils and Antiquities" means all fossils, articles of value or antiquity and structures or other remains or things of particular geological, historical or archaeological interest discovered on the Site or Adjacent Areas or in the course of carrying out the Operations.

"Funders" means all or any of the persons who provide financing or funding in respect of the Project under the Funding Agreements.

"Funding Agreements" means:

- (a) all or any of the agreements or instruments of even date herewith specified in Clause 2.3.1.3, including any amendments or supplements thereto, and any agreements or instruments (other than the DBFO Co Loan Note Instrument) entered into by the DBFO Co to raise additional or substitute finance or financial facilities of any form or relating to the rescheduling of its indebtedness or the refinancing of the Project; and
- (b) all or any agreements or instruments entered into by the DBFO Co for the purpose of facilitating the hedging of any exposure to interest rate fluctuations under any of the agreements or instruments referred to in (a) above (other than the DBFO Co Loan Note Instrument), including any amendments or supplements thereto, and any agreements or instruments entered into by the DBFO Co to effect additional or substitute interest rate hedging arrangements.

"General Change Procedure" means the procedure set out in Part 2 of Schedule 12 [General Change Procedure].

"General Vesting Declaration" means a declaration made by the Secretary of State pursuant to Section 8 of the Compulsory Purchase (Vesting Declaration) Act 1981.

"Good Industry Practice" means, at any time, the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected at such time from a skilled and experienced operator seeking in good faith to comply

with its contractual obligations, complying with all applicable laws and engaged in the same type of undertaking and under the same or similar circumstances and conditions.

"Government" means the government of the United Kingdom.

"Government Policy Directive" means any Government or Department policy directive or instruction published and issued to the Highways Agency (other than by way of a Change in Law) which is required to be implemented on the motorway and/or trunk road network generally.

"Handback Amount" has the meaning given in Clause 19.6.7.

"Handback Inspection" has the meaning given in Clause 19.6.1.

"Handback Requirements" means the requirements set out or identified or referred to in paragraph 1 of Part 4 of Schedule 4 [Handback Requirements] as amended from time to time by any Department's Change.

"Health & Safety Management Systems" means the organisational structure, procedures, processes and resources for determining and implementing health and safety policy.

"Health & Safety Management System Documentation" means the manuals, plans, procedures, work instructions or like documentation, as appropriate, which describe and define a Health & Safety Management System.

"Hedging Agreements" means any agreement referred to in paragraph (b) of the definition of "Funding Agreements" including, without limitation, the Initial Hedging Agreement.

"Hedging Termination Amounts" means the net amount (if any) payable under the Hedging Agreements on termination of the interest rate hedging transaction(s) entered into under the Hedging Agreements.

"Highway Construction Details" or "HCD" means the Highway Construction Details published by The Stationery Office as Volume 3 of the Manual of Contract Documents for Highway Works.

"Highways Act" means the Highways Act 1980.

"Highways Inspection Survey Site Inspectors Manual" means the manual of instruction and guidance for the inspection of highways published by the Department.

"Holdco" means Sheppey Route (Holdings) Limited a company organised and existing under the laws of England and Wales, registered under number 04918710 and having its registered office at Birch Street, Wolverhampton, West Midlands WV1 4HY.

"Holdco Loan Note Instrument" means the instrument issued by the Holdco dated on or about the date hereof authorising the issue of unsecured loan notes due 30 September 2033 of varying denominations and not exceeding £5,955,425.00 in the aggregate principal amount.

"Holdco Security Agreement" means the security agreement dated on or about the date hereof between (1) Holdco and (2) the Security Trustee.

"Holdco Side Letter" means the letter agreement dated on or about the date hereof between (1) Holdco, (2) the DBFO Co and (3) the Secretary of State relating to, amongst other things, the Authorised Junior Security.

"Holding Company" has the meaning given to it in Section 736 of the Companies Act 1985 as amended by Section 144 of the Companies Act 1989. Notwithstanding the provisions of Clause 1.2.5 this definition shall not be changed in the event of an amendment to the definition of "holding company" contained in the Companies Act 1985 as amended by the Companies Act 1989, whether by any subordinate legislation or otherwise.

"Hold Point" has the meaning given in paragraph 2 of Part 1 of Schedule 5 [Principles for Quality Documentation].

"Immediate Penalty Point Failure" has the meaning given in Clause 26.1.2.

"Implementation Date" means the date for implementation of a Department's Change (other than one which is a variation in the design, quality or quantity of the Works) as agreed or determined in accordance with Annex 1 to Part 1 of Schedule 12 [Department's Change].

"Improvement" means any change, improvement or addition to the design, layout or structure of the Project Facilities made or proposed to be made by the DBFO Co on or after the following dates:

- (a) for the Existing Road (other than any Upgraded Section), at any time after the date of this Agreement; and
- (b) for the New Road (including, without limitation, any Upgraded Section) and Off-Site Facilities at any time after the issue of the Completion Certificate,

which can lawfully be accomplished by the DBFO Co without obtaining New Orders.

"Incident" means an occurrence necessitating traffic control measures either by the DBFO Co or the police or affecting or potentially affecting safety, the environment or the structural integrity of the Project Road.

"Index" has the meaning given in paragraph 1 of Part 4 of Schedule 9 [Indexation].

"Indexation Date" means, for the purposes of Part 4 of Schedule 9 [Indexation], the Review Date or any other date on which any Index is to be applied.

"Initial Hedging Agreement" means the hedging arrangements entered into by the DBFO Co in connection with interest payable under the Credit Agreement on or about the date hereof.

"Injurious Affection Costs" means any Claim or Loss arising under Section 10 of the Compulsory Purchase Act 1965 or Part 1 of the Land Compensation Act 1973 or otherwise in relation to injurious affection or nuisance or infringement of rights whether actionable or not in relation to the construction, use or operation of the Project Road or in relation to the operation or effects of any statutory order promoted or made in relation to the construction, use or operation of the Project Road.

"Injurious Affection Party" means any person other than a Compensation Party entitled to Land Compensation Costs in connection with the Project.

"Injurious Affection Party Accommodation Works" or "IAPA Works" means works carried out in lieu of the entitlement of an Injurious Affection Party to Land Compensation Costs including, without limitation, any works carried out in the discharge of the Requirements of Interested Parties set out in Part 4 of Schedule 8 boundary fencing and boundary arrangements, means of access and screening.

"Initial Inspection" has the meaning given in Clause 19.2.1.

"Insolvent" means (for the purposes of Clause 20.9 [Insurance]) in relation to a person, that an Insolvency Event has occurred.

"Insolvency Event" means, (for the purposes of Clause 20.9 [Insurance]) in relation to a person:

- (a) the issue of a petition for winding up of that person which petition is not withdrawn or discharged within seven (7) days of its issue;
- (b) the making of an order or an effective resolution being passed for the winding up of that person;
- (c) a liquidator, receiver, administrative receiver, administrator, trustee or other similar officer or an encumbrancer taking possession of the whole or any part of that person's undertaking, property or assets;
- (d) that person entering into a company voluntary arrangement within the meaning of Part 1 Insolvency Act 1986 or otherwise making an arrangement, composition or assignment for the benefit of all or any part of its creditors;
- (e) that person being unable to pay its debts within the meaning of section 123(1)(e) of the Insolvency Act 1986 (without the need to prove any fact or matter to the satisfaction of the Court);
- (f) the issue of a notice of intention to appoint an administrator.

"Insulation Works" has the meaning given in Part 6 of Schedule 4 [Noise Insulation Requirements].

"Insurance Review Date" means each of the following dates:

- (a) the First Insurance Review Date;
- (b) each subsequent second Review Date after the First Insurance Review Date;  
and
- (b) the Termination Date.

"Insurance Review Period" means:

- (a) in relation to the First Insurance Review Date, the period from the date of this Agreement until the date of issue of the Completion Certificate (the "Construction Review Period");
- (b) in relation to each subsequent Insurance Review Date (other than the Last Insurance Review Date), the two year period preceding the last Relevant

Completion Certificate Anniversary to occur immediately prior to such Insurance Review Date (each such period being an "O&M Review Period");

- (c) in relation to the Last Insurance Review Date, the period from (i) the last Relevant Completion Certificate Anniversary to occur prior to the Termination Date until (ii) the Termination Date (the "Last O&M Review Period").

"Insurance Year" means a period of twelve months starting on an anniversary of the issue of the Completion Certificate, with the exception of the first Insurance Year which shall be a period of twelve months starting on the issue of the Completion Certificate and the last Insurance Year which shall commence on the last anniversary of the issue of the Completion Certificate to occur prior to the Termination Date and shall end on the Termination Date.

"Insurances" has the meaning given in Clause 20.1.1.

"Intellectual Property" means all current and future legal and/or equitable interests in registered or unregistered trade marks, service marks, patents, registered designs, utility marks, applications for any of the foregoing, copyrights, unauthorised extraction and/or re-utilisation rights, unregistered designs, inventions, confidential information, know-how or other intellectual property rights subsisting in or relating to the Design Data and/or the Traffic Data.

"Intercreditor Deed" means the intercreditor deed dated on or about the date hereof entered into by (1) the DBFO Co, (2) Holdco, (3) the Equity Bridge Guarantor, (4) Carillion Private Finance Limited, (5) the Senior Lenders, (6) the Mezzanine Lenders, (7) the Hedging Banks, (8) the Equity Bridge Lenders, (9) the Sponsor, (10) the Issuing Bank, (11) the Senior Facility Agent and Security Trustee and (12) the Mezzanine Facility Agent (as each such party, where the same is not defined in this Agreement, is defined therein).

"Interested Parties" means those persons who may be affected by the carrying out of the Works or Operations or who are duly authorised by a Legal Requirement to review or otherwise take an interest in the Works or Operations, including without limitation the Relevant Authorities and those persons identified in Part 2 of Schedule 8 [Other Interested Parties].

"Interest Rate" means a rate of interest per annum equivalent to the average of the base lending rates announced by Barclays Bank PLC and Royal Bank of Scotland PLC which are current on the date upon which the amount bearing interest first became due (such interest to accrue daily on the basis of a 365 day year and to be compounded at six monthly intervals). In the event of any variation in such lending rates being announced while such amount remains outstanding, the interest payable shall be correspondingly varied from the date of each such variation.

"Interim Advice Notes" means the interim advice notes published by the Department.

"Internal Advice Notes" means the internal advice notes published by the Department.

"Investigation" means any ground, physical or geophysical investigation of the conditions of the Site or Adjacent Areas, including the surface and subsoil, or archaeological or ecological survey of the Site or Adjacent Areas, to enable the Works to be designed and constructed with due regard for those conditions and for seismic activity in the region of the Site and Adjacent Areas.

"Judicial Review" means any application for judicial review (including any application for leave) made under Part 54 of the Civil Procedure Rules seeking review of any determination, decision, order or omission of the Secretary of State or any application for a declaration (not made pursuant to such Part 54) which concerns the legality of any determination, decision, order or omission of the Secretary of State or any statutory challenge, action or appeal which proceeds on similar principles.

"Land Compensation Costs" means all amounts (including, without limitation, any interest) properly payable to compensate for Claims and associated Losses (including, without limitation, Injurious Affection Costs) incurred by owners or occupiers of land or owners of Rights in respect of land whose property is acquired, taken or otherwise injuriously affected (including, without limitation, an effect consequent upon rights being created) by the Orders or the use of the Project Road.

"Landscape Architect" means Symonds Group Limited of 24-30 Holborn, London EC1N 2LX acting through its Principal, Roger Cooper, or such substitute (who shall act through its Principal who shall be a full member of the Landscape Institute (Design Division) or its equivalent with a minimum of 10 years' relevant post qualification experience) as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1. or 45.4.2 [Sub-Contracting].

"Lane Closure" means:

- (a) any partial or total closure or other restriction (including, without limitation, any narrowing of one or more traffic lanes (in one direction of travel) on the Project Road;
- (b) any partial or total closure or other restriction of any hard shoulder on the Project Road;
- (c) to the extent not included in paragraph (a) or (b) above, any partial or total closure or other restriction of any slip road, access road, side road or other part of the Project Road;

but excluding in any such case any Type C lane closures (as defined in Section 6 of Chapter 8 of the Traffic Signs Manual).

"Last Contract Year" has the meaning given in the definition of "Contract Year".

"Last Insurance Review Date" means the Insurance Review Date that occurs on the Termination Date.

"Last O&M Review Period" has the meaning given in paragraph (c) of the definition of "Insurance Review Period".

"Latent Defect" has the meaning given in Clause 17.1 [Latent Defects].

"Law" means any applicable law (including any rule of common law), statute, proclamation, by-law, directive, decision, regulation, rule, order, notice, rule of court or delegated or subordinate legislation.

"Legal Requirement" means the requirement of any United Kingdom or European Community Law or of any Law, requirement or demand of any Relevant Authority

which has jurisdiction with regard to any of the Operations or whose systems may be affected by the conduct of any of the Operations.

"Legislation" means United Kingdom legislation or subordinate legislation or any legislative act of the Council of the European Union or the Commission of the European Communities which (without further enactment) has legal effect within the United Kingdom.

"Liaison Procedures" means any of the procedures set out in Schedule 16 [Liaison Procedures] or to be developed pursuant to this Agreement in accordance with such Schedule 16 [Liaison Procedures], as the case may be.

"Link" means a unidirectional sub-section of a Carriageway Section, the limits of which, prior to the issue of a Permit to Use for Scheme 1 are as defined in Annex 1 to Part 2 of Schedule 9 and thereafter are as defined in Annex 1 to Part 1 of Schedule 9 and further detailed on the drawings numbered A249/09/01/01-001 and 002 set out in Part 5 of Schedule 9 [Drawings].

"Local Authority Road" means any De-Trunked Segment and any part of the Off-Site Facilities which is or is to be a highway maintainable at public expense as indicated or shown on drawings numbered A249/03/01-011 and A249/03/02-001 to 004 (inclusive) set out in Part 7 of Schedule 3 [Drawings], including without limitation all carriageways, hard shoulders, slip roads, side roads, access roads, bridges and other highway structures, together with all supporting infrastructure and amenity, including without limitation all fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, road markings, road traffic signs, road traffic signals, road lighting, communications installations, embankments and cuttings.

"Local Facilities" means any Local Authority Road, CPA Works and any other part of the Off-Site Facilities which (on completion of any Works in respect thereof) is to be operated and maintained by the Secretary of State, a local authority or other third party.

"Local Person" means any highway authority or other party to whom any Local Facilities are to be handed over in accordance with Clause 13.3 [Local Facilities and De-Trunked Segments].

"Long Vehicle" means any motor vehicle greater than six (6) metres in length.

"Loss" means any loss, damage, cost or expense.

"Maintenance Works" means any works for the maintenance or repair of the Project Facilities made or proposed to be made by the DBFO Co on or after the following dates:

- (a) for the Existing Road, at any time after the O&M Commencement Date;
- (b) for the New Road and Off-Site Facilities located on Adjacent Areas, at any time after the issue of the Completion Certificate,

but excluding any Routine Maintenance.

"Management Services Agreement" means the agreement so titled of even date herewith between the DBFO Co, Holdco and TPS Consult Limited (trading as TPS Schal) in respect of, inter alia, the provision of personnel to the DBFO Co.

"Management System Documentation" means Quality Documentation, Environmental Management System Documentation and Health & Safety Management System Documentation.

"Management Systems" means Quality Management Systems, Environmental Management Systems and Health & Safety Management Systems.

"Manual of Contract Documents for Highway Works" or "MCHW" means the manual for contract documents for highway works published by The Stationery Office.

"Milestone Event" has the meaning given in Part 2 of Schedule 1 [Milestone Event].

"Minimum Environmental Performance Level" has the meaning given in paragraph 2.5 of Part 5 of Schedule 14 [DBFO Co's 5 Year Environmental Management Plan].

"Minimum Performance Criteria" has the meaning given in Appendix 1 to Annex 2 to Part 1 of Schedule 9 [Congestion Management Payments] and "Minimum Performance Criterion" shall mean one of the Minimum Performance Criteria as appropriate.

"Minimum Performance Level" has the meaning given in paragraph 2.6 of Part 3 of Schedule 14 [DBFO Co's 5 Year Management Plan].

"Monthly Report" has the meaning given in paragraph 2 of Part 2 of Schedule 14 [Reports].

"National Data Processing Authority" means TRL Limited or any other replacement authority responsible for operating a national database of PIAs and for producing data relating to PIAs required for the calculation of the Safety Performance Adjustment.

"National Speed Limit" means, in relation to a Carriageway Section, the maximum speed at which a person may legally drive a motor vehicle along that Carriageway Section.

"Net Cash Flow" means the DBFO Payments less any operating and maintenance costs, capital expenditure and taxes.

"Network Board" means the strategic partnering board to be established and maintained by the Parties.

"Network Rail" means Network Rail Infrastructure Limited registered in England with number 2904587 whose registered office is at 40 Melton Street, London NW1 2EE and including any successor in title to Network Rail or any other subsequent or replacement body.

"Network Rail Agreement" means the agreement dated 9<sup>th</sup> February 2004 between the Secretary of State and Network Rail in the form of the Agreement set out in Part 5 of Schedule 8 [Form of Network Rail Agreement].

"Network Rail Loss" means any Loss suffered by the DBFO Co arising from or occasioned by a breach by Network Rail of its obligations under the Network Rail Agreement but excluding any costs or delays occasioned by the terms of or failure to obtain or receive timely Possessions, Network Rail Consents (as such terms are defined in the Network Rail Agreement), consents, permissions, orders and approvals unless such costs or delays are due to the negligence or wilful default in bad faith of Network Rail, its agents or employees.

"Network Rail Recovery Amount" means the amount (net of any costs of recovery which have not been recovered by the Secretary of State from Network Rail or the DBFO Co) that the Secretary of State has recovered from Network Rail in respect of any Network Rail Loss.

"New Order" means any line, side road, de-trunking, compulsory purchase or other order, any certificate, approval, revocation, consent or variation of any existing order, statutory instrument or other subordinate legislation made in respect of the Project Facilities in accordance with the terms of this Agreement.

"New Road" means (subject to Clause 8.8 [Boundaries of Site and Adjacent Areas], paragraph 6 of Part 1 of Schedule 13 [Procedure for Additional Works], paragraph 7 of Part 3 of Schedule 13 [Subsequent Schemes] and paragraph 3 of Part 4 of Schedule 13 [Improvements]) the lengths of trunk road or motorway described in Part 2 of Schedule 3 [New Road] located in the areas shown on drawings numbered A249/03/02-001 to 004 (inclusive) set out in Part 7 of Schedule 3 [Drawings] and constructed or modified or to be constructed or modified by the DBFO Co, including without limitation:

- (a) all carriageways, hard shoulders, slip roads, side roads, access roads, bridges and other highway structures whether over or under such road (but excluding the bridges and other structures (if any) so specified in Part 2 of Schedule 3 [New Road] to the extent so specified);
- (b) unless otherwise expressly provided, any Upgraded Sections,

together with all supporting infrastructure and amenity, including, without limitation, all fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, cycleways, road markings, road traffic signs, road traffic signals, road lighting, communications installations, the Monitoring System, embankments and cuttings but excluding any parts thereof which are excluded from this definition from time to time in accordance with Clause 13.3.5.2.

"Noise Insulation Requirements" has the meaning given in Part 6 of Schedule 4 [Noise Insulation Requirements].

"Non-Urgent Traffic Signal Fault" has the meaning given in Section 3 of Part 2 of Schedule 6.

"Notes for Guidance" means the Notes for Guidance on the Specification for Highway Works, published by The Stationery Office as Volume 2 of the Manual of Contract Documents for Highway Works.

"Notice" has the meaning given in Clause 46.1 [Requirement for Writing].

"Nuisance" means statutory, public and private nuisances as defined from time to time by Law.

"O&M Commencement Date" means the later of:

- (a) the Commencement Date; and
- (b) 1st June 2004.

"O&M Requirements" means the standards, specifications, procedures and other requirements for the operation and maintenance of the Project Facilities set out or identified or referred to in Part 2 of Schedule 6 [O&M Requirements], as amended from time to time by any Department's Change or in accordance with Clause 14.2 [O&M Requirements].

"O&M Review Period" has the meaning given in paragraph (b) of the definition of "Insurance Review Period".

"O&M Standards" means the standards and specifications set out in Part 4 of Schedule 6 [O&M Standards] as amended from time to time in accordance with Clause 14.2 [O&M Requirements].

"Occupied Property" means, the property known as Barrowgate shown for the purposes of general identification only on drawing number A249/03/01-008 set out in Part 7 of Schedule 3 [Drawings].

"Off-Site Facilities" means:

- (a) (subject to paragraph 3 of Part 4 of Schedule 13 [Improvements]) those parts of the Permanent Works located on Adjacent Areas, including but not limited to carriageways, hard shoulders, slip roads, side roads, access roads, pedestrian subways, cycleways, bridges and other highway structures, land under bridges, fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, road markings, road traffic signs, road traffic signals, road lighting, communications installations, embankments and cuttings, but excluding any parts thereof which are excluded from this definition from time to time in accordance with Clause 13.3.5.2; and
- (b) subject to paragraph 6 of Part 1 of Schedule 13 [Procedure for Additional Works], those Additional Works (if any) located on Adjacent Areas; and
- (c) subject to paragraph 7 of Part 3 of Schedule 13 [Subsequent Schemes], any part of any Subsequent Scheme located on Adjacent Areas.

"Off-Site Works" means those parts of the Works which are to be carried out by the DBFO Co in respect of the Off-Site Facilities.

"Operation and Maintenance Contract" means the contract so titled of even date herewith between the DBFO Co and the Operator for the operation and maintenance of the Project Facilities.

"Operations" means the activities of or required of the DBFO Co (and/or any of the DBFO Co's agents, employees, contractors or sub-contractors of any tier) in connection with the performance of any obligations of the DBFO Co under this Agreement, and the conduct of any works or operations of the DBFO Co (and/or any

of the DBFO Co's agents, employees, contractors or sub-contractors of any tier) on or in relation to the Project Facilities, the Site or the Adjacent Areas.

"Operator" means Carillion Highway Maintenance Limited of Birch Street, Wolverhampton, West Midlands WV1 4HY or such substitute as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or 45.4.2.

"Operator's Quality Documentation" has the meaning given in Clause 23.2.1.4.

"Orders" means the orders, certificates, statutory instruments and other subordinate legislation listed in Part 6 of Schedule 3 [Scheme Orders] as may be amended, modified, varied or superseded by any New Order. Where the context so requires it shall mean any of the individual orders comprising the Order.

"Ordinary Shares" means ordinary shares of £1 each in the capital of the DBFO Co.

"Original Senior Debt Differential" means, as at any date, the amount by which the amounts outstanding as at such date under the Facilities (as defined in the Credit Agreement) exceed the amounts which were projected in the Base Case to be outstanding as at such date under the Facilities (as defined in the Credit Agreement), taking into account any rescheduling of such projected amounts pursuant to Approved Reschedulings.

"Other Party" has the meaning given in paragraph 1.2 of Part 2 of Schedule 12 [General Change Procedure].

"Other Vehicles" means all motor vehicles other than Long Vehicles.

"Parent Company Guarantee" means the parent company guarantee dated on or before the date hereof between (1) Carillion plc and (2) the DBFO Co.

"Partnering Facilitator" means the person appointed by the Secretary of State to fulfil the role referred to in paragraph 4 of Schedule 23 [The Network Board].

"Part of the New Road" means any part of the New Road so designated in Part 2 of Schedule 3 [New Road].

"Penalty Points" has the meaning given in Clause 26.2 [Penalty Points].

"Performance Guarantee" means a guarantee in the form set out in Part 1 of Schedule 1 [Form of Performance Guarantee].

"Permanent Works" means the works having a permanent function (regardless of the length of the design life of such works) which are to be or have been designed, constructed and completed by the DBFO Co in accordance with the Construction Requirements and the Communications Requirements.

"Permit to Use" means a permit in the form set out in Annex 1(14) to Part 3 of Schedule 4 [Design and Certification Procedure] to be issued by the Department's Nominee in accordance with Clause 13.1.

"Persistent Neglect Notice" means a notice to the DBFO Co which:

- (a) states on its face that it is a notice being given for the purposes of Clause 26.7.1;
- (b) states which sub-clause of Clause 26.7.1 is relevant;
- (c) identifies the obligation with which the DBFO Co is neglecting persistently to comply;
- (d) identifies the dates of the relevant number of occasions (determined by reference to Clause 26.7.1) upon which Penalty Points have been issued in respect of such failure to perform such obligation in accordance with Clause 26.2 [Penalty Points]; and
- (e) is signed by the Department's Nominee and counter-signed on behalf of the Secretary of State by an official of the Department who is more senior than the Department's (or the Highways Agency's) DBFO Manager for the Project.

"Persistent Neglect Notice Plan" means, in relation to an obligation with which the DBFO Co has neglected persistently to comply and in respect of which the Department's Nominee has issued a Persistent Neglect Notice in accordance with Clause 26.7.1, a plan which sets out the steps the DBFO Co will take to ensure that such non-compliance will not subsequently recur.

"Persistent Neglect Remedy Programme" means a programme specifying in reasonable detail the manner in which the DBFO Co intends to remedy a breach of an obligation which is the subject of a Persistent Neglect Notice and the latest date by which it is intended that such breach will be remedied.

"Persistent Neglect Undertaking" means, in relation to an obligation with which the DBFO Co has neglected persistently to comply and in respect of which the Department's Nominee has issued a Persistent Neglect Notice in accordance with Clause 26.7.1, a notice from the DBFO Co undertaking to the Secretary of State that the DBFO Co will use best endeavours to ensure that such non-compliance will not subsequently recur.

"PIA" or "Personal Injury Accident" means an injury accident as reported on police report STATS 19 (or any replacement of or substitute for such report) as processed by the Data Processing Authority.

"PIA Change Effective Date" means, in relation to an Eligible Change, the date on which such Eligible Change first has or will have an effect on the number of Personal Injury Accidents on the Project Road.

"Plant" means machinery, apparatus and the like intended to form or forming part of the Project Facilities.

"Pre-Commencement Costs" means all costs (in each case net of amounts received or receivable in respect thereof or benefits relating thereto) properly incurred in connection with the Project by the DBFO Co during the Pre-Commencement Period in accordance with Clauses 6.2 [Investigations and Surveys], 6.3 [Other Preparatory Works], 6.4 [Works by Relevant Authorities] and 6.5 [Authorised Expenditures] and to which the DBFO Co is entitled to reimbursement in accordance with such Clauses 6.2 [Investigations and Surveys], 6.3 [Other Preparatory Works], 6.4 [Works by Relevant Authorities] and 6.5 [Authorised Expenditures] and including:

- (a) all liabilities in respect of such costs arising as a result of termination of this Agreement;
- (b) any financing charges, fees, interest (but not default interest other than default interest arising as a result of a breach by the Secretary of State of any of his obligations under this Agreement) or breakage costs paid or payable under the Funding Agreements in respect of principal sums drawn down to pay any such costs (but not the principal sums themselves or any other amount paid or payable under the Funding Agreements);
- (c) an amount equal to the Hedging Termination Amounts, if such Hedging Termination Amounts are paid by the DBFO Co under any Hedging Agreements; and
- (d) the cost of any insurance specified in paragraph 1.1 to 1.6 (inclusive) and paragraph 1.8 of Part 1 of Schedule 10 [Insurances] and in respect of which evidence has been provided to the Department's Nominee in accordance with this Agreement but excluding from such cost an amount equal to any commission in respect of such policies paid or credited to or for the benefit of Carillion Insurance Advisers Limited but not excluding any part thereof that is properly payable to a third party broker on a bona fide arm's length basis.

all as shown in the Termination Accounts.

"Pre-Commencement Period" means the period from the date of this Agreement until the Commencement Date.

"PRIDe" means the performance review group of that name established by the Highways Agency.

"Primary Function" has the meaning given in paragraph 1.5.5 of Annex 10/B to Part 2 of Schedule 4 [Environmental Requirements].

"Principal" means a partner or director of the relevant organisation having authority, inter alios, to sign Certificates on behalf of such organisation.

"Programmed Completion Date" has the meaning given in Part 3 of Schedule 12 [Change Definitions].

"Project" means the design and construction of the Works, the operation and maintenance of the Project Facilities and the conduct of any other Operations during the Contract Period and the financing of such activities.

"Project Documents" means the documents referred to in Clause 2.3.1 and (as soon as it has been executed) each document referred to in Clause 2.3.1A.

"Project Facilities" means the Project Road and the Off-Site Facilities.

"Project Road" means the Existing Road and the New Road.

"Proponent" has the meaning given in paragraph 1.2 of Part 2 of Schedule 12 [General Change Procedure].

"Proposed Substitute" has the meaning given to it in the Direct Agreement.

"Proposal" has the meaning given in paragraph 1 of Section A of Part 3 of Schedule 4 [Design and Certification Procedure].

"Protestor" means any person engaged in protest action against the construction or operation of the Project Road or against the construction or operation of highways generally.

"Qualifying Refinancing" has the meaning given in Schedule 25 [Refinancing].

"Quality Documentation" means the quality manuals, quality plans, quality procedures, inspection and test plans, work instructions or like documentation, as appropriate, which describe and define a Quality Management System.

"Quality Management Systems" means the organisational structure, procedures, processes and resources for determining and implementing quality policy.

"Quarter" means a period of three calendar months beginning on 1st January, 1st April, 1st July or 1st October.

"Quieter Road Surface" means a road surface formed from a material that has the capability of providing road/tyre noise levels that are quieter than hot rolled asphalt by at least 2.5 dB(A) as demonstrated by the value of Road Surface Influence stated on the relevant British Board of Agrément HAPAS Roads and Bridges Certificate for such material.

"Ramsar Sites" means sites designated under the Convention on the Conservation of Wetlands of International Importance.

"Recovery Amount" means the amount (net of any costs of recovery) which the Secretary of State has recovered from a Third Party Contractor in respect of Defective Work.

"Refinancing" has the meaning given in Schedule 25 [Refinancing].

"Relevant Authority" means any person identified in Part 1 of Schedule 8 [Relevant Authorities] and any other person whose authority is or may be required for the carrying out of all or any part of the Operations or which has any authority or right in respect of any part of any of the Project Facilities under any Law.

"Relevant Change" has the meaning given in paragraph 1.1 of Annex 1 to Part 2 of Schedule 12.

"Relevant Change in Law" means:

- (a) any Change in the Scope of Value Added Tax; and
- (b) any Change in Law the effect of which is to discriminate against:
  - (i) the Project Road in relation to other roads;
  - (ii) roads whose design, construction, financing and operation are procured under a single contractual arrangement similar to that for the Project Road in relation to other roads;

- (iii) the DBFO Co in relation to other companies; or
- (iv) companies undertaking the functions referred to in paragraph (ii) above under a single contractual arrangement similar to that for the Project in relation to other companies,

unless the Secretary of State can demonstrate that this effect is not intended

provided that Legislation which also affects roads other than the Project Road or companies other than the DBFO Co shall not be deemed to be discriminatory solely on the basis that its effect on the Project Road or the DBFO Co is greater than on any such other roads or other companies and provided further that any Change in the Scope of Value Added Tax in the United Kingdom shall not be treated as a Relevant Change of Law for the purposes of Schedule 12 to the extent that the DBFO Co is otherwise compensated under this Agreement for increases in costs which it suffers as a result of such change in scope.

"Relevant Change Notice" has the meaning given in Part 3 of Schedule 12 [Change Definitions].

"Relevant Completion Certificate Anniversary" means each fifth anniversary of the date of issue of the Completion Certificate.

"Relevant Link" means, in respect of a Carriageway Section for a Payment Period, the Link on that Carriageway Section which records the highest number of PCUs for that Payment Period.

"Relevant PN Period" means:

- (a) where the relevant Persistent Neglect Notice was issued in reliance upon Clause 26.7.1.1, two years;
- (b) where the relevant Persistent Neglect Notice was issued in reliance upon Clause 26.7.1.2, one year;
- (c) where the relevant Persistent Neglect Notice was issued in reliance upon Clause 26.7.1.3, one year;
- (d) where the relevant Persistent Neglect Notice was issued in reliance upon Clause 26.7.1.4, one year;
- (e) where the relevant Persistent Neglect Notice was issued in reliance upon Clause 26.7.1.5, six months;
- (f) where the relevant Persistent Neglect Notice was issued in reliance upon Clause 26.7.1.6, six months;
- (g) where the relevant Persistent Neglect Notice was issued in reliance upon Clause 26.7.1.7, three months; and
- (h) where the relevant Persistent Neglect Notice was issued in reliance upon Clause 26.7.1.8, a period which is determined on a pro rata basis having regard to the relevant periods referred to in paragraphs (a) to (g) above and the frequency with which the relevant obligation falls to be performed.

"Relevant Project Document" means any Project Document other than (i) any Funding Agreement listed at Clause 2.3.1.3 or (ii) any Shareholder Subordinated Loan Agreement listed at Clause 2.3.1.5.

"Relevant Regulatory Authority" means the European Commission or the Office of Fair Trading or such other regulator who may have concurrent jurisdiction with the Office of Fair Trading under the Competition Act 1998.

"Remedial Period" has the meaning given in Clause 26.1.2.

"Renewal Amount" means the cost of carrying out the Renewal Works as agreed or determined in accordance with Clause 19 [Handback].

"Renewal Programme" means the programme for the carrying out of the Renewal Works over the remainder of the Contract Period following the Initial Inspection, as agreed or determined in accordance with Clause 19 [Handback], as such programme may be revised or amended at any time in accordance with Clause 19 [Handback].

"Renewal Works" means the Maintenance Works or other works of renewal, reconstruction, repair or reinstatement required, as agreed or determined at any time in accordance with Clause 19 [Handback], to be carried out in order to procure that the Project Facilities will, on the Expiry Date, satisfy the Handback Requirements.

"Report" means any report given in accordance with Clause 24.1 [Required Reports].

"Requirements of Interested Parties" means the requirements of Interested Parties set out or referred to in Parts 3 and 4 of Schedule 8 [Third Parties].

"Rescue Refinancing" means any Refinancing (other than a Qualifying Refinancing) which occurs after the occurrence of:

- (a) an Event of Default (as defined in the Credit Agreement); or
- (b) an event or circumstance which with the giving of notice and/or the effluxion of time would constitute an Event of Default (as defined in the Credit Agreement),

but only to the extent of any terms of such Refinancing that are either:

- (i) necessary to, in the case of paragraph (a) above, remedy or, in the case of paragraph (b) above, prevent the occurrence of such Event of Default; or
- (ii) (provided such Refinancing also contains terms falling within paragraph (i) above) substantially equivalent to those which a prudent banker would require for such Refinancing (having regard to the circumstances of the DBFO Co and the terms generally available in the relevant financial markets for refinancings comparable to such Refinancing, in each case prevailing at the date of such Refinancing) as an acceptable basis for continuing to make the facilities comprised in such Refinancing available to, and/or permitting such facilities to remain outstanding from, the DBFO Co.

"Residual Life" means that part of the Serviceable Life of an element of the Project Facilities that remains at the Termination Date.

"Residual Value" means any value attaching to the Ordinary Shares in issue immediately following termination of this Agreement pursuant to Clause 44 [Compensation on Termination] arising as a result of or attributable to either:

- (a) the continuing activities of the DBFO Co and any of its Subsidiaries other than the Project; or
- (b) the value of any assets relating to or derived from the Project remaining vested in the DBFO Co or any of its Subsidiaries immediately following termination,

such value to be as agreed by the Department's Nominee and the DBFO Co's financial adviser or, if no such agreement has been reached within 60 days after the date of termination of this Agreement, as determined by the Disputes Resolution Procedure on reference by either Party.

"Retention Account" means a joint deposit account to be opened in the names of the Secretary of State and the DBFO Co in accordance with Clause 19.7.1.

"Retention Sum" means an amount equal to 40% of the Renewal Amount from time to time.

"Review Date" means the last day of a Contract Year.

"Review Procedure" means the procedure whereby submissions are made to the Department's Nominee as set out in Part 2 of Schedule 7 [Review Procedure].

"Revised Value" has the meaning given in paragraph 1.1 of Annex 6 to Part 2 of Schedule 12 [General Change Procedure].

"Rights in respect of land" means any right or licence over or in respect of or otherwise relating in any way to land, whether temporary, revocable, legal, equitable or otherwise of whatever nature.

"Road User's Charter" means the document of that name issued by the Highways Agency in November 2000 or any replacement or substitute therefor.

"Routine Maintenance" means work which is short term or cyclic in nature and necessary to keep the Project Facilities in good and safe working order, including without limitation minor repairs to all elements of the Project Facilities, cleansing, verge and horticultural maintenance and Winter Maintenance and inspections and surveys associated with any of the foregoing.

"Routine Maintenance Management Systems Manual" or "RMMS Manual" means the Routine Maintenance Management Systems Manual published by the Department.

"RPI" means the Retail Prices Index (all items) published by the Office for National Statistics.

"Safety Performance Adjustment Notice" has the meaning given in Clause 32.3.2.

"Schedule of Lane Closures" means a schedule submitted:

- (a) by the DBFO Co under Clause 15.3.1 (or any revision thereof submitted under Clause 15.3.2 or Clause 15.3.3) indicating the period or periods during which the DBFO Co plans to effect or otherwise reasonably foresees any Lane Closure in respect of the Project Road including, for the avoidance of doubt any Lane Closure in respect of any works by any Relevant Authority; or
- (b) by the Secretary of State under Clause 15.5.2 indicating the period or periods during which the Secretary of State plans to close one or more lanes of traffic using the Connecting Roads or to take any other action liable to restrict traffic flow on the Connecting Roads,

but excluding in either case any Type C lane closures (as defined in Section 6 of Chapter 8 of the Traffic Signs Manual).

"Scheme 1" means the Part of the New Road described in paragraph 3.1 of Part 2 of Schedule 3 [New Roads].

"Scheme 2" means the Part of the New Road described in paragraph 3.2 of Part 2 of Schedule 3 [New Roads].

"Scheme Specific Core Construction Requirements" means the requirements set out or identified or referred to in Part 1 of Schedule 4 [Scheme Specific Core Construction Requirements].

"Scheme Specific Core Monitoring System Requirements" means the requirements set out or identified or referred to in Part 1 of Schedule 17 [Scheme Specific Core Monitoring System Requirements].

"Scheme Specific Core O&M Requirements" means the requirements set out or identified or referred to in Part 1 of Schedule 6 [Scheme Specific Core O&M Requirements].

"Second Inspection" has the meaning given in Clause 19.4.1.

"Section Average Speed" means in respect of a Carriageway Section for a Payment Period, the average speed of vehicles travelling over such Carriageway Section in such Payment Period determined in accordance with paragraph 1 of Part 2 of Schedule 17 [Monitoring System Requirements].

"Security Trustee" means the Royal Bank of Scotland plc in its capacity as security trustee to the Lenders (as defined in the Credit Agreement).

"Serviceable Life" means:

- (a) in the case of a proprietary manufactured element of the Project Facilities, the period of time, as declared in writing by the manufacturer, for which the element will continue to perform as intended after incorporation in the Project Facilities in a manner, and operating under design conditions, accepted by the manufacturer, and subject to maintenance in accordance with the manufacturer's written recommendations; and
- (b) in the case of a non-proprietary element of the Project Facilities, the period of time for which the element is expected to continue to perform as intended after completion of construction of the relevant Project Facilities, and subject to design in accordance with the Construction Requirements and the

Communications Requirements and maintenance in accordance with the O&M Requirements.

"Shareholders' Agreement" has the meaning given to it in Clause 2.3.1B.

"Signs Working Drawings" means the Signs Working Drawings, Volumes 1 to 3 published by the Stationery Office.

"Site" means, subject to Clause 8.8 [Boundaries of Site and Adjacent Areas], paragraph 6 of Part 1 of Schedule 13 [Procedure for Additional Works], paragraph 7 of Part 3 of Schedule 13 [Subsequent Schemes] and paragraph 3 of Part 4 of Schedule 13 [Improvements], the land, spaces, waterway, roads and any surface required for the Project Road shown or identified as such on the date hereof on drawings entitled 'Existing Road Plan' and 'New Road Plan' contained in Part 7 of Schedule 3 [Drawings].

"Site Materials" has the meaning given in Clause 8.9 [Disposal of Materials Won on Site].

"SoS Insurance Account" has the meaning given in Clause 20.6.4.1.1.

"Special Events" means events likely to affect significantly traffic flows on the Project Road.

"Special Protection Areas" means areas designated under EU Directive 79/409/EEC on the Conservation of Wild Birds.

"Specification for Highway Works" or "SHW" means the Specification for Highway Works, published by The Stationery Office as Volume 1 of the Manual of Contract Documents for Highway Works.

"Specified CPA Works" means works carried out or to be carried out in lieu of the entitlement of a Compensation Party to Land Compensation Costs comprising:

- (a) those works specified in Appendix 1/15 to Annex 6 to Part 2 of Schedule 4; and
- (b) any works carried out in the discharge of the Requirements of Interested Parties set out in Part 4 of Schedule 8.

"Specified Notices" means the draft orders and notices to be prepared by the DBFO Co in accordance with Part 7 of Schedule 4 [Preparation of Orders and Statutory Notices Required for the opening of the New Road] which shall include, without limitation, the following:

- (a) notice advising the public on the right for claims to be made under Part 1 of the Land Compensation Act 1973;
- (b) notice to relevant local highways authority confirming that in accordance with any Side Road Order, the highways affected will be its responsibility;
- (c) notice of Noise Insulation Appeal procedure;
- (d) notice to relevant highway(s) authorities in accordance with the requirements of any Detrunking Order;

- (e) Traffic Regulation Orders and Notices both temporary and permanent;
- (f) any notices required to be given under the Orders;
- (g) any notices required to be given to any of the Interested Parties.

"SPECLIB" means the Specification Library for the Specification for Highway Works published by the Department.

"SSSI" means a site of Special Scientific Interest as defined in the Wildlife and Countryside Act 1981.

"Statutory Undertaker" means an undertaker for the purposes of Part III of the New Roads and Street Works Act 1991 as defined in Section 48(4) of that Act.

"Step Change" means a change in the Department's Standards;

- (a) the purpose and effect of which is to implement a Government Policy Directive; and
- (b) which constitutes a substantial and unforeseeable variation to or departure from the standards and specifications applicable to the operation and maintenance of the motorway and/or trunk road network immediately prior to such change.

"Strengthened Earthworks" has the meaning given in paragraph 2 of Section A of Part 3 of Schedule 4 [Design and Certification Procedure].

"Structure" means, for technical appraisal purposes (as referred to in Part 3 of Schedule 4 [Design and Certification Procedure]), any temporary or permanent:

- (a) bridge, buried structure, subway underpass, masonry arch, culvert or any other structure supporting the highway with a clear span or internal diameter greater than 0.9 metres;
- (b) overhead crossing carrying a conveyor or utility service;
- (c) access gantry;
- (d) earth retaining structure where the level of the fill at the back of the structure above the finished ground level in front of the structure is greater than 1.5 metres;
- (e) reinforced/strengthened soil/fill structure, with hard facings, where the level of the fill at the back of the structure above the finished ground level in front of the structure is greater than 1.5 metres;
- (f) reinforced/strengthened soil/fill which is an integral part of another highway structure;
- (g) portal or cantilever sign and/or signal gantry;
- (h) cantilever traffic signal mast;

- (i) lighting column;
- (j) high mast of more than 20 metres in height for lighting;
- (k) mast for cameras, radio and telecommunication transmission equipment;
- (l) catenary lighting support system;
- (m) environmental barrier;
- (n) proprietary manufactured highway structure;
- (o) highway signs on posts of more than 4 metres in height;
- (p) road tunnels, tunnel services buildings and large service tunnels; and
- (q) small (0.9 metres to 2.0 metres) diameter service tunnels.

"Structure Statement" means the structure statement set out in Appendix 1 to Annex 7 of Part 2 of Schedule 4 [Structures Requirements for New Structures].

"Subordinated Shareholder Debt" means, at any time, the aggregate amount of principal and accrued, but unpaid and uncapitalised, interest outstanding at that time under:

- (a) the DBFO Co Loan Note Instrument as in force at the date of this Agreement;  
or
- (b) if the DBFO Co Loan Note Instrument is amended or replaced after the date of this Agreement, the DBFO Loan Note Instrument as so amended or replaced, but only to the extent that there was no objection to such amendments or replacements under the Review Procedure pursuant to Clause 2.3.2,

other than any liability or obligation of the DBFO Co under the DBFO Co Loan Note Instrument which, had Holdco been a Funder and such DBFO Co Loan Note Instrument been a Funding Agreement in respect of which an amount were payable by the Secretary of State under Clause 44.3.2.1 would have been excluded from such amount under Clause 44.4.1.2, Clause 44.4.1.3, Clause 44.4.1.4, Clause 44.4.1.7, Clause 44.4.1.8, Clause 44.4.1.9, Clause 44.4.1.11 and Clause 44.4.1.12 and/or Clause 44.4.1.13. To the extent that an Equal HoldCo Payment (as defined in the Equity Subscription Agreement as in force at the date of this Agreement or, if amended or replaced after the date of this Agreement, the Equity Subscription Agreement as so amended or replaced, but only to the extent that there was no objection to such amendments or replacements under the Review Procedure pursuant to Clause 2.3.2) is made pursuant to clause 3.5 of the Equity Subscription Agreement, all references in this definition to "DBFO Co Loan Note Instrument" shall be deemed to be references to the loan referred to in that clause.

"Subsequent Design Contract" means any contract entered into between the Contractor and the Designer, in respect of, inter alia, the design and examination of the works in relation to a Proposal (other than the Works).

"Subsequent Scheme" means any change, improvement or addition to the design, layout or structure of the Project Facilities made or proposed to be made by the DBFO Co on or after the following dates:

- (a) for the Existing Road (other than any Upgraded Section), at any time after the date of this Agreement; and
- (b) for the New Road (including, without limitation, any Upgraded Section) and Off-Site Facilities at any time after the issue of the Completion Certificate,

which cannot lawfully be accomplished by the DBFO Co without obtaining New Orders.

"Subsequent Scheme Completion Certificate" has the meaning given in paragraph 7 of Part 3 of Schedule 13 [Subsequent Schemes].

"Subsequent Scheme Notice" has the meaning given in paragraph 1.1 of Part 3 of Schedule 13 [Subsequent Schemes].

"Subsidiary" shall have the meaning given to it in Section 736 of the Companies Act 1985 as amended by Section 144 of the Companies Act 1989. Notwithstanding the provisions of Clause 1.2.5, this definition shall not be changed in the event of an amendment to the definition of "subsidiary" contained in the Companies Act 1985 as amended by the Companies Act 1989, whether by any subordinate legislation or otherwise.

"Surveyor" means Montagu Evans of 44-48 Dover Street, London W1S 4AZ acting through its Principal, Robert Harvey, or such substitute (acting through its Principal who shall be a chartered surveyor (or the equivalent) with a minimum of 5 years' post qualification experience) as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or Clause 45.4.2 [Sub-Contracting].

"Sustainable Development" means, in respect of any activity, the carrying out of that activity in a manner consistent with the following principles:

- (a) the effective protection of the environment;
- (b) the prudent use of natural resources;
- (c) the maintenance of high and stable levels of economic growth and employment; and
- (d) the achievement of social progress which recognises the needs of everyone.

"Technical Appraisal Authority" has the meaning given in paragraph 2.11 of Section A of Part 3 of Schedule 4 [Design and Certification Procedure].

"Technical Requirements" means the Construction Requirements, the O&M Requirements, the Communications Requirements, the Handback Requirements, the requirements set out in Clause 23.1.3.2 in respect of Quality Management Systems, the requirements set out in Clause 23.1.3.3 in respect of the Environmental Management Systems, the requirements set out in Clause 23.1.3.4 in respect of the Health & Safety Management Systems and any other standard or specification referred to or set out in this Agreement.

"Temporary Adjacent Areas" means, subject to Clause 8.8 [Boundaries of the Site and Adjacent Areas], those parts of the Adjacent Areas shown or identified as Temporary Adjacent Areas on drawings numbered A249/03/02-001 to 004 (inclusive) set out in Part 7 of Schedule 3 [Drawings] or as the Secretary of State may from time to time specify.

"Temporary Construction Area" means, at any time, any area within any Upgraded Section within which any part of the Works is actively being carried out at such time.

"Temporary Speed Limit" has the meaning given by Section 88 of the Road Traffic Regulation Act 1984.

"Temporary Works" means all works and things (of a temporary nature) of every kind required in or about the execution and completion of the Permanent Works or of capital works in connection with the operation, maintenance or improvement of the Project Facilities.

"Termination Accounts" means:

- (a) accounts of the DBFO Co and, if appropriate, consolidated accounts of the DBFO Co and its Subsidiaries which have been prepared applying accounting principles and bases consistent with those applied in the immediately preceding audited accounts of the DBFO Co or, as the case may be, consolidated audited accounts of the DBFO Co and its Subsidiaries; and
- (b) a statement of liabilities of the DBFO Co in respect of the Project as at the date of termination of this Agreement, or which arise out of or in connection with such termination,

in each case drawn up as at such date of termination and to be agreed or determined as provided in Clause 44.1 [Termination Accounts].

"Termination Date" means the date upon which this Agreement terminates.

"Testing Contractor" means Weeks Laboratories Limited of The Oasts, Newnham Court, Bearsted Road, Maidstone, Kent ME14 5LH or such substitute (who shall have operated at least ten site laboratories each of which shall have obtained a Category II (NAMAS or UKAS) accreditation or its equivalent in respect of its calibration/testing capability associated with highway works) as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or 45.4.2.

"The Swale High Level Crossing" means the new Structure to be provided across The Swale in accordance with the Structure Statement.

"Third Party Contractor" means any contractor which, under a contract with the Secretary of State to which neither the DBFO Co nor any of its contractors or sub-contractors is a party, has prior to the date of execution of this Agreement carried out work in respect of the Existing Road.

"Third Party Contractor Claim Notice" has the meaning given in Clause 17.5.1.

"TRACS" means a traffic speed condition survey as described in Interim Advice Note 42/02 for the purposes of recording road surface conditions.

"TRACS Contractor" means W.D.M. Limited of North View, Staple Hill, Bristol BS16 4NX or such substitute (who shall have at least 5 years' experience in the operation of high speed road monitoring and data collection and processing equipment) as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or 45.4.2.

"Traffic Control Centre Company" means Traffic Information Services (TiS) Limited or such substitute or substitutes as may be appointed by the Secretary of State from time to time and notified by the Secretary of State to the DBFO Co.

"Traffic Data" means the information relating to traffic derived from the Counting Equipment and the Speed Measuring Equipment.

"Traffic Noise Works" has the meaning given in Part 6 of Schedule 4 [Noise Insulation Requirements].

"Traffic Sign" has the meaning given to it in Section 64 of the Road Traffic Regulations Act 1984.

"Traffic Signal Installation Contractor" means Siemens plc of Siemens House, Oldbury, Bracknell, Berkshire RG12 8FZ or such substitute who shall have at least 5 years' experience of installation of traffic signal equipment as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or 45.4.2 [Sub-Contracting].

"Traffic Signal Maintenance Contractor" means Siemens plc of Siemens House, Oldbury, Bracknell, Berkshire RG12 8FZ or such substitute who shall have at least 5 years' experience of maintenance of traffic signal equipment as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or 45.4.2 [Sub-Contracting].

"Traffic Signal System Certifier" means Symonds Group Limited of 24-30 Holborn, London EC1N 2LX acting through Ian Routledge of Routledge Consultancy, Glenville, Dike Lane, Upper Poppleton, York YO26 6PT, or such substitute (who shall be independent of the Traffic Signal System Designer, the Traffic Signal Installation Contractor and the Traffic Signal Maintenance Contractor and shall act through its Principal who shall be a full member of the Institution of Highways and Transportation or its equivalent with a minimum of 10 years' relevant post qualification experience) as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or 45.4.2 [Sub-Contracting].

"Traffic Signal System Designer" means Symonds Group Limited of 24-30 Holborn, London EC1N 2LX acting through its Principal, Brian Crossland, or such substitute (acting through its Principal who shall be a full member of the Institution of Highways and Transportation or its equivalent with a minimum of 10 years' relevant post qualification experience) as may be appointed by the DBFO Co for the time being in accordance with Clause 45.4.1 or 45.4.2 [Sub-Contracting].

"Traffic Signs Manual" means the manual of that name published by The Stationery Office and any associated advice (including without limitation all local transport notes issued from time to time by the Department and published by The Stationery Office).

"Traffic Signs Provisions" means the Road Traffic Regulation Act 1984, The Traffic Signs Regulations and General Directions 1994 (S.I. 1994/1519) and any authorisation

given under Section 64, or direction given under Section 65, of the Road Traffic Regulation Act 1984.

"Trespasser" means any person (other than a Protestor) not entitled to be on the Site or Adjacent Areas.

"Trigger Date 1" has the meaning given in paragraph 2.1 of Part 3 of Schedule 9 [Construction Payments].

"Trigger Date 2" has the meaning given in paragraph 2.1 of Part 3 of Schedule 9 [Construction Payments] .

"Trigger Date 3" has the meaning given in paragraph 2.1 of Part 3 of Schedule 9 [Construction Payments].

"Trunk Roads Maintenance Manual" or "TRMM" means the trunk roads maintenance manual issued by the Department.

"Unapproved Rescue Refinancing " means any Eligible Rescue Refinancing which:

- (a) was submitted to the Review Procedure and in respect of which there was an objection under the Review Procedure; or
- (b) was not submitted to the Review Procedure,

and, in either case, in respect of which the DBFO Co has complied with the requirements of paragraphs 2.2, 2.6 and 2.7 of Schedule 25 [Refinancing].

"Unforeseeable Archaeological Features" means any Fossils or Antiquities the presence of which could not reasonably have been foreseen at the date of this Agreement by a competent archaeologist acting in accordance with Good Industry Practice having regard, without limitation to the generality of the foregoing, to the following sources of information:

- (a) Annex 10/E to Part 2 of Schedule 4 [Archaeology] and including, without limitation, the documents referred to therein;
- (b) the Environmental Statement;
- (c) the Disclosed Data.

"Unrecovered Fixed Investment Costs" means such amount, if any, which the DBFO Co has demonstrated to the satisfaction of the Secretary of State that the Operator has, by reason only of the termination of the Operation and Maintenance Contract, failed to recover as at the date of such termination in respect of the acquisition of property rights, licences, equipment, goods and/or materials required in connection with the performance of the Operation and Maintenance Contract.

"Unspecified CPA Works" means works (other than Specified CPA Works) carried out or to be carried out in lieu of the entitlement of a Compensation party to Land Compensation Costs including, without limitation, boundary arrangements, means of access and screening.

"Upgraded Sections" means those lengths of existing trunk road or motorway described in paragraph 3 of Part 1 of Schedule 3 [Existing Roads] and identified as such on

drawings numbered A249/03/01-005 to 008 (inclusive) set out in Part 7 of Schedule 3 [Drawings], which are to be or have been widened or otherwise modified in accordance with the Construction Requirements and the Communications Requirements.

"Urgent Traffic Signal Fault" has the meaning given in Section 3 of Part 2 of Schedule 6 O&M Requirements].

"User Paid Tolls" has the meaning given in Part 3 of Schedule 12 [Change Definitions].

"Users" means the users of the Project Road.

"VAT" means value added tax or any similar tax which is introduced to replace value added tax.

"VAT Sum" has the meaning given in Clause 48.1.5.

"Vehicle Speed" means the speed of an individual vehicle as it passes a Speed Measurement Point.

"Warning Notice" has the meaning given in Clause 26.3 [Warning Notices].

"Week" for the purposes of Schedule 9 has the meaning given in paragraph 2.1 of Part 1 of Schedule 9 [Congestion Management Payments].

"Winter Maintenance" means works in relation to the prevention of the formation of ice and the removal of snow and ice as set out or described in Section 5 of Part 2 of Schedule 6 [O&M Requirements] and all maintenance works and functions relating thereto.

"Working Day" means a day (other than a Saturday or Sunday) on which banks are open for business in the City of London.

"Works" means the Permanent Works (including Plant) and the Temporary Works required in accordance with the Construction Requirements and the Communications Requirements for the design, construction, testing and completion of the New Road, the Off-Site Facilities and any works in respect of any De-Trunked Segment, the CPA Works and all related slip roads, side roads, access roads, bridges and other highway structures, fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, road markings, road traffic signs, road traffic signals, road lighting, communications installations, the Monitoring System, embankments and cuttings and archaeological and ecological works.

## 1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;

1.2.2 all references to Clauses and Schedules are references to Clauses of and Schedules to this Agreement and all references to Parts, Sections, paragraphs, Annexes or Appendices are references to Parts, Sections and paragraphs contained in and Annexes and Appendices to the Schedules;

- 1.2.3 the Schedules to this Agreement (including any Annexes or Appendices thereto) are an integral part of this Agreement and reference to this Agreement includes reference thereto and reference to any Schedule includes reference to any Annex or Appendix thereto;
- 1.2.4 all references to any agreement (including, without limitation, this Agreement), document or other instrument include (subject to all relevant approvals and any other provision of this Agreement expressly concerning such agreement, document or other instrument) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned;
- 1.2.5 all references to any statute or statutory provision (including any subordinate legislation) shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute;
- 1.2.6 all references to time of day shall be a reference to whatever time of day shall be in force in England and Wales;
- 1.2.7 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause, Schedule, Part, Section, paragraph, Annex or Appendix in which such word may be used;
- 1.2.8 words importing the singular include the plural and vice versa;
- 1.2.9 words importing a particular gender include all genders;
- 1.2.10 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, emanation, agency or instrumentality, unincorporated body of persons or association;
- 1.2.11 any reference to a public organisation or representative shall be deemed to include a reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative provided that this provision shall not operate to limit the application of Clause 41.1.5;
- 1.2.12 references to "Parties" mean the parties to this Agreement and references to a "Party" mean one of the parties to this Agreement;
- 1.2.13 references to drawings are references to drawings appearing in the Schedules hereto having the revision numbers set against the relevant drawings numbers in Part 5 of Schedule 4;
- 1.2.14 all monetary amounts are expressed in pounds sterling;
- 1.2.15 references to amounts or sums being expressed in March 2002 prices are references to amounts or sums which are to be adjusted to reflect the effects of inflation after that date as measured by changes in the RPI from the level published in April 2002 for the month of March 2002. At any time, such

adjusted amount or sum, shall be calculated by applying the following formula:

**—**  $R_m =$

where:

$R_m =$  the actual amount or sum pertaining in month m;

$R_{\text{March 2002}}$  = the relevant amount or sum expressed in March 2002 prices;

m = the calendar month in respect of which the March 2002 price comparison is to be made;

$RPI_m$  = the RPI published or which is to be published in month m+1 for the preceding month m;

$RPI_{\text{March 2002}}$  = the RPI published in April 2002 for the month of March 2002, being 174.5;

1.2.16 wherever this Agreement (other than pursuant to Clauses 44.2 [Pre-Commencement Termination] and 44.3 [Post Commencement Termination]), but without prejudice to Clauses 44.4.1.4 and 44.4.1.11) obliges the Secretary of State to pay any amount to the DBFO Co (including, without limitation, pursuant to Schedule 12 [Change] or Schedule 13 [Additional Works and Subsequent Schemes]) in respect of any costs, expenses, fees, charges, liabilities, Losses, Claims or other sums incurred by the DBFO Co:

1.2.16.1 such obligation shall be construed as applying only to so much of such sums as have been properly incurred on an arm's length commercial basis or, where not incurred on an arm's length commercial basis (including where the payment is made to the Contractor or an Associated Company of the DBFO Co), so much of them as are proper and reasonable; and

1.2.16.2 the DBFO Co shall, where requested by the Secretary of State, provide supporting evidence of such costs, expenses, fees, charges, liabilities, Losses, Claims or other sums;

1.2.17 the Secretary of State shall not be imputed with knowledge of any fact, matter or thing unless that fact, matter or thing is within the knowledge of those of the Crown's servants or agents (including the Department's Nominee) who have responsibilities in connection with the conduct of the Operations or the Project;

1.2.18 any reference to the statutory duties or functions of the Secretary of State shall be a reference to such duties or functions (including powers and

discretions) from time to time and shall include any common law duties and functions (including powers and discretions); and

1.2.19 any reference to "day" shall, unless otherwise stated, mean the period of time which begins with one midnight and ends with the next.

### 1.3 Language

The language of this Agreement is English. All correspondence, drawings, Design Data, test reports, certificates, specifications and information shall be entirely in English. All operating and maintenance instructions, name and rating plates, identification labels and other written and printed matter required for the Operations shall be in English, as shall instructions and notices to the public and staff and all other signing and information notices.

### 1.4 Provisions applicable to Existing Road and New Road

Save as otherwise expressly provided, both the provisions of this Agreement applicable to the Existing Road and the provisions of this Agreement applicable to the New Road shall apply in respect of any Upgraded Sections, provided that:

1.4.1 save as otherwise expressly provided, in respect of any statement of the time from which any provision of this Agreement is to apply, Upgraded Sections shall be treated as part of the Existing Road and not part of the New Road; and

1.4.2 the DBFO Co shall be relieved from the obligation to perform Routine Maintenance of any Temporary Construction Area in existence from time to time (but without prejudice to the obligation to comply with the Construction Requirements in respect of the operation or maintenance of such Temporary Construction Area).

## 2. **DOCUMENTATION**

### 2.1 Ambiguities

In the case of any ambiguity or discrepancy between the provisions in the main body of this Agreement and those in any Schedule or between the provisions of any Schedules, the Department's Nominee shall at the request of the DBFO Co state in writing which provision shall take priority.

### 2.2 Additional Payments and Time

The DBFO Co shall not be entitled to any additional payment or extension of time under this Agreement as a result of giving effect to the decision of the Department's Nominee under Clause 2.1 [Ambiguities] unless the ambiguity or discrepancy is one which the DBFO Co could not reasonably have been expected (in accordance with Good Industry Practice) to have identified or foreseen at any time prior to the execution of this Agreement.

In such event the decision of the Department's Nominee shall be treated as a Department's Change in accordance with Annex 1 to Part 1 of Schedule 12 [Department's Changes].

## 3. THE PROJECT

### 3.1 Design, Construction, Operation and Maintenance

Subject to and in accordance with the provisions of this Agreement, the DBFO Co shall:

- 3.1.1 design, construct, complete, commission and test the Works;
- 3.1.2 operate and maintain the Project Facilities during the Contract Period from the O&M Commencement Date;
- 3.1.3 conduct the other Operations during the Contract Period; and
- 3.1.4 finance the activities referred to in Clauses 3.1.1 to 3.1.3,

at its own cost and risk without recourse to Government funds (other than as expressly provided in this Agreement) or to Government guarantees.

### 3.2 Improvements

The DBFO Co may, if it thinks fit, improve the Project Facilities, subject to and in accordance with the provisions of this Agreement, including but not limited to Clause 11.4 [DBFO Co's Changes], Clause 14.6 [Maintenance and Other Works], Clause 36.3 [Subsequent Schemes] and Part 3 of Schedule 13 [Subsequent Schemes] and Clause 36.4 [Improvements] and Part 4 of Schedule 13 [Improvements].

### 3.3 Public Use

3.3.1 The DBFO Co shall:

- 3.3.1.1 subject to Clause 15.3 [Lane Closures], keep the Existing Road open for public use; and

- 3.3.1.2 from the date of issue of the Permit to Use in respect of Scheme 1, open and, subject to Clause 15.3 [Lane Closures], keep open the New Road for public use.
- 3.3.2 Without prejudice to Clause 28.2 [Primary Duty of Co-ordination], all Operations shall be carried on so as not to interfere unnecessarily with:
  - 3.3.2.1 the convenience of Users;
  - 3.3.2.2 the convenience of other members of the public; or
  - 3.3.2.3 the access to, use and occupation of public or private roads or footpaths, footways, cycleways or bridleways whether under the control or in the possession of the Secretary of State or any other person.

#### 3.4 Standard of Performance

The DBFO Co shall procure that the Operations are at all times performed:

- 3.4.1 in a safe manner and in accordance with Good Industry Practice and the Management System Documentation;
- 3.4.2 in a manner that is not likely to be injurious to health or to cause damage to property provided that damage to property located within the Site that is an inevitable consequence of carrying out the Works which damage cannot be avoided irrespective of the procedures and working methods adopted within the Site shall not constitute a breach of this obligation unless, to the extent that the same should be remedied, it is not remedied by the DBFO Co as soon as practicable;
- 3.4.3 in such manner as to enable the Secretary of State to discharge his statutory duties and his undertakings or objectives set out in the Road User's Charter and as not to detract from the image and reputation of the Secretary of State as highway authority;
- 3.4.4 in compliance with all applicable Legal Requirements;
- 3.4.5 in compliance with the Core Construction Requirements, the Core O&M Requirements and the Core Communications Requirements; and
- 3.4.6 in a manner consistent with the promotion of Sustainable Development.

Provided that:

- 3.4.6.1 the DBFO Co will only be treated as being in breach of this Clause 3.4.6 to the extent that any of elements set out in subparagraphs (a) – (d) (inclusive) of the definition of Sustainable Development are reflected in any of the DBFO Co's 5 Year Performance Indicators or the DBFO Co's 5 Year Environmental Performance Indicators and the DBFO Co has failed to meet any Minimum Performance Levels relating to such indicator;

3.4.6.2 the exception contained in Clause 3.4.6.1 above shall not prevent action being taken by or on behalf of the Secretary of State under any other provision of this Agreement if the circumstances giving rise to such failure to meet any such Minimum Performance Level also constitute a breach of some other provision of this Agreement.

### 3.5 Core Construction Requirements

3.5.1 In the design, planning and execution of the Works and other works in connection with the repair, maintenance or improvement of the Project Facilities, and functions associated with the construction, repair, maintenance or improvement of the Project Facilities, the DBFO Co shall take all such action and do all such things (including, without limitation, organising itself, adopting measures and standards, executing procedures, including inspection procedures and safety patrols, and engaging and managing contractors, agents and employees) as will and in such manner as will:

3.5.1.1 enable the Secretary of State to provide a safe highway in respect of its condition, use and risks affecting third parties;

3.5.1.2 secure the safety of Users, workers or other persons on the Project Road or the Adjacent Areas or on land adjacent to the Project Facilities or using adjoining roads or facilities; and

3.5.1.3 enable the Secretary of State to fulfil his obligations in respect of his statutory powers and in respect of administrative law, common law, European Community law and human rights;

and, subject to Clauses 3.5.1.1, 3.5.1.2 and 3.5.1.3 above:

3.5.1.4 enable the Secretary of State to provide a level of highway service to the public not inferior to that provided on the trunk road and motorway network generally during construction, repair, maintenance or improvement works, taking account of Special Events;

3.5.1.5 enable the police, local authorities, and others with statutory powers in relation to the Project Facilities or adjoining roads to fulfil their obligations in respect of those statutory powers;

3.5.1.6 discharge the Secretary of State's liabilities in respect of the undertakings and commitments at Schedule 8 [Third Parties] or given in the course of obtaining any of the Orders or any New Order, without creating or incurring any liability that would subsist beyond the Contract Period;

3.5.1.7 minimise the occurrence and adverse effects of accidents and ensure that all accidents and emergencies are responded to as quickly as possible;

- 3.5.1.8 minimise the risk of damage or disturbance to or destruction of third party property;
  - 3.5.1.9 ensure that members of the public are treated with all due courtesy and consideration;
  - 3.5.1.10 provide a safe, clear and informative system of road signs;
  - 3.5.1.11 enable standards of reliability, durability, accessibility, maintainability, quality control and assurance, and fitness for purpose appropriate to a highway of the character of the Project Road to be achieved throughout the Contract Period;
  - 3.5.1.12 enable standards of reliability, durability, accessibility, maintainability, quality control and assurance, and fitness for purpose appropriate to facilities of the character of the Off-Site Facilities to be achieved throughout the Contract Period.;
  - 3.5.1.13 comply with the Orders and any New Order provided that if a Department's Change would but for this provision entitle the DBFO Co to claim that an Eligible Change has occurred the requirement in this sub-clause to comply with a New Order will not of itself preclude the DBFO Co from claiming that an Eligible Change has occurred;
  - 3.5.1.14 meet the environmental objectives detailed in the Environmental Statement(s), including the achievement of a high standard in the mitigation of adverse environmental effects;
  - 3.5.1.15 achieve a high standard in the appearance and aesthetic quality of the Project Facilities and achieve integration of the Project Facilities with the character of the surrounding landscape through both sensitive design and sensitive management of all visible elements including, without limitation, those on the Existing Road; and
  - 3.5.1.16 comply with the Scheme Specific Core Construction Requirements in Part 1 of Schedule 4.
- 3.5.2 The Monitoring System shall be designed and constructed in such a manner as will enable the same to comply with the Core Construction Requirements.

### 3.6 Core O&M Requirements

In the design, planning and execution of all works and functions associated with the operation and maintenance of the Project Facilities, the DBFO Co shall take all such action and do all such things (including, without limitation, organising itself, adopting measures and standards, executing procedures, including inspection procedures and safety patrols, and engaging and managing contractors, agents and employees) as will and in such manner as will:

- 3.6.1 enable the Secretary of State to provide a safe highway in respect of its condition, use and risks affecting third parties;
- 3.6.2 secure the safety of Users, workers or other persons on the Project Road or the Adjacent Areas or on land adjacent to the Project Facilities or using adjoining roads or facilities; and
- 3.6.3 enable the Secretary of State to fulfil his obligations in respect of his statutory powers and in respect of administrative law, common law, European Community law and human rights;

and, subject to Clauses 3.6.1, 3.6.2 and 3.6.3:

- 3.6.4 enable the Secretary of State to provide a level of highway service to the public not inferior to that provided on the trunk road and motorway network generally, taking account of Special Events;
- 3.6.5 enable the police, local authorities, and others with statutory powers in relation to the Project Facilities or adjoining roads to fulfil their obligations in respect of those statutory powers;
- 3.6.6 discharge the Secretary of State's liabilities in respect of the undertakings and commitments at Schedule 8 [Third Parties] or given in the course of obtaining any of the Orders or any New Order are discharged, without creating or incurring any liability that would subsist beyond the Contract Period;
- 3.6.7 ensure that all accidents and emergencies are responded to as quickly as possible and their adverse effects minimised;
- 3.6.8 minimise the risk of damage or disturbance to or destruction of third party property;
- 3.6.9 ensure that members of the public are treated with all due courtesy and consideration;
- 3.6.10 ensure that Users are given adequate information and forewarning of any events on or any matters affecting the Project Road so as to enable them to minimise any adverse consequences on them of those events or matters;
- 3.6.11 ensure that the Project Road is operated and maintained to no lesser standard than is appropriate for a highway of the character of the Project Road and for use by the traffic which is reasonably to be expected to use the Project Road;
- 3.6.12 ensure that the Off-Site Facilities are operated and maintained to no lesser standard than is appropriate for facilities of the character of the Off-Site Facilities;
- 3.6.13 minimise the risk of adverse effects on the environment and on the amenity enjoyed by the owners and occupiers of land adjacent to the Project Facilities and to adjoining roads and facilities;

- 3.6.14 ensure that members of the public and others are given adequate opportunity to bring to the attention of the DBFO Co any matters affecting the ability of the DBFO Co to meet the Core O&M Requirements;
- 3.6.15 ensure that traffic data and data relating to the operation and maintenance of the Project Facilities and events on the Project Road are collected and disseminated such that the Secretary of State and other persons or bodies with statutory powers in relation to the Project Facilities or adjoining roads are better able to perform their obligations in respect of those statutory powers;
- 3.6.16 ensure that the Project Facilities are operated and maintained in accordance with the Core Construction Requirements; and
- 3.6.17 comply with the Scheme Specific Core O&M Requirements identified in Part 1 of Schedule 6.

### 3.7 Core Communications Requirements

In the design, supply, installation, testing, commissioning, operation, maintenance, repair and/or improvement of the Monitoring System and functions in connection therewith, the DBFO Co shall take all such action and do all such things (including, without limitation, organising itself, adopting measures and standards, executing procedures, including inspection procedures, and engaging and managing contractors, agents and employees) as will and in such manner as will:

- 3.7.1 enable the Secretary of State to provide a safe highway in respect of its condition, use and risks affecting third parties;
- 3.7.2 secure the safety of Users, workers or other persons on the Project Road or the Adjacent Areas or on land adjacent to the Project Facilities or using adjoining roads or facilities; and
- 3.7.3 enable the Secretary of State to fulfil his obligations in respect of his statutory powers and in respect of administrative law, common law, European Community law and human rights;

and, subject to Clauses 3.7.1, 3.7.2 and 3.7.3 above:

- 3.7.4 enable the Secretary of State to provide a level of highway service to the public not inferior to that provided on the trunk road and motorway network generally during installation, testing, commissioning, maintenance, repair or improvement works, taking account of Special Events;
- 3.7.5 enable the police, local authorities and others with statutory powers in relation to the Project Facilities or adjoining roads to fulfil their obligations in respect of those statutory powers;
- 3.7.6 discharge the Secretary of State's liabilities in respect of the undertakings and commitments at Schedule 8 [Third Parties] or given in the course of obtaining any of the Orders or any New Order, without creating or incurring any liability that would subsist beyond the Contract Period;

- 3.7.7 minimise the occurrence and adverse effects of accidents and ensure that all accidents and emergencies are responded to as quickly as possible;
- 3.7.8 minimise the risk of damage or disturbance to or destruction of third party property;
- 3.7.9 ensure that members of the public are treated with all due courtesy and consideration;
- 3.7.10 provide a safe, clear and informative system of road signs;
- 3.7.11 enable standards of reliability, durability, accessibility, maintainability, quality control and assurance, and fitness for purpose appropriate to a highway of the character of the Project Road to be achieved throughout the Contract Period;
- 3.7.12 enable standards of reliability, durability, accessibility, maintainability, quality control and assurance, and fitness for purpose appropriate to facilities of the character of the Off-Site Facilities to be achieved throughout the Contract Period;
- 3.7.13 comply with the Orders and any New Order;
- 3.7.14 meet the environmental objectives detailed in the Environmental Statements(s), including the achievement of a high standard in the mitigation of adverse environmental effects;
- 3.7.15 achieve a high standard in the appearance and aesthetic quality of the Project Facilities and achieve integration of the Project Facilities with the character of the surrounding landscape through both sensitive design and sensitive management of all visible elements including, without limitation, those on the Existing Road;
- 3.7.16 ensure that traffic data and data relating to the operation and maintenance of the Project Facilities and events on the Project Road are collected and disseminated such that the Secretary of State and other persons or bodies with statutory powers in relation to the Project Facilities or adjoining roads are better able to perform their obligations in respect of those statutory powers;
- 3.7.17 ensure that the Project Road is operated and maintained to no lesser standard than is appropriate for a highway of the character of the Project Road and for use by the traffic which is reasonably to be expected to use the Project Road;
- 3.7.18 ensure that members of the public and others are given adequate opportunity to bring to the attention of the DBFO Co any matters affecting the ability of the DBFO Co to meet the Core Communications Requirements; and
- 3.7.19 in the case of the Monitoring System, ensure compliance with the Scheme Specific Core Monitoring System Requirements in Part 1 of Schedule 17 [Scheme Specific Core Monitoring System Requirements].

### 3.8 Discrimination

The DBFO Co shall not, and confirms that it will procure that the Contractor, Designer and Operator shall not, unlawfully discriminate on the grounds of colour, sex, religion, political opinion or nationality and in particular but without limitation the DBFO Co, the Contractor, the Designer and the Operator shall not discriminate on the grounds of nationality in the selection of sub-contractors.



## **PART II** **OPERATIONS**

### **6. PRE-COMMENCEMENT PERIOD**

#### **6.1 Site Inspection**

Without limitation to any other provision of this Agreement (including, without limitation, Clause 38.2.2), the DBFO Co shall be deemed prior to executing this Agreement to have, and warrants that it has:

- 6.1.1 inspected and examined to its satisfaction the Site and the Adjacent Areas and their surroundings and, where applicable, any existing structures or works on, over or under the Site and the Adjacent Areas;
- 6.1.2 satisfied itself as to the nature of the climatic, hydrological, ecological, environmental and general conditions of the Site and the Adjacent Areas, the nature of the ground and subsoil, the form and nature of the Site and the Adjacent Areas, the risk of injury or damage to property adjacent to or affecting the Site and the Adjacent Areas, and to occupiers of such property, the nature of the materials (whether natural or otherwise) to be excavated, and the nature of the design, work, Plant and materials necessary for the execution of the Operations;
- 6.1.3 satisfied itself as to:
  - 6.1.3.1 the means of communication with and access to and through the Site and the Adjacent Areas, the accommodation it may require and the adequacy of the rights of access set out in Clause 8.1 [Access for DBFO Co] for those purposes; and
  - 6.1.3.2 the possibility of interference by persons (other than the Secretary of State and other than persons claiming rights or title through, under or paramount to the Secretary of State) with access to or use of the Site and the Adjacent Areas, with particular regard to the Requirements of Interested Parties;
  - 6.1.3.3 the precautions and times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties; and
  - 6.1.3.4 the risks of interference by Protestors or others trespassing on the Site and the Adjacent Areas;
- 6.1.4 thoroughly examined, checked and satisfied itself as to the adequacy, correctness and suitability of all Design Data made available to the DBFO Co by the Secretary of State prior to execution of this Agreement and which the DBFO Co has adopted or made use of in the Construction Requirements, the Communications Requirements or the O&M Requirements or which the DBFO Co intends to adopt or make use of;
- 6.1.5 conducted its own analysis and review of the other materials, documents and data referred to in Clause 38.2.1 which bear on any of the matters referred to in Clauses 6.1.1, 6.1.2 and 6.1.3; and

- 6.1.6 generally obtained for itself all necessary information as to:
  - 6.1.6.1 the risks, contingencies and all other circumstances which may influence or affect the Construction Requirements, the Communications Requirements and the O&M Requirements and its obligation to carry out the Operations; and
  - 6.1.6.2 any other factors which would affect its decision to enter into this Agreement or the terms on which it would do so.

The provisions of any Sub-Clause of this Clause 6.1 [Site Inspection] shall be without limitation to the provisions of any other Sub-Clause of this Clause 6.1 [Site Inspection] provided that, without prejudice to the DBFO Co's obligations under this Agreement, the warranty given in this Sub-Clause 6.1 shall not constitute an actionable warranty by the DBFO Co in favour of the Secretary of State but the Secretary of State may rely on it for the purpose of defending or contesting any action brought against him.

## 6.2 Investigations and Surveys

- 6.2.1 The DBFO Co shall promptly notify the Department's Nominee in accordance with the Review Procedure of any Investigation (other than those set out in Part 1 of Schedule 21 [Investigations and Surveys]) which it is intending to carry out during the Pre-Commencement Period.
- 6.2.2 During the Pre-Commencement Period the DBFO Co may carry out any Investigation which is set out in Part 1 of Schedule 21 [Investigations and Surveys] or which has been so notified to the Department's Nominee pursuant to Clause 6.2.1, provided that:
  - 6.2.2.1 prior to commencing any such Investigation the DBFO Co shall have provided to the Department's Nominee such evidence as the Department's Nominee may reasonably require that the insurance specified in Clause 20.1.1.1 has been effected; and
  - 6.2.2.2 subject to Clause 6.5 the DBFO Co shall only be entitled to recover the costs of any such Investigation in accordance with Clause 44.2 if such Investigation is set out in Part 1 of Schedule 21 [Investigations and Surveys] or there has been no objection to the notice of such Investigation in accordance with the Review Procedure (the right to such objection being in the absolute discretion of the Department's Nominee).
- 6.2.3 Not used.
- 6.2.4 The DBFO Co shall promptly furnish the Department's Nominee with copies of all information, records and test results (including any interpretation of such test results) resulting from the Investigations referred to in Clause 6.2.2.

## 6.3 Other Preparatory Works

During the Pre-Commencement Period the DBFO Co may mobilise such resources and carry out such further design and other works (other than works subject to Clause 6.2

[Investigations and Surveys] or Clause 6.4 [Works by Relevant Authorities]) as are set out in Part 2 of Schedule 21 [Other Preparatory Works] or as shall be appropriate having regard to the expected Commencement Date (based on the information referred to in Clause 7.4 [Estimated Commencement Date]) provided that:

- 6.3.1 the DBFO Co shall have provided to the Department's Nominee such evidence as the Department's Nominee may reasonably require that any insurance specified in Clause 20.1.1.1 has been effected;
- 6.3.2 subject to Clause 6.5 the DBFO Co shall only be entitled to recover the costs of any such activities in accordance with Clause 44.2 if such activities are set out in Part 2 of Schedule 21 [Other Preparatory Works] or there has been no objection to the notice of such activities in accordance with the Review Procedure (the right of such objection being in the absolute discretion of the Department's Nominee); and
- 6.3.3 this Clause 6.3 [Other Preparatory Works] shall not authorise the doing of any thing which would affect the physical integrity of the Site or the Adjacent Areas unless the works and their effect are set out in Part 2 of Schedule 21 [Other Preparatory Works] or have been consented to by the Secretary of State in his absolute discretion.

#### 6.4 Works by Relevant Authorities

- 6.4.1 Works which the DBFO Co wishes during the Pre-Commencement Period to have carried out by any Relevant Authority (including without limitation any Statutory Undertaker) are set out in Part 3 of Schedule 21 [Works by Relevant Authorities].
- 6.4.2 If the DBFO Co wishes during the Pre-Commencement Period to have additional works carried out by any Relevant Authority (including without limitation any Statutory Undertaker), then, the DBFO Co shall give notice of such intended works to the Department's Nominee under the Review Procedure.
- 6.4.3 The Secretary of State will either procure the works described in Clause 6.4.1 or Clause 6.4.2 or will instruct the DBFO Co that subject to Clause 28.5.3 it is to manage such works by carrying out such of the services set out in Parts 2 and 3 of Schedule 19 as may be relevant to such works, provided that:
  - 6.4.3.1 the works are set out in Part 3 of Schedule 21 [Works by Relevant Authorities]; or
  - 6.4.3.2 if the works are not set out in Part 3 of Schedule 21 [Works by Relevant Authorities], there has been no objection to such works in accordance with the Review Procedure,and, in either case, the DBFO Co shall have provided to the Department's Nominee such evidence as the Department's Nominee may reasonably require that any insurance specified in Clause 20.1.1.1 has been effected.
- 6.4.4 The Department's Nominee shall not be entitled to object to the works set out in Part 3 of Schedule 21 [Works by Relevant Authorities]. The Department's Nominee shall only be entitled to object to the works

described in a notice given pursuant to Clause 6.4.2 on the grounds set out in paragraph 3.3 of Part 2 of Schedule 7 [Review Procedure].

6.4.5 The DBFO Co shall not agree to any variation to the terms of the agreements under which the works described in Clause 6.4.1 and Clause 6.4.2 are to be executed which would, if such varied term had originally been contained in such agreement:

6.4.5.1 in respect of the works set out in Part 3 of Schedule 21 [Works by Relevant Authorities], have materially influenced the decision of the Secretary of State to accept the terms of Part 3 of Schedule 21 [Works by Relevant Authorities]; or

6.4.5.2 in respect of the works described in Clause 6.4.2, have entitled the Department's Nominee to withhold or defer consent pursuant to Clause 6.4.4 provided that if, in his absolute discretion, the Secretary of State consents to such a variation then that variation shall be treated as if it had been submitted to the Review Procedure by the DBFO Co and no objection has been raised thereto by the Department's Nominee.

6.4.6 The DBFO Co shall bear the cost of the carrying out of the works described in Clause 6.4.1 and Clause 6.4.2.

6.4.7 The DBFO Co shall be entitled to recover, in accordance with Clause 44.2 on the occurrence of the circumstances envisaged by such Clause, the costs of the works set out in Part 3 of Schedule 21 [Works by Relevant Authorities] and any works carried out in accordance with Clause 6.4.2 to which there has been no objection in accordance with the Review Procedure.

## 6.5 Authorised Expenditure

6.5.1 Notwithstanding Clauses 6.2.2.2, 6.3.2 and 6.4.7, where an agreed value for the carrying out of Investigations pursuant to and in accordance with Clause 6.2 [Investigations and Surveys], design or other works pursuant to and in accordance with Clause 6.3 [Other Preparatory Works] or works by Relevant Authorities pursuant to and in accordance with Clause 6.4 [Works by Relevant Authorities] (together the "Pre-Commencement Activities") is set out in Part 4 of Schedule 21 [Pre-Commencement Activities], such agreed value shall (where such Pre-Commencement Activity has been completed prior to the Termination Date) be the amount recoverable by the DBFO Co as Pre-Commencement Costs pursuant to Clause 44.2 [Pre-Commencement Termination] in relation to the relevant Pre-Commencement Activity.

6.5.2 Where a Pre-Commencement Activity is partially completed on the Termination Date, the amount recoverable by the DBFO Co as Pre-Commencement Costs pursuant to Clause 44.2 [Pre-Commencement Termination] with respect to such Pre-Commencement Activity shall be an amount equal to a fair and reasonable proportion of the amount set out in Part 4 of Schedule 21 [Pre-Commencement Activities] with respect to such Pre-Commencement Activity taking into account the extent to which such Pre-Commencement Activity was completed on the Termination Date.

## 7. COMMENCEMENT

### 7.1 Conditions to Commencement

The following shall be conditions to the issue of the Commencement Certificate:

7.1.1 the Secretary of State having received from the DBFO Co notice confirming:

7.1.1.1 that all conditions (other than conditions relating to the issue of the Commencement Certificate) to the availability under the Funding Agreements of the funds for initial drawdown required by the DBFO Co for all Operations have been satisfied or waived; and

7.1.1.2 that 49,999 Ordinary Shares have been unconditionally allotted to Holdco fully paid up in cash,

accompanied in each case by such evidence thereof as may reasonably be required by the Secretary of State;

7.1.2 the Secretary of State having received the Performance Guarantee referred to in Clause 4.1 [Performance Guarantee];

7.1.3 the Secretary of State having received such evidence as he may reasonably require that the Liaison Procedures referred to in Clause 14.5.1 [Emergencies and Liaison] have been developed and agreed with each of the persons referred to in paragraph 1 of Part 2 of Schedule 16 [Operations, Emergencies and Traffic Management];

7.1.4 the Secretary of State having received such evidence as he may reasonably require that adequate procedures have been agreed between the DBFO Co and "Interoute JV" (comprising Mott MacDonald Ltd and Raynesway Construction Southern Ltd) for the transfer of the operation and maintenance of the Existing Road to the DBFO Co with effect from the O&M Commencement Date and that the DBFO Co is ready to commence operation and maintenance of the Existing Road with effect from the O&M Commencement Date;

7.1.5 the Department's Nominee having received such evidence as he may reasonably require of compliance with Clause 20 [Insurance];

7.1.6 there being no Dispute which remains the subject of the Disputes Resolution Procedure the resolution of which may give rise to the premature termination of this Agreement; and

7.1.7 the undertakings referred to in Clause 20.6.6 having been received by the Secretary of State in terms satisfactory to the Secretary of State.

### 7.2 Satisfaction of Conditions

The DBFO Co shall use its reasonable endeavours to procure the satisfaction of the conditions referred to in Clauses 7.1.1, 7.1.2, 7.1.3, 7.1.4, 7.1.5 and 7.1.7 [Conditions to Commencement] as soon as practicable after the date of execution of this Agreement and in any event shall procure their satisfaction prior to 1st March 2004.

### 7.3 Commencement Certificate

7.3.1 The Secretary of State shall (subject to the conditions referred to in Clause 7.1 [Conditions to Commencement] remaining satisfied) issue the Commencement Certificate no later than 5 Working Days after the date on which all the conditions referred to in Clause 7.1 [Conditions to Commencement] have been satisfied.

7.3.2 The Commencement Certificate shall state the Commencement Date, which shall be the date being the later of:

7.3.2.1 28 days from the date of issue of the Commencement Certificate; and

7.3.2.2 1 June 2004.

### 7.4 Estimated Commencement Date

Prior to the issue of the Commencement Certificate, the DBFO Co shall keep the Secretary of State advised by notice of its estimate of the date for satisfaction of each of the conditions referred to in Clause 7.1 [Conditions to Commencement] (other than Clause 7.1.6) including in any such notice reasonable detail of the circumstances taken into account in making such estimate, provided that any such notice shall be for information and planning purposes only and shall not be binding on the DBFO Co for any purpose.

8. **LAND**

8.1 **Access for DBFO Co**

Subject to the conditions set out in Clause 7.1 [Conditions to Commencement] having been satisfied at the date of issue of the Commencement Certificate and subject to the provisions of Clauses 8.2 [Duration], 8.3 [Limitations], 8.5 [Off-Site Works] and 10 [Security of the Site], the Secretary of State shall make available to the DBFO Co for the periods referred to in Clause 8.2 [Duration] access to so much of the Site and the Adjacent Areas (including, for the avoidance of doubt, any land conveyed to the Secretary of State pursuant to Clause 8.6.2) as shall be required from time to time for the carrying out of the relevant part of the Operations, in each case subject to:

- 8.1.1 any rights of public passage or access existing over any part of the Site or the Adjacent Areas from time to time;
- 8.1.2 the right of any Relevant Authority under any Law or Legal Requirement to have access to the Site or the Adjacent Areas but subject to the provisions of Clause 14.4.2;
- 8.1.3 the right of Users to use the Project Road or of the public to use any Local Authority Road or other highway;
- 8.1.4 the rights of access referred to in Clause 14.4.1;
- 8.1.5 the right of any relevant highway authority to have access for the execution on or near the Site or the Adjacent Areas of any work in fulfilling any function of such highway authority under any Law;
- 8.1.6 the terms and conditions of any Rights in respect of land comprising the Site and the Adjacent Areas;
- 8.1.7 the provisions of Clause 10 [Security of the Site] and Schedule 22 [Security of the Site]; and
- 8.1.8 in the case of any land conveyed to the Secretary of State pursuant to Clause 8.6.2 any Encumbrances affecting such land as at the date of such conveyance.

8.1A **Access for DBFO Co during the Pre-Commencement Period**

Notwithstanding but without prejudice to the provisions of Clauses 8.1 and 8.2 to 8.3.2 (inclusive), the Secretary of State shall make available to the DBFO Co during the Pre-Commencement Period access to so much of the Site (other than the Occupied Property (until such date as the Secretary of State secures its vacant possession) and the Existing Road) as the DBFO Co may reasonably require for the purpose of carrying out the Investigations referred to in Clause 6.2.2 and any other works that the DBFO Co is permitted to carry out pursuant to Clauses 6.3 and 6.4 and for no other purpose in each case subject to:

- 8.1A.1 the Department's Nominee having previously received such evidence as he may reasonably require of compliance with Clause 20 [Insurance] in relation to the insurances required to be provided pursuant to paragraph 1 of Part 1 of Schedule 10 (other than paragraph 1.2) and to such insurances remaining in full force and effect;

- 8.1A.2 any rights of public passage or access existing over any part of the Site or from time to time;
- 8.1A.3 the right of any Relevant Authority under any Law or Legal Requirement to have access to the Site but subject to the provisions of Clause 14.4.2;
- 8.1A.4 the right of Users to use the Project Road or of the public to use any Local Authority Road or other highway;
- 8.1A.5 the rights of access referred to in Clause 14.4.1;
- 8.1A.6 the right of any relevant highway authority to have access for the execution on or near the Site of any work in fulfilling any function of such highway authority under any Law;
- 8.1A.7 the terms and conditions of any Rights in respect of land comprising the Site;
- 8.1A.8 the provisions of Clause 10 [Security of the Site] and Schedule 22 [Security of the Site]; and
- 8.1A.9 in the case of any land conveyed to the Secretary of State pursuant to Clause 8.6.2 any Encumbrances affecting such land as at the date of such conveyance.

Any access given by the Secretary of State under this Clause 8.1A shall be by way of licence for the particular activity only and shall not grant or be deemed to grant any legal estate or other interest in land. For the avoidance of doubt, the Secretary of State shall have no obligation to procure access to any land outside of the Site or to the Existing Road or (until such date as the Secretary of State secures its vacant possession) to the Occupied Property.

## 8.2 Duration

Subject to Clauses 8.3 [Limitations] and 43.1 [Step-In Rights], the commencement and duration of the rights of access given under Clause 8.1 [Access for DBFO Co] shall be as follows:

- 8.2.1 in respect of the Site, from the Commencement Date and thereafter until the end of the Contract Period or, in respect of any part of the Site comprising a De-Trunked Segment, the date on which the DBFO Co ceases to be responsible for the operation and maintenance thereof in accordance with Clause 13.3.5 (save to the extent necessary to perform the obligations set out in Clause 13.3.5.3);
- 8.2.2 in respect of the Temporary Adjacent Areas, from the later of the Commencement Date and the date on which access is required in respect of the relevant part of the Temporary Adjacent Areas under the DBFO Co's Programme and thereafter until a Taking Over Certificate is issued in respect of the Local Facilities on the relevant part of the Temporary Adjacent Areas in accordance with Clause 13.3 [Local Facilities and De-Trunked Segments]; and

- 8.2.3 in respect of the Adjacent Areas, from the later of the Commencement Date and the date on which access is required in respect of the relevant part of the Adjacent Areas under the DBFO Co's Programme and thereafter until the end of the Contract Period.
- 8.2.4 in respect of land transferred pursuant to Clause 8.6.2, from the date that such land is transferred to the Secretary of State in accordance with such Clause and thereafter until the end of the Contract Period.

### 8.3 Limitations

- 8.3.1 The rights of access referred to in Clause 8.1 [Access for DBFO Co] shall subsist for the purposes of carrying out the Operations and for no other purposes. Any access given under Clause 8.1 [Access for DBFO Co] shall be by way of licence for the relevant part of the Operations only and shall not grant or be deemed to grant any legal estate or other interest in land.
- 8.3.2 Without prejudice to the generality of Clause 8.3.1, where land or Rights in respect of land forming part of the Site or the Adjacent Areas has been acquired:
- 8.3.2.1 by compulsory purchase order for landscaping or any other specified purpose; or
- 8.3.2.2 subject to any restriction relating to the use of such land for landscaping or any other specified purpose,
- such land shall not be used by the DBFO Co otherwise than for activities which are necessary for the achievement of such landscaping or such other specified purpose, and the right of access granted by the Secretary of State in respect of such land shall be limited accordingly.

### 8.4 Additional Access

- 8.4.1 Any request by the DBFO Co that the Secretary of State exercise in respect of any land outside the Site and the Adjacent Areas any power of entry under any Law (to the extent that the exercise of such power of entry is necessary to enable the DBFO Co to perform its obligations under this Agreement) shall be dealt with in accordance with Clause 27 [Statutory Powers], and the DBFO Co shall bear all costs and charges in respect of and any Loss or Claims arising from such entry.
- 8.4.2 Save as provided in Clauses 8.4.1, 8.4.4, 8.4.5 and 8.4.6, the DBFO Co shall procure, and shall bear all costs and charges in respect of and any Loss or Claims arising from, any access to any land required additional to that required to be provided by the Secretary of State pursuant to Clause 8.1 [Access for DBFO Co].
- 8.4.3 If requested by the Secretary of State the DBFO Co will be responsible for preparing and negotiating for approval and signature by the Secretary of State agreements made pursuant to Section 4 of the Highways Act 1980 necessary to carry out Operations associated with the Project Facilities and to enable the DBFO Co to fulfil its obligations under this Agreement.

8.4.4 If, notwithstanding that the DBFO Co has used its reasonable endeavours to secure such access, the DBFO Co is unable to perform its obligations under this Agreement to maintain those bridges over Network Rail's railway (other than the Bridge (as defined in the Network Rail Agreement)) forming part of the Project Facilities solely because it is unable to secure reasonable access over land ("Network Rail Access Land") which is either in Network Rail's ownership or in respect of which Network Rail has a legal interest entitling it (without the requirement for the consent of a third party) to grant such reasonable access rights to the DBFO Co then the DBFO Co shall not be treated as being in breach of such maintenance obligations in relation to those bridges for so long as and to the extent that it is unable to secure reasonable access over the Network Rail Access Land to do so.

8.4.5 If the DBFO Co is unable to obtain access:

8.4.5.1 over third party land to maintain the 450mm outfall pipe referred to in Annex 3/1 of Section 3 of Part 2 of Schedule 6, as it crosses a field before reaching the stream; or

8.4.5.2 over third party land to maintain approx. 200m of Environmental Barrier on the North Eastern side of the approach road to Wormdale Hill Overbridge; or

8.4.5.3 to a linear soakaway and connecting pipe referred to in Annex 3/1 of Section 3 of Part 2 of Schedule 6

and in any such case the Secretary of State has the benefit of rights of access over such land which rights it is entitled to make available to the DBFO Co (but not otherwise) the Secretary of State shall, upon request by the DBFO Co, make available such rights of access for the benefit of the DBFO Co.

8.4.6 If the DBFO Co requires access over a public highway in the ownership of the local authority and the local authority prevents the DBFO Co from gaining access to the Project Road to carry out its maintenance obligations then, provided that:

8.4.6.1 the local authority has not taken such action because it objects to the DBFO Co's proposed methods of working; and

8.4.6.2 the DBFO Co has complied with the relevant Liaison Procedures; and

8.4.6.3 it is not possible to carry out such maintenance in any other way that is consistent with Good Industry Practice,

the DBFO Co shall not be treated as being in breach of the relevant maintenance obligations for so long as and to the extent that it is thereby prevented from complying with such obligations.

## 8.5 Off-Site Works

Subject to Clause 10.1.2, to the extent that the Works are required to be carried out on land or highways in the control or ownership of a highway authority other than the

Secretary of State and such highway authority has not given to the DBFO Co access to areas required to carry out the Off-Site Works, then and during any such period:

8.5.1 the DBFO Co shall not be required to carry out the Off-Site Works relating to such area; and

8.5.2 the Secretary of State shall not be required to make available to the DBFO Co access to such area.

#### 8.6 Acquisition of Land by the DBFO Co

8.6.1 The DBFO Co shall not acquire any land or any Rights in respect of any land required for or for the support of the Project Facilities without the prior consent of the Secretary of State.

8.6.2 Without prejudice to Clause 8.6.1 or paragraph 2.4.6(d) of Part 3 of Schedule 13 [Subsequent Schemes], the freehold interest in any land together with any Rights in respect of land acquired by the DBFO Co which is acquired for the Project Facilities shall, upon request by the Secretary of State, be conveyed to the Secretary of State free of charge and without any Encumbrances which would impede the Secretary of State's performance of his highway functions provided that upon completion of such a transfer the Secretary of State will grant the DBFO Co a licence of such land pursuant to Clause 8.1 subject to the matters specified in Clauses 8.1.1 to 8.1.8 (inclusive).

8.6.3 As soon as practicable, the DBFO Co shall acquire the unencumbered freehold interest in the land shown coloured blue (in this Clause 8.6 referred to as the "Blue Land") on drawing number 60062/SG/2600/035RWA in Part 7 of Schedule 3 [Drawings] and forthwith upon acquiring the same shall, as beneficial owner, transfer such interest to the Secretary of State in accordance with Clause 8.6.2.

8.6.4 The DBFO Co shall upon request by the Secretary of State cease the construction of the bridge pier to be constructed on the Blue Land if before it has acquired the Blue Land the owner of such land indicates that it is unwilling to transfer the same.

8.6.5 For the avoidance of doubt:

8.6.5.1 the Secretary of State shall have no obligations to the DBFO Co in respect of the Blue Land pursuant to any of Clauses 8.1, 8.1A or 8.5.1;

8.6.5.2 the DBFO Co shall not be entitled to relief under Clause 8.5.1 if the DBFO Co fails to acquire the Blue Land; and

8.6.5.3 the provisions of Clause 27 shall not apply in relation to the Blue Land.

#### 8.7 Observance by DBFO Co

The DBFO Co shall observe and comply with the terms and conditions of any Rights in respect of land relating to the Site and the Adjacent Areas.

## 8.8 Boundaries of Site and Adjacent Areas

- 8.8.1 The Parties acknowledge that the boundaries (both vertical and horizontal) of the Site and Adjacent Areas, as they relate to the New Road and as reflected on drawings numbered A249/03/02-001 to 004 (inclusive) set out in Part 7 of Schedule 3 [Drawings], have been set by reference to the preliminary design of the New Road as shown in the Construction Requirements on the date of execution of this Agreement.
- 8.8.2 Within 90 days after issuance of the Completion Certificate, the DBFO Co shall by notice to the Secretary of State specify any area of land falling within the boundaries of the Site and Adjacent Areas as referred to in Clause 8.8.1 which is not required for the Project. The Secretary of State shall be entitled in his absolute discretion (as between the Secretary of State and the DBFO Co) to return any such area of land to the person who owned it prior to its acquisition by the Secretary of State (or the successors in interest of such person).
- 8.8.3 If the Secretary of State exercises the right referred to in Clause 8.8.2 in respect of any area of land, then such area of land shall be excluded from the definition of the Site or the Adjacent Areas as the case may be, with effect from the effective date of such exercise. The Parties shall use their reasonable endeavours to agree any revisions to drawings numbered A249/03/02-001 to 004 (inclusive) set out in Part 7 of Schedule 3 necessary to reflect such exclusion and if they are unable to reach agreement within 90 days of the effective date of such exercise then either Party may refer the Dispute for resolution under the Disputes Resolution Procedure.
- 8.8.4 For the avoidance of doubt, if and so long as the Secretary of State does not exercise the right referred to in Clause 8.8.2 in respect of any such area of land, then such area shall remain part of the Site or the Adjacent Areas as the case may be, and the DBFO Co shall remain subject to the terms of this Agreement in respect of such area of land.

## 8.9 Disposal of Materials Won on Site

The DBFO Co may only excavate, extract, dispose of, exploit or otherwise deal with any materials, including without limitation any soil, aggregates, rocks, coal, minerals or other deposits, excavated, arising or produced in connection with the carrying out of the Operations on the Site or any Adjacent Areas (together "Site Materials"):

- 8.9.1 if and to the extent that the Secretary of State has the right to do so by Law or pursuant to the terms of any agreement or compulsory purchase order;
- 8.9.2 if and to the extent that, in the case of excavation or extraction of Site Materials, such excavation or extraction is necessary for the purpose of constructing the New Road in accordance with the Construction Requirements;
- 8.9.3 subject to the rights of any third party, whether being rights in or to the Site Materials, Rights in respect of land or otherwise; and

8.9.4 subject to any limitation, restriction or condition, whether pursuant to any Law or otherwise, applying to or affecting the right of the Secretary of State to undertake any such excavation, extraction, disposal, exploitation or other dealing.

#### 8.10 Land Acquisition

8.10.1 Subject to Clause 8.11.1 and without prejudice to Clauses 8.11.2 and 8.12, the DBFO Co shall, on the terms set out in Schedule 24, take all steps and carry out all activities and works necessary to:

8.10.1.1 enable the Secretary of State's duties with respect to a Claim of a Compensation Party or an Injurious Affection Party to be properly, promptly and fully satisfied and/or procure that the Secretary of State's duties with respect to a Claim of Compensation Party or an Injurious Affection Party are properly, promptly and fully satisfied;

8.10.1.2 enable the Secretary of State, having taken into account all material considerations, freely and timeously to exercise all discretions, powers and rights with respect to a Claim of a Compensation Party or an Injurious Affection Party;

8.10.1.3 enable the Secretary of State to act properly in respect of the human rights of any Compensation Party or Injurious Affection Party;

8.10.1.4 minimise any Claim and any associated Losses of a Compensation Party or an Injurious Affection Party.

8.10.2 Nothing in this Clause 8.10, 8.11, 8.12 or Schedule 24 shall authorise or be deemed to authorise the DBFO Co to, and the DBFO Co shall not, at any time act in a manner which would amount to or suggest any:

8.10.2.1 delegation of the statutory duties or functions of the Secretary of State; or

8.10.2.2 fetter on the discretion of the Secretary of State.

8.10.3 Nothing in this Clause 8.10, 8.11 8.12 or Schedule 24 shall derogate from or limit (or be deemed to derogate from or limit) the ability or obligation of the Secretary of State to exercise all discretions, powers and rights conferred on him or require (or be deemed to require) the Secretary of State to act other than in accordance with the relevant Legal Requirements and in a manner appropriate to the Secretary of State or highway authority.

8.10.4 Save as may be otherwise expressly provided in this Clause 8.10, 8.11, 8.12 or Schedule 24, the DBFO Co shall not negotiate with, express any opinion to or otherwise make any representation to any person in relation to any Claim or any associated Losses of a Compensation Party or an Injurious Affection Party

#### 8.11 Claims of Compensation Parties

8.11.1 Save to the extent provided in Part 1 of Schedule 24, the Secretary of State shall be responsible for dealing with and negotiating any Claims made by any Compensation Party.

8.11.2 The DBFO Co shall:

8.11.2.1 take all steps necessary to minimise any Claims made by any Compensation Party and any associated Losses;

8.11.2.2 provide the Secretary of State with all administrative and other support and liaison associated with the handling of such Claims required by the Secretary of State and without prejudice to the generality of the foregoing will provide all necessary information, calculations, plans, drawings, sketches, photographs, evidence and other material required by the Secretary of State in connection with his responsibilities in relation to the subject matter of such Claims;

8.11.2.3 immediately provide to the Secretary of State any notices, statements, proofs or other documents sent to it or as part of, or in connection with any such Claim and immediately notify him of any fact or issue relevant to the consideration or negotiation of such Claim and any associated Losses; and

8.11.2.4 carry out the CPA Works in accordance with and on the terms set out in Part 1 of Schedule 24, provided that:

8.11.2.4.1 with respect to any Specified CPA Works, the DBFO Co shall carry out such works at its own cost and expense; and

8.11.2.4.2 with respect to any Unspecified CPA Works, the Secretary of State shall pay to the DBFO Co an amount equal to the cost of such works as certified in accordance with paragraph 1.4.4 (as applicable) of Part 1 of Schedule 24 within 30 days of receiving a relevant invoice after completion of the relevant Unspecified CPA Works to the reasonable satisfaction of the Secretary of State and the relevant Compensation Party.

## 8.12 Claims of Injurious Affection Parties

The DBFO Co shall be responsible at its own cost and expense for negotiating and paying on behalf of the Secretary of State all Claims made by any Injurious Affection Party in accordance with and on the terms set out in Part 2 of Schedule 24.

9. **PARTNERING**

- 9.1 The Secretary of State and the DBFO Co shall deal fairly, in good faith and in mutual co-operation with one another and with Interested Parties.
- 9.2 The Secretary of State and the DBFO Co shall each take the respective steps necessary to establish and maintain the Network Board. Such steps shall include the following:
- 9.2.1 the Secretary of State shall appoint and keep appointed two representatives of the Secretary of State to the Network Board, such representatives to be the Project Sponsor (or a nominee of the Project Sponsor having equivalent authority to the Project Sponsor) and the Area Manager (or a nominee of the Area Manager having equivalent authority to the Area Manager);
- 9.2.2 the Secretary of State shall appoint and use reasonable endeavours to keep appointed to the Network Board a Partnering Facilitator who shall have been nominated by the Network Board from a list of partnering facilitators provided by the Secretary of State, provided that in the absence of consensus on the part of the members of the Network Board with regard to such nomination the Secretary of State shall nominate the Partnering Facilitator; and
- 9.2.3 the DBFO Co shall appoint and keep appointed two representatives to the Network Board, such representatives to be the DBFO Co's Representative (or a nominee of the DBFO Co's Representative having equivalent authority to the DBFO Co's Representative) and a director of the DBFO Co nominated for such purpose by the DBFO Co (or a nominee of such director having equivalent authority).
- 9.3 The appointments referred to in Clause 9.2 shall be made within 21 days of the date of this Agreement. If at any time either Party wishes to replace a representative then the consent of the other Party shall first be obtained, such consent not to be unreasonably withheld.
- 9.4 The objectives and terms of reference of the Network Board are set out in Schedule 23 [The Network Board].
- 9.5 The Network Board may co-opt other parties to attend meetings and/or to provide such information and assistance as the Network Board may from time to time require.
- 9.6 The Network Board shall meet within 28 days of the date of this Agreement and thereafter every three months or more frequently as the members of the Network Board may agree.
- 9.7 Decisions of the Network Board shall become binding on the Parties to this Agreement only by way of an amendment to this Agreement signed by the duly authorised representatives of the Secretary of State and the DBFO Co.
- 9.8 The DBFO Co's representatives on the Network Board shall, when required to do so by the Department's Nominee, attend meetings of any Area Network Board.

10. **SECURITY OF THE SITE**

10.1 **Responsibility for Protestors and Trespassers**

10.1.1 The Secretary of State shall not be responsible for the presence on or around or entry onto or around the Site or Adjacent Areas of, or any other interference with or affecting the Site or Adjacent Areas or the vicinity of them or the Operations by or caused by, any Protestor or Trespasser nor for any act, omission or default of any such person (in any such case whether before or during the Pre-Commencement Period or the Contract Period). The presence on or around or entry onto or around the Site or Adjacent Areas of, or any other interference with or affecting the Site or Adjacent Areas or the vicinity of them or the Operations by or caused by, any Protestor or Trespasser and any lawful or unlawful activities of any such person shall not be a breach of the obligations of the Secretary of State under Clause 6 [Pre-Commencement Period] or Clause 8 [Land] to make available to the DBFO Co access to the Site and the Adjacent Areas, nor a breach of any other obligation or warranty of the Secretary of State under this Agreement.

10.1.2 Save as mentioned in the proviso hereto the DBFO Co shall not be relieved by Clause 8.5 [Off-Site Works] of any requirement to carry out Off-Site Works if the failure referred to in that Clause of the relevant highway authority (not being the Secretary of State) to give to the DBFO Co access to areas required to carry out the relevant Off-Site Works is the result of the presence on or around or entry onto or around the relevant areas of, or any other interference with or affecting the Site or Adjacent Areas or the vicinity of them or the Operations by or caused by, any Protestor or Trespasser or any lawful or unlawful activities of any such person (in any such case whether before or during the Pre-Commencement Period or the Contract Period) provided that if the relevant highway authority (not being the Secretary of State) has refused to give the DBFO Co access to the Adjacent Areas because of the presence on or around the Adjacent Areas of any Protestor or Trespasser then provided that the DBFO Co has done everything that this Agreement requires it to do to remove such Protestor or Trespasser and notwithstanding the taking of such action it has failed to remove them then for so long as it is unable to gain such access to the Adjacent Areas the DBFO Co shall not be treated as being in breach of its obligation to carry out so much of the Off-Site Works as it is thereby prevented from carrying out by virtue of the highway authority's refusal to provide such access.

10.2 **DBFO Co to Bear Loss**

10.2.1 As between the Secretary of State and the DBFO Co, the DBFO Co shall bear, without recourse to the Secretary of State:

10.2.1.1 any Loss suffered by the DBFO Co, its agents, contractors or sub-contractors of any tier or employees of any of them which is caused by any Protestor or Trespasser, including without limitation any damage to property, any personal injury or death, and any loss of income (including without limitation any reduction in DBFO Payments); and

10.2.1.2 any Loss suffered by the Secretary of State which is caused by any Protestor or Trespasser, including without limitation any damage to property, any personal injury or

death, and any loss of income, to the extent that such Loss arises either:

- 10.2.1.2.1 directly in relation to the Project Facilities; or
- 10.2.1.2.2 as a result of any measures taken by or on behalf of or at the direction of the DBFO Co; or
- 10.2.1.2.3 as a result of the failure by the DBFO Co to take or cause to be taken measures which should have been taken.

10.2.2 For the avoidance of doubt, nothing in Clause 10.2.1 shall affect:

- 10.2.2.1 any right of the Secretary of State to make or recover any Claim against any Protestor or Trespasser for damage suffered by the Secretary of State, his agents or contractors (other than the DBFO Co) or sub-contractors of any tier or any employees of any of them, or
- 10.2.2.2 any right of the DBFO Co to make or recover any Claim against any Protestor or Trespasser for damage suffered by the DBFO Co, its agents, contractors or sub-contractors of any tier or any employees of any of them.

### 10.3 No Payments to Protestors

The DBFO Co shall not give nor permit nor suffer to be given to any Protestor or Trespasser any inducement, monetary or otherwise, with a view to avoiding, limiting or influencing the manner of protest activities by that Protestor or Trespasser or by other Protestors or Trespassers.

### 10.4 Measures to Deal with Protestors and Trespassers

The provisions of Schedule 22 [Security of the Site] shall apply.

## 11. **DESIGN AND CONSTRUCTION**

### 11.1 **Responsibility**

The DBFO Co shall be responsible for the design, construction, completion, commissioning and testing of the Works, which shall be carried out in strict accordance with the Construction Requirements and (subject to Schedule 17 [Communications]) the Communications Requirements, the Design and Certification Procedure and the Review Procedure and in such manner as to procure satisfaction of the Core Construction Requirements and the Core Communications Requirements.

### 11.2 **Design and Certification Procedure**

11.2.1 The DBFO Co shall procure that:

11.2.1.1 the Designer shall prepare or supervise the preparation of all Design Data in respect of the Works (including, without limitation, the Detailed Design) in accordance with the Construction Requirements and the Communications Requirements and shall comply with the Design and Certification Procedure;

11.2.1.2 without prejudice to Clause 11.2.1.1:

11.2.1.2.1 where, in accordance with paragraph 4 of Part 3 of Schedule 4 [Design and Certification Procedure] Design Data is prepared by the Contractor, the Traffic Signal System Designer or the Monitoring System Contractor, the Contractor, the Traffic Signal System Designer or the Monitoring System Contractor shall prepare such Design Data in accordance with the Construction Requirements and the Communications Requirements and shall comply with the Design and Certification Procedure;

11.2.1.2.2 the Archaeologist shall prepare, in accordance with the Construction Requirements, all Design Data permitted by paragraph 11 of Part 3 of Schedule 4 [Design and Certification Procedure] to be prepared by it and shall comply with the Design and Certification Procedure;

11.2.1.2.3 the Landscape Architect shall prepare, in accordance with the Construction Requirements, all Design Data permitted by paragraph 11 of Part 3 of Schedule 4 [Design and Certification Procedure] to be prepared by it and shall comply with the Design and Certification Procedure; and

11.2.1.2.4 the Ecologist shall prepare, in accordance with the Construction Requirements, all Design Data permitted by paragraph 11 of Part 3 of Schedule 4 [Design and Certification Procedure] to be prepared by it and shall comply with the Design and Certification Procedure.

11.2.2 The DBFO Co shall procure that the certification procedures referred to in the Design and Certification Procedure are complied with by the

appropriate persons referred to therein, including but not limited to the Design Team, the Designer and any independent team or engineer within the Designer, as the case may be, and that such persons are at all relevant times duly authorised to carry out such procedures and to sign the relevant Certificates.

- 11.2.3 The DBFO Co shall procure that the checking procedures referred to in the Design and Certification Procedure are complied with by the appropriate persons referred to therein, including but not limited to the Checking Team, the Checker, the Traffic Signal System Certifier, the Audit Team and any independent team or engineer within the Designer, as the case may be, and that such persons are at all relevant times duly appointed to carry out such procedures.
- 11.2.4 Without limitation to Clause 51.3 [DBFO Co Responsibility], any failure by any person referred to in the Design and Certification Procedure, including but not limited to the Design Team, the Designer, the Checking Team, the Checker, the Traffic Signal System Certifier, the Traffic Signal System Designer, the Audit Team, the Testing Contractor, the Archaeologist, the Landscape Architect, the Environmental Manager, the Ecologist, the Monitoring System Contractor, the Contractor and any independent team or engineer within the Designer, to fulfil the obligations required of them under the Design and Certification Procedure shall be a breach of the DBFO Co's obligations under this Agreement.
- 11.2.5 Design Data the subject of a Certificate which has been submitted to the Department's Nominee in accordance with the Design and Certification Procedure shall not be departed from otherwise than pursuant to a DBFO Co's Change or a Department's Change.

### 11.3 Review Procedure

- 11.3.1 The DBFO Co shall not commence or permit the commencement of construction of any part of the Works until there has been no objection under the Review Procedure to all Design Data and all relevant Certificates required in respect of such part of the Works. Relevant Certificates shall include, without limitation, Design Certificates, Archaeology Certificates, Ecology Certificates, Landscaping Certificates, Check Certificates and Traffic Management Certificates as appropriate under the Design and Certification Procedure. If the DBFO Co notifies the Department's Nominee that it disputes comments made by the Department's Nominee pursuant to the Review Procedure and/or the withholding by the Department's Nominee of any Certificate required for the relevant Works, the DBFO Co shall following such notification be entitled to proceed with such Works at its own risk pending the resolution of such Dispute (whether or not under the Disputes Resolution Procedure) unless the Department's Nominee notifies the DBFO Co that (in his absolute discretion on the grounds of safety or as a result of a breach or potential breach of statutory duty on the part of the Secretary of State or any other person) the DBFO Co must not so proceed and in such circumstances the DBFO Co shall not so proceed with such works. If it is determined in the Disputes Resolution Procedure that the comments made in the Review Procedure and/or withholding by the Department's Nominee of any Certificate (as the case may be) were justified, the DBFO Co shall take all necessary steps to implement the decision of the Disputes

Resolution Procedure, including (as necessary) removing and redoing relevant Works.

- 11.3.2 The DBFO Co shall not commence or permit the commencement of construction or implementation of any Temporary Works for which a Temporary Works Check Certificate is required under the provisions of Part 3 of Schedule 4 [Design and Certification Procedure] until there has been no objection under the Review Procedure to that Certificate and the relevant Design Data. If the DBFO Co notifies the Department's Nominee that it disputes comments made by the Department's Nominee pursuant to the Review Procedure and/or the withholding by the Department's Nominee of any Certificate required for the relevant works, the DBFO Co shall following such notification be entitled to proceed with such works at its own risk pending the resolution of such Dispute (whether or not under the Disputes Resolution Procedure) unless the Department's Nominee notifies the DBFO Co that (in his absolute discretion on the grounds of safety or as a result of a breach or a potential breach of statutory duty on the part of the Secretary of State or any other person) the DBFO Co must not so proceed and in such circumstances the DBFO Co shall not so proceed with such work. If it is determined in the Disputes Resolution Procedure that the comments made in the Review Procedure and/or withholding by the Department's Nominee of any Certificate (as the case may be) were justified, the DBFO Co shall take all necessary steps to implement the decision of the Disputes Resolution Procedure, including (as necessary) removing and redoing relevant Works.

#### 11.4 DBFO Co's Changes

- 11.4.1 If the DBFO Co proposes to vary or amend the design, quality or quantity of the Works after the date hereof, including making additions, omissions, substitutions, alterations in design and/or variations in or to the Construction Requirements, or the Communications Requirements, such proposal, together with all supporting Design Data and an explanation of the reasons for the proposed change (including, if appropriate the Designer's comments), shall be submitted in accordance with the Review Procedure as a proposed DBFO Co's Change. The DBFO Co shall not proceed to implement a proposed DBFO Co's Change unless and until there has been no objection in accordance with the Review Procedure (on the grounds set out in paragraph 3.3 of Part 2 of Schedule 7 [Review Procedure]) and the relevant DBFO Co's Change Certificate has been issued by the Designer and duly countersigned by the Department's Nominee in accordance with paragraph 7 of Part 2 of Schedule 7 [Review Procedure].
- 11.4.2 If the DBFO Co becomes aware that any element of the Construction Requirements does not comply with and satisfy the Core Construction Requirements or that any element of the Communications Requirements does not comply with and satisfy the Core Communications Requirements, the DBFO Co shall so notify the Department's Nominee and, as soon as reasonably practicable, and in any event within 30 days of becoming aware of such matter, the DBFO Co shall propose (in accordance with Clause 11.4.1) a DBFO Co's Change to amend the Construction Requirements or the Communications Requirements (as the case may be) so that they comply with and satisfy the Core Construction Requirements or the Core Communications Requirements (as the case may be).

## 11.5 Breaches

11.5.1 In the event that the DBFO Co becomes aware of a breach of any of Clauses 11.1 [Responsibility] to 11.4 [DBFO Co's Changes] (both inclusive), the DBFO Co shall:

11.5.1.1 forthwith notify the Department's Nominee of the fact of such breach and the subject matter thereof; and

11.5.1.2 as soon as reasonably practicable make a submission in respect of such breach to the Review Procedure, including in such submission:

11.5.1.2.1 a full statement of the circumstances in which such breach took place together with a full explanation of the reasons for such breach and, if appropriate, for any delay in providing notification under Clause 11.5.1.1;

11.5.1.2.2 a full statement of the measures, if any, which the DBFO Co proposes to adopt in order to rectify such breach and/or to preclude or mitigate the consequences thereof (if any); and

11.5.1.2.3 if such breach relates to a variation in the design, quality or quantity of the Works, an application for a DBFO Co's Change.

11.5.2 The Department's Nominee shall deal with a submission pursuant to Clause 11.5.1 above as soon as reasonably practicable (but without being subject to any specific time limit). The Department's Nominee shall be entitled to raise comments in respect of such a submission in its absolute discretion, but in deciding upon the appropriate response to such submission, the Department's Nominee shall have regard to all the circumstances, including, without limitation:

11.5.2.1 whether the breach is inadvertent on the part of the DBFO Co or the Contractor or any person referred to in Clause 11.2.4;

11.5.2.2 whether there has been culpable delay in making the relevant notification under Clause 11.5.1.1 or submission under Clause 11.5.1.2;

11.5.2.3 whether similar breaches occurred previously and, if so, the gravity of such breaches and the measures, if any, adopted by the DBFO Co to prevent their re-occurrence,

provided that in the circumstances set out in Clause 11.5.1 the Department's Nominee shall not comment upon a certificate issued by the Designer or by the Checker accompanying such a submission unless such submission related to a DBFO Co's Change for which a DBFO Co's Change Certificate has not previously been issued.

#### 11.6 Department's Design Data

Save as expressly provided in this Agreement, the DBFO Co shall not seek to recover from the Secretary of State, his servants or agents and shall indemnify the Secretary of State and his servants and agents against any Loss or Claim which may arise from the adoption, use or application by or on behalf of the DBFO Co, the Designer, the Checker, the Contractor, the Operator, the Testing Contractor, the Archaeologist, the Landscape Architect, the Environmental Manager, the Ecologist, the Surveyor, the TRACS Contractor, the Monitoring System Contractor, the Monitoring System Verification Contractor, the Traffic Signal Installation Contractor, the Traffic Signal Maintenance Contractor, the Traffic Signal System Certifier, the Traffic Signal System Designer or any other person for whom the DBFO Co is responsible in the design, construction, testing, operation and maintenance of the Project Facilities of any Design Data and other data and documents made available to it or its representatives in connection with the Project by or on behalf of the Secretary of State whether before or after the execution of this Agreement.

#### 11.7 Site Safety and Security

The DBFO Co shall, throughout the progress of the Works, have full regard for the safety of all persons on the Site or the Adjacent Areas (whether lawfully or not) and shall keep the Site, the Adjacent Areas and the Works in an orderly state appropriate to the avoidance of danger to such persons. Without limitation to Clause 10 [Security of the Site] or Clause 30.3 [Conduct of Claims against Third Parties] or Schedule 22 [Security of the Site], the DBFO Co shall take such measures as are reasonably required to prevent the trespass onto the Site or the Adjacent Areas of any persons or livestock not entitled to be there including, without limitation, fencing of the Site and the Adjacent Areas where appropriate.

#### 11.8 Health and Safety

11.8.1 In this Clause 11.8 [Health and Safety]:

11.8.1.1 "the Regulations" means the Construction (Design and Management) Regulations 1994 (1994 S.I. 3140) (and "Regulation" shall be construed accordingly); and

11.8.1.2 "the client" and "the Executive" have the same meanings as in the Regulations.

11.8.2 Within 7 days of the date of execution of this Agreement the DBFO Co shall make and serve on the Executive a declaration pursuant to and in the form (if any) required by Regulation 4 that the DBFO Co will act as the client in relation to the Operations for all the purposes of the Regulations save on termination of this Agreement provided that on such termination the DBFO Co shall procure that a copy of the up to date health and safety file is handed to the Department's Nominee. The DBFO Co shall forthwith send a copy of the declaration to the Department's Nominee and upon receipt of notice from the Executive that it has received the declaration the DBFO Co shall send a copy of such notice to the Department's Nominee. The DBFO Co shall not and shall not seek to withdraw, terminate or in any manner derogate from its declaration that it will act as, and its acceptance of its responsibilities as, the client for all the purposes of the Regulations.

11.8.3 The DBFO Co shall observe, perform and discharge and shall procure the observance, performance and discharge of:

11.8.3.1 all the obligations, requirements and duties arising under the Regulations in connection with the Operations; and

11.8.3.2 any code of practice for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work etc. Act 1974 in connection with the Regulations.

11.9 Access and Facilities for Department's Nominee

Without limitation to Clause 14.4 [Access], the DBFO Co shall procure that:

11.9.1 subject to complying with all relevant safety procedures, the Department's Nominee shall have unrestricted access at all reasonable times to any site or workshop where materials are being manufactured for the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;

11.9.2 the Department's Nominee shall have the right to attend monthly Site and other similar progress meetings; and

11.9.3 there are kept on Site one copy of all drawings for construction and of all specifications, and that the same shall, at all reasonable times, be available for inspection and use by the Department's Nominee and by any other person authorised by the Department's Nominee.

11.10 Licensing of Goods Vehicles

Each goods vehicle used by the DBFO Co or the Contractor or any sub-contractor in connection with the Operations shall display the vehicle licence disc relevant in the Goods Operator's licence under which the vehicle is operated or, in the absence of an Operator's licence disc, the vehicle shall carry documentation giving the operator's licence number, name and address.

11.11 Noise Insulation Requirements

The DBFO Co shall comply with the provisions of Part 6 of Schedule 4 [Noise Insulation Requirements].

## 12. **PROGRAMME**

### 12.1 **DBFO Co's Programme**

The DBFO Co's Programme sets out the timetable in which the DBFO Co intends to carry out the investigations, design, construction, commissioning, testing, maintenance and related works appearing in the Construction Requirements and the Communications Requirements.

### 12.2 **Variations to DBFO Co's Programme**

Should it appear to the Department's Nominee or the DBFO Co at any time that the actual or likely progress of the Works does not or will not conform with the DBFO Co's Programme then, within 28 days of being so required by the Department's Nominee or (if earlier) becoming aware of the same, the DBFO Co shall:

- 12.2.1 submit to the Department's Nominee a report identifying the reasons for such non-conformity; and
- 12.2.2 submit to the Department's Nominee, in accordance with the Review Procedure, a revised DBFO Co's Programme, which shall provide for the Works to be pursued diligently in such manner as to achieve completion of the Works as soon as practicable and provide for the Works to be commenced and pursued diligently in accordance with Clause 12.5 [Achievement of Completion].

The Department's Nominee shall be entitled to raise comments in respect of the revised DBFO Co's Programme only on the grounds set out in paragraph 3.4 of Part 2 of Schedule 7 [Review Procedure].

### 12.3 **Preparation of DBFO Co's Works Programme**

12.3.1 The DBFO Co shall procure the preparation of:

- 12.3.1.1 an initial DBFO Co's Works Programme, which shall be in all respects consistent with the DBFO Co's Programme, and shall submit to the Department's Nominee, in accordance with the Review Procedure, a copy of the same within 28 days of the date of execution of this Agreement;
- 12.3.1.2 a revised version of the DBFO Co's Works Programme prepared in accordance with Clause 12.3.1.1 in respect of each revised DBFO Co's Programme submitted in accordance with Clause 12.2 [Variations to DBFO Co's Programme], which shall be in all respects consistent with such DBFO Co's Programme, and shall submit to the Department's Nominee, in accordance with the Review Procedure, a copy of each such revised DBFO Co's Works Programme at the same time as the revised DBFO Co's Programme is submitted in accordance with Clause 12.2 [Variations to DBFO Co's Programme].

12.3.2 If the DBFO Co wishes to make any amendment to any DBFO Co's Works Programme or should it appear to the Department's Nominee or the DBFO Co at any time that the actual or likely progress of the Works does not or will not conform with the relevant DBFO Co's Works Programme then,

prior to making any such amendment or within 28 days of being so required by the Department's Nominee or (if earlier) becoming aware of such non-conformity, the DBFO Co shall:

12.3.2.1 submit to the Department's Nominee a report identifying the reasons for such amendment or non-conformity; and

12.3.2.2 submit to the Department's Nominee, in accordance with the Review Procedure, a revised version of the DBFO Co's Works Programme, which shall be in all respects consistent with the DBFO Co's Programme.

12.3.3 The Department's Nominee shall be entitled to raise comments in respect of the initial DBFO Co's Works Programme or any revised DBFO Co's Works Programme only on the grounds set out in paragraph 3.4 of Part 2 of Schedule 7 [Review Procedure].

12.3.4 Subject to Clause 12.4 [DBFO Co's Works Programme], the DBFO Co's Works Programme shall be provided for the information of the Secretary of State and the Department's Nominee. In the event of any conflict between the DBFO Co's Programme and any DBFO Co's Works Programme, the DBFO Co's Programme shall (unless otherwise agreed by the Secretary of State) prevail.

#### 12.4 DBFO Co's Works Programme

The initial DBFO Co's Works Programme and any revised DBFO Co's Works Programme submitted in accordance with Clause 12.3 [Preparation of DBFO Co's Works Programme] shall:

12.4.1 be in accordance with Good Industry Practice;

12.4.2 in all respects be consistent with the DBFO Co's Programme;

12.4.3 satisfy the requirements of Part 2 of Schedule 2 [Submission Requirements for DBFO Co's Programme and DBFO Co's Works Programme];

12.4.4 without prejudice to Clause 12.4.3, be in sufficient detail so as to enable the Department's Nominee to resource itself appropriately; and

12.4.5 provide for the Works to be commenced and pursued in accordance with Clause 12.5 [Achievement of Completion].

#### 12.5 Achievement of Completion

Subject always to Clause 11.3 [Review Procedure], the DBFO Co shall commence the Works, promptly following the Commencement Date, and shall thereafter diligently pursue the Works with a view to procuring that they are completed in accordance with the DBFO Co's Programme to such standard as would require the issue of the Completion Certificate provided that for the avoidance of doubt failure by the DBFO Co strictly to comply with the DBFO Co's Programme will not automatically constitute a failure diligently to pursue the Works (the occurrence of which shall be determined on the facts) but any such failure may be taken into account in determining whether such a failure has occurred.

## 12.6 Delay

12.6.1 Without prejudice to Clauses 12.2 [Variations to DBFO Co's Programme] and 12.3 [Preparation of DBFO Co's Works Programme], the DBFO Co shall give notice to the Department's Nominee as soon as it can foresee an event occurring which will cause material delay to:

- (a) completion of the Works by the date set out in the DBFO Co's Programme for such completion; and/or
- (b) completion of so much of the Works as are required to be completed in order to achieve the issue of the Permit to Use in respect of Scheme 2

or, if the same is not foreseeable, as soon as it shall become aware of such event but in any case within 7 days of such event becoming apparent to the DBFO Co or, if earlier, of the date upon which the same ought reasonably to have become apparent to the DBFO Co. Thereafter but in any event not later than 21 days after such notification the DBFO Co shall give further written details to the Department's Nominee, which shall include:

- 12.6.1.1 details of the circumstances from which the delay arises;
- 12.6.1.2 details of the contemporary records which the DBFO Co will maintain to substantiate such delay;
- 12.6.1.3 details of the consequences, whether direct or indirect, which such delay may have on completion of the Works; and
- 12.6.1.4 details of any measures which the DBFO Co proposes to adopt to mitigate the consequences of such delay.

12.6.2 The DBFO Co shall, following notification of any event pursuant to Clause 12.6.1:

- 12.6.2.1 provide such further written information of which it becomes aware or as the Department's Nominee may reasonably require regarding the nature and likely duration of such event;
- 12.6.2.2 afford the Department's Nominee reasonable facilities for investigating the effect on the DBFO Co or the DBFO Co's Programme of such event including on-site inspection; and
- 12.6.2.3 take all reasonable steps consistent with Good Industry Practice to minimise the delay to:
  - 12.6.2.3.1 completion of the Works; and/or
  - 12.6.2.3.2 completion of so much of the Works as are required to be completed in order to achieve the issue of the Permit to Use in respect of Scheme 2.

12.6.3 If the DBFO Co has failed to comply with the requirements as to the giving of notice under Clause 12.6.1, then the Department's Nominee may require

the DBFO Co to submit details of the reasons for such failure. If the Department's Nominee has not stated that he is satisfied with the reasons given within 28 days of their receipt, the DBFO Co may refer the matter for resolution under the Disputes Resolution Procedure. If the decision of the Disputes Resolution Procedure is that the failure is not excusable, then the period of such delay shall not at any time be taken into account if the DBFO Co is entitled to any additional payment in any of the circumstances referred to in Clause 12.6.5.

12.6.4 The Department's Nominee will be entitled, after receipt of written details under Clause 12.6.1 or of further particulars under Clause 12.6.2, by notice in writing to require the DBFO Co to provide such further supporting particulars as he may reasonably consider necessary.

12.6.5 Where the DBFO Co may have a claim for additional payment as a result of:

12.6.5.1 an event of Eligible Force Majeure, the provisions of Clause 37.4 [Consequences of Force Majeure] shall have effect;

12.6.5.2 a Department's Change, the provisions of Annex 1 to Part 1 of Schedule 12 [Department's Change] shall have effect; or

12.6.5.3 a Compensation Event, the provisions of Annex 3 to Part 1 of Schedule 12 [Compensation Events] shall have effect.

For the avoidance of doubt, the DBFO Co shall have no claim against the Secretary of State for any additional payment as a result of any delay which is not an event referred to in Clauses 12.6.5.1, 12.6.5.2 or 12.6.5.3 above.

12.6.6 Where the DBFO Co is entitled to any additional payment as a result of an event of Eligible Force Majeure, a Department's Change or a Compensation Event, then subject to:

12.6.6.1 the DBFO Co complying with the requirements of Clause 12.6.1 in respect of any such notice or its failure to do so having been found to be excusable pursuant to Clause 12.6.3;

12.6.6.2 the DBFO Co putting forward proposals pursuant to Clause 12.6.1.4 as to the measures which it intends to adopt in order to mitigate the consequences of any delay to completion of the Works and/or the completion of so much of the Works as are required to be completed in order to achieve the issue of the Permit to Use in respect of Scheme 2 (as applicable) by the dates set out in the DBFO Co's Programme for such completion and issue of the Permit to Use in respect of Scheme 2 respectively; and

12.6.6.3 such delay being material,

the Department's Nominee shall, as soon as reasonably practicable, notify the DBFO Co (either prospectively or retrospectively) of his determination of the period of the delay (if any) to each of:

- (a) completion of so much of the Works as are required to be completed in order to achieve the issue of the Permit to Use in respect of Scheme 2 by the date set out in the DBFO Co's Works Programme for such completion (the "PTU2 Delay Period"); and
- (b) completion of the Works by the date set out in the DBFO Co's Works Programme for such completion (the "Completion Date Delay Period")

which has arisen or will arise as a consequence of the relevant event of Eligible Force Majeure, Department's Change or Compensation Event (as the case may be). If the Department's Nominee determines that no PTU2 Delay Period or Completion Date Delay Period (as the case may be) has arisen or will arise or the DBFO Co considers the PTU2 Delay Period or Completion Date Delay Period (as the case may be) so determined to be insufficient, then the DBFO Co shall be entitled to refer the matter to the Disputes Resolution Procedure.

12.6.7 In determining the period of any delay for the purposes of any of Clauses 12.6.5.1, 12.6.5.2 and 12.6.5.3 there shall be taken into account, inter alia:

- 12.6.7.1 whether (and if so to what extent), as a consequence of the failure of the DBFO Co to conduct the Operations in accordance with this Agreement at all times prior to the occurrence of the event giving rise to the delay, the impact of the event on the timing of the completion (or in the case of the Permit to Use for Scheme 2 partial completion) of the Works is greater than it would otherwise have been; and
- 12.6.7.2 (without prejudice to Clause 12.6.2.3) the extent to which the delay or impediment ought reasonably to be or to have been mitigated by the DBFO Co by the taking of reasonable steps after its occurrence.

12.6.8 The only purpose of the PTU2 Delay Period and the Completion Date Delay Period (as the case may be) shall be to determine any additional payment pursuant to Clauses 12.6.5.1, 12.6.5.2 and 12.6.5.3 and provided that, for the avoidance of doubt there shall be no double counting in the application of such periods in making any such determination.

13. **INSPECTION AND COMPLETION**

13.1 **Permit to Use**

13.1.1 Not later than 20 Working Days and not earlier than 25 Working Days prior to the date upon which the DBFO Co expects the Works will be completed to such extent that the New Road or any Part of the New Road shall be suitable and safe for use by members of the public without traffic management restrictions, the DBFO Co shall issue to the Department's Nominee a notice to that effect, which shall identify all of the works which the DBFO Co anticipates will be required during that period to bring the New Road or any Part of the New Road up to such standard. The Department's Nominee shall as soon as reasonably practicable and in any event within 10 Working Days of receipt of such notice commence an inspection of the New Road or any Part of the New Road.

13.1.2 The Department's Nominee shall as soon as reasonably practicable and in any event within 10 Working Days of the commencement of such inspection either:

13.1.2.1 confirm in writing that he will, subject to Clause 13.1.4.2 and to the satisfactory completion of the works referred to in the notice given by the DBFO Co pursuant to Clause 13.1.1, issue a Permit to Use in respect of the New Road or any Part of the New Road; or

13.1.2.2 notify the DBFO Co in writing that he would not issue a Permit to Use in respect of the New Road or any Part of the New Road upon completion of the works referred to in the notice given by the DBFO Co pursuant to Clause 13.1.1 and state the reasons for such decision, in which case the notice referred to in Clause 13.1.1 shall cease to have any effect.

13.1.3 Following the confirmation by the Department's Nominee under Clause 13.1.2.1 and the DBFO Co completing the whole of the Works or completing the Works to such extent that the New Road or any Part of the New Road shall be suitable and safe for use by members of the public without traffic management restrictions the DBFO Co shall issue to the Department's Nominee a notice to that effect together with a DBFO Co's Substantial Completion Certificate in accordance with paragraph 32 of Section A of Part 3 of Schedule 4 [Design and Certification Procedure]. The Department's Nominee shall as soon as reasonably practicable and in any event within 2 Working Days of the later of the receipt of such notice and of the DBFO Co's Substantial Completion Certificate in accordance with paragraph 32 of Section A of Part 3 of Schedule 4 [Design and Certification Procedure] commence an inspection of the New Road.

13.1.4 The Department's Nominee shall, within 3 Working Days of the commencement of such inspection referred to in Clause 13.1.3 either:

13.1.4.1 issue a Permit to Use, whereupon:

13.1.4.1.1 in the case of the Permit to Use for Scheme 1, the New Road shall, as soon as practicable, be made

available for public use without traffic management restrictions; and

13.1.4.1.2 in the case of the Permit to Use for Scheme 2, the Monitoring Equipment shall be brought into operation; or

13.1.4.2 notify the DBFO Co, in writing, of his decision not to issue a Permit to Use and state the reasons for such decision (which shall not be limited by any reasons stated in the notice given by the Department's Nominee pursuant to Clause 13.1.2).

13.1.5 The Department's Nominee may refuse to issue the confirmation referred to in Clause 13.1.2.1 or a Permit to Use:

13.1.5.1 with respect to Scheme 1 if:

13.1.5.1.1 the New Road or the relevant Part of the New Road (in the case of the confirmation referred to in Clause 13.1.2.1) will not have or (in the case of the Permit to Use) has not, been completed to such extent as to be suitable and safe for use by members of the public without traffic management restrictions;

13.1.5.1.2 the Department's Nominee believes, on reasonable grounds, that any lane or any part of any lane of the New Road or the relevant Part of the New Road will be closed at any time in the next 12 months in order to complete the Works to the standard required for the Completion Certificate;

13.1.5.1.3 there has been and continues to be material non-compliance with the Design and Certification Procedure and that non-compliance is still material at the date that the certificate would otherwise be issued;

13.1.5.1.4 satisfactory evidence of compliance with Clause 20.1.1.3.2 [Insurance Cover] has not been adduced;

13.1.5.1.5 the orders and notices referred to in Part 7 of Schedule 4 have not been made or are not in force and such failure is wholly or partly due to the failure of the DBFO Co to comply with its obligations set out in Part 7 of Schedule 4;

13.1.5.1.6 the Maintenance Works as described in paragraph 4 of Part 1 of Schedule 6 has not been completed;

13.1.5.1.7 if all noise barriers forming part of the relevant part of the Works have not been constructed in accordance with the Construction Requirements;

13.1.5.1.8 if the requirements of paragraph 1.19 of Annex 10/C to Part 2 of Schedule 4 have not been complied with;

13.1.5.2 with respect to Scheme 2 if:

13.1.5.2.1 the Department's Nominee believes, on reasonable grounds, that any lane or any part of any lane of the New Road or the relevant Part of the New Road will be closed at any time in the next 12 months in order to complete the Works to the standard required for the Completion Certificate;

13.1.5.2.2 there has been and continues to be material non-compliance with the Design and Certification Procedure and that non compliance is still material at the date that the certificate would otherwise be issued;

13.1.5.2.3 satisfactory evidence of compliance with Clause 20.1.1.3.2 [Insurance Cover] has not been adduced;

13.1.5.2.4 the Permit to Use in respect of Scheme 1 has not been issued;

13.1.5.2.5 any of the conditions specified in any of paragraphs 6.1, 6.2 and 6.3 of Part 1 of Schedule 17 have not been satisfied.

13.1.6 In the event of service of a notice by the Department's Nominee under Clause 13.1.4.2 and following completion by the DBFO Co of such further works or other measures necessary or appropriate to remedy or remove the cause of the refusal to issue a Permit to Use, the DBFO Co may give notice to the Department's Nominee that such further works have been completed or measures taken and the Department's Nominee shall inspect such further works or measures within 5 Working Days of such notice and the provisions of Clauses 13.1.4 and 13.1.5 and this Clause 13.1.6 shall thereafter apply to such notice mutatis mutandis.

## 13.2 Completion Certificate

13.2.1 Notwithstanding the issue of a Permit to Use in respect of the New Road or any Part of the New Road, the DBFO Co shall promptly complete all outstanding Works, if any, as soon as practicable.

13.2.2 Not later than 20 Working Days and not earlier than 25 Working Days prior to the date upon which the DBFO Co expects the whole of the Works (other than the Excepted Works (if any)) to be completed the DBFO Co shall issue to the Department's Nominee a notice to that effect, which shall identify all of the works which the DBFO Co anticipates will be required during that period to complete the Works up to such standard. The Department's Nominee shall as soon as reasonably practicable and in any

event within 10 Working Days of receipt of such notice commence an inspection of the Works.

13.2.3 The Department's Nominee shall as soon as reasonably practicable and in any event within 10 Working Days of the commencement of such inspection either:

13.2.3.1 confirm in writing that he will, subject to Clause 13.2.5.2 and to the satisfactory completion of the works referred to in the notice given by the DBFO Co pursuant to Clause 13.2.2, issue the Completion Certificate; or

13.2.3.2 notify the DBFO Co in writing that he would not issue the Completion Certificate upon completion of the works referred to in the notice given by the DBFO Co pursuant to Clause 13.2.2 and state the reasons for such decision, in which case the notice referred to in Clause 13.2.2 shall cease to have any effect.

13.2.4 Following the confirmation by the Department's Nominee under Clause 13.2.3.1 and the DBFO Co completing the whole of the Works the DBFO Co shall issue to the Department's Nominee a notice to that effect. The Department's Nominee shall as soon as reasonably practicable and in any event within 2 Working Days of the receipt of such notice commence an inspection of the Works.

13.2.5 The Department's Nominee shall within 3 Working Days of the commencement of the inspection referred to in Clause 13.2.4 either:

13.2.5.1 issue the Completion Certificate; or

13.2.5.2 notify the DBFO Co in writing of his decision not to issue the Completion Certificate and state the reasons for such decision (which shall not be limited by any reasons stated in the notice given by the Department's Nominee pursuant to Clause 13.2.3).

13.2.6 The Department's Nominee may refuse to issue the Completion Certificate if:

13.2.6.1 the Works (other than any Excepted Works) (in the case of a confirmation given pursuant to Clause 13.2.3.1) will not have or (in the case of the Completion Certificate) have not, been completed in all material respects in accordance with the Core Construction Requirements, the Core Communications Requirements, the Construction Requirements and the Communications Requirements; or

13.2.6.2 there has been and continues to be material non-compliance with the Design and Certification Procedure and that non-compliance is still material at the date that the certificate would otherwise be issued; or

- 13.2.6.3 the DBFO Co has not complied with the requirements of paragraph 7 of Part 2 of Schedule 14 [Reports and Records];  
or
- 13.2.6.4 the requirements of paragraph 7.1.7 of Section 7 of Part 2 of Schedule 6 have not been complied with.
- 13.2.7 In the event of service of a notice by the Department's Nominee under Clause 13.2.5.2 and following completion by the DBFO Co of such further works or other measures necessary or appropriate to remedy or remove the cause of the refusal to issue a Completion Certificate, the DBFO Co may give notice to the Department's Nominee that such further works have been completed or measures taken and the Department's Nominee shall inspect such further works or measures within 5 Working Days of such notice and the provisions of Clauses 13.2.3, 13.2.4, 13.2.5, 13.2.6 and this Clause 13.2.7 shall thereafter apply to such notice mutatis mutandis.
- 13.2.8 The issue of a Completion Certificate shall be without prejudice to:
  - 13.2.8.1 the obligation of the DBFO Co to operate and maintain the Project Facilities in accordance with this Agreement;
  - 13.2.8.2 any warranties given by the DBFO Co under this Agreement;
  - 13.2.8.3 Clause 13.3.5.3.
  - 13.2.8.4 the obligation of the DBFO Co to complete all Excepted Off-Site Works as soon as practicable following the grant of access to the relevant areas by the relevant highway authority for the purpose of carrying out such Works; or
  - 13.2.8.5 the obligation of the DBFO Co to complete all Insulation Works in accordance with the requirements of Part 6 of Schedule 4 [Noise Insulation Requirements].
- 13.2.9 In this Clause 13.2, "Excepted Off-Site Works" means Off-Site Works which;
  - 13.2.9.1 are required to be carried out on land or highways in the control or ownership of a highway authority other than the Secretary of State; and
  - 13.2.9.2 have not been completed in all material respects in accordance with the Construction Requirements at the time of the inspection under Clause 13.2.3 solely by reason of such highway authority not having given access to the DBFO Co to such areas to carry out such Off-Site Works (provided that such failure to give access is not attributable to any act, neglect or default of the DBFO Co).

### 13.3 Local Facilities and De-Trunked Segments

- 13.3.1 Not later than 20 Working Days prior to the date upon which the DBFO Co expects:

- 13.3.1.1 that part of the Works in respect of any Local Authority Road will be completed in all material respects in accordance with the Core Construction Requirements and the Construction Requirements and, without limitation thereto, completed to such extent that such Local Authority Road shall be suitable and safe for use by members of the public without traffic management restrictions; or
- 13.3.1.2 that part of the Works in respect of any other Local Facilities will be completed in accordance with the Core Construction Requirements and the Construction Requirements; or
- 13.3.1.3 the Works on a section of the New Road, which will replace a De-Trunked Segment upon which no Works are required, will be completed in accordance with the Core Construction Requirements and the Construction Requirements,

the DBFO Co shall issue a notice to that effect to the Department's Nominee. Upon the DBFO Co confirming that completion as aforesaid has occurred then the Department's Nominee shall, within 15 Working Days of receipt of such confirmation, commence an inspection of such Local Facilities, and the DBFO Co shall not object to the participation in such inspection of any Local Person to whom such Local Facilities are intended to be handed over.

13.3.2 The Department's Nominee shall, within 10 Working Days of the commencement of such inspection, either:

- 13.3.2.1 issue a Taking Over Certificate; or
- 13.3.2.2 notify the DBFO Co in writing of his decision not to issue a Taking Over Certificate and state the reasons for such decision.

13.3.3 Where notice is given pursuant to Clause 13.3.1.1 or 13.3.1.2 the Department's Nominee may refuse to issue a Taking Over Certificate in accordance with Clause 13.3.2.2 if:

- 13.3.3.1 in the case of a Local Authority Road, the Works in respect thereof have not been completed in all material respects in accordance with the Core Construction Requirements and the Construction Requirements or have not been completed to such extent that such Local Authority Road is suitable and safe for use by members of the public without traffic management restrictions;
- 13.3.3.2 without limitation to Clause 13.3.3.1, in the case of a De-Trunked Segment, a Permit to Use has not been issued in respect of the New Road or Part of the New Road which will replace such De-Trunked Segment;
- 13.3.3.3 in the case of any Local Facilities, other than a Local Authority Road, the Works in respect thereof have not been completed in all material respects in accordance with the Core

Construction Requirements and the Construction Requirements; or

- 13.3.3.4 in the case of the Works in respect of any Local Facilities, there has been and continues to be material non-compliance with the Design and Certification Procedure and that non-compliance is still material at the date that the certificate would otherwise be issued.
- 13.3.4 Where notice is given pursuant to Clause 13.3.1.3 the Department's Nominee may refuse to issue a Taking Over Certificate in accordance with Clause 13.3.2.2 if, in the case of a De-Trunked Segment, a Permit to Use has not been issued in respect of the New Road or part of the New Road which will replace such De-Trunked Segment.
- 13.3.5 Upon the issue of a Taking Over Certificate in respect of any Local Facilities:
  - 13.3.5.1 either the Secretary of State shall procure that the relevant Local Person assumes responsibility for the operation and maintenance (subject to Clause 13.3.5.3) of such Local Facilities or De-Trunked Segment or the Secretary of State shall himself assume responsibility for the operation and maintenance (subject to Clause 13.3.5.3) of such Local Facilities or De-Trunked Segment;
  - 13.3.5.2 those parts of the Works comprising such Local Facilities and those parts of the Existing Road comprising any De-Trunked Segment shall be excluded from the definition of "Off-Site Facilities", "New Road" and "Existing Road", as the case may be, for all purposes of this Agreement (save for the purpose of giving effect to the provisions of this Clause 13.3 [Local Facilities and De-Trunked Segments]); and
  - 13.3.5.3 the DBFO Co shall execute all such work of amendment, reconstruction, and remedying of defects, shrinkages or other faults required as a result of the DBFO Co's performance or non-performance of its obligations under this Agreement as the Department's Nominee may reasonably instruct the DBFO Co to execute in order to bring or return (fair wear and tear excepted) the relevant Local Facilities to the standard required by the Core Construction Requirements and the Construction Requirements, such instruction to be issued either during the period of 5 years following the date of issue of the Taking Over Certificate or within 10 Working Days after the expiration of such period, as a result of an inspection made by or on behalf of the Department's Nominee prior to its expiration.
- 13.3.6 In the event of service of a notice by the Department's Nominee under Clause 13.3.2.2 and following completion by the DBFO Co of such further works or other measures necessary or appropriate to remedy or remove the cause of the refusal to issue a Taking Over Certificate, the DBFO Co may give notice to the Department's Nominee that such further works have been completed or measures taken. The Department's

Nominee shall inspect such further works or measures within 5 Working Days of such notice, and the DBFO Co shall not object to the participation in such inspection of the relevant Local Person. The provisions of Clauses 13.3.2 to 13.3.6 (inclusive) shall thereafter apply to such notice mutatis mutandis.

- 13.3.7 For the avoidance of doubt, all work referred to in Clause 13.3.5.3 shall be executed by the DBFO Co at its own cost.
- 13.3.8 If the relevant Local Person assumes the responsibility for the operation and maintenance of the Local Facilities or De-Trunked Segment in accordance with Clause 13.3 [Local Facilities and De-Trunked Segments] or otherwise, then it shall be entitled to the benefit of any warranties by the DBFO Co under this Agreement to the extent applicable to such Local Facilities and to the benefit of the undertakings by the DBFO Co under this Clause 13.3 [Local Facilities and De-Trunked Segments] to the extent applicable to such Local Facilities or De-Trunked Segment. The DBFO Co shall execute such further documents and do all such other things as may be reasonably requested by the Secretary of State for the purpose of confirming or giving effect to the provisions of this Clause 13.3.8.
- 13.3.9 If the Secretary of State assumes responsibility for the operation and maintenance of any Local Facilities or De-Trunked Segment in accordance with Clause 13.3.5.1, then he may at his option by notice to the DBFO Co require the DBFO Co to perform such obligations as may be specified in such notice in respect of the operation and maintenance of such Local Facilities or De-Trunked Segment for such period and on such terms as may be specified in such notice. In such event:
- 13.3.9.1 the Secretary of State shall pay to the DBFO Co such sum in respect of such operation and maintenance of such Local Facilities or De-Trunked Segment as may be agreed between the Secretary of State and the DBFO Co or, in the absence of agreement, as may be determined under the Disputes Resolution Procedure to be reasonable in the circumstances; and
- 13.3.9.2 such Local Facilities or De-Trunked Segment shall continue to be included in the definition of "Off-Site Facilities" and "Existing Road", as the case may be, for all purposes of this Agreement for the period specified in such notice.
- 13.3.10 Subject to Clause 13.3.9, as soon as practicable following the issue of a Taking Over Certificate, the DBFO Co shall vacate the relevant part of the Adjacent Areas or Existing Road and leave it clear and free from such debris, construction materials, Construction Plant and the like as shall arise from the execution of the Works in respect of the relevant Local Facilities to the reasonable satisfaction of the Department's Nominee.
- 13.3.11 Subject to Clause 13.3.9, as soon as practicable after a de-trunking order comes into effect with respect to a De-Trunked Segment in respect of which no Works are required under the Construction Requirements, the DBFO Co shall vacate the relevant De-Trunked Segment, leaving it in no worse condition than when the DBFO Co first was given access to or occupation of the relevant De-Trunked Segment.

13.4 Disputed Certificate

- 13.4.1 If there shall be any Dispute as to whether a Permit to Use, Completion Certificate or Taking Over Certificate is required to be issued in accordance with the terms of Clause 13.1 [Permit to Use], Clause 13.2 [Completion Certificate] or Clause 13.3 [Local Facilities and De-Trunked Segments] respectively, then either the Department's Nominee or the DBFO Co may refer such Dispute for resolution under the Disputes Resolution Procedure.
- 13.4.2 The issues for resolution in any such referral to the Disputes Resolution Procedure shall be:
- 13.4.2.1 whether the Permit to Use, Completion Certificate or Taking Over Certificate, as the case may be, was required to be issued in accordance with the terms of Clause 13.1 [Permit to Use], Clause 13.2 [Completion Certificate] or Clause 13.3 [Local Facilities and De-Trunked Segments] respectively; and
- 13.4.2.2 if so, the date on which such Permit to Use, Completion Certificate or Taking Over Certificate should have been issued.
- 13.4.3 The provisions of Annex 3 to Part 1 of Schedule 12 [Compensation Events] shall, if applicable, be given effect.

14. **OPERATION AND MAINTENANCE**

14.1 **Operation and Maintenance**

- 14.1.1 Subject to Clause 1.4.2 and save to the extent that it is prohibited from so doing by reason of a breach by the Secretary of State of his obligations under Clause 8.1 [Access for DBFO Co], from the O&M Commencement Date and thereafter throughout the Contract Period the DBFO Co shall operate and maintain the Project Facilities (other than the New Road (but excluding from the definition of New Road any Upgraded Section) and any Off-Site Facilities) in accordance with the terms of this Agreement (including, without limitation, the O&M Requirements) and in such manner as to procure satisfaction of the Core O&M Requirements provided that the DBFO Co shall not (unless instructed to do so pursuant to the Change Procedure) be obliged to remedy any damage to the Existing Road caused as a direct result of road traffic accidents or ship collisions (not involving the DBFO Co, its Contracting Associates or any other DBFO Co's contractors or sub-contractors) which occurs during the period between the execution of this Agreement and the day immediately preceding the O&M Commencement Date. If such damage occurs and the DBFO Co is not instructed to remedy the same as aforesaid the DBFO Co shall permit the Secretary of State and/or his contractors and others to enter upon the Site to carry out such works of repair as may be necessary to remedy such damage.
- 14.1.2 Save to the extent that it is prohibited from so doing by reason of a breach by the Secretary of State of his obligations under Clause 8.1 [Access for DBFO Co], from the date of issue of a Permit to Use in respect of the New Road or any Part of the New Road and thereafter throughout the Contract Period, the DBFO Co shall operate and maintain the New Road or such Part of the New Road in accordance with the terms of this Agreement (including, without limitation, the O&M Requirements) and in such manner as to procure satisfaction of the Core O & M Requirements.
- 14.1.3 Save to the extent that it is prohibited from so doing by reason of a breach by the Secretary of State of his obligations under Clause 8.1 [Access for DBFO Co], from the date of issue of the Completion Certificate in respect of the Off-Site Facilities and thereafter throughout the Contract Period, the DBFO Co shall operate and maintain such Off-Site Facilities in accordance with the terms of this Agreement (including, without limitation, the O&M Requirements) and in such manner as to procure satisfaction of the Core O&M Requirements.
- 14.1.4 From the execution of this Agreement until the day immediately preceding the O&M Commencement Date, the Secretary of State shall not exercise any lesser standard of diligence in enforcing terms under any contract for the operation and maintenance of the Existing Road to which it is a party than he would usually exercise in relation to a similar contract.
- 14.1.5 If and to the extent that damage to the Existing Road occurs between the date of execution of this Agreement and the O&M Commencement Date (the "Existing Road Damage") and the Secretary of State receives the proceeds ("the ERD Insurance Proceeds") of the policy of insurance set out in paragraph 2.1 of Part 1 to Schedule 10 [Insurances] as a consequence of such Existing Road Damage, the Secretary of State shall

ensure that such proceeds are applied towards the repair of the Existing Road Damage. For the purposes of this Clause 14.1.5, the Secretary of State shall use his reasonable endeavours to pursue any claim he is entitled to make arising in relation to the Existing Road Damage pursuant to the policy of insurance set out in paragraph 2.1 of Part 1 to Schedule 10 [Insurances].

- 14.1.6 If any Existing Road Damage in respect of which the ERD Insurance Proceeds were received has not been fully repaired prior to the O&M Commencement Date, the Secretary of State shall pay to the DBFO Co the balance (if any) of the ERD Insurance Proceeds that has not been applied towards the repair of the Existing Road Damage.

#### 14.2 O&M Requirements

- 14.2.1 The DBFO Co may, at any time hereafter, submit to the Department's Nominee in accordance with the Review Procedure any proposed revision to or substitution for the O&M Requirements (as set out in Part 2 of Schedule 6 [Operation and Maintenance]) or as previously varied in accordance with this Clause 14.2 [O&M Requirements]) or any part thereof. If there shall be no objection to such proposed revision or substitution (on the grounds set out in paragraph 3.8 of Part 2 of Schedule 7 [Review Procedure]), then the O&M Requirements as so varied shall be the O&M Requirements for the purposes of this Agreement, subject to any further revision or substitution to which there has been no objection in accordance with the Review Procedure.

- 14.2.2 If the DBFO Co becomes aware that any element of the O&M Requirements does not comply with and satisfy the Core O&M Requirements, the DBFO Co shall so notify the Department's Nominee and as soon as reasonably practicable, and in any event within 30 days of becoming aware of such matter, the DBFO Co shall submit (in accordance with Clause 14.2.1) a proposal to amend the O&M Requirements so that they comply with and satisfy the Core O&M Requirements.

- 14.2.3 Without prejudice to Clause 14.2.2, if the DBFO Co:

14.2.3.1 becomes aware of any change (whether by addition, modification, omission or otherwise) in the Department's Standards; or

14.2.3.2 is notified by the Department's Nominee of a change (whether by addition, modification, omission or otherwise) in the Department's Standards that the Department's Nominee considers relevant to the operation and maintenance of the Project Facilities,

the DBFO Co shall forthwith submit (in accordance with Clause 14.2.1) a proposal to amend the O&M Requirements to incorporate such change in the Department's Standards. Such proposal shall be in the form set out in Clause 14.10 [Changes to the O&M Standards] or Clause 14.11 [Step Change in O&M Standards] (as applicable).

#### 14.3 Inspections

14.3.1 The DBFO Co shall give the Department's Nominee timely notice of any general or principal inspection or any other inspection of structures to be conducted in accordance with the O&M Requirements.

14.3.2 The Department's Nominee shall be entitled to attend any inspection of the Project Facilities (whether or not it is entitled to receive or has received notice thereof in accordance with Clause 14.3.1) upon giving reasonable notice to the DBFO Co.

14.4 Access

14.4.1 The DBFO Co shall procure that:

14.4.1.1 the Department's Nominee and any designee of the Department's Nominee has unrestricted access to the Site and the Adjacent Areas at all reasonable times throughout the Contract Period in order to perform its functions under this Agreement; and

14.4.1.2 the Secretary of State and any contractor or other designee of the Secretary of State has unrestricted access to the Site and the Adjacent Areas at all reasonable times throughout the Contract Period in order:

14.4.1.2.1 to perform any obligations or exercise any rights of the Secretary of State under this Agreement; or

14.4.1.2.2 to fulfil any statutory functions of the Secretary of State;

14.4.1.2.3 without limitation to Clauses 14.4.1.2.1 and 14.4.1.2.2, to conduct any study or trial for purposes of research initiated by the Secretary of State, provided that any such study or trial shall be conducted in accordance with the provisions of Clause 14.7 [Trials]; or

14.4.1.2.4 without limitation to Clauses 14.4.1.2.1 and 14.4.1.2.2, to carry out or procure the carrying out of any Additional Works.

14.4.2 The DBFO Co shall procure that all Relevant Authorities have access to the Site and the Adjacent Areas throughout the Contract Period in order to carry out any work (including, without limitation, surveys and inspections) in accordance with any Legal Requirement or to exercise any right, power or duty of such Relevant Authority under any Law, subject, other than in the case of an emergency, to reasonable notice being given.

14.4.3 The Secretary of State shall procure that the DBFO Co (or the Contractor or Operator) has access to the Connecting Roads at all reasonable times throughout the Contract Period to the extent necessary to enable the DBFO Co to perform its obligations under this Agreement, subject, other than in the case of emergency, to reasonable notice being given.

#### 14.5 Emergencies and Liaison

- 14.5.1 The Parties shall develop Liaison Procedures in accordance with the provisions of Schedule 16 as soon as practicable after the date hereof.
- 14.5.2 Whenever the DBFO Co is required by this Agreement to take any action in accordance with the Liaison Procedures, it shall take such action in accordance with the procedures set out in or agreed in accordance with the provisions of Schedule 16 [Liaison Procedures].
- 14.5.3 Notwithstanding any other provision of this Agreement, the DBFO Co shall and shall be entitled to take (at its own cost) such steps as necessary in an emergency for the protection of the public, but subject to the provisions of the Liaison Procedures.
- 14.5.4 The DBFO Co shall establish the A249 Environmental Group in accordance with, and comply with the other provisions of, Part 4 of Schedule 16 [A249 Environment Group].

#### 14.6 Maintenance and Other Works

The provisions of Clause 11 [Design and Construction] and paragraphs 3.3, 3.5, 3.8, 3.13, 3.14, 4 and 7 of Part 2 of Schedule 7 [Review Procedure] shall apply, mutatis mutandis, to any works the subject of a Proposal other than the Works and other than any works in relation to any Improvement, with any reference in such provisions to:

- 14.6.1 the Works being deemed a reference to such works the subject of the Proposal;
- 14.6.2 a DBFO Co's Change being deemed a reference to an Alternative Proposal; and
- 14.6.3 a DBFO Co's Change Certificate being deemed a reference to an Alternative Proposal Certificate.

#### 14.7 Trials

Any study or trial referred to in Clause 14.4.1.2.3 shall be conducted in such manner as to minimise any adverse effect on traffic flows on the Project Road and no such study or trial shall, without the consent of the DBFO Co (such consent not to be unreasonably withheld or delayed), substantially affect the physical integrity of the Project Facilities.

#### 14.8 DBFO Co's 5 Year Management Plan

The DBFO Co shall prepare a DBFO Co's 5 Year Management Plan annually in accordance with Part 3 of Schedule 14 [DBFO Co's 5 Year Management Plan] and shall design and construct the New Road and operate and maintain the Project Facilities:

- 14.8.1 in a manner designed to meet the DBFO Co's 5 Year Performance Targets and the Annual Performance Targets contained in such DBFO Co's 5 Year Management Plan; and

14.8.2 without prejudice to Clause 14.8.1, so as to achieve at all times the Minimum Performance Levels.

14.9 DBFO Co's 5 Year Environmental Management Plan

The DBFO Co shall prepare and submit to the Secretary of State a DBFO Co's 5 Year Environmental Management Plan in accordance with Part 5 of Schedule 14 [DBFO Co's 5 Year Environmental Management Plan] and shall design and construct the New Road and operate and maintain the Project Facilities.

14.9.1 in a manner designed to meet the DBFO Co's 5 Year Environmental Performance Targets and the Annual Environmental Performance Targets contained in such DBFO Co's 5 Year Environmental Management Plan; and

14.9.2 without prejudice to Clause 14.9.1, so as to achieve at all times the Minimum Environmental Performance Levels.

14.10 Changes to O&M Standards

14.10.1 Subject to Clause 14.11 [Step Changes in O&M Standards], any proposal submitted by the DBFO Co to the Department's Nominee pursuant to Clause 14.2.3 shall identify as applicable:

14.10.1.1 the standard or specification that the DBFO Co proposes as an O&M Standard or should no longer constitute an O&M Standard;

14.10.1.2 any amendments to the terms used in such standard or specification as may be necessary to ensure the proper application of such standard or specification to the operation and maintenance of the Project Facilities;

14.10.1.3 any consequential amendments to Part 4 of Schedule 6 [O&M Standards];

14.10.1.4 any consequential amendments to Part 2 of Schedule 6 [O&M Requirements]; and

14.10.1.5 any other consequential amendments to this Agreement.

14.11 Step Change in O&M Standards

14.11.1 Where the DBFO Co believes that the submission of a proposal to the Department's Nominee pursuant to Clause 14.2.3 would constitute a submission in respect of a Step Change, it shall (instead of giving a notice in accordance with Clause 14.10 [Changes to O&M Standards]) give a notice (a "Step Change Notice") to that effect on the Department's Nominee.

14.11.2 The Step Change Notice shall:

14.11.2.1 identify the details required by Clauses 14.10.1.1 to 14.10.1.5 [Changes to O&M Standards];

- 14.11.2.2 give details of the variation to the Operations which will become necessary as a result of the implementation of the change in Department's Standards; and
  - 14.11.2.3 set out the basis of its belief that the implementation of the change in Department's Standards would constitute a Step Change.
- 14.11.3 Within 60 days of receipt of a Step Change Notice, the Department's Nominee shall notify the DBFO Co that:
  - 14.11.3.1 he agrees that a Step Change has occurred and that the provisions of Clause 14.11.5 shall apply; or
  - 14.11.3.2 he agrees that a Step Change has occurred and that the provisions of Clause 14.11.6 shall apply; or
  - 14.11.3.3 he does not agree that a Step Change has occurred, in which case the Department's Nominee shall set out in the notice the grounds of objection.
- 14.11.4 Where the Department's Nominee fails to respond to a Step Change Notice within such 60 day period, the DBFO Co shall not be obliged to implement the change in Department's Standards the subject of such Step Change Notice and the Department's Nominee shall be deemed to have given a notice to the DBFO Co under Clause 14.11.3.2.
- 14.11.5 Where the Department's Nominee gives (or is deemed to give) a notice under Clause 14.11.3.1 or Clause 14.11.9.1, the Department's Nominee shall initiate a Department's Change and the provisions of Annex 1 to Part 1 of Schedule 12 [Department's Change] shall apply.
- 14.11.6 Where the Department's Nominee gives (or is deemed to give) a notice under Clause 14.11.3.2 or Clause 14.11.9.2, the DBFO Co shall not be obliged to implement the change in Department's Standards the subject of such Step Change Notice and the DBFO Co shall be deemed to have discharged its obligations under Clause 14.2.3.1 and Clause 14.2.3.2.
- 14.11.7 Where the Department's Nominee gives a notice under Clause 14.11.3.3, the Parties shall negotiate for a period of 60 days in an attempt to agree whether a Step Change has occurred.
- 14.11.8 If the Parties fail to reach an agreement in accordance with Clause 14.11.7 within such 60 day period, then either Party may refer the Dispute to the Disputes Resolution Procedure.
- 14.11.9 If it is determined under the Disputes Resolution Procedure that a Step Change has occurred, the Department's Nominee shall, within 14 days of such determination, give a notice to the DBFO Co specifying that either:
  - 14.11.9.1 he wishes to initiate a Department's Change and that the provisions of Clause 14.11.5 shall apply in respect of such Step Change; or

14.11.9.2 he does not wish to initiate a Department's Change and that the provisions of Clause 14.11.6 shall apply in respect of such Step Change.

14.11.10 If the Department's Nominee fails to give a notice under Clause 14.11.9 within such 14 day period, the Department's Nominee shall be deemed to have given a notice under Clause 14.11.9.1 and the provisions of Clause 14.11.5 shall apply as though the Department's Nominee had given notice under Clause 14.11.9.1.

15. **TRAFFIC MANAGEMENT**

15.1 **Traffic Management**

15.1.1 Subject to Clause 15.2 [Liaison and Diversionary Measures], from the O&M Commencement Date, general management of traffic on the Project Road shall be the responsibility of the DBFO Co.

15.1.2 Users shall be subject to the same Laws as those using the remainder of the public highway network, and the enforcement of those Laws shall be the responsibility of the police.

15.2 **Liaison and Diversionary Measures**

15.2.1 The DBFO Co shall be responsible during the conduct of the Operations for ensuring compliance with the reasonable requirements of the Secretary of State in respect of then existing highways (other than the Project Road) for which he is the highway authority, of other highway authorities and of the police with regard to the management of traffic which may be affected by the carrying out of the Operations, all in accordance with the Liaison Procedures.

15.2.2 Without prejudice to any authorisations required under any Law and without prejudice to any other requirement of this Agreement, any proposal by the DBFO Co to use Diversionary Measures shall be notified to the Department's Nominee under the Review Procedure, explaining the need for the same and the period during which such Diversionary Measures will be used. Save in an emergency, the DBFO Co shall not implement any such Diversionary Measures unless and until there has been no objection to its proposal for the same under the Review Procedure. The period during which such Diversionary Measures may be used shall not exceed the period to which there has been no objection under the Review Procedure.

15.2.3 If as a result of an emergency the need arises to use Emergency Diversionary Measures, then subject to Clause 15.2.1 the DBFO Co may effect the same, provided that the DBFO Co shall as soon as reasonably practicable advise the Department's Nominee of such Emergency Diversionary Measures and the reasons therefor and the DBFO Co shall take reasonable steps to minimise the duration of such Emergency Diversionary Measures.

15.3 **Lane Closures**

15.3.1 Within 60 days after the date of execution of this Agreement the DBFO Co shall submit to the Department's Nominee in accordance with the Review Procedure a Schedule of Lane Closures in respect of the Project Road for the First Contract Year and the next succeeding Contract Year. Not later than 1st January in each Contract Year after the First Contract Year the DBFO Co shall submit to the Department's Nominee in accordance with the Review Procedure a Schedule of Lane Closures in respect of the Project Road for the next succeeding Contract Year. Any such Schedule of Lane Closures shall give details of the proposed start and end dates for each period of Lane Closure and the works to be carried out.

15.3.2 Not later than 60 days prior to the commencement of any Quarter, the DBFO Co may submit to the Department's Nominee in accordance with the Review Procedure a revision of the Schedule of Lane Closures submitted pursuant to Clause 15.3.1 showing proposed revisions to the periods of Lane Closure in respect of such Quarter. If there is no objection to any such revision in accordance with the Review Procedure, then it shall replace the annual Schedule of Lane Closures in respect of such Quarter.

15.3.3 The Department's Nominee may raise comments in respect of any period of Lane Closure requested in a Schedule of Lane Closures submitted by the DBFO Co pursuant to Clause 15.3.1 or Clause 15.3.2 in accordance with paragraph 3.6 of Part 2 of Schedule 7 [Review Procedure]. In such event, the Department's Nominee shall notify the DBFO Co thereof with reasons and shall indicate, in the case of an objection pursuant to paragraph 3.6.3 of Part 2 of Schedule 7 [Review Procedure], an appropriate duration for such Lane Closure and in any other case a period when the unacceptable period can be re-scheduled, on the basis that each such re-scheduled period shall be as close as reasonably practicable to the requested period of Lane Closure and of equal duration or, if the DBFO Co has indicated another period and/or duration that would be preferable to it and that is acceptable to the Department's Nominee, such other period and/or duration. The DBFO Co shall thereupon amend the relevant Schedule of Lane Closures accordingly and re-submit the same to the Department's Nominee in accordance with the Review Procedure.

15.3.4 The DBFO Co shall not effect any Lane Closures save:

15.3.4.1 in accordance with a Schedule of Lane Closures to which no objection has been made under the Review Procedure;

15.3.4.2 in accordance with the procedures set out in Clause 15.3.6;

15.3.4.3 in an emergency, in accordance with Clause 15.3.7;

15.3.4.4 for Type C lane closures (as defined in Section 6 of Chapter 8 of the Traffic Signs Manual); or

15.3.4.5 in accordance with an instruction from the police.

The DBFO Co shall not effect any Lane Closure without first obtaining any order in respect of such Lane Closure necessary under any Law.

15.3.5 Notwithstanding that there has been no objection to a Schedule of Lane Closures in accordance with the Review Procedure, the Department's Nominee may upon 90 days prior written notice require the DBFO Co to re-schedule a period of Lane Closure if due to a change in any circumstances such re-scheduling is necessary to satisfy the standards set out in paragraph 3.9.1 or 3.9.2 of Part 2 of Schedule 7 [Review Procedure], provided, however, that the Department's Nominee may not require:

15.3.5.1 that such period of Lane Closure be brought forward by more than 60 days from the scheduled date of commencement of such period of Lane Closure; or

- 15.3.5.2 that a period of Lane Closure be deferred by more than 60 days from the scheduled date of commencement of such period of Lane Closure.
- 15.3.6 If the need arises for unprogrammed maintenance or repair works (not being an emergency) requiring Lane Closures otherwise than in accordance with an approved Schedule of Lane Closures, the DBFO Co shall advise the Department's Nominee of such need and request approval of the proposed commencement date and estimated duration of the requisite Lane Closures. The Department's Nominee's approval of such works shall not be unreasonably withheld or delayed, having regard to the factors set out in paragraph 3.6 of Part 2 of Schedule 7 [Review Procedure].
- 15.3.7 If as a result of an emergency the need arises for unprogrammed maintenance or repair works requiring Lane Closures otherwise than in accordance with an approved Schedule of Lane Closures, the DBFO Co shall effect such Lane Closures, provided that the DBFO Co shall as soon as reasonably practicable advise the Department's Nominee of such closure and the reasons therefor and shall take all reasonable steps to minimise the duration of such Lane Closure.
- 15.3.8 In the event of an emergency occurring on a Connecting Road, at the request of the Department's Nominee the DBFO Co shall as far as is reasonably practicable temporarily remove or modify any existing Lane Closures and delay any proposed Lane Closures under any Schedule of Lane Closures to which there has been no objection under the Review Procedure which in either such case conflict with any lane closures or other arrangements implemented to deal with the emergency.
- 15.3.9 The DBFO Co shall promptly remove traffic cones or other traffic management equipment which is no longer required.
- 15.4 Information Requirements
- 15.4.1 The DBFO Co shall provide to the Secretary of State such information (including without limitation details of proposed Lane Closures and information about its traffic safety and management measures on the Project Road) as may be required for purposes of any information service operated by or on behalf of the Secretary of State from time to time. Such information shall contain such details, be in such format and be sent to such address at such times as may be notified to the DBFO Co by the Secretary of State from time to time.
- 15.4.2 The DBFO Co shall, in accordance with Clause 16.9 [Information for the Public], operate a telephone service connected to any telephone system and number nominated from time to time by the Secretary of State in relation to all or any part of the Trunk Road Network.
- 15.5 Secretary of State's Maintenance
- 15.5.1 Without prejudice to Clause 15.3.8, the Secretary of State shall use reasonable endeavours to co-ordinate his maintenance programme for the Connecting Roads with any Schedule of Lane Closures in respect of the

Project Road to which there has been no objection under the Review Procedure, so as to minimise any disruption to the operation of the Project Road.

- 15.5.2 Within 90 days after the date of execution of this Agreement the Department's Nominee shall provide to the DBFO Co a Schedule of Lane Closures in respect of the Connecting Roads for the First Contract Year and the next succeeding Contract Year. Not later than 1st February in each Contract Year after the First Contract Year the Department's Nominee shall provide to the DBFO Co a Schedule of Lane Closures in respect of the Connecting Roads for the next succeeding Contract Year.
- 15.5.3 Other than in the case of emergency, the Department's Nominee shall give prompt notice to the DBFO Co of any revisions to the Schedule of Lane Closures provided to the DBFO Co pursuant to Clause 15.5.2.
- 15.5.4 The Schedule of Lane Closures provided to the DBFO Co pursuant to Clause 15.5.2 and any revisions thereto provided pursuant to Clause 15.5.3 shall be for information purposes only. The Secretary of State shall have no liability to the DBFO Co in respect of any variations of or departures from any such Schedule of Lane Closures.

16. **SIGNING AND COMMUNICATIONS**

16.1 **Traffic Signs Provisions**

The DBFO Co shall procure that all Traffic Signs on or near the Project Road shall be in accordance with the Traffic Signs Provisions and the Traffic Signs Manual, except:

16.1.1 to the extent required by any contrary provision in the Technical Requirements;

16.1.2 to the extent required by any Department's Change; or

16.1.3 for any Traffic Signs on the Project Road on the Commencement Date, provided that any such Traffic Signs which under the Traffic Signs Provisions are required by a specified time to be replaced by signs of a different design or removed shall be so replaced or removed.

16.2 **New Signs**

Save to the extent that any of the same are specified by the Technical Requirements or any Department's Change and notwithstanding and without prejudice to any obligation to obtain any necessary authorisations in accordance with the Traffic Signs Provisions in respect thereof, the DBFO Co shall submit the proposed layout, location, type, size, colour and content of all Traffic Signs or other signs (including without limitation the signs referred to in Clause 16.5 [Notification Signs]) to be located on or near the Project Road to the Department's Nominee in accordance with the Review Procedure. The Department's Nominee shall be entitled to raise comments on any such proposal only on the grounds set out in paragraph 3.7 of Part 2 of Schedule 7 [Review Procedure].

16.3 **Local Roads**

Signing on roads for which the Secretary of State is not the highway authority shall be subject to agreement between the DBFO Co and the relevant local highway authority.

16.4 **Directional Signs**

Without prejudice to the DBFO Co's obligations to provide signs near the Project Road in accordance with the Technical Requirements the Secretary of State shall, at his own cost, install on motorways or trunk roads for which the Secretary of State is the highway authority (other than the Project Road) such further signs notifying motorists of the access to the Project Road as shall be necessary in accordance with the Secretary of State's duties as highway authority.

16.5 **Notification Signs**

The DBFO Co shall install on the Project Road at distances not further than 1 kilometre from each Motorway junction or Class A Road which is an access to or exit from the Project Road signs notifying Users of the telephone number for enquiries and complaints in respect of the Project Road required pursuant to Clause 15.4 [Information Requirements] and in accordance with Clause 16.9 [Information for the Public].

16.6 Additional Signs

For the avoidance of doubt, the Secretary of State may require the DBFO Co to place Traffic Signs (other than those required in accordance with the Technical Requirements or Clauses 16.4 [Directional Signs] and 16.5 [Notification Signs]) on or near the Project Road or to remove any such Traffic Signs. Where the Secretary of State does so require such requirement shall be treated as a Department's Change.

16.7 Removal of Signs

The DBFO Co shall, at its own cost (unless otherwise directed by the Secretary of State), remove all signs referred to in Clause 16.5 [Notification Signs] within 30 days following termination of this Agreement.

16.8 Communications

16.8.1 The DBFO Co shall comply with the Communications Requirements.

16.8.2 The DBFO Co shall obtain in a timely manner and maintain in force any licence or consent required under the Telecommunications Act 1984 in order to perform its obligations under this Agreement.

16.9 Information for the Public

In relation to any provision of information to the public pursuant to this Agreement including, without limitation, pursuant to Clauses 15.4 [Information Requirements] and 16.5 [Notification Signs] the DBFO Co shall comply with the requirements set out in paragraph 2.7.2 of Part 2 of Section 2 of Schedule 6 [O&M Requirements].

**17. DEFECTS IN THE EXISTING ROAD**

17.1 Latent Defects

For the purposes of this Agreement, the term "Latent Defect" shall mean any defect in the Existing Road at the date hereof which could not reasonably have been ascertained by a competent person acting in accordance with Good Industry Practice during the inspection referred to in Clause 6.1.1 or from an analysis of all relevant information available to the DBFO Co prior to the date of execution of this Agreement (including, without limitation, the information referred to in Clause 38.2.1).

17.2 Reporting of Latent Defects

Without prejudice to paragraph 2.8 of Part 2 of Schedule 14 [Reports], in the event that a Latent Defect shall become apparent, the DBFO Co shall promptly give notice to the Secretary of State identifying such defect.

17.3 Remedial Action

For the avoidance of doubt, the DBFO Co shall be responsible for any remedial or other works required as a result of any defect in the Project Road, including, without limitation, any Latent Defect.

17.4 Costs of Defects

17.4.1 All costs of and associated with any defect in the Project Road (including without limitation any Latent Defect) and any remedial or other works in respect thereof shall be borne by the DBFO Co, provided that this obligation to bear costs shall not extend to:

17.4.1.1 the costs of damage to the Existing Road caused as a direct result of road traffic accidents or ship collisions (not involving the DBFO Co, its contracting associates or any other of the DBFO Co's contractors or sub-contractors) which occurs during the period between the execution of this Agreement and the day immediately preceding the O&M Commencement Date; or

17.4.1.2 any costs arising from a failure by the Secretary of State to comply with his obligations under Clause 14.1.4; or

17.4.1.3 the costs of any Existing Road Damage to the extent that the Secretary of State receives the proceeds of the policy of insurance set out in paragraph 2.1 of Part 1 to Schedule 10 as a consequence of such damage and applies the same towards the repair of the Existing Road Damage.

17.4.2 For the avoidance of doubt, the Secretary of State shall have no liability to the DBFO Co in respect of any loss of profit, loss of income, loss of contract or any other losses arising out of or in connection with the existence of any Latent Defect or any remedial or other works required as a result of any Latent Defect.

17.5 Enforcement of Rights against Third Parties

- 17.5.1 If the DBFO Co suffers loss as a result of any Latent Defect and it wishes the Secretary of State to exercise any rights against any Third Party Contractor which the Secretary of State may have in respect of any Defective Work giving rise to such Latent Defect, then the DBFO Co may serve a notice on the Secretary of State asking him to exercise any right he may have to make a claim against the relevant Third Party Contractor (the "Third Party Contractor Claim Notice");
- 17.5.2 The Third Party Contractor Claim Notice shall:
- 17.5.2.1 describe such claim in a level of detail sufficient to enable the Secretary of State to understand the basis for such claim;
  - 17.5.2.2 set out the DBFO Co's detailed estimate of the value of such claim; and
  - 17.5.2.3 contain an undertaking on the part of the DBFO Co (in a form reasonably satisfactory to the Secretary of State) to meet all costs and/or liabilities properly incurred by the Secretary of State in pursuing such claim.
- 17.5.3 The Secretary of State shall be under no obligation to exercise any right in respect of any Defective Work against any Third Party Contractor if he considers, and either it is agreed by the DBFO Co or decided by an Expert appointed under the Disputes Resolution Procedure, that there is no reasonable prospect of making a successful and financially worthwhile claim in relation to such right.
- 17.5.4 Where the Secretary of State is successful in a claim against a Third Party Contractor in respect of Defective Work pursuant to a Third Party Contractor Claim Notice he shall account to the DBFO Co for the Recovery Amount following the final conclusion of the relevant proceedings by the Secretary of State against the Third Party Contractor and the expiry of the time for any appeal.
- 17.5.5 Nothing in this Clause 17.5 [Enforcement of Rights against Third Parties] shall derogate from or relieve the DBFO Co of any of its obligations under this Agreement.

## **FOSSILS AND ANTIQUITIES**

### 18.1 Archaeological Works

- 18.1.1 The DBFO Co shall procure that the Archaeologist has unrestricted access to the Site and the Adjacent Areas at all reasonable times and, without limitation to Clause 18.3 [Disposal], shall give due regard to any recommendation of the Archaeologist in regard to any archaeological surveys or inspections of the Site or the Adjacent Areas.
- 18.1.2 The DBFO Co shall carry out the Archaeological Works.
- 18.1.3 In connection with Maintenance Works, the DBFO Co shall undertake such further archaeological surveys and consultations with English Heritage and the archaeologists of the relevant local authorities as is consistent with Annex 10/E to Part 2 of Schedule 4 [Archaeology] mutatis mutandis.
- 18.1.4 At all times when an Archaeologist is or is required to be appointed in accordance with this Agreement, the DBFO Co shall at all times ensure that he has expertise in the area of archaeology relevant to any Fossils and Antiquities discovered on the Site or Adjacent Areas.
- 18.1.5 The DBFO Co shall comply with all the requirements of Annex 10/E to Part 2 of Schedule 4.

### 18.2 Ownership

As between the Secretary of State and the DBFO Co, all Fossils and Antiquities shall be the property of the Secretary of State.

### 18.3 Disposal

The DBFO Co shall take all reasonable precautions to prevent the removal of, or damage to, any Fossils and Antiquities. It shall immediately notify the Department's Nominee of the discovery of any Fossils and Antiquities and shall carry out any orders of the Department's Nominee regarding the examination and disposal of the same, provided that

- 18.3.1 if such Fossils and Antiquities comprise Archaeological Remains and as at the date of such notification there is an Archaeological Design in respect of the examination and disposal of such Fossils and Antiquities to which there has been no objection under the Review Procedure, then:
  - 18.3.1.1 the DBFO Co shall proceed to examine and dispose of such Fossils and Antiquities in accordance with such Archaeological Design and Good Industry Practice; and
  - 18.3.1.2 if such Fossils and Antiquities comprise Unforeseeable Archaeological Features, the Department's Nominee shall be deemed, for the purposes of Clause 18.4 [Costs], to have given an order in accordance with this Clause 18.3 to examine and dispose of such Fossils and Antiquities in accordance with such Archaeological Design and Good Industry Practice,

but without prejudice to the ability of the Department's Nominee to give further orders pursuant to this Clause 18.3 regarding the examination and disposal of such Fossils and Antiquities;

18.3.2 if such Fossils and Antiquities comprise Archaeological Remains and as at the date of such notification there is no Archaeological Design in respect of the examination and disposal of such Fossils and Antiquities to which there has been no objection under the Review Procedure, then the provisions of paragraphs 6.1 to 6.8 of Annex 10/E to Part 2 of Schedule 4 shall apply (as applicable);

18.3.3 if such Fossils and Antiquities do not comprise Archaeological Remains and as at the date of such notification there is Design Data in respect of the examination and disposal of such Fossils and Antiquities to which there has been no objection under the Review Procedure, then

18.3.3.1 the DBFO Co shall proceed to examine and dispose of such Fossils and Antiquities in accordance with such Design Data and Good Industry Practice; and

18.3.3.2 if such Fossils and Antiquities comprise Unforeseeable Archaeological Features, the Department's Nominee shall be deemed, for the purposes of Clause 18.4 [Costs], to have given an order to the DBFO Co in accordance with this Clause 18.3 to examine and dispose of such Fossils and Antiquities in accordance with such Archaeological Design and Good Industry Practice,

but without prejudice to the ability of the Department's Nominee to give further orders pursuant to this Clause 18.3 regarding the examination and disposal of such Fossils and Antiquities; or

18.3.4 if such Fossils and Antiquities do not comprise Archaeological Remains and as at the date of such notification there is no Design Data in respect of the examination and disposal of such Fossils and Antiquities to which there has been no objection under the Review Procedure, then as soon as reasonably practicable after such notification the DBFO Co shall submit to the Department's Nominee under the Review Procedure its proposals for the examination and disposal of such Fossils and Antiquities and:

18.3.4.1 the DBFO Co shall proceed to implement such of its proposals to which there has been no objection under the Review Procedure;

18.3.4.2 if such Fossils and Antiquities comprise Unforeseeable Archaeological Features then upon there being no objection under the Review Procedure to the DBFO Co's proposals, the Department's Nominee shall be deemed, for the purposes of Clause 18.4 [Costs], to have given an order in accordance with this Clause 18.3 to proceed to implement such proposal,

but without prejudice to the ability of the Department's Nominee to give further orders pursuant to this Clause 18.3 regarding the examination and disposal of such Fossils and Antiquities.

18.3.5 Save as provided in Clause 18.4 [Costs], the DBFO Co shall not be entitled to recover from the Secretary of State any costs it incurs as a consequence of carrying out such orders of the Department's Nominee. The DBFO Co shall take all reasonable steps consistent with Good Industry Practice to minimise any delay to completion of the Works as a result of carrying out such orders.

18.4 Costs

If:

18.4.1 the DBFO Co notifies the Department's Nominee of the discovery of Fossils and Antiquities in accordance with Clause 18.3 [Disposal] and such Fossils and Antiquities comprise Unforeseeable Archaeological Features;

18.4.2 the Department's Nominee gives (or is deemed to give) orders in accordance with Clause 18.3 [Disposal] regarding the examination and disposal of such Unforeseeable Archaeological Features; and

18.4.3 in consequence of compliance with the orders of the Department's Nominee referred to in Clause 18.4.2 there will be a delay in or increase in the cost of the Works or the conduct of the Operations,

then the Department's Nominee shall as soon as reasonably practicable request a Department's Change pursuant to Annex 1 to Part 1 of Schedule 12 [Department's Change] or give notice of Additional Works pursuant to Part 1 of Schedule 13 [Procedure for Additional Works]. Save as agreed or determined pursuant to Annex 1 or Annex 2 to Part 1 of Schedule 12, no increases in costs will be allowed as a consequence of compliance with the orders of the Department's Nominee referred to in Clause 18.4.2.

## 19. **HANDBACK**

### 19.1 Handback Requirements

Upon the Expiry Date, each element of the Project Facilities shall comply with the Handback Requirements.

### 19.2 Initial Inspection

19.2.1 Not less than 57 months nor more than 63 months prior to the expected Expiry Date, the DBFO Co and the Department's Nominee shall conduct a joint inspection (the "Initial Inspection") of the pavement of the Project Road and all Structures forming part of the Project Road. If no date for the Initial Inspection has been agreed between the DBFO Co and the Department's Nominee, the Department's Nominee may initiate the Initial Inspection during such period by giving at least 30 days' notice to that effect to the DBFO Co and such inspection shall be conducted on the date specified in such notice.

19.2.2 Such inspection shall comply with the requirements set out in paragraph 2 of Part 4 of Schedule 4 [Handback Requirements].

### 19.3 Renewal Programme

19.3.1 Within 90 days after the completion of the Initial Inspection, the DBFO Co shall provide to the Department's Nominee a report on the condition of the pavement of the Project Road and the Structures referred to in Clause 19.2.1 and a notice setting out:

19.3.1.1 the DBFO Co's proposals as to the Renewal Works;

19.3.1.2 the DBFO Co's proposals as to the Renewal Programme; and

19.3.1.3 the DBFO Co's estimate of the Renewal Amount.

19.3.2 The proposals referred to in Clause 19.3.1.1 shall be made, inter alia:

19.3.2.1 on the basis of an assessment of the Residual Life of the relevant element of the Project Facilities in accordance with the provisions of paragraph 2 of Part 4 of Schedule 4 [Handback Requirements]; and

19.3.2.2 on the assumption that the Project Facilities will be maintained in accordance with the O&M Requirements for the remainder of the Contract Period.

19.3.3 The Department's Nominee may, within 90 days after receipt of the notice from the DBFO Co in accordance with Clause 19.3.1, by notice to the DBFO Co object to the proposals in respect of any or all of the Renewal Works, the Renewal Programme and the Renewal Amount as set out in the DBFO Co's notice. The notice from the Department's Nominee shall give details of the grounds for such objection and shall give the Department's Nominee's proposals in respect of the Renewal Works and Renewal Programme and his estimate of the Renewal Amount.

- 19.3.4 If no agreement is reached between the DBFO Co and the Department's Nominee as to any matter referred to in the notice given in accordance with Clause 19.3.3 within 60 days of receipt by the DBFO Co of such notice, then either the DBFO Co or the Department's Nominee may refer the matter to the Disputes Resolution Procedure for determination:
- 19.3.4.1 in the case of an objection in respect of the Renewal Works, whether or not the objection is justified and whether any alternative proposals by the Department's Nominee are more appropriate to ensure that the pavement of the Project Road and the relevant Structures will satisfy the Handback Requirements on the Expiry Date (on the basis referred to in Clause 19.3.2);
  - 19.3.4.2 in the case of an objection in respect of the Renewal Programme, what programme would be reasonable for the implementation of the Renewal Works; and
  - 19.3.4.3 in the case of an objection in respect of the Renewal Amount, what amount would represent the reasonable cost of carrying out the Renewal Works, on the assumption that such Renewal Works will be carried out in accordance with Good Industry Practice.
- 19.3.5 Upon agreement or determination in accordance with the Disputes Resolution Procedure of the Renewal Works and the Renewal Programme, the DBFO Co shall procure that the Renewal Works are carried out in accordance with the Renewal Programme. For the avoidance of doubt, the DBFO Co shall procure at its own cost that the Renewal Works are carried out notwithstanding that the actual cost of the Renewal Works may be higher than the Renewal Amount.
- 19.3.6 For the avoidance of doubt, neither the agreement of the Department's Nominee to any Renewal Works, Renewal Programme or Renewal Amount, nor the participation of the Department's Nominee in any inspection under this Clause 19 [Handback], nor the complete or partial carrying out of the Renewal Works shall relieve or absolve the DBFO Co from:
- 19.3.6.1 its obligation under Clause 19.1 [Handback Requirements]; or
  - 19.3.6.2 any obligation to conduct any other inspection or perform any other works in accordance with the O&M Requirements.

#### 19.4 Second Inspection

- 19.4.1 Not less than 15 months nor more than 18 months prior to the expected Expiry Date, the DBFO Co and the Department's Nominee shall conduct a joint inspection (the "Second Inspection") of all elements of the Project Facilities, including without limitation the pavement and the Structures referred to in Clause 19.2.1 (whether or not the Renewal Works in respect of the pavement and such Structures have been carried out).

19.4.2 Such inspection shall comply with the requirements set out in paragraph 2 of Part 4 of Schedule 4 [Handback Requirements] as applicable to each element of the Project Facilities.

19.5 Revised Renewal Programme

19.5.1 Within 60 days after the completion of the Second Inspection, the DBFO Co shall provide to the Department's Nominee a report on the condition of the Project Facilities and a notice setting out:

19.5.1.1 the DBFO Co's proposals as to any revisions or additions to the Renewal Works (including without limitation those referred to in Clause 19.5.6) required in order to procure that all elements of the Project Facilities will, on the Expiry Date, satisfy the Handback Requirements;

19.5.1.2 the DBFO Co's proposals as to any revisions to the Renewal Programme as a consequence of such revisions or additions to the Renewal Works; and

19.5.1.3 the DBFO Co's estimate of any changes in the Renewal Amount as a consequence of such revisions or additions to the Renewal Works.

19.5.2 The proposals referred to in Clause 19.5.1.1 shall be made, inter alia, on the basis set out in Clause 19.3.2.

19.5.3 The Department's Nominee may, within 28 days after receipt of the notice from the DBFO Co in accordance with Clause 19.5.1, by notice to the DBFO Co object to any proposed revisions or additions to any or all of the Renewal Works, the Renewal Programme and the Renewal Amount as set out in the DBFO Co's notice. The notice from the Department's Nominee shall give details of the grounds for such objection and shall give the Department's Nominee's proposals in respect of such matters.

19.5.4 If no agreement is reached between the DBFO Co and the Department's Nominee as to any matter referred to in the notice given in accordance with Clause 19.5.3 within 28 days of receipt by the DBFO Co of such notice, then either the DBFO Co or the Department's Nominee may refer the matter to the Disputes Resolution Procedure for determination:

19.5.4.1 in the case of an objection in respect of any revisions or additions to the Renewal Works, whether or not the objection is justified and whether any alternative proposals by the Department's Nominee are more appropriate to ensure that each element of the Project Facilities will satisfy the Handback Requirements on the Expiry Date (on the basis referred to in Clause 19.3.2);

19.5.4.2 in the case of an objection in respect of any revisions to the Renewal Programme, what programme would be reasonable for the implementation of the Renewal Works (as revised or added to in accordance with the provisions of this Clause 19.5 [Revised Renewal Programme]); and

- 19.5.4.3 in the case of an objection in respect of any change in the Renewal Amount, what amount would represent the reasonable cost of carrying out the Renewal Works (as revised or added to in accordance with the provisions of this Clause 19.5 [Revised Renewal Programme]).
- 19.5.5 Upon agreement or determination in accordance with the Disputes Resolution Procedure of any revision or addition to the Renewal Works or the Renewal Programme, the DBFO Co shall procure that the Renewal Works (as so revised or added to) are carried out in accordance with the Renewal Programme (as so revised). For the avoidance of doubt, the DBFO Co shall procure, at its own cost, that the Renewal Works (as so revised or added to) are carried out notwithstanding that the actual cost of the Renewal Works may be higher than the Renewal Amount (as changed in accordance with this Clause 19.5 [Revised Renewal Programme]).
- 19.5.6 The Renewal Works proposed pursuant to Clause 19.5.1.1 shall include, inter alia, the following:
  - 19.5.6.1 the renewal of all reflecting road studs on the Project Facilities within the last 6 months of the Contract Period, provided that metal housings having a Residual Life of at least 5 years at the Expiry Date need not be renewed; and
  - 19.5.6.2 the renewal of all lamps on the Project Facilities within the last 6 months of the Contract Period.
- 19.6 Handback Inspection
  - 19.6.1 Not later than 28 days after the Expiry Date, the DBFO Co and the Department's Nominee shall conduct a joint inspection of the Project Facilities (the "Handback Inspection"). Such inspection shall comply with the requirements set out in paragraph 2 of Part 4 of Schedule 4 [Handback Requirements] as applicable to each element of the Project Facilities.
  - 19.6.2 Within 90 days after the completion of the Handback Inspection, the Department's Nominee shall either:
    - 19.6.2.1 issue to the DBFO Co a Handback Certificate; or
    - 19.6.2.2 notify the DBFO Co in writing of his decision not to issue the Handback Certificate and state the reason for such decision.
  - 19.6.3 The Department's Nominee may refuse to issue the Handback Certificate if:
    - 19.6.3.1 the DBFO Co shall have failed to complete all of the Renewal Works; or
    - 19.6.3.2 the Project Facilities for any other reason do not comply with the Handback Requirements in all respects.
  - 19.6.4 Any notice given by the Department's Nominee in accordance with Clause 19.6.2.2 shall set out each respect in which the Renewal Works have not been completed or the Project Facilities do not comply with the Handback Requirements and shall state the Department's Nominee's estimate of the

cost of completing such Renewal Works and/or of procuring that the Project Facilities comply in all respects with the Handback Requirements.

- 19.6.5 The DBFO Co may, within 28 days after receipt of a notice given in accordance with Clause 19.6.2.2, by notice to the Department's Nominee object to any matter set out in the Department's Nominee's notice. The notice from the DBFO Co shall give details of the grounds for such objection and shall give the DBFO Co's proposals in respect of such matters.
- 19.6.6 If no agreement is reached between the DBFO Co and the Department's Nominee as to any matter referred to in the notice given in accordance with Clause 19.6.5 within 60 days of receipt by the Department's Nominee of such notice, then either the DBFO Co or the Department's Nominee may refer the matter to the Disputes Resolution Procedure for determination, as the case may be:
- 19.6.6.1 whether the Renewal Works have been completed;
  - 19.6.6.2 whether the Project Facilities comply in all respects with the Handback Requirements; and
  - 19.6.6.3 of the estimated cost of procuring that such Renewal Works are completed and that the Project Facilities comply in all respects with the Handback Requirements.
- 19.6.7 If it is agreed or determined in accordance with the Disputes Resolution Procedure that the DBFO Co has not completed the Renewal Works or that the Project Facilities do not comply in all respects with the Handback Requirements, then without prejudice to any other right or remedy of the Secretary of State the DBFO Co shall pay to the Secretary of State an amount equal to the estimated cost of completing such Renewal Works or procuring that the Project Facilities comply in all respects with the Handback Requirements, as agreed or determined in accordance with Clause 19.6.6 (the "Handback Amount"). Such payment shall be made not later than 14 days after such estimated cost has been agreed or determined in accordance with this Clause 19.6 [Handback Inspection].

## 19.7 Retention Account

- 19.7.1 The Secretary of State and the DBFO Co shall procure that the Retention Account is established with a bank located in the United Kingdom not later than the date which is 5 years prior to the expected Expiry Date. The Secretary of State may (if he so chooses) by notice in writing to the DBFO Co, designate the Retention Account as a "Charged Retention Account". Any interest accrued on any money standing to the credit of the Retention Account shall be credited to the Retention Account. All sums standing to the credit of the Retention Account from time to time, including without limitation any accrued interest, shall be dealt with only in accordance with the following provisions of this Clause 19 [Handback].
- 19.7.2 Subject to Clause 19.7.3, from the date which is 5 years prior to the expected Expiry Date, the Secretary of State shall withhold from any payment which would otherwise be due to the DBFO Co under this Agreement in respect of any DBFO Payment a sum equal to 40% of such

payment. The Secretary of State shall procure that such sum is deposited into the Retention Account on the date on which payment of such sum would, absent the provisions of this Clause 19.7.2, be due to the DBFO Co.

- 19.7.3 When the amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law to be made from such account) is equal to the Retention Sum, then subject to Clause 19.7.5.1 the Secretary of State shall not be entitled to withhold any further sums in accordance with Clause 19.7.2 and the DBFO Co shall be entitled to receive directly the full amount of any sum due to it under any other provision of this Agreement.
- 19.7.3A If when the Retention Sum is agreed or determined, the amount already standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by Law to be made from such account) exceeds the Retention Sum, then without prejudice to Clause 19.7.5.1 the Secretary of State and the DBFO Co shall, within 14 days after agreement or determination of the Retention Sum, pay the amount of such excess out of the Retention Account to the DBFO Co.
- 19.7.4 If, following the Initial Inspection, it is agreed or determined in accordance with Clause 19.3 [Renewal Programme] that no Renewal Works are required, then within 14 days of such agreement or determination the Secretary of State and the DBFO Co shall pay to the DBFO Co all sums standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law to be made from such account), but without prejudice to the provisions of Clause 19.7.5.
- 19.7.5 If, as a result of the Second Inspection:
- 19.7.5.1 the Renewal Amount is increased, then the provisions of Clause 19.7.2 shall apply, or shall again apply, until the amount held in the Retention Account equals the increased Retention Sum;
- 19.7.5.2 there is a decrease in the Renewal Amount, such that the total amount held in the Retention Account (including accrued interest but less any bank charges and less any deductions required by any Law to be made from such account) exceeds the revised Retention Sum, then the Secretary of State and the DBFO Co shall, within 14 days of the agreement or determination of the revised Renewal Amount in accordance with the provisions of Clause 19.5 [Revised Renewal Programme], pay the amount of such excess out of the Retention Account to the DBFO Co.
- 19.7.6 Within 14 days after the issue of a Handback Certificate in accordance with Clause 19.6.2.1, the Secretary of State and the DBFO Co shall pay the monies standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law to be made from such account) to the DBFO Co.

19.7.7 If the Department's Nominee gives a notice in accordance with Clause 19.6.2.2, then pending the agreement or determination in accordance with the Disputes Resolution Procedure of all matters referred to in that notice, the Secretary of State and the DBFO Co shall retain in the Retention Account whichever is the lesser of:

19.7.7.1 the amount standing to the credit of the Retention Account (including accrued interest), and

19.7.7.2 the amount stated by the Department's Nominee in the notice given in accordance with Clause 19.6.2.2 as his estimate of the cost of completing the Renewal Works and/or of procuring that the Project Facilities comply in all respects with the Handback Requirements,

and the balance (if any) of any amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law to be made from such account) shall be paid to the DBFO Co in accordance with Clause 19.7.6.

19.7.8 If any sum is retained in the Retention Account in accordance with Clause 19.7.7, then the Secretary of State and the DBFO Co shall continue to hold such sum in the Retention Account pending the agreement or determination under the Disputes Resolution Procedure of all matters raised in the notice given by the Department's Nominee in accordance with Clause 19.6.2.2.

19.7.9 Within 14 days after the agreement or determination in accordance with the Disputes Resolution Procedure of the Handback Amount, the Secretary of State and the DBFO Co shall pay out of the Retention Account to the Secretary of State an amount equal to the Handback Amount or, if the amount standing to the credit of the Retention Account is insufficient to pay the Handback Amount in full, the entire amount (including accrued interest but less any bank charges and less any deductions required by any Law to be made from such account) standing to the credit of the Retention Account. Any remaining sums standing to the credit of the Retention Account (after deducting the amount payable to the Secretary of State and any bank charges and any deductions required by any Law to be made from such account) shall be paid by the Secretary of State and the DBFO Co out of the Retention Account to the DBFO Co.

19.7.10 If the amount standing to the credit of the Retention Account is less than the Handback Amount, then the payment of any sum to the Secretary of State in accordance with Clause 19.7.9 in or towards satisfaction of the Handback Amount shall not in any way prejudice or affect any other rights or remedies of the Secretary of State for the purpose of recovering the remainder of the Handback Amount.

19.7.11 Upon the occurrence of an Event of Default, the Secretary of State may, at his option and without prejudice to any of his other rights or remedies, require that any amount standing to the credit of the Retention Account be applied in payment of any amount due from the DBFO Co to the Secretary of State or becoming due as a consequence of such Event of Default or any termination of this Agreement (including, without limitation, any

damages arising from such Event of Default). The DBFO Co and the Secretary of State shall pay to the Secretary of State out of the Retention Account such sum or, if the amount standing to the credit of the Retention Account is insufficient to pay such amount in full, the entire amount (including accrued interest but less bank charges and less any deductions required by any Law to be made from such account) standing to the credit of the Retention Account upon termination of this Agreement. Any remaining sums standing to the credit of the Retention Account (after deducting the amount payable to the Secretary of State and any bank charges and any deductions required by any Law to be made from such account) shall be paid by the Secretary of State and the DBFO Co out of the Retention Account to the DBFO Co.

19.7.12 Subject to satisfaction of the conditions set out in Sub-Clauses 19.7.12(a) and (b) below if, at any time following the establishment of the Retention Account, the DBFO Co has carried out, in compliance with the requirements of this Agreement, any of the Renewal Works (as such works are modified in accordance with Clause 19.5) it shall be entitled to withdraw from the Retention Account an amount (the "Interim Withdrawal Sum") equal to 40% of the reasonable cost of carrying out those elements of the Renewal Works provided that:

- (a) after such withdrawal the amount remaining in the Retention Account is not less than the value of A calculated in accordance with the following formula:

$$A = (0.4 \times [B+C]) - [D+E]$$

Where:

B = the value of the Renewal Amount agreed or determined in accordance with Clause 19.3 as increased (if applicable) in accordance with Clause 19.5;

C = the reasonable estimated cost of carrying out any further Maintenance Works or other works of renewal, reconstruction, repair or reinstatement required to be carried out in order to procure that the Project Facilities will, on the Expiry Date, satisfy the Handback Requirements that have been identified since the later of the date that the Renewal Amount was last calculated and the date that the last withdrawal from the Retention Account was made by the DBFO Co pursuant to this Clause including, for the avoidance of doubt, any such costs that were included as the value of C in any previous calculation of value of A;

D = the value of any previous withdrawals from the Retention Account made by the DBFO Co in accordance with this Clause;

E = the proposed Interim Withdrawal Sum;

- (b) if following the proposed withdrawal the amount in the Retention Account would be less than the value of A then the DBFO Co shall be entitled to withdraw so much of the Interim Withdrawal Sum as

would result in the amount remaining in the Retention Account following such withdrawal being a sum that is not less than the value of A.

- 19.7.13 The foregoing provisions of this Clause 19.7 [Retention Account] shall not apply if, not later than the date which is 5 years prior to the expected Expiry Date, the DBFO Co procures that a performance guarantee is provided to the Secretary of State in respect of the DBFO Co's obligations under this Clause 19 [Handback] (other than this Clause 19.7 [Retention Account]) by a bank or other institution approved by the Secretary of State and in form and substance acceptable to him (in each case in his absolute discretion).



21. **SECRETARY OF STATE'S OBLIGATIONS**

21.1 Connecting Roads

Without prejudice to Clause 39.1.15, the Secretary of State shall repair and maintain the Connecting Roads throughout the Contract Period having regard to the character of the highway and the traffic which is reasonably to be expected to use it and to the standard of maintenance appropriate for a highway of that character and used by such traffic.

21.2 Information

The Secretary of State shall provide to the DBFO Co such information within his possession or control with respect to the Project as the DBFO Co may reasonably request to enable it to perform its obligations under this Agreement, provided that the Secretary of State shall have no obligation to provide any information with respect to which he is subject to an obligation of confidentiality (whether under any Law or contract or otherwise).

**PART III**  
**RELATIONSHIPS AND MONITORING**

22. **REPRESENTATIVES**

22.1 The Department's Nominee

- 22.1.1 The Secretary of State has appointed the Department's Nominee to act as his agent in connection with all Operations. The Department's Nominee shall exercise the functions set out in Part 1 of Schedule 7 [Department's Nominee] and such other functions in respect of this Agreement as the Secretary of State may notify to the DBFO Co from time to time.
- 22.1.2 The Secretary of State may at any time, by notice to the DBFO Co, change the Department's Nominee.
- 22.1.3 During any period when there is no Department's Nominee, the Secretary of State shall carry out the functions which would otherwise be performed by the Department's Nominee.
- 22.1.4 Except as expressly stated in this Agreement or as otherwise authorised in writing by or on behalf of the Secretary of State, the Department's Nominee shall have no authority to relieve the DBFO Co of any of its obligations under this Agreement.
- 22.1.5 Except as notified by the Secretary of State to the DBFO Co in writing and subject to the limitation in Clause 22.1.4 the DBFO Co shall be entitled to treat any act of the Department's Nominee which is authorised by this Agreement as being expressly authorised by the Secretary of State, and the DBFO Co shall not be required to determine whether an express authority has in fact been given.
- 22.1.6 Any decision by any Department's Nominee is specific to the circumstances to which it relates, and shall not be construed as binding on, or limiting any other decision to be made by, that or any other Department's Nominee, whether in the same or similar circumstances or otherwise.
- 22.1.7 For the avoidance of doubt the Department's Nominee shall be entitled to consult anyone he considers appropriate in connection with the discharge of his duties in relation to this Agreement.

22.2 DBFO Co's Representative

- 22.2.1 The DBFO Co shall appoint a competent and qualified person to act as its agent in connection with this agreement. Such appointment shall be subject to the approval of the Secretary of State, such approval not to be unreasonably withheld or delayed.
- 22.2.2 The DBFO Co's Representative shall have full authority to act on behalf of the DBFO Co for all purposes of this Agreement. The Secretary of State and the Department's Nominee shall be entitled to treat any act of the DBFO Co's Representative in connection with this Agreement as being expressly authorised by the DBFO Co, and the Secretary of State and the

Department's Nominee shall not be required to determine whether any express authority has in fact been given.

22.3 Change of Representatives

22.3.1 The Secretary of State may, at any time and from time to time by notice to the DBFO Co, terminate the appointment of any Department's Nominee or appoint one or more substitute Department's Nominees. Any such notice shall specify the date on which such termination or substitution shall have effect, which date shall, other than in the case of an emergency, be such as will not cause serious inconvenience to the DBFO Co in the execution of its obligations hereunder.

22.3.2 Save in the case of death or serious illness, the appointment of the DBFO Co's Representative shall not be terminated by the DBFO Co without the prior approval of the Secretary of State. Immediately upon the DBFO Co's Representative ceasing to act and prior to any termination of the appointment by the DBFO Co, the DBFO Co shall by notice to the Secretary of State appoint a substitute. Such appointment shall be subject to the approval of the Secretary of State.

23. **MANAGEMENT SYSTEMS**

23.1 **Management Systems and Documentation**

23.1.1 The DBFO Co shall procure that all aspects of the Operations are the subject of Management Systems which comply with the provisions of this Clause 23 [Management Systems].

23.1.2 The Management Systems referred to in Clause 23.1.1 shall comprise:

23.1.2.1 Quality Management Systems;

23.1.2.2 Environmental Management Systems; and

23.1.2.3 Health & Safety Management Systems.

23.1.3 The Management Systems referred to in Clause 23.1.1 shall comply with:

23.1.3.1 the Technical Requirements (other than the requirements set out in Clauses 23.1.3.2, 23.1.3.3 and 23.1.3.4);

23.1.3.2 in the case of the Quality Management Systems, BS EN ISO 9001: 2000 or its successors;

23.1.3.3 in the case of Environmental Management Systems, BS EN ISO 14001 or its successors;

23.1.3.4 in the case of the Health & Safety Management Systems, OHSAS 18001 or its successors; and

23.1.3.5 Good Industry Practice,

and shall be reflected in appropriate documentation which is appropriate for the Management System in question, provided always that the Quality Management Systems shall be reflected in Quality Documentation which complies with the requirements set out in Part 1 of Schedule 5 [Principles for Quality Documentation].

23.1.4 Each Quality Management System shall be registered with and certified by an accredited third party assessment body not later than 18 months after the date of this Agreement.

23.1.5 The DBFO Co shall not commence or permit the commencement of any aspect of the Operations before those parts of:

23.1.5.1 the Quality Documentation;

23.1.5.2 the Environmental Management System Documentation; and

23.1.5.3 the Health & Safety Management System Documentation,

which concern such aspect of the Operations have been submitted to the Department's Nominee under the Review Procedure and there has been no objection thereto in accordance with the Review Procedure (on the grounds set out in paragraph 3.9 of Part 2 of Schedule 7 [Review Procedure]).

- 23.1.6 Where any aspect of the Operations is performed by more than one contractor or sub-contractor, then the provisions of this Clause 23 [Management Systems] shall apply in respect of each of such contractors or sub-contractors.
- 23.1.7 The DBFO Co shall submit to the Department's Nominee in accordance with the Review Procedure any proposed changes or additions to or revisions of any of:
- 23.1.7.1 the Quality Documentation;
  - 23.1.7.2 the Environmental Management System Documentation; or
  - 23.1.7.3 the Health & Safety Management System Documentation, and
- no such changes, additions or revisions shall be given effect unless there has been no objection thereto in accordance with the Review Procedure (on the grounds set out in paragraph 3.9 of Part 2 of Schedule 7 [Review Procedure]).
- 23.1.8 Without limitation to the generality of Clause 23.1.7, the DBFO Co shall from time to time submit to the Department's Nominee in accordance with the Review Procedure any changes to:
- 23.1.8.1 the Quality Documentation;
  - 23.1.8.2 the Environmental Management System Documentation; or
  - 23.1.8.3 the Health & Safety Management System Documentation,
- and required for such documentation to continue to reflect Management Systems which comply with the requirements set out in Clause 23.1.3. The Department's Nominee may object to any such proposed change only on the grounds set out in paragraph 3.9 of Part 2 of Schedule 7 [Review Procedure].
- 23.1.9 If the DBFO Co fails to propose any change required pursuant to Clause 23.1.8, then the Secretary of State may propose such change and it shall be dealt with in accordance with the Review Procedure as though it had been proposed by the DBFO Co.
- 23.1.10 If there is no objection under the Review Procedure to a part of the documentation referred to in Clause 23.1.5 or a change, addition or revision proposed pursuant to Clause 23.1.7, Clause 23.1.8 or Clause 23.1.9, then the relevant documentation shall be amended to incorporate such part, change, addition or revision.

## 23.2 Quality Documentation

- 23.2.1 Without limitation to the generality of Clause 23.1.3, there shall be:
- 23.2.1.1 Quality Documentation for the DBFO Co describing its Quality Management System for all aspects of the Operations meeting the requirements set out in Annex 1 to Part 1 of

Schedule 5 [Quality Documentation for the DBFO Co] (the "DBFO Co's Quality Documentation");

23.2.1.2 Quality Documentation for the Contractor describing its Quality Management System for undertaking the activities covered by the Construction Contract and meeting the requirements set out in Annex 2 to Part 1 of Schedule 5 [Quality Documentation for the Contractor] (the "Contractor's Quality Documentation");

23.2.1.3 Quality Documentation for the Designer describing its Quality Management System for undertaking the activities covered by the Design Contract and meeting the requirements set out in Annex 3 to Part 1 of Schedule 5 [Quality Documentation for the Designer] (the "Designer's Quality Documentation");

23.2.1.4 Quality Documentation for the Operator describing its Quality Management System for undertaking the activities covered by the Operation and Maintenance Contract and meeting the requirements set out in Annex 4 to Part 1 of Schedule 5 [Quality Documentation for the Operator] (the "Operator's Quality Documentation"); and

23.2.1.5 Quality Documentation for any other party contracting with the DBFO Co describing the Quality Management System for undertaking the activities covered by that party's contract with the DBFO Co and meeting the requirements set out in Annex 5 to Part 1 of Schedule 5 [Other Quality Documentation].

23.2.2 The DBFO Co shall comply with the DBFO Co's Quality Documentation and shall procure that:

23.2.2.1 the Designer complies with the Designer's Quality Documentation;

23.2.2.2 the Contractor complies with the Contractor's Quality Documentation;

23.2.2.3 the Operator complies with the Operator's Quality Documentation; and

23.2.2.4 any other party contracting with the DBFO Co complies with that party's Quality Documentation.

### 23.3 Environmental Management System Documentation

23.3.1 Without limitation to the generality of Clause 23.1.3, there shall be:

23.3.1.1 Environmental Management System Documentation for the DBFO Co describing the Environmental Management Systems for undertaking the Operations; and

23.3.1.2 Environmental Management System Documentation for any other party contracting with the DBFO Co describing the Environmental Management Systems for undertaking the activities covered by that party's contract with the DBFO Co.

23.3.2 The DBFO Co shall comply with the Environmental Management System Documentation referred to in Clause 23.3.1.1 and shall procure any party contracting with the DBFO Co complies with the Environmental Management System Documentation that describes the Environmental Management Systems for undertaking the activities covered by that contract with the DBFO Co.

#### 23.4 Health & Safety Management System Documentation

23.4.1 Without limitation to the generality of Clause 23.1.3, there shall be:

23.4.1.1 Health & Safety Management System Documentation for the DBFO Co describing the Health & Safety Management Systems for undertaking the Operations; and

23.4.1.2 Health & Safety Management System Documentation for any other party contracting with the DBFO Co describing the Health & Safety Management System for undertaking the activities covered by that party's contract with the DBFO Co.

23.4.2 The DBFO Co shall comply with the Health and Safety Management System Documentation referred to in Clause 23.4.1.1 and shall procure any party contracting with the DBFO Co complies with the Health and Safety Management System Documentation that describes the Health and Safety Management Systems for undertaking the activities covered by that contract with the DBFO Co.

#### 23.5 Manuals, Plans and Procedures

If any documentation required by Clause 23.1.3 refers to, relies on or incorporates any manual, plan, procedure or like document then such manual, plan, procedure or other document or the relevant parts thereof shall (unless the Department's Nominee otherwise agrees) be submitted to the Department's Nominee at the time that the relevant documentation or part of or change, addition or revision to the documentation is submitted in accordance with the Review Procedure, and the contents of such manual, plan, procedure or other document shall be taken into account in the consideration of the relevant documentation or part of or change, addition or revision to the documentation in accordance with the Review Procedure. The Department's Nominee may require the amendment of any such manual, plan, procedure or other document to the extent necessary to enable the relevant documentation to satisfy the requirements of Clause 23.1.3.

#### 23.6 Additional Information

Notwithstanding any other provision of this Clause 23 [Management Systems], the DBFO Co shall provide to the Department's Nominee such information as the Department's Nominee may reasonably require to demonstrate compliance with this Clause 23 [Management Systems].

#### 23.7 Trials and Testing

- 23.7.1 Where the DBFO Co is required by Table NG 1/1 in the Notes for Guidance to carry out any calibration, sample, trial or test, such calibration, sample, trial or test shall be carried out by the Testing Contractor in accordance with the following provisions of this Clause 23.7 [Trials and Testing].
- 23.7.2 Save as referred to in Clause 23.7.3, all on-site and off-site calibrations, samples, trials and tests shall be carried out by laboratories accredited by the United Kingdom Accreditation Service ("UKAS") for such calibrations, samples, trials and tests.
- 23.7.3 In respect of any calibration, sample, trial or test to be carried out at an on-site laboratory during an initial period not exceeding 30 days from the first calibration, sample, trial or test to be carried out at that laboratory:
- 23.7.3.1 the DBFO Co shall take two samples for calibration, sampling, trial or testing, one of which shall be calibrated, sampled, tried and tested at the on-site laboratory; and
- 23.7.3.2 if the on-site laboratory does not obtain a UKAS accreditation within such initial period, then the calibration, sample, trial or test referred to in Clause 23.7.3.1 shall not constitute a valid calibration, sample, trial or test in accordance with this Agreement and the second set of samples shall be taken to and calibrated, sampled, tried or tested at an off-site laboratory which is UKAS accredited.
- 23.7.4 For the avoidance of doubt, the DBFO Co shall be responsible, without limitation, at its own expense for any remedial work required as a result of any failure to pass any calibration, sample, trial or test required in accordance with this Agreement or as a result of any laboratory not being accredited as required by this Agreement.

## 23.8 DBFO Co Quality Director

The DBFO Co shall at all times, employ a DBFO Co Quality Director, who shall, irrespective of his other responsibilities, have defined authority for ensuring the establishment and maintenance of the DBFO Co's Quality Management System and reporting on the performance of the DBFO Co's Quality Management System. The identity of the DBFO Co Quality Director (and any replacement) and his job specification and responsibilities shall be subject to the approval of the Secretary of State. Without limitation to the foregoing, the job specification and responsibilities of the DBFO Co Quality Director shall include:

- 23.8.1 ensuring the effective operation of the DBFO Co's Quality Management System;
- 23.8.2 auditing the DBFO Co's Quality Management System and the other Quality Management Systems referred to in this Clause 23 [Management Systems] at regular intervals and reporting the findings of such audits to the Department's Nominee;

- 23.8.3 reviewing all Quality Management Systems referred to in this Clause 23 [Management Systems] at intervals agreed with the Department's Nominee to ensure their continued suitability and effectiveness;
- 23.8.4 liaising with the Department's Nominee on all matters relating to quality management; and
- 23.8.5 ensuring that relevant quality records are retained for the retention periods required by Clause 25 [Records].

23.9 Quality Monitoring

Without limitation to Clause 26 [Monitoring of Performance], the Department's Nominee may carry out audits of the Management Systems referred to in Clause 23 [Management Systems] (including without limitation all Management Systems Documentation) at approximate intervals of 3 months and may carry out other periodic monitoring, spot checks and auditing of such Management Systems.

24. **REPORTS AND INFORMATION**

24.1 **Required Reports**

The DBFO Co shall submit to the Department's Nominee the reports specified in Part 2 of Schedule 14 [Reports], in such numbers as provided therein, which reports shall, at the Department's Nominee's request, be accompanied by a copy of such report or any part thereof on computer diskette or other electronic storage device in such form and compatible with such software as the Department's Nominee shall reasonably require.

24.2 **Form**

The form of such Reports shall be agreed with the Department's Nominee, such agreement not to be unreasonably withheld.

24.3 **Further Information**

The DBFO Co shall at any time and from time to time at its own cost provide to the Department's Nominee such information (including any copy correspondence) with respect to the Project as the Department's Nominee may reasonably require.

24.4 **Objections to Reports**

24.4.1 If the Department's Nominee considers that any Report either has not been compiled in accordance with the provisions of this Agreement or has been based on erroneous information or data, then it may serve a notice to that effect on the DBFO Co within 28 days of receipt of such Report objecting to such Report.

24.4.2 If any such objection has not been resolved by agreement between the Department's Nominee and the DBFO Co within 14 days after the service of such notice, then either of them may refer the matter to the Disputes Resolution Procedure.

24.5 **Revisions to Reports**

If either:

24.5.1 the resolution (whether by agreement or determination under the Disputes Resolution Procedure) of any objection made pursuant to Clause 24.4.1; or

24.5.2 the discovery of any Missing Data,

requires any revision or adjustment to any Report, then the DBFO Co shall, as soon as practicable, issue revised versions of each affected Report and such revised Report shall for all purposes of this Agreement take the place of the original Report.

24.6 **TUPE Information**

24.6.1 Where notified in writing by the Secretary of State to do so, the DBFO Co shall provide TUPE Information to the Secretary of State within 14 days of such notice.

- 24.6.2 The Secretary of State may disclose TUPE Information to any Prospective Tenderer and, if requested in writing by the DBFO Co to do so, shall ensure that prior to such disclosure the Prospective Tenderer undertakes not to disclose (unless required by law to do so) the information to any other person other than a person who:
- 24.6.2.1 is a servant or agent (including legal adviser) of the Prospective Tenderer; and
  - 24.6.2.2 has undertaken not to disclose that information unless required by law to do so.
- 24.6.3 Where TUPE Information has been provided, the DBFO Co shall:
- 24.6.3.1 inform the Secretary of State of any change to the information provided or provide any new TUPE Information not previously provided;
  - 24.6.3.2 clarify any matter upon which clarification is requested by the Secretary of State; and
  - 24.6.3.3 co-operate with any other request made by the Secretary of State concerning the TUPE Information or the DBFO Co's employees or the employees of its contractors or sub-contractors,
- within 14 days of any such change, discovery of new information, or receipt of such request.
- 24.6.4 Subject to Clause 24.6.2 above and unless required by law to do so, the Secretary of State shall not disclose TUPE Information (or any part of that information) to any other person.
- 24.6.5 For the purposes of this Clause 24.6 [TUPE Information], "TUPE Information" means written details of the following to the extent that the DBFO Co is not prohibited by Legislation from revealing the same:
- 24.6.5.1 the total number of employees employed by the DBFO Co or by any of its contractors and sub-contractors whose work (or any part of it) is work undertaken for the purposes of this Agreement;
  - 24.6.5.2 in relation to each employee who falls within the scope of Clause 24.6.5.1 above:
    - 24.6.5.2.1 the employee's date of birth and gender and the terms of any pension scheme of which the employee is a member (so that appropriate pension entitlements can be calculated and provided for); and
    - 24.6.5.2.2 the employee's salary, job title, normal working hours, length of service, contractual period of notice, any pay settlement covering future dates which has already been agreed

by the DBFO Co and any redundancy entitlement;

24.6.5.3 information relating to or connected with the employment of employees falling within the scope of Clause 24.6.5.1 above, including details of:

24.6.5.3.1 terms and conditions of employment including terms incorporated from any collective agreement;

24.6.5.3.2 any staff handbook or employment policies or procedures;

24.6.5.3.3 any outstanding or potential liability for past breaches of such contracts;

24.6.5.3.4 any employee who is on sick, maternity or other statutory or contractual leave (other than normal holiday leave) whether paid or unpaid;

24.6.5.3.5 any outstanding or potential statutory liability (for example, any claim for unfair dismissal or under non-discrimination legislation); and

24.6.5.3.6 any other outstanding or potential liability to be met by the Prospective Tenderer if its tender is accepted; and

24.6.5.4 such other information as the Secretary of State may reasonably require in relation to the DBFO Co's employees or the employees of its contractors (other than the name or as far as is possible other details which enable any employee to be identified unless both the DBFO Co and that employee have consented in writing to the provision of such details).

24.6.6 For the purposes of this Clause 24.6 [TUPE Information], "Prospective Tenderer" means a person who has been or is to be invited to submit a tender in relation to the provision of works or services of a similar type to any of those provided by the DBFO Co in relation to the Project Road or any part of the Project Road.

## 24.7 Changes to the Workforce

24.7.1 During the 12 month period preceding the expiry of this Agreement or at any time after either Party has given notice to terminate this Agreement, the DBFO Co shall not without the prior written agreement of the Secretary of State:

24.7.1.1 materially amend or offer, promise or agree for the future materially to amend the terms and conditions of employment of any employee falling within the scope of Clause 24.6.5.1; or

24.7.1.2 materially increase or make offers of employment so as materially to increase the number of employees whose work (or any part of it) is work undertaken for the purposes of this Agreement.

24.7.2 In Clause 24.7.1 above, what is material:

24.7.2.1 for the purposes of the phrase "materially amend" shall be determined by considering the individual contract of employment as a whole; or

24.7.2.2 for the purposes of the phrase "materially increase" shall be determined by considering this Agreement as a whole.

#### 24.8 Parliamentary Questions and Issues

24.8.1 Without prejudice to Clause 24.3, the DBFO Co shall, at its own cost and within the timescale from time to time prescribed by the Secretary of State to ensure compliance with all relevant procedures, provide any information within the possession of the DBFO Co or any company which is at the relevant time an Associated Company of the DBFO Co or any of their respective directors, officers, employees, servants or agents which is requested by the Secretary of State in relation to his statements to or responses to questions or issues raised by or on behalf of the United Kingdom Parliament, or any member thereof (provided that the DBFO Co (or such other company) is not prohibited by any Legislation from providing the same).

24.8.2 Notwithstanding the provisions of Clause 50 [Confidentiality], the Secretary of State shall be entitled to disclose in the course of carrying out his public functions any information to which Clause 24.8.1 applies to the extent necessary for the purpose of discharging such public function.

#### 24.9 Development Control

Without prejudice to Clause 24.3, the DBFO Co shall, upon request by the Secretary of State, consider and provide advice and recommendations to the Secretary of State in respect of all development proposals (whether or not in the immediate vicinity of the Project Facilities) which might in the opinion of the Secretary of State have a safety or traffic impact upon the whole or any part of the Project Facilities. Without prejudice to the generality of the foregoing the DBFO Co shall within such reasonable period specified by the Secretary of State and using Good Industry Practice:

24.9.1 review the development proposals (including, any planning application and related papers);

24.9.2 submit to the Secretary of State preliminary, reasoned advice describing in detail the safety and traffic implications (if any) that such proposals might have in relation to the Project Facilities;

24.9.3 advise the Secretary of State whether it considers that any further action (including the commissioning of any further investigations or studies) is required or desirable in the circumstances as a consequence of such proposals;

24.9.4 keep the Secretary of State informed of the progress of the development proposals including the progress of any planning application,

provided that such further action as referred to in Clause 24.9.3 (other than further review or advice by the DBFO Co which shall be provided on terms to be agreed between the Secretary of State and the DBFO Co) that the Secretary of State determines is necessary shall be commissioned by the Secretary of State at his own expense.

25. **RECORDS**

25.1 **Required Records**

25.1.1 The DBFO Co shall maintain and update those records relating to the Project set out in Part 1 of Schedule 14 [Records].

25.1.2 The Secretary of State shall be entitled at his own cost within 180 days after the Commencement Date to deliver up to the DBFO Co the existing records of the Secretary of State (or copies thereof) in respect of the Project Facilities (or any part thereof). In such event, the DBFO Co shall retain such records in safe storage at its own cost and such records shall thereafter be treated for all purposes as though they were part of the records referred to in Clause 25.1.1 except that there shall be no obligation on the DBFO Co to retain the records delivered by the Secretary of State pursuant to this Clause 25.1.2 in any different or better condition than that in which they were provided by the Secretary of State. For the avoidance of doubt this exception shall not alter or diminish the DBFO Co's obligations regarding the treatment and keeping of new data and records that are created using information from those records.

25.2 **Audit**

The records referred to in Clause 25.1 [Required Records] shall be kept in good order and in such form as to be capable of audit (including by electronic means) by the Department's Nominee. The DBFO Co shall make such records available for inspection by or on behalf of the Secretary of State and the Department's Nominee at all reasonable times.

25.3 **Copies**

The Secretary of State and the Department's Nominee shall be entitled to take copies of all such records free of charge and for that purpose to use such copying facilities as are maintained at the place where the records are kept.

25.4 **Retention of Records**

25.4.1 Without prejudice to any Legal Requirement, all records referred to in Clause 25.1 [Required Records] shall be retained for no less than the period specified in respect of such records in Part 1 of Schedule 14 [Records] or, if no such period is specified, a period of 7 years after the end of the Contract Year to which such records relate.

25.4.2 Where the period for the retention of any records (as set out against the relevant class of records in Part 1 of Schedule 14 [Records]) has expired, then the DBFO Co shall notify the Secretary of State as to what it intends to do with such records. If it intends to dispose of them or subsequently decides to dispose of them, the DBFO Co shall notify the Secretary of State, and if the Secretary of State shall within 40 days of such notice elect to receive those records or any part of them the DBFO Co, at its own cost, shall deliver up such records to the Secretary of State in the manner and at such location as the Secretary of State shall reasonably specify.

25.4.3 Upon the termination, for whatever reason, of this Agreement, the DBFO Co shall, at its own cost, deliver up to the Secretary of State, in the

manner and at such location as the Secretary of State shall reasonably specify, all such records as are referred to in Clause 25.1 [Required Records] which were in existence at the Termination Date (or, where those records are required by Law to remain with the DBFO Co, copies thereof) or such part of such records as the Secretary of State may by notice to the DBFO Co specify. The Secretary of State shall make available to the DBFO Co all the records the DBFO Co delivers up pursuant to this Clause 25.4.3, subject to reasonable notice.

25.4.4 The DBFO Co shall retain in safe storage for a period of not less than 5 years following the Termination Date all such records as are referred to in Clause 25.4.3 which the Secretary of State does not require to be delivered up to him. The costs of retaining those records in safe storage shall be borne:

25.4.4.1 by the DBFO Co where the termination arises as a result of an Event of Default;

25.4.4.2 by the Secretary of State where the termination arises as a result of a DBFO Co Termination Event; and

25.4.4.3 in cases of termination other than those governed by Clauses 25.4.4.1 and 25.4.4.2 by the DBFO Co and the Secretary of State in equal proportions.

## 25.5 Computer Records

To the extent that the records of the DBFO Co are to be created or maintained on a computer or other electronic storage device, then the DBFO Co shall agree with the Department's Nominee a procedure for back-up and off-site storage for copies of such records and shall adhere to such agreed procedure and shall cause the Contractor, the Designer, the Operator and its or their sub-contractors to implement and adhere to such agreed procedure.

26. **MONITORING OF PERFORMANCE**

26.1 **Breach of this Agreement**

26.1.1 The DBFO Co shall notify the Department's Nominee of the occurrence of any matter specified in Schedule 18 [Penalty Points] and any other breach of its obligations under this Agreement as soon as practicable after it becomes aware of such matter but in any case within 7 days of such matter becoming apparent to the DBFO Co or, if earlier, of the date upon which the same ought reasonably to have become apparent to the DBFO Co.

26.1.2 If at any time the Department's Nominee is of the opinion that the DBFO Co has failed to perform any of its obligations under this Agreement (whether or not such failure has been notified under Clause 26.1.1) and such failure is capable of remedy, then the Department's Nominee will, unless such remediable failure relates to either safety, health or security or constitutes an emergency or constitutes or gives rise to a Nuisance or unless a notice under this Clause has been served in respect of the same kind of failure within the preceding one year or where the matter to which the failure relates occurs annually only then within the preceding two years (each such failure being an "Immediate Penalty Point Failure"), serve a notice (a "Remedial Notice") on the DBFO Co requiring the DBFO Co (at its own cost and expense) to remedy such failure (and any damage resulting from such failure) within a reasonable period (the "Remedial Period") and for the avoidance of doubt a failure to perform shall include a failure to remedy as required by this Clause 26.1.2.

26.1.3 Without prejudice to Clause 26.1.2, if an Immediate Penalty Point Failure shall occur, then the Department's Nominee may (in his absolute discretion) serve a Remedial Notice on the DBFO Co.

26.2 **Penalty Points**

26.2.1 If at any time:

26.2.1.1 any Report indicates or the Department's Nominee is notified or otherwise becomes aware that the DBFO Co has failed to perform any of its obligations under this Agreement which failure is incapable of remedy;

26.2.1.2 the Department's Nominee serves a Remedial Notice under Clause 26.1.2 or 26.1.3 and the DBFO Co fails to remedy the failure within the Remedial Period; or

26.2.1.3 an Immediate Penalty Point Failure occurs and the Department's Nominee does not serve a Remedial Notice under Clause 26.1.3,

then the Department's Nominee may (without prejudice to any other right or remedy available to the Secretary of State) by notice to the DBFO Co award points (herein called "Penalty Points") calculated by reference to the table set out in Schedule 18 [Penalty Points] provided always that any notice awarding Penalty Points which would result in the DBFO Co having been awarded in excess of 100 Penalty Points in any 1 year period shall be counter-signed by a representative of the Secretary of State who is more senior than the Department's Nominee.

26.2.2 The Parties acknowledge and agree that:

26.2.2.1 Schedule 18 [Penalty Points] provides a list of examples of matters which may attract Penalty Points but is only by way of illustration of the matters for which Penalty Points may be awarded and the severity attributed to such defaults and in no way restricts the Department's Nominee's right to award Penalty Points for other failures by the DBFO Co to perform its obligations under this Agreement (including for the avoidance of doubt its obligations under the Construction Requirements) or to enforce other remedies in respect of such failures. For the avoidance of doubt, the number of points set out in Schedule 18 [Penalty Points] in respect of a matter is the maximum number of Penalty Points which may be awarded in respect of a single breach of the relevant obligation;

26.2.2.2 in respect of any single failure by the DBFO Co to perform its obligations under this Agreement (or where a Remedial Notice has been served, any failure by the DBFO Co to remedy the failure within the Remedial Period) not listed in Schedule 18, the number of Penalty Points which may be awarded shall be consistent with the number of Penalty Points attributable to breaches of a similar severity which are listed in Schedule 18 and, in any event, shall not exceed 5 Penalty Points (but, in the case of a failure which is capable of remedy, without prejudice to the right to award further Penalty Points if the failure is not remedied); and

26.2.2.3 if a single act or a single failure to act by or on behalf of the DBFO Co results in a breach of more than one of the DBFO Co's obligations under this Agreement so that the Department's Nominee would be entitled to award Penalty Points in respect of each of those breaches, the maximum aggregate number of Penalty Points that the Department's Nominee can award in respect of the breaches caused by such act shall be the lesser of (i) 12 Penalty Points and (ii) the aggregate of the numbers of Penalty Points that the Department's Nominee would have been entitled to award for each of the breaches that resulted from the relevant single act or a single failure to act.

26.2.3 The DBFO Co may, within 28 days of receipt of any notice pursuant to Clause 26.2.1, object to the award of any such Penalty Points or, where Penalty Points have been awarded in respect of a matter which is not set out in Schedule 18 [Penalty Points], to the number of such Penalty Points. If the Department's Nominee and the DBFO Co are unable to reach agreement on any such matter within 14 days of such objection by the DBFO Co, either may refer the Dispute for resolution under the Disputes Resolution Procedure. In respect of any Dispute as to the number of Penalty Points to be awarded pursuant to Clause 26.2.2, the issue for decision shall be either how many Penalty Points should be awarded in comparison with the number of Penalty Points set out in Schedule 18

[Penalty Points] for defaults of equivalent severity or the application of Clause 26.2.2.3.

### 26.3 Warning Notices

Without prejudice to any other right or remedy available to the Secretary of State, if at any time the DBFO Co has committed any material breach of its obligations under this Agreement or has been awarded a total of 100 or more Penalty Points in any 3 year period, then the Department's Nominee may give written notice (herein called a "Warning Notice") to the DBFO Co setting out in general terms the matter or matters giving rise to such notice and containing a reminder to the DBFO Co of the implications of such notice. Any such notice shall state on its face that it is a "Warning Notice" and shall be signed by or on behalf of the Secretary of State by a representative of the Secretary of State who is more senior than the Department's Nominee.

### 26.4 Increased Monitoring

In the event of the DBFO Co either:

26.4.1 being awarded a total of 50 or more Penalty Points in any 1 year period; or

26.4.2 receiving one or more Warning Notices,

the Department's Nominee may (without prejudice to any other right or remedy available to the Secretary of State) by notice to the DBFO Co increase the level of its monitoring of the DBFO Co until such time as the DBFO Co shall have demonstrated to the reasonable satisfaction of the Department's Nominee that it will perform and is capable of performing its obligations under this Agreement. The notice to the DBFO Co shall specify the additional measures to be taken by the Department's Nominee in monitoring the DBFO Co in response to the matters which led to such Penalty Points being awarded or Warning Notice sent. The DBFO Co shall compensate the Secretary of State for all costs incurred by him as a result of such increased level of monitoring (including, without limitation, the relevant administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads).

### 26.5 Step-In Rights

26.5.1 Without prejudice to Clause 26.5.2, if at any time the Department's Nominee serves a notice under Clause 26.1.2 and the DBFO Co fails to remedy the failure within the Remedial Period, then the Secretary of State may (without prejudice to any other right or remedy available to him) himself take such steps as necessary to remedy such failure or engage others to take such steps, and the provisions of Clauses 26.5.3 and 26.5.4 shall apply.

26.5.2 Notwithstanding any other provision of this Agreement and without prejudice to any other right or remedy of the Secretary of State:

26.5.2.1 in the event that the Secretary of State considers that a breach by the DBFO Co of an obligation under this Agreement may create an immediate and serious threat to public safety; or

26.5.2.2 in the event of an emergency; or

26.5.2.3 where it appears to the Secretary of State necessary or expedient in the interests of road safety; or

26.5.2.4 where it appears to the Secretary of State necessary in order to secure the carrying out of any statutory function,

the Secretary of State may give notice requiring the DBFO Co forthwith to take such steps as he considers necessary or expedient to mitigate or preclude such state of affairs. In the event that the DBFO Co shall fail to take such steps as the Secretary of State may think necessary and within such time as the Secretary of State shall think fit, then the Secretary of State may take such steps himself or engage others to take such steps, and the provisions of Clauses 26.5.3 and 26.5.4 shall apply.

26.5.3 To the extent that the Parties shall agree, or it shall be determined under the Disputes Resolution Procedure, that the DBFO Co had not failed to perform its obligations under this Agreement (in the case of any action taken pursuant to Clause 26.5.1) or the Secretary of State was not reasonable in requiring the DBFO Co to take such steps as are referred to in Clause 26.5.2 or, in the case of Clause 26.5.2.1, that no such breach had occurred or, in the case of Clause 26.5.2.4, such steps were not necessary in order to secure the carrying out of any statutory function (any such determination to be made on the basis of the facts available to the Secretary of State at the time he took or required such action to be taken), then the provisions of Annex 3 to Part 1 of Schedule 12 [Compensation Events] shall apply.

26.5.4 Except in the circumstances referred to in Clause 26.5.3, the DBFO Co shall reimburse the Secretary of State for all costs incurred by him in taking the steps or engaging others to take the steps referred to in Clause 26.5.1 or Clause 26.5.2 (including, without limitation, the relevant administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads).

## 26.6 Removal of Personnel

The Department's Nominee may require the DBFO Co to remove forthwith from the Site and Adjacent Areas any person who, in the opinion of the Department's Nominee, misconducts himself or is incompetent or negligent in the proper performance of his duties, or whose presence on the Site or Adjacent Areas is otherwise considered by the Department's Nominee to be undesirable, and such person shall not be again allowed upon the Site or the Adjacent Areas without the consent of the Department's Nominee.

## 26.7 Persistent Neglect

26.7.1 If the Department's Nominee reasonably considers that the DBFO Co is neglecting persistently to comply with any of its obligations under this Agreement and provided that the Department's Nominee shall have issued Penalty Points in respect of such failure to perform such obligation in accordance with Clause 26.2:

26.7.1.1 on at least 3 separate occasions within the previous 48 months, where the obligation in question only falls to be performed once per year;

- 26.7.1.2 on at least 3 separate occasions within the previous 24 month period where the obligation in question only falls to be performed twice per year;
- 26.7.1.3 on at least 6 separate occasions within the previous 24 month period where the obligation in question falls to be performed quarterly;
- 26.7.1.4 on at least 9 separate occasions within the previous 12 month period where the obligation in question falls to be performed monthly;
- 26.7.1.5 on at least 9 separate occasions within the previous 6 month period where the obligation in question falls to be performed fortnightly;
- 26.7.1.6 on at least 9 separate occasions within the previous 3 month period, where the obligation falls to be performed weekly;
- 26.7.1.7 on at least 15 separate occasions within the previous month (provided that each such occasion relates to a failure occurring on a different day within such month), where the obligation falls to be performed on a daily or continuous basis; or
- 26.7.1.8 where the frequency of performance of an obligation falls between any categories listed in Clauses 26.7.1.1 to 26.7.1.7 above, on that number of occasions determined in accordance with Clause 26.7.1A within a period determined in accordance with Clause 26.7.1A,

then the Department's Nominee may (without prejudice to any other right or remedy available to the Secretary of State) issue a Persistent Neglect Notice in respect of such persistent neglect.

26.7.1A Where the frequency of performance of an obligation (the "Relevant Obligation") falls between the categories listed in Clauses 26.7.1.1 to 26.7.1.7, then for the purposes of Clause 26.7.1.8 the number of occasions upon which Penalty Points shall have been issued and the period during which such Penalty Points shall have been issued in respect of such Relevant Obligation in order for the Department's Nominee to issue a Persistent Neglect Notice shall each be determined on a pro rata basis (rounded up to the nearest whole number) by reference to frequencies of performance, the numbers of Penalty Points and periods referred to in Clauses 26.7.1.1 to 26.7.1.7 and the frequency with which the Relevant Obligation falls to be performed.

26.7.2 Within 28 days of receipt of a Persistent Neglect Notice the DBFO Co shall issue to the Department's Nominee:

- 26.7.2.1 where the Persistent Neglect Notice relates to breach of an obligation which such breach is capable of remedy, a Persistent Neglect Remedy Programme for the DBFO Co to remedy such breach within a reasonable time;

26.7.2.2 a Persistent Neglect Notice Plan; and

26.7.2.3 a Persistent Neglect Undertaking.

- 26.7.3 Within 14 days of receipt of a Persistent Neglect Remedy Programme in accordance with Clause 26.7.2, the Department's Nominee shall notify the DBFO Co whether or not he considers the Persistent Neglect Remedy Programme to be reasonable. If the Department's Nominee does not so notify the DBFO Co then the Persistent Neglect Remedy Programme issued by the DBFO Co in accordance with Clause 26.7.2 shall be deemed agreed. Where the Department's Nominee notifies the DBFO Co that he does not consider the Persistent Neglect Remedy Programme to be reasonable then the Parties shall use their reasonable endeavours to agree any necessary amendments to the Persistent Neglect Remedy Programme. In the absence of agreement within 7 days of the Department's Nominee's notification then either Party may refer the matter for resolution under the Disputes Resolution Procedure.
- 26.7.4 Within 14 days of receipt of a Persistent Neglect Notice Plan in accordance with Clause 26.7.2, the Department's Nominee shall notify the DBFO Co whether or not he considers the Persistent Neglect Notice Plan to be reasonable. If the Department's Nominee does not so notify the DBFO Co then the Persistent Neglect Notice Plan issued by the DBFO Co in accordance with Clause 26.7.2 shall be deemed agreed. Where the Department's Nominee notifies the DBFO Co that he does not consider the Persistent Neglect Notice Plan to be reasonable then the Parties shall use their reasonable endeavours to agree any necessary amendments to the Persistent Neglect Notice Plan. In the absence of agreement within 7 days of the Department's Nominee's notification then either Party may refer the matter for resolution under the Disputes Resolution Procedure.
- 26.7.5 Where a Persistent Neglect Notice issued by the Department's Nominee relates to breach of an obligation which such breach is capable of remedy, the DBFO Co shall remedy such breach in accordance with the Persistent Neglect Remedy Programme agreed or determined in accordance with Clause 26.7.3.
- 26.7.6 The DBFO Co shall implement any Persistent Neglect Notice Plan agreed or determined in accordance with Clause 26.7.4.

27. **STATUTORY POWERS**

27.1 **Application**

Whenever the exercise by the Secretary of State of any statutory power is essential to enable the DBFO Co to perform any obligation under this Agreement, the provisions of this Clause 27 [Statutory Powers] shall apply, save where the provisions of Clauses 8.6.3 and 8.6.4 and/or Clause 28.4.4 and/or Clause 29.3.4 and/or Part 3 of Schedule 13 [Subsequent Schemes] and/or Schedule 22 [Security of the Site] apply.

27.2 **Procedure**

27.2.1 If the DBFO Co believes that the exercise by the Secretary of State of any statutory power is essential to enable the DBFO Co to perform any obligation under this Agreement, the DBFO Co shall give notice to that effect to the Secretary of State.

27.2.2 Any notice given by the DBFO Co in accordance with Clause 27.2.1 shall:

27.2.2.1 clearly specify the action requested of the Secretary of State, the duty of the DBFO Co under this Agreement in respect of which such action is requested and the reasons why such action by the Secretary of State is required;

27.2.2.2 indicate the time by which the requested action is required; and

27.2.2.3 set out any recommendation by the DBFO Co in respect of the requested action.

27.2.3 Within 21 days after receipt of a notice given in accordance with Clause 27.2.1, the Secretary of State shall acknowledge receipt of such notice and shall give his good faith estimate of the date on which he will respond on the merits of the request, provided that no such estimate shall be binding on the Secretary of State.

27.2.4 The Secretary of State shall respond to the merits of the request contained in the notice given in accordance with Clause 27.2.1 as soon as reasonably practicable in the circumstances, taking into consideration, inter alia, any requirement for consultation with the public or other interested parties in connection with such request.

27.3 **No Fetter on Discretion**

The Secretary of State shall consider on its merits in accordance with his statutory duties any request for action contained in a notice given in accordance with Clause 27.2.1. Without in any way limiting the discretion of the Secretary of State in responding to any such request, the Secretary of State shall, in reaching any such decision, give consideration, inter alia, to the matters set out in Clause 27.4 [Relevant Considerations]. The decision of the Secretary of State on the merits of the request shall not be subject to review under the Disputes Resolution Procedure.

27.4 **Relevant Considerations**

The considerations referred to in Clause 27.3 [No Fetter on Discretion] are the following:

- 27.4.1 whether the Secretary of State has the statutory power to take the action requested;
- 27.4.2 whether there is any alternative course available to the DBFO Co (and the cost of such alternative course) which would not require action by the Secretary of State;
- 27.4.3 the effect the requested action would have on the interests of any third parties;
- 27.4.4 whether the timing and substance of the request is such as to enable the Secretary of State to consider the merits of the request in accordance with the principles of procedural fairness (taking into account, where appropriate, the necessity or desirability of consultation with other interested parties); and
- 27.4.5 whether the action requested would have any implications for safety, either of Users or of any other third parties.

#### 27.5 Refusal of Request

- 27.5.1 Subject to Clauses 27.5.2 and 27.5.4, if, in the exercise of his discretion, the Secretary of State refuses to take the action requested, then the DBFO Co shall be relieved from liability under this Agreement to the extent that by reason of such refusal the DBFO Co is not able to perform the obligations identified in the request contained in the notice given in accordance with Clause 27.2.1.
- 27.5.2 The DBFO Co shall be relieved of its liability in accordance with Clause 27.5.1 only if it has taken all steps necessary to mitigate the effects of the refusal of the Secretary of State to take the requested action.
- 27.5.3 If the failure to take any action requested in a notice given in accordance with Clause 27.2.1 renders impossible (and not merely more expensive) the DBFO Co's performance of this Agreement (as a whole) or has a fundamental effect on the rights or obligations of the DBFO Co under this Agreement, then following:
  - 27.5.3.1 consultation for a period of not less than 120 days from the date of the Secretary of State's response under Clause 27.2.4 to reach a solution acceptable to both Parties; and
  - 27.5.3.2 (if applicable) such period as is reasonably necessary for the implementation of such solution,the DBFO Co shall be entitled to terminate this Agreement in accordance with Clause 42.4 [Termination under Clause 27].
- 27.5.4 For the avoidance of doubt any refusal to take action to promote a Subsequent Scheme shall not relieve the DBFO Co of any liability under this Agreement.

#### 27.6 Traffic Regulation Orders

Whether or not Clause 27.1 [Application] applies, the DBFO Co (at its own cost) shall be responsible for, and shall provide to the Secretary of State, all data gathering, document preparation, administrative and other support and liaison (including preparation of plans, publication of notices, administrative steps required to serve notices and serving notices) in such manner and at such times as to enable the Secretary of State to make any traffic regulation order in respect of the Project Road.

28. **STATUTORY UNDERTAKERS**

28.1 **Definitions**

For the purpose of this Clause 28 [Statutory Undertakers]:

- 28.1.1 "Apparatus" means all apparatus (including apparatus as defined in the 1991 Act) located in, on, under, over, across, along or adjacent to the Site or Adjacent Areas;
- 28.1.2 "Authorised Functions" means each of the functions conferred on the Secretary of State by the 1991 Act which the DBFO Co is authorised by the Secretary of State from time to time to exercise pursuant to Clause 28.4.1 or 28.4.5, as the case may be;
- 28.1.3 "Authorisation Period" means:
- 28.1.3.1 (save as provided in Clause 28.1.3.2) the period commencing on the O&M Commencement Date and expiring 10 years therefrom or on the termination of this Agreement, whichever is earlier;
  - 28.1.3.2 in relation to those parts of the Project Facilities shown as New Road, Adjacent Areas Temporary Adjacent Areas and Existing Areas on drawings numbers A249/03/02-001 to 004 (inclusive) set out in Part 7 of Schedule 3 [Drawings], but only in relation to those functions listed in Paragraph 4 of Part 1 of Schedule 19 and only to the extent that such functions are exercisable in relation to those areas, the period commencing on the date of this Agreement and expiring 10 years herefrom or on the termination of this Agreement, whichever is earlier.
- 28.1.4 "Bridge Authority" has the meaning given in Section 88 (1)(b) of the 1991 Act;
- 28.1.5 "Codes of Practice" means the codes of practice issued from time to time pursuant to Part III of the 1991 Act;
- 28.1.6 "Diversionary Works" means works involving the diversion, change in level, protection or removal of Apparatus or other works in relation to Apparatus which are necessary to facilitate the execution of the Operations;
- 28.1.7 "Highway Authority" has the same meaning as ascribed in the Highways Act;
- 28.1.8 "Major Highway Works" means both major highway works as defined in Section 86(3) of the 1991 Act and major bridge works as defined in Section 88 (2) of the 1991 Act;
- 28.1.9 "the Regulations" means regulations issued pursuant to Part III of the 1991 Act;
- 28.1.10 "Renewed Authorisation Period" has the meaning given in Clause 28.4.5.2;
- 28.1.11 "Street Authority" has the meaning given in Section 49(1) of the 1991 Act;

- 28.1.12 "Street Works Licences" has the meaning given in Section 50(1) of the 1991 Act;
- 28.1.13 "Sample Inspections" has the meaning given to it in the Code of Practice entitled Code of Practice for Inspections;
- 28.1.14 "Traffic Authority" has the meaning given in Section 121A of the Road Traffic Regulation Act 1984;
- 28.1.15 "Works for Road Purposes" has the meaning given in Section 86(2) of the 1991 Act;
- 28.1.16 "1991 Act" means the New Roads and Street Works Act 1991;
- 28.1.17 "1995 Order" means the Contracting Out (Highway Functions) Order 1995 (SI 1995/1986);
- 28.1.18 "affected" or "affecting" shall be regarded as including the meaning given to "affected" in Section 105(4) of the 1991 Act; and
- 28.1.19 "Street Works Register" means the register referred to in Section 53(1) of the 1991 Act.

## 28.2 Primary Duty of Co-ordination

28.2.1 The DBFO Co covenants with the Secretary of State to use its best endeavours to co-ordinate the execution of works of all kinds affecting the Project Facilities and the surrounding highway network:

28.2.1.1 in the interests of safety;

28.2.1.2 so as to minimise the inconvenience to persons using the Project Facilities having regard in particular to the needs of people with disabilities; and

28.2.1.3 so as to protect the structure of the Project Facilities and the integrity of Apparatus,

and in accordance with all relevant Codes of Practice.

28.2.2 The DBFO Co shall comply with such directions as to the co-ordination of works of all kinds, including the co-ordination of works on streets other than the Project Road, as the Secretary of State may give from time to time consistent with Good Industry Practice.

## 28.3 The 1991 Act

28.3.1 In constructing and operating the Project Facilities and otherwise performing the Operations, the DBFO Co shall comply with the 1991 Act, the Regulations, the Codes of Practice and any requirements of Statutory Undertakers notified to the DBFO Co or the Secretary of State pursuant to the 1991 Act.

- 28.3.2 The DBFO Co shall notify the Secretary of State of all proposed Major Highway Works, Diversionary Works and Works for Road Purposes necessary in connection with the Operations and shall contract, commit or compromise in respect of such works with Statutory Undertakers and carry out any such works in accordance with the 1991 Act, the Regulations, the Codes of Practice and the provisions of this Clause 28 [Statutory Undertakers].
- 28.3.3 The DBFO Co will be responsible for all costs of, and shall make all payments due to, Statutory Undertakers in connection with any Diversionary Works.
- 28.3.4 Subject to Clauses 28.3.5 and 28.6.2 the Secretary of State will pay to the DBFO Co within 28 days of receipt any monies actually received by him from any Statutory Undertaker in respect of the Project Facilities pursuant to any provision of the 1991 Act, the Regulations or the Codes of Practice, other than fees relating to Sample Inspections.
- 28.3.5 If a contribution is made to the Secretary of State pursuant to Section 78 of the 1991 Act then payment will only be made to the DBFO Co if the contribution relates to costs actually incurred or likely to be incurred by the DBFO Co during the Pre-Commencement Period or the Contract Period and the DBFO Co shall pay to the Secretary of State any contribution received if the contribution does not relate to the DBFO Co's costs incurred or likely to be incurred during the Pre-Commencement Period or the Contract Period.
- 28.3.6 At the request of the DBFO Co, and subject to an indemnity for all costs including administrative costs, general staff costs and overheads, the Secretary of State will use his reasonable endeavours to recover all damages, losses, charges, fees, contributions and costs due to the Secretary of State as Street Authority in respect of the Project Facilities pursuant to the 1991 Act, the Regulations or Codes of Practice. Subject to the last sentence of this Clause 28.3.6, any such damages, losses, charges, fees, contributions and costs (but excluding any fees relating to Sample Inspections and excluding any damages, losses, charges, fees, contributions and costs recovered that relate to the period before or after the Contract Period and/or relate to costs and expenses directly incurred by the Secretary of State himself as Street Authority) shall be for the account of the DBFO Co whether recovered by the Secretary of State directly or by the DBFO Co acting under the Secretary of State's authorisation pursuant to Clause 28.4.1. Without prejudice to Clause 28.3.4, the Secretary of State will pay to the DBFO Co within 28 days of receipt any monies actually received by him directly pursuant to this Clause 28.3.6 less the costs in respect of which the Secretary of State is indemnified by the DBFO Co pursuant to this Clause 28.3.6.
- 28.3.7 Other than where the DBFO Co keeps the Street Works Register pursuant to Clause 28.4 [Contracting Out of Functions] the DBFO Co shall provide to the keeper of the Street Works Register such information as may be prescribed pursuant to Sections 53 and 54 of the 1991 Act and such other information of which it becomes aware as is eligible for registration and shall make any payment or payments to such party as the Secretary of State may require pursuant to Section 53(5) of the 1991 Act, and the DBFO Co shall maintain, at all times, a terminal linked to the Street Works Register for the purposes of giving and receiving notices and information affecting the Project Road and the surrounding road network.

28.3.8 Subject to the provisions of Section 50 and Schedule 3 of the 1991 Act, the Secretary of State will, as soon as is reasonably practicable after receiving a request from the DBFO Co, grant a Street Works Licence to the DBFO Co in respect of any specified part of the Project Road on the following terms:

28.3.8.1 it shall be non-assignable;

28.3.8.2 it shall not inure beyond the shorter of the Contract Period and the period during which the Secretary of State is Street Authority in respect of the Project Road; and

28.3.8.3 it shall only be exercisable after consultation with any affected Relevant Authority or person owning Apparatus.

28.3.9 [Not used.]

28.3.10 The DBFO Co shall notify the Secretary of State of any possible offence committed or likely to be committed by a Statutory Undertaker under the 1991 Act of which the DBFO Co is or should reasonably be aware and shall provide such information relating to such offence as may be specified by the Secretary of State.

28.3.11 Without limitation to Clause 3.4 [Standard of Performance] the DBFO Co will, at all times, assist and facilitate the Secretary of State in carrying out, and shall take all steps necessary to ensure that the Secretary of State is able to comply with, his duties under the 1991 Act, the Regulations and the Codes of Practice.

28.3.12 The DBFO Co shall take such actions as are appropriate to inform all interested parties of its role on behalf of the Secretary of State pursuant to Clauses 28.4 [Contracting Out of Functions] and 28.5 [Management of Operations affecting Apparatus].

#### 28.4 Contracting Out of Functions

28.4.1 Subject to the provisions of this Clause 28.4 [Contracting Out of Functions] and pursuant to the 1995 Order, the DBFO Co is hereby authorised by the Secretary of State as Street Authority, Highway Authority, Bridge Authority and Traffic Authority (as the case may be) for the Authorisation Period to exercise in respect of the Project Facilities each of the functions of the Secretary of State listed in Part 1 of Schedule 19 [Authorised Functions]. The DBFO Co shall take such actions as are necessary for the efficient transfer of any such function to the DBFO Co.

28.4.2 From the O&M Commencement Date and for as long as any authorisation made under this Clause 28.4 [Contracting Out of Functions] is effective, the DBFO Co shall exercise properly and fully each of the Authorised Functions in respect of the Project Facilities.

28.4.3 The authorisation made under this Clause 28.4 [Contracting Out of Functions] in respect of an Authorised Function is made on the following terms:

28.4.3.1 it shall be non assignable; and

- 28.4.3.2 the DBFO Co shall not delegate any such Authorised Function provided that this will not prohibit the DBFO Co from sub-contracting the performance of any works or services arising as a result of the DBFO Co's exercise of any such Authorised Function.
- 28.4.4 On or before the expiry of the Authorisation Period (or any Renewed Authorisation Period) in respect of an Authorised Function the DBFO Co may request the Secretary of State to renew the authorisation for any period not exceeding 10 years from the date of renewal. The decision whether or not to renew the authorisation in whole or in part shall be in the absolute discretion of the Secretary of State. The decision of the Secretary of State shall not be subject to review under the Disputes Resolution Procedure.
- 28.4.5 If, following a request under Clause 28.4.4, the Secretary of State decides to renew the authorisation, he shall confirm the same by notice in writing to the DBFO Co. Such notice shall specify:
- 28.4.5.1 the function of the Secretary of State which the DBFO Co is authorised to exercise in respect of the Project Facilities; and
- 28.4.5.2 the authorisation period, which shall not exceed the shorter of the Contract Period and 10 years from the date of the renewal (the "Renewed Authorisation Period").
- 28.4.6 If the 1995 Order or any replacement order made under Sections 69 and 77 of the Deregulation and Contracting Out Act 1994 shall cease for whatever reason to be in effect, the DBFO Co may request the Secretary of State to take such action as necessary to bring into effect a further order in respect of part or all of the functions the subject of the original order. The provisions of Clauses 27.2 [Procedure], 27.3 [No Fetter on Discretion] and 27.4 [Relevant Considerations] (but for the avoidance of doubt not Clause 27.5 [Refusal of Request]) shall apply mutatis mutandis to any such request.
- 28.4.7 In exercising the Authorised Functions the DBFO Co shall act in accordance with the principles of administrative law which govern the conduct of the Secretary of State and, without prejudice to the generality of the foregoing, shall:
- 28.4.7.1 obey all relevant Legal Requirements, and administrative and procedural requirements;
- 28.4.7.2 not take any decisions or actions which may be considered perverse and liable to be quashed; and
- 28.4.7.3 obey the rules of natural justice.
- 28.4.8 For so long as any authorisation under this Clause 28.4 [Contracting Out of Functions] is effective the DBFO Co shall include in the Monthly Report details of all actions taken by the DBFO Co pursuant to the Authorised Functions, including without limitation details of:
- 28.4.8.1 all notices given and received;
- 28.4.8.2 all directions and consents given to Statutory Undertakers;

28.4.8.3 all agreements, commitments or compromises reached with Statutory Undertakers with regard to Diversionary Works; and

28.4.8.4 any arbitration proceedings commenced or proposed.

28.4.9 Without prejudice to the generality of Clause 28.4.8, the DBFO Co shall provide the Department's Nominee with copies of all consents and directions given by the DBFO Co and all notices given and received by the DBFO Co pursuant to the 1991 Act.

28.4.10 If the DBFO Co fails to exercise any Authorised Function in the manner set out in Clause 28.4.7 then the Secretary of State may withdraw or suspend the authorisation in respect of such Authorised Function. Such suspension or withdrawal shall not be treated by the DBFO Co as a repudiation by the Secretary of State.

28.4.11 If an authorisation under this Clause 28.4 [Contracting Out of Functions] is revoked by the Secretary of State, other than in accordance with Clause 28.4.10, then for the purposes of Section 73 of the Deregulation and Contracting Out Act 1994 "relevant contract" shall mean this Clause 28.4 [Contracting Out of Functions] and no other provision of this Agreement.

28.4.12 On the expiry, revocation, withdrawal or suspension of an authorisation under this Clause 28.4 [Contracting Out of Functions], the DBFO Co shall take such actions as are necessary for the efficient transfer of any such function to such person as the Secretary of State may designate.

## 28.5 Management of Operations Affecting Apparatus

28.5.1 If, at any time an authorisation under Clause 28.4 [Contracting Out of Functions] is revoked or expires (and is not renewed) the DBFO Co shall be released from exercising and shall not exercise the relevant Authorised Function. Subject to Clause 28.5.3, the DBFO Co shall instead perform those services set out in Part 2 of Schedule 19 [Services in Relation to the Secretary of State's Functions] (if any) which relate to the same function of the Secretary of State as the Authorised Function which has been revoked or has expired.

28.5.2 In addition to its obligations under Clause 28.4 [Contracting Out of Functions] or Clause 28.5.1 (as the case may be) but subject to Clause 28.5.3, the DBFO Co shall throughout the Contract Period perform the services set out in Part 3 of Schedule 19 [Other Services].

28.5.3 In carrying out its services pursuant to this Clause 28.5 [Management of Operations Affecting Apparatus], the DBFO Co shall not contract with, enter into binding commitments with, compromise with, give a notice of intention to proceed to, impose obligations upon, issue Street Works Licences to or seek to recover costs from Statutory Undertakers or carry out works affecting Statutory Undertakers without the prior written approval of the Secretary of State.

28.5.4 For the purposes of Clause 28.5.3, the approval of the Secretary of State may be given from time to time either in terms relating to a particular contract, commitment, compromise or works or upon terms relating to particular classes of contracts, commitments, compromises or works.

28.5.5 Actions taken by the DBFO Co pursuant to this Clause 28.5 [Management of Operations Affecting Apparatus] and Part 2 or Part 3 of Schedule 19 shall not in any way limit or fetter the discretion of the Secretary of State in the discharge or exercise of his duties or powers. The decision of the Secretary of State on the merits of any recommendation made by the DBFO Co pursuant to this Clause 28.5 [Management of Operations Affecting Apparatus] and Part 2 or Part 3 of Schedule 19 shall not be subject to review under the Disputes Resolution Procedure.

28.6 The Secretary of State's Responsibility

28.6.1 Without prejudice to the DBFO Co's obligations pursuant to Clause 28.3.12 the Secretary of State shall:

28.6.1.1 from time to time, at the request of the DBFO Co, notify Statutory Undertakers that, subject to the terms and conditions set out in this Clause 28 [Statutory Undertakers], the DBFO Co will be exercising the Authorised Functions or will be performing the services set out in Clause 28.5 [Management of Operations affecting Apparatus] (as the case may be); and

28.6.1.2 notify the DBFO Co promptly of any Statutory Undertaker's requirements or notices or any notices from Street Authorities for streets other than the Project Road (but which affect the Project Road) which he receives pursuant to the 1991 Act, the Regulations or the Codes of Practice.

28.6.2 If works are necessary as a consequence of an event described in Section 82(2) of the 1991 Act then those works shall be considered as a Department's Change and any sums received by the Secretary of State from any Statutory Undertaker shall not be subject to Clause 28.3.4.

29. **OTHER FUNCTIONS OF THE SECRETARY OF STATE**

29.1 **Definitions**

For the purpose of this Clause 29 [Other Functions of the Secretary of State]:

29.1.1 "Highway Authority" has the same meaning as ascribed in the Highways Act;

29.1.2 "Statutory Provisions" means the provisions of the statutes and regulations set out in Schedule 20 [Contracted Out Functions of the Secretary of State] and (subject to Clause 29.3.7.3) the provisions of any statute or regulation which the Secretary of State has authorised the DBFO Co to exercise pursuant to Clause 29.3.7;

29.1.3 "Third Party" means any third party (but excluding any Statutory Undertaker to the extent that the provisions of Clause 28 [Statutory Undertakers] apply in relation to such Statutory Undertaker in any particular case);

29.1.4 "Third Party Authorised Functions" means each of the functions conferred on the Secretary of State by the Statutory Provisions, which the DBFO Co is authorised by the Secretary of State from time to time to exercise pursuant to Clause 29.3.1, Clause 29.3.5 or (subject to Clause 29.3.7.3) Clause 29.3.7;

29.1.5 "Third Party Authorisation Period" means, in the case of an authorisation pursuant to Clause 29.3.1 and subject to Clause 29.3.2, the period commencing on the O&M Commencement Date and expiring 10 years therefrom or on the termination of this Agreement, whichever is earlier, or, in the case of an authorisation pursuant to Clause 29.3.7.3, the period specified in the notice given by the Secretary of State pursuant to Clause 29.3.7.2.2;

29.1.6 "Third Party Renewed Authorisation Period" has the meaning given in Clause 29.3.5.2; and

29.1.7 "1995 Order" means the Contracting Out (Highway Functions) Order 1995 (SI 1995/1986).

29.2 **General**

29.2.1 Without limitation to Clause 3.4 [Standard of Performance], the DBFO Co will, at all times, assist and facilitate the Secretary of State in carrying out, and shall take all steps necessary to ensure that the Secretary of State is able to comply with, his duties under the Statutory Provisions.

29.2.2 The DBFO Co shall take such actions as are appropriate to inform all interested parties of its role on behalf of the Secretary of State pursuant to Clauses 29.3 [Contracting Out of Functions] and 29.4 [Management of Operations].

29.3 **Contracting Out of Functions**

29.3.1 Subject to the provisions of this Clause 29.3 [Contracting Out of Functions] and pursuant to the 1995 Order, the DBFO Co is hereby authorised by the Secretary of State as Highway Authority and as Minister under the Parish Councils Act 1957 (as the case may be) for the Third Party Authorisation Period to exercise in respect of the Project Facilities each of the functions of the Secretary of State listed in Schedule 20

[Contracted Out Functions of the Secretary of State]. The DBFO Co shall take such actions as are necessary for the efficient transfer of any such function to the DBFO Co.

- 29.3.2 From the O&M Commencement Date and for as long as any authorisation made under this Clause 29.3 [Contracting Out of Functions] is effective, the DBFO Co shall exercise properly and fully each of the Third Party Authorised Functions in respect of the Project Facilities.
- 29.3.3 The authorisation made under this Clause 29.3 [Contracting Out of Functions] in respect of a Third Party Authorised Function is made on the following terms:
- 29.3.3.1 it shall be non assignable; and
- 29.3.3.2 the DBFO Co shall not delegate any such Third Party Authorised Function provided that this will not prohibit the DBFO Co from sub-contracting the performance of any works or services arising as a result of the DBFO Co's exercise of any such Third Party Authorised Function.
- 29.3.4 On or before the expiry of the Third Party Authorisation Period (or any Third Party Renewed Authorisation Period) in respect of a Third Party Authorised Function the DBFO Co may request the Secretary of State to renew the authorisation for any period not exceeding 10 years from the date of renewal. The decision whether or not to renew the authorisation in whole or in part shall be in the absolute discretion of the Secretary of State. The decision of the Secretary of State shall not be subject to review under the Disputes Resolution Procedure.
- 29.3.5 If, following a request under Clause 29.3.4, the Secretary of State decides to renew the authorisation, he shall confirm the same by notice in writing to the DBFO Co. Such notice shall specify:
- 29.3.5.1 the function of the Secretary of State which the DBFO Co is authorised to exercise in respect of the Project Facilities; and
- 29.3.5.2 the authorisation period, which shall not exceed the shorter of the Contract Period and 10 years from the date of the renewal (the "Third Party Renewed Authorisation Period").
- 29.3.6 If the 1995 Order or any replacement order made under Sections 69 and 77 of the Deregulation and Contracting Out Act 1994 shall cease for whatever reason to be in effect, the DBFO Co may request the Secretary of State to take such action as necessary to bring into effect a further order in respect of part or all of the functions the subject of the original order. The provisions of Clauses 27.2 [Procedure], 27.3 [No Fetter on Discretion] and 27.4 [Relevant Considerations] (but for the avoidance of doubt not Clause 27.5 [Refusal of Request]) shall apply mutatis mutandis to any such request.
- 29.3.7 The DBFO Co may at any time and from time to time request the Secretary of State to authorise it to exercise any one or more of the functions conferred on the Secretary of State by the provisions of any of the statutes or regulations set out in any of the schedules to the 1995 Order (other than those functions authorised pursuant to Clause 29.3.1 and Clause 28.4.1) and the following provisions shall apply to any such request by the DBFO Co:
- 29.3.7.1 the provisions of Clauses 27.2 [Procedure], 27.3 [No Fetter on Discretion] and 27.4 [Relevant Considerations] (but for the avoidance of doubt not

Clause 27.5 [Refusal of Request]) shall apply mutatis mutandis in relation to any such request pursuant to this Clause 29.3.7;

29.3.7.2 if the Secretary of State decides to make any such authorisation, he shall confirm the same by a notice in writing to the DBFO Co. Such notice shall specify:

29.3.7.2.1 the function(s) of the Secretary of State which the DBFO Co is authorised to exercise in respect of the Project Facilities; and

29.3.7.2.2 the authorisation period, which shall not exceed the shorter of the Contract Period and 10 years from the date of the grant of the authorisation; and

29.3.7.3 each of the statutes or regulations setting out one of the functions so authorised shall be deemed to be a Statutory Provision from the date of the authorisation and the provisions of this Clause 29 [Other Functions of the Secretary of State] applicable to Third Party Authorised Functions (other than this Clause 29.3.7) shall apply mutatis mutandis in respect of such function from such date.

The decision of the Secretary of State whether or not to accede to any request of the DBFO Co pursuant to this Clause 29.3.7 in whole or in part shall not be subject to review under the Disputes Resolution Procedure.

29.3.8 In exercising the Third Party Authorised Functions the DBFO Co will act in accordance with the principles of administrative law which govern the conduct of the Secretary of State and, without prejudice to the generality of the foregoing, will:

29.3.8.1 obey all relevant Legal Requirements, and administrative and procedural requirements;

29.3.8.2 not take any decisions or actions which may be considered perverse and liable to be quashed in a court of law; and

29.3.8.3 obey the rules of natural justice.

29.3.9 For so long as any authorisation under this Clause 29.3 [Contracting Out of Functions] is effective the DBFO Co shall include in the Monthly Report details of all actions taken by the DBFO Co or which the DBFO Co is aware of relating to the Third Party Authorised Functions, including without limitation details of:

29.3.9.1 all notices given and received;

29.3.9.2 all directions, permissions and consents given to Third Parties in the exercise of any Third Party Authorised Functions;

29.3.9.3 all agreements, commitments or compromises reached with Third Parties in the exercise of any Third Party Authorised Functions; and

29.3.9.4 any legal proceedings (including without limitation any appeals) commenced or proposed or threatened to be commenced in relation to any Statutory Provision or the exercise of any Third Party Authorised Function.

- 29.3.10 Without prejudice to the generality of Clause 29.3.9, the DBFO Co shall provide the Department's Nominee with copies of all permissions, consents, directions and proceedings issued by the DBFO Co and all notices given and received by the DBFO Co and all proceedings (including without limitation any appeals) commenced against the DBFO Co in respect of any Statutory Provision or the exercise of any Third Party Authorised Function.
- 29.3.11 If the DBFO Co fails to exercise any Third Party Authorised Function in the manner referred to in Clause 29.3.8 then the Secretary of State may withdraw or suspend the authorisation in respect of such Third Party Authorised Function. Such suspension or withdrawal shall not be treated by the DBFO Co as a repudiation by the Secretary of State.
- 29.3.12 If an authorisation under this Clause 29.3 [Contracting Out of Functions] is revoked by the Secretary of State, other than in accordance with Clause 29.3.11, then for the purposes of Section 73 of the Deregulation and Contracting Out Act 1994 "relevant contract" shall mean this Clause 29.3 [Contracting Out of Functions] and no other provision of this Agreement.
- 29.3.13 On the expiry, revocation, withdrawal or suspension of an authorisation under this Clause 29.3 [Contracting Out of Functions], the DBFO Co shall take such actions as are necessary for the efficient transfer of any such function to such person as the Secretary of State may designate.

#### 29.4 Management of Operations

- 29.4.1 If at any time and from time to time:
- 29.4.1.1 an authorisation under Clause 29.3 [Contracting Out of Functions] is revoked or expires (and is not renewed) the DBFO Co shall be released from exercising and shall not exercise the relevant Third Party Authorised Function and, subject to Clause 29.4.5 and unless otherwise directed by the Secretary of State, the DBFO Co shall instead perform those services set out in Clause 29.4.2 insofar as they apply to the same function of the Secretary of State as the Third Party Authorised Function which has been revoked or has expired;
- 29.4.1.2 a Third Party requests the DBFO Co or the Secretary of State (and the Secretary of State notifies the DBFO Co of such request) to exercise in relation to the Project Facilities or the Operations any function of the Secretary of State as Highway Authority under any statute or regulation (other than a Third Party Authorised Function) (an "Other Function"), then, subject to Clause 29.4.5 and unless otherwise directed by the Secretary of State, the DBFO Co shall perform those services set out in Clause 29.4.2 insofar as they apply to the Other Function.
- 29.4.2 In the circumstances referred to in Clauses 29.4.1.1 and 29.4.1.2, in relation to:
- 29.4.2.1 any application for a permission, consent, authorisation or other form of approval relating to the Project Facilities or the execution of the Operations the grant of which is required by

Law to be made by or on behalf of the Secretary of State (an "Application"), the DBFO Co shall assemble all requisite documentation to support and explain the relevant Application and shall prepare a recommendation in respect of (i) any terms and conditions to be attached to any consent to the Application (if relevant) and (ii) the merits of the relevant Application, and submit the same to the Secretary of State. Upon the Secretary of State granting or refusing any Application, the DBFO Co shall upon notice from the Secretary of State take all necessary steps to give effect to any such grant or refusal and comply with the terms thereof;

- 29.4.2.2 any proceedings commenced by a Third Party relating to any decision made or condition imposed on an Application ("Appeal"), the DBFO Co shall assemble all requisite documentation and evidence to defend the Appeal and shall prepare a recommendation in respect of the merits of the relevant Appeal and submit the same to the Secretary of State;
  - 29.4.2.3 any power to carry out any works on the Project Road by or on behalf of the Secretary of State and to recover the expenses from any Third Party, the DBFO Co shall assemble all relevant documentation and evidence necessary to explain why the said works should be carried out and prepare a recommendation as to how the said expenses should be recovered;
  - 29.4.2.4 any requirement for a notice or a direction to a Third Party which is required by Law to be made by or on behalf of the Secretary of State (a "Direction"), the DBFO Co shall assemble all requisite documentation to support and explain the Direction and prepare a recommendation as to whether the Direction should be made and the terms thereof. Upon the Secretary of State making a Direction the DBFO Co shall serve the Direction on the relevant Third Party on behalf of the Secretary of State;
  - 29.4.2.5 any power to manage, maintain or provide facilities on any part of the Project Facilities by or on behalf of the Secretary of State, the DBFO Co shall prepare recommendations to the Secretary of State as and when required by the Secretary of State in respect of the exercise of the aforementioned powers in relation to the Project Facilities; and
  - 29.4.2.6 any right of the Secretary of State as Highway Authority in relation to the Project Facilities to object to a proposed course of action by a Third Party ("Objection"), the DBFO Co shall assemble all requisite documentation and evidence in relation to the Objection and prepare a recommendation in relation to the Objection and submit the same to the Secretary of State.
- 29.4.3 As part of the Liaison Procedures the DBFO Co shall establish with the Department's Nominee a procedure for the communication of the matters referred to in Clause 29.4.2 to the Secretary of State.

- 29.4.4 Without limitation to Clause 3.4 [Standard of Performance], the DBFO Co shall deal with all matters relating to its obligations pursuant to Clause 29.4.2 in a timely and expeditious manner so as to ensure that the Secretary of State is able to discharge or exercise any relevant duty, power or discretion within the time required by Law.
- 29.4.5 In carrying out its services pursuant to this Clause 29.4 [Management of Operations], the DBFO Co shall not contract with, enter into binding commitments with, compromise with, give a notice of intention to proceed to, impose obligations upon, respond to any Application from or Appeal by, issue any Direction to or seek to recover costs from any Third Party or carry out works affecting any Third Party without the prior written approval of the Secretary of State.
- 29.4.6 For the purposes of Clause 29.4.5, the approval of the Secretary of State may be given from time to time either in terms relating to a particular matter relating to the relevant Statutory Provision or upon terms relating to particular classes of such matters.
- 29.4.7 Actions taken by the DBFO Co pursuant to this Clause 29.4 [Management of Operations] shall not in any way limit or fetter the discretion of the Secretary of State in the discharge or exercise of his duties or powers. The decision of the Secretary of State on the merits of any recommendation made by the DBFO Co pursuant to Clause 29.4.2 shall not be subject to review under the Disputes Resolution Procedure.

29.5 The Secretary of State's Responsibility

Without prejudice to the DBFO Co's obligations pursuant to Clause 29.2.2, the Secretary of State shall:

- 29.5.1 from time to time, at the request of DBFO Co, notify Third Parties that, subject to the terms and conditions set out in this Clause 29 [Other Functions of the Secretary of State], the DBFO Co will be exercising the Third Party Authorised Functions or will be performing the services set out in Clause 29.4 [Management of Operations] (as the case may be); and
- 29.5.2 notify the DBFO Co promptly of any Third Party's requirements, notices or details of legal proceedings which he receives relating to the Statutory Provisions.

### **30. OTHER THIRD PARTIES**

#### **30.1 Third Party Claims**

30.1.1 The DBFO Co shall deal with any complaints received (whether received orally or in writing, and whether from a User or others) in a prompt, courteous and efficient manner.

30.1.2 If the DBFO Co receives any Claim from a third party relating wholly to any period prior to:

30.1.2.1 the date of execution of this Agreement; or

30.1.2.2 the O&M Commencement Date where such third party Claim relates to the Existing Road

and in any such case such claim does not result from any act, omission or default by, or by any person on behalf of, the DBFO Co, the DBFO Co shall not be liable to indemnify the Secretary of State in respect thereof pursuant to Clause 39.1 and it shall promptly forward such Claim to the Secretary of State. All other Claims from third parties shall be dealt with in accordance with the provisions of Clause 39 [Indemnities].

#### **30.2 Claims Against Third Parties**

30.2.1 As between the Secretary of State and the DBFO Co, the DBFO Co will bear, without recourse to the Secretary of State:

30.2.1.1 any Claim or Loss suffered by the Secretary of State arising in connection with the Project Facilities; and

30.2.1.2 any Claim or Loss suffered by the DBFO Co, its agents, contractors or sub-contractors of any tier or the employees of any of them,

which is caused in any of the cases referred to in Clauses 30.2.1.1 and 30.2.1.2 by the acts or omissions of any user of the Project Facilities including, without limitation, any damage to property, any personal injury or death, and any loss of income (including without limitation any reduction in DBFO Payments).

30.2.2 For the avoidance of doubt, nothing in Clause 30.2.1 shall affect:

30.2.2.1 any right of the Secretary of State to make or recover any Claim against any person referred to in Clause 30.2.1 for damage suffered by the Secretary of State, its agents or contractors (other than the DBFO Co) or sub-contractors of any tier or the employees of any of them; or

30.2.2.2 any right of the DBFO Co to make or recover any Claim against any person referred to in Clause 30.2.1 for damage suffered by the DBFO Co, its agents, contractors or sub-contractors of any tier, or the employees of any of them.

#### **30.3 Conduct of Claims Against Third Parties**

- 30.3.1 Subject to the prior consent of the Secretary of State (such consent not to be unreasonably withheld or delayed and to be on such terms as the Secretary of State may reasonably require), the DBFO Co may if necessary bring any action against a person referred to in Clause 30.2.1 in the name of the Secretary of State, provided that the DBFO Co shall indemnify and keep indemnified the Secretary of State against all costs and expenses of and Losses and Claims arising out of any such action.
- 30.3.2 With respect to any action brought under Clause 30.3.1 and without prejudice to any terms which the Secretary of State may reasonably require in accordance with such Clause 30.3.1:
- 30.3.2.1 the DBFO Co shall keep the Secretary of State fully informed about the conduct of any such action;
- 30.3.2.2 the DBFO Co shall consult with the Secretary of State about the conduct of any such action and shall take account of the reasonable requirements of the Secretary of State in the conduct of such action; and
- 30.3.2.3 the DBFO Co shall not settle any such action without the consent of the Secretary of State, provided that such consent shall not be required to the settlement of any action if the amount of the claim at issue does not exceed £20,000 (in December 2002 prices).

#### 30.4 Police

The DBFO Co shall comply at all times with all instructions of the police in respect of the Project Facilities.

#### 30.5 Interested Parties

- 30.5.1 The DBFO Co shall discharge the Requirements of Interested Parties.
- 30.5.2 Without limitation to Clause 30.5.1, the DBFO Co shall be responsible for discharging:
- 30.5.2.1 any reasonable requirements of any Relevant Authorities;
- 30.5.2.2 any requirement of any Interested Party which is legally enforceable against the Secretary of State or the DBFO Co,
- of which the DBFO Co has notice or ought reasonably to be aware from time to time.

#### 30.6 Abnormal Loads

- 30.6.1 Without prejudice to Clause 30.6.2, the DBFO Co will receive and process notifications for the movement of Abnormal Loads, required by the Motor Vehicles (Authorisation of Special Types) (General) Order 2003. On request, the DBFO Co will, without charge, supply relevant information to third parties regarding the routeing of abnormal loads. The DBFO Co will additionally co-ordinate, obtain (in such form as may be specified

from time to time by the Secretary of State), complete, index and hold indemnities from hauliers.

- 30.6.2 The Secretary of State shall promptly advise the DBFO Co of any notice it receives of any Abnormal Load to be transported over the Project Road. The DBFO Co shall be responsible for liaising with the police and other relevant persons regarding any Abnormal Load and for carrying out any necessary related works.
- 30.6.3 For the avoidance of doubt, the provisions of Clause 30.2.1 shall apply in respect of any Claim or Loss arising directly or indirectly as a result of any such Abnormal Load.

### 30.7 Litter Authority

- 30.7.1 If and so long as required by the Secretary of State to do so, the DBFO Co shall discharge in respect of the Project Road (or any part thereof specified by the Secretary of State) the duties of the Secretary of State under Sections 89(1) and 89(2) of the Environmental Protection Act 1990. In discharging those duties, the DBFO Co shall have regard to any codes of practice in force under Section 89(7) of such Act from time to time.
- 30.7.2 For the avoidance of doubt, in respect of any period during which, or any part of the Project Road in respect of which, the Secretary of State has not given a notice pursuant to Clause 30.7.1, the DBFO Co shall procure access for the Relevant Authority in accordance with Clause 14.4.2 to discharge the duties under Sections 89(1) and 89(2) of the Environmental Protection Act 1990.

### 30.8 Shared Facilities

- 30.8.1 The DBFO Co shall be fully responsible, at its own expense, for the operation and maintenance of any facilities which form part of the Project Facilities (including, without limitation, those facilities set out in Part 4 of Schedule 3 [Shared Facilities]) whose use is shared with any person. The DBFO Co may agree such cost sharing arrangements as it deems appropriate with any such person, provided always that in no circumstances shall such agreement adversely affect the Secretary of State.
- 30.8.2 Without prejudice to Clause 30.8.1, if any electrical power supply, lighting, pumping station, drainage or other apparatus serving the Project Facilities also serves any facilities (other than the Project Facilities) for which the Secretary of State is the highway authority, then:
- 30.8.2.1 the DBFO Co shall use all reasonable endeavours to procure, at the earliest date practicable, the installation of equipment measuring the cost of that service in respect of the Project Facilities and shall make payment for such supply directly to the provider of such service; and
- 30.8.2.2 in respect of any period during which there is no such separate measurement equipment installed, the Secretary of State shall in the first instance meet the cost of such supply and he shall

be reimbursed by the DBFO Co a proportion of such cost equal, in the case of an electricity supply, to the ratio of the power rating of the DBFO Co's equipment which is connected to that supply to the power rating of all equipment which is connected to that supply and in the case of other services an equitable amount taking account of each Party's relative usage and reliance upon the service.

30.8.3 If any electrical power supply, lighting, pumping station, drainage or other apparatus serving the Project Facilities also serves any facilities (other than the Project Facilities) for which any highway authority other than the Secretary of State is the highway authority, then:

30.8.3.1 the DBFO Co shall make arrangements with the relevant highway authority in relation to the payment for such service and, as between the Secretary of State and the DBFO Co, the DBFO Co shall be responsible for any such payment; and

30.8.3.2 the DBFO Co shall, if any works are to be carried out affecting such service, use all reasonable endeavours to agree with the relevant highway authority that separate equipment shall be installed measuring the cost of that service in respect of the Project Facilities.

### 30.9 Network Rail

30.9.1 Subject to Clause 30.9.7 and 30.9.8 the Secretary of State hereby grants the DBFO Co the authority to, and the DBFO Co shall, act as agent for and on behalf of the Secretary of State in relation to the exercise and discharge of the rights, obligations and duties of the Secretary of State under the Network Rail Agreement.

30.9.2 During the period for which the DBFO Co is appointed as agent for and on behalf of the Secretary of State in accordance with Clause 30.9.1, the Secretary of State shall, as soon as is reasonably practicable, pass to the DBFO Co copies of all correspondence, documents or other communications received by the Secretary of State from Network Rail or otherwise, which concern, affect or are otherwise relevant to the rights, obligations and duties of the Secretary of State under the Network Rail Agreement

30.9.3 Without prejudice to the rights and entitlements of the DBFO Co under this Agreement, if:

30.9.3.1 it appears to the DBFO Co that Network Rail is not performing its obligations under the Network Rail Agreement; or

30.9.3.2 the DBFO Co wishes to challenge a decision of Network Rail under the Network Rail Agreement

the DBFO Co shall give notice to that effect to the Secretary of State specifying the measures which the DBFO Co proposes to take (and in relation to Clause 30.9.3.1, the obligation which the DBFO Co considers that Network Rail has breached).

- 30.9.4 Upon receipt of a notice given in accordance with Clause 30.9.3, the Parties shall consult with each other with regard to the measures which the DBFO Co proposes to take. As soon as is reasonably practicable (having regard to the urgency and circumstances of the case) and in any event within 10 Working Days of receipt of the aforesaid notice, the Secretary of State shall either:
- 30.9.4.1 grant authority to the DBFO Co to take such measures proposed by the DBFO Co or such other measures as the DBFO Co and the Secretary of State may agree (including, as the case may be, legal proceedings) in the name of and on behalf of the Secretary of State for the enforcement of, or authority otherwise to enforce on behalf of the Secretary of State, any of the rights of the Secretary of State under the Network Rail Agreement; or
  - 30.9.4.2 give a notice to the DBFO Co requesting any further information which the Secretary of State may reasonably require for the purpose of evaluating the proposed measures; or
  - 30.9.4.3 withhold such authority, and the provisions of Clause 30.9.12 shall apply.
- 30.9.5 If the Secretary of State requests further information in accordance with Clause 30.9.4.2, the DBFO Co shall submit such information to the Secretary of State. As soon as reasonably practicable (having regard to the urgency and circumstances of the case) and in any event with 5 Working Days of receipt of such further information, the Secretary of State shall either:
- 30.9.5.1 grant authority to the DBFO Co to take the measures proposed by the DBFO Co or such other measures as the DBFO Co and the Secretary of State may agree (including, as the case may be, legal proceedings) in the name of and on behalf of the Secretary of State for the enforcement of, or authority otherwise to enforce on behalf of the Secretary of State, any of the rights of the Secretary of State under the Network Rail Agreement; or
  - 30.9.5.2 withhold such authority and the provisions of Clause 30.9.12 shall apply.
- 30.9.6 If authority is granted by the Secretary of State in accordance with Clause 30.9.4.1 or Clause 30.9.5.1, the DBFO Co may in the name of and on behalf of the Secretary of State take such measures as notified in accordance with Clause 30.9.3 or such measures as the DBFO Co and the Secretary of State may agree, subject always to Clauses 30.9.7 and 30.9.9 and to the following provisions:
- 30.9.6.1 the DBFO Co shall, in doing anything in the name of or on behalf of the Secretary of State pursuant to Clause 30.9.4.1 or Clause 30.9.5.1, act in accordance with the terms of such authority and in accordance with any relevant Law and procedural requirements to which the Secretary of State is

subject and in a manner so as not to cause the Secretary of State to be in breach of any such Law or any duty upon him and so as not knowingly to detract from the image and reputation of the Secretary of State as highway authority;

30.9.6.2 the DBFO Co shall keep the Secretary of State fully informed and consult with him about the progress of all measures proposed or taken by the DBFO Co pursuant to this Clause 30.9 and shall promptly provide the Secretary of State with all information (including copies of any documents or evidence of any kind) reasonably requested by him concerning such measures; and

30.9.6.3 to the extent that any such measures comprise legal proceedings, the DBFO Co shall not compromise or settle any such legal proceedings without the consent of the Secretary of State, provided that such consent shall not be required to the settlement of any legal proceedings if the amount the subject of such legal proceedings does not exceed £20,000 (in March 2002 prices);

30.9.7 The DBFO Co shall indemnify and keep indemnified the Secretary of State, his servants and agents in respect of any Claims or Losses of any person (including, for the avoidance of doubt, the Secretary of State and the DBFO Co) arising out of:

30.9.7.1 the performance or non-performance of the DBFO Co's obligations as the agent of the Secretary of State in accordance with Clause 30.9.1;

30.9.7.2 a breach of the Network Rail Agreement by the Secretary of State as a consequence of the DBFO Co acting as agent for and on behalf of the Secretary of State in accordance with Clause 30.9.1; and/or

30.9.7.3 the taking of any measures authorised in accordance with Clause 30.9.4.1 or Clause 30.9.5.1,

and including, without limitation, any liabilities of the Secretary of State under the Network Rail Agreement (other than any liabilities arising out of clause 2.11 of the Network Rail Agreement to the extent that the same arise by virtue of the existence of the Bridge (as defined in the Network Rail Agreement)).

30.9.8 Notwithstanding the other provisions of this Clause 30.9, the DBFO Co shall not be required to discharge the obligations of the Secretary of State (but shall co-operate with the Secretary of State to the extent necessary to enable him to discharge those obligations that the DBFO Co is not required to discharge):

30.9.8.1 arising under:

30.9.8.1.1 clause 3.11 of the Network Rail Agreement, save to the extent that:

- 30.9.8.1.1.1 the DBFO Co has failed to comply with an obligation under this Agreement or the Secretary of State would himself, but for the provisions of this Clause 30.9 be entitled to take or require the DBFO Co to take such action; and
- 30.9.8.1.1.2 (insofar as there are any costs payable under Clause 3.11) the costs to be paid to Network Rail arise as a direct consequence of the circumstances set out in Clause 30.9.8.1.1.1 above;
- 30.9.8.1.2 clause 5.1 of the Network Rail Agreement to the extent that such obligation:
  - 30.9.8.1.2.1 arises solely by reason of the existence of the Bridge and/or the Road (each as defined in the Network Rail Agreement); or
  - 30.9.8.1.2.2 does not arise as a direct consequence of the Operations, or the performance of, or failure to perform, any obligations of the DBFO Co under this Agreement;
- 30.9.8.1.3 paragraph 1(H) of schedule 2 of the Network Rail Agreement but only to the extent that:
  - 30.9.8.1.3.1 the same arises by virtue of the existence of the Bridge (as defined in the Network Rail Agreement) and would have arisen irrespective of the design of the Bridge and neither could have been avoided by using a different method of construction to that adopted by the DBFO Co nor has been caused by a breach by the DBFO Co of some other term of this Agreement; or
  - 30.9.8.1.3.2 such obligation neither:
    - (a) arises directly as a result of injury or damage caused as a

direct consequence of the Operations; nor

- (b) is a direct consequence of the Operations or the performance of, or failure to perform, any obligations of the DBFO Co under this Agreement;

30.9.8.2 to pay any costs (including, without limitation, any Costs (as defined in the Network Rail Agreement)) of Network Rail unless such costs are:

30.9.8.2.1 reasonable, properly and reasonably incurred and properly and reasonably payable; and

30.9.8.2.2 in the case of the costs referred to in paragraph 1(F) of schedule 2 of the Network Rail Agreement, incurred solely as a consequence of and prior to the completion of the Works (as defined in the Network Rail Agreement); or

30.9.8.3 arising as a consequence of a breach by the Secretary of State of his obligation not to commence construction of the Works (as defined in the Network Rail Agreement) prior to the Works Commencement Date (as defined in the Network Rail Agreement) pursuant to clause 2.2.3 of the Network Rail Agreement (unless such breach is a consequence of a breach by the DBFO Co of any provision of this Agreement other than this Clause 30.9);

30.9.8.4 to exercise his statutory duties pursuant to the Network Rail Agreement.

30.9.9 The Secretary of State shall be entitled at any time in his absolute discretion to revoke (in whole or in part including, without limitation, as to any specific proceedings) any authority granted pursuant to this Clause 30.9 by giving notice to that effect to the DBFO Co and thereupon in respect of the relevant measures:

30.9.9.1 the authority of the DBFO Co to continue taking such measures in the name of and on behalf of the Secretary of State shall cease;

30.9.9.2 the Secretary of State shall take over the conduct of such measures (including, as the case may be, any relevant legal proceedings or other matter being conducted in the name of the Secretary of State or on his behalf) and shall be entitled to conduct, compromise or discontinue the same as the Secretary of State sees fit in his absolute discretion;

- 30.9.9.3 the DBFO Co shall promptly take all steps necessary to transfer the conduct of such measures to the Secretary of State and shall give to the Secretary of State all documents in the DBFO Co's possession relating to any such measures (including, as the case may be, any relevant legal proceedings or the enforcement of any rights or a Court order) and shall provide such further assistance as the Secretary of State may reasonably require to effect an orderly transfer of the conduct of such measures to the Secretary of State; and
- 30.9.9.4 the DBFO Co shall be released from its indemnity under Clause 30.9.7 save for:
  - 30.9.9.4.1 any accrued or contingent liability thereunder which arose before the date of revocation of authority by the Secretary of State pursuant to Clause 30.9.9;
  - 30.9.9.4.2 any liability which arises out of or in connection with any breach by the DBFO Co of its obligations under this Clause 30.9 whether occurring before or after the date of revocation of such authority; or
  - 30.9.9.4.3 any liability which arises out of or in connection with the manner in which the DBFO Co exercised such authority (whether or not in breach of this Clause 30.9) where such liability ought reasonably to have been avoided by the DBFO Co.
- 30.9.10 A decision by the Secretary of State to revoke any authority pursuant to Clause 30.9.9 shall not be subject to review under the Disputes Resolution Procedure.
- 30.9.11 Any authority granted to the DBFO Co by the Secretary of State in accordance with this Clause 30.9 shall not preclude the Secretary of State from taking any action whether by way of proceedings or otherwise in connection with Network Rail Agreement or any other matter.
- 30.9.12 If and to the extent that the Secretary of State:
  - 30.9.12.1 withholds his authority to take measures, or fails to agree the measures to be taken, pursuant to Clause 30.9.4 or Clause 30.9.5; or
  - 30.9.12.2 revokes any authority granted pursuant to this Clause 30.9 in accordance with Clause 30.9.9 or Clause 30.9.13.6; or
  - 30.9.12.3 withholds his consent pursuant to Clause 30.9.6.3 to settlement by the DBFO Co of any legal proceedings which the DBFO Co was authorised to pursue pursuant to Clause 30.9.4.1 or Clause 30.9.5.1,

unless the reason for the taking of such action by the Secretary of State is solely in consequence of the DBFO Co being in breach of its obligations under this Agreement (including, without limitation, Clause 30.9.6), the provisions of Annex 3 to Part 1 of Schedule 12 [Compensation Event] shall, if applicable, be given effect.

30.9.13 Subject to and in accordance with this Clause 30.9.13, the Secretary of State shall pay to the DBFO Co the amount of any Network Rail Loss. The Secretary of State shall only be liable to the DBFO Co in respect of any Network Rail Loss as follows:

30.9.13.1 If a Network Rail Loss becomes apparent and the DBFO Co wishes the Secretary of State to exercise any rights against Network Rail which the Secretary of State may have in respect of such Network Rail Loss, then the DBFO Co may serve a notice on the Secretary of State asking him to exercise any rights he may have to make a claim against Network Rail.

30.9.13.2 Any notice given in accordance with Clause 30.9.13.1 shall:

30.9.13.2.1 describe such claim in a level of detail sufficient to enable the Secretary of State to understand the basis for such claim in respect of such Network Rail Loss;

30.9.13.2.2 set out the DBFO Co's detailed estimate of the amount of the Network Rail Loss;

30.9.13.2.3 contain an undertaking on the part of the DBFO Co (in a form reasonably satisfactory to the Secretary of State) to meet all the costs and/or liabilities incurred by the Secretary of State in pursuing such claim.

30.9.13.3 The Secretary of State shall be under no obligation to exercise any right in respect of any claim in respect of such Network Rail Loss nor shall he have any liability under this Clause 30.9.13 if:

30.9.13.3.1 he has not received a notice which satisfies the requirements of Clause 30.9.13.2; or

30.9.13.3.2 he considers, and either it is agreed by the DBFO Co or decided by an Expert appointed under the Disputes Resolution Procedure, that there is no reasonable prospect of making a

successful and financially worthwhile claim in relation to such right.

30.9.13.4 Subject to Clause 30.9.13.2, the Secretary of State shall in his sole discretion either:

30.9.13.4.1 proceed to enforce or compromise such rights in respect of such Network Rail Loss against or with Network Rail at the cost of and in accordance with the reasonable directions of the DBFO Co; or

30.9.13.4.2 take such actions as may be necessary to enable the DBFO Co (at its own expense) to enforce or compromise such rights in respect of such Network Rail Loss against or with Network Rail in the name of the Secretary of State and in such circumstance the DBFO Co shall keep the Secretary of State fully informed and consult with him about the conduct of the proceedings and/or actions,

provided that the Secretary of State may prescribe such conditions in relation to the conduct of any such proceedings or actions as he shall reasonably require.

30.9.13.5 The Secretary of State may at time, if the DBFO Co is enforcing or seeking to enforce such rights in respect of such Network Rail Loss in a vexatious manner or is pursuing or seeking to pursue such rights at a time when there is no reasonable prospect of a successful outcome, by notice to the DBFO Co in writing recover full control of the proceedings and/or negotiations, including without limitation, the right to settle or discontinue. In such circumstances the DBFO Co shall not be released from its undertaking for costs.

30.9.13.6 In addition to and without prejudice to Clause 30.9.13.5, the Secretary of State may at any time, if he considers in his absolute discretion that to do so is required on policy grounds, by notice to the DBFO Co in writing recover full control of the proceedings and/or negotiations, including without limitation, the right to settle or discontinue. In such event (but unless Clause 30.9.13.5 applies), the DBFO Co shall from the date of such notice be released from its undertaking for costs (in respect of the costs incurred both prior to and following the service of such notice) and the Secretary of State shall within 30 days after service of such notice repay to the DBFO Co all costs previously paid by the DBFO Co pursuant to its undertaking.

30.9.13.7 Where the Secretary of State pursuant to Clause 30.9.13.4.1, or the DBFO Co pursuant to Clause 30.9.13.4.2, is successful in a claim against Network Rail with respect to a Network Rail Loss, but the Network Rail Loss exceeds (such excess being referred to in this Clause 30.9.13.7 as the “Excess Network Rail Loss”) the aggregate of:

30.9.13.7.1 the Network Rail Recovery Amount;  
and

30.9.13.7.2 the amount that the DBFO Co is entitled to recover in respect of the Network Rail Loss under any insurance policy (whether effected pursuant to this Agreement or otherwise)

then following the final conclusion of any proceedings by the Secretary of State against Network Rail with respect to the Network Rail Loss and the expiry of the time for any appeal without a successful appeal being made, the Secretary of State shall account to the DBFO Co for so much of the Excess Network Rail Loss as the Secretary of State pursuant to Clause 30.9.13.4.1, or the DBFO Co pursuant to Clause 30.9.13.4.2, would have recovered from Network Rail had the claim in respect of the Network Rail Loss not been subject to the cap on liability contained in clause 5.2.2 of the Network Rail Agreement and provided that, for the purposes of calculating such amount, it shall be assumed that Network Rail would not have been entitled to reduce or avoid to any extent the amount recoverable from it by the Secretary of State under the Network Rail Agreement in reliance solely on the ground that the Secretary of State is entitled to limit his liability under the terms of this Clause 30.9.13.

30.9.13.8 The Secretary of State shall not be obliged to pay the DBFO Co any sums under this Clause 30.9.13 other than the Network Rail Recovery Amount and any sum payable by the Secretary of State pursuant to Clause 30.9.13.7.

30.9.14 Nothing in this Clause 30.9 shall derogate from or relieve the DBFO Co of any of its obligations under this Agreement

**PART V**  
**CHANGE, LIABILITIES AND TERMINATION**

34. **CHANGE PROCEDURE**

If at any time after the date of this Agreement an Eligible Change occurs, except and to the extent that the same arises out of a breach by the DBFO Co (or any person for whom it is responsible) of any obligations under this Agreement or the Project Documents, the provisions of Schedule 12 [Change] shall apply.

35. **CHANGE IN LAW**

35.1 **Relevant Change in Law**

35.1.1 If the DBFO Co believes that a Relevant Change in Law has occurred which is a Compensation Event, the DBFO Co may give a notice pursuant to paragraph 1.1 of Annex 3 to Part 1 of Schedule 12 [Compensation Events] and the General Change Procedure shall apply subject to the provisions of Annex 3 to Part 1 of Schedule 12 [Compensation Events].

35.1.2 Where, after the date of this Agreement, any Relevant Change in Law is repealed or modified or any Law is enacted or modified the effect of which is to neutralise or reduce the discriminatory effect of a Relevant Change in Law, then the Secretary of State may give a notice to that effect to the DBFO Co and the provisions of Annex 3 to Part 1 of Schedule 12 [Compensation Events] shall apply, mutatis mutandis, as if such event were a Compensation Event, with references to the Secretary of State being deemed to be references to the DBFO Co, and vice versa, and with references to Relevant Change in Law being replaced by references to the repeal, modification or enactment referred to in this Clause 35.1.2. For the avoidance of doubt, the Secretary of State shall be the "Proponent" and the DBFO Co shall be the "Other Party" for the purposes of the General Change Procedure.

35.2 **Deemed Department's Change**

35.2.1 Where the DBFO Co believes that a Change in Law constitutes a Deemed Department's Change, it may, within 28 days of the relevant Change of Law coming into effect or if later, within 28 days of the date that the DBFO Co ought reasonably to have become aware of the effect of the Deemed Department's Change, serve a notice (a "Deemed Department's Change Notice") to that effect on the Department's Nominee.

35.2.2 The Deemed Department's Change Notice shall:

35.2.2.1 identify the relevant Change in Law;

35.2.2.2 give details of the variation to the Works and/or the Operations which has become necessary as a result of the relevant Change in Law; and

35.2.2.3 set out the basis of its belief that if the same had been effected in accordance with the terms of this Agreement, it would have constituted a Department's Change.

35.2.3 Within 60 days of receipt of the Deemed Department's Change Notice, the Department's Nominee shall notify the DBFO Co that either:

35.2.3.1 he agrees that a Deemed Department's Change has occurred; or

35.2.3.2 he does not agree that a Deemed Department's Change has occurred, in which case the Department's Nominee shall set out in the notice the grounds of objection.

- 35.2.4 Where the Department's Nominee fails to respond to a Deemed Department's Change Notice within such 60 day period, a Deemed Department's Change shall be deemed to have occurred and the DBFO Co may serve a notice on the Department's Nominee requiring him to issue a Department's Change and the provisions of Annex 1 of Part 1 of Schedule 12 [Department's Change] shall apply.
- 35.2.5 Where the Department's Nominee gives a notice under Clause 35.2.3, the Parties shall negotiate for a period of 60 days in an attempt to agree:
- 35.2.5.1 whether a Deemed Department's Change has occurred; and
- 35.2.5.2 where a Deemed Department's Change has occurred, the effect, if any, it has on the Works and/or the Operations.
- 35.2.6 If the Parties fail to agree any matter referred to in Clause 35.2.5 within such 60 day period, then either Party may refer the Dispute to the Disputes Resolution Procedure.
- 35.2.7 Where the Department's Nominee agrees, or it is determined in accordance with the Disputes Resolution Procedure, that there has been a Deemed Department's Change, the Department's Nominee shall issue a Department's Change and the provisions of Annex 1 of Part 1 of Schedule 12 [Department's Change] shall apply.
- 35.2.8 The provisions of Clause 3.5.1.13 shall not be construed as denying the DBFO Co the benefit of the provisions of this Clause 35.2.

36. **ADDITIONAL WORKS AND SUBSEQUENT SCHEMES**

36.1 Additional Works Services

Where the Secretary of State requires the DBFO Co to carry out any Additional Works Services, the DBFO Co shall procure that such Additional Works Services are carried out in accordance with the provisions of Part 1 of Schedule 13 [Procedure for Additional Works].

36.2 Compensation

36.2.1 The DBFO Co shall be entitled to compensation from the Secretary of State in respect of Additional Works Services, calculated in accordance with the provisions of Part 2 of Schedule 13 [Payment for Additional Works Services].

36.2.2 The provisions of Annex 2 of Part 1 of Schedule 12 [Additional Works] shall apply with respect to any Change in Costs, or Change in Revenue of the DBFO Co consequential upon the carrying out of any Additional Works provided that where the Additional Works are not carried out by the DBFO Co or any Associated Company of the DBFO Co or by the Sponsor or any Associated Company of the Sponsor or Holdco and the Secretary of State elects not to procure that the Additional Works Contractor enters into a direct agreement with the DBFO Co providing a warranty in favour of the DBFO Co in terms that are, at the relevant time, reasonably and ordinarily to be expected to be provided by a skilled and experienced contractor carrying out such works the DBFO Co shall be entitled to include in its estimate of any Change in Costs a reasonable amount in respect of the risk of any defects in the Additional Works not attributable to the DBFO Co.

36.3 Subsequent Schemes

Where the DBFO Co desires a Subsequent Scheme to be carried out, the provisions of Part 3 of Schedule 13 [Subsequent Schemes] shall apply.

36.4 Improvements

Where the DBFO Co desires to make any Improvement to the Project Facilities, the provisions of Part 4 of Schedule 13 [Improvements] shall apply.

36.5 Defects in Additional Works

36.5.1 Without prejudice to paragraph 6 of Part 1 of Schedule 13 [Procedure for Additional Works] and without prejudice to Clause 17.3 [Remedial Action], from the date of completion specified in the Additional Works Completion Certificate in respect of any Additional Works, the DBFO Co shall be responsible for any remedial or other works required as a result of any defect in such Additional Works including, without limitation, any latent defect.

36.5.2 All costs of and associated with any such defect in such Additional Works (including, without limitation, any latent defect therein) and any remedial or other works in respect thereof shall be borne by the DBFO Co.

- 36.5.3 For the avoidance of doubt, the Secretary of State shall have no liability to the DBFO Co in respect of any loss of profit, loss of income, loss of contract or any other losses arising out of or in connection with the existence of any such latent defect in the Additional Works or any remedial works required as a result of any latent defect.
- 36.5.4 If the DBFO Co suffers loss as a result of any defect in any such Additional Works (including, without limitation, any latent defect therein) and it wishes the Secretary of State to exercise any rights against any Additional Works Contractor which the Secretary of State may have in respect of any such defect in such Additional Works (including, without limitation, any latent defect therein) then the DBFO Co may serve a notice on the Secretary of State asking him to exercise any right he may have to make a claim against the relevant Additional Works Contractor (the "Additional Works Contractor Notice") and the provisions of Clause 17.5.2 to 17.5.5 inclusive shall apply mutatis mutandis in respect of the Additional Works Contractor Notice, with reference therein to:
- 36.5.4.1 the "Third Party Contractor Claim Notice" being deemed to be a reference to the "Additional Works Contractor Notice";
- 36.5.4.2 "Third Party Contractor" being deemed to be a reference to the relevant "Additional Works Contractor";
- 36.5.4.3 "Defective Work" being deemed to be a reference to the relevant defect in the Additional Works; and
- 36.5.4.4 the definition of "Recovery Amount" being deemed to mean the amount (net of any costs of recovery) which the Secretary of State has recovered from the relevant Additional Works Contractor in respect of the relevant defect in the relevant Additional Works the subject of the Additional Works Contractor Notice.

37. **FORCE MAJEURE**

37.1 **Relief from Liability**

The Parties shall be relieved from liability under this Agreement to the extent that by reason of Force Majeure they are not able to perform their obligations under this Agreement provided that it is agreed that for the purposes of this Agreement the provisions of paragraphs 1.3 and 1.4 of Schedule 11 shall only be deemed to constitute Force Majeure insofar as:

37.1.1 they affect the ability of the Secretary of State in the performance of his obligations; or

37.1.2 they affect the DBFO Co in the performance of its obligations but do not also constitute a risk which has become Uninsurable and to which the provisions of Clause 20.7 apply.

37.2 **Notice**

Relief under Clause 37.1 [Relief from Liability] shall not be given unless the Party intending to claim relief has, by notice to the other Party within 10 days of becoming aware of the event of Force Majeure or, if later, of the failure to perform, informed the other Party that it intends to claim relief. Such notice shall contain such relevant information relating to such failure as is available, including (without limitation) the actions being taken to remedy such failure to perform and an estimate of the period of time required to remedy such failure.

37.3 **Obligation to Remedy**

As soon as practicable after the occurrence of an event of Force Majeure the Party affected shall take all reasonable steps in accordance with Good Industry Practice to remedy the failure to perform and relief under this Clause 37 [Force Majeure] shall cease to be available to a Party to the extent that it fails so to take all such reasonable steps to remedy the failure.

37.4 **Consequences of Force Majeure**

If the Parties agree or it is determined through the Disputes Resolution Procedure that Eligible Force Majeure:

37.4.1 has, prior to the issue of the Completion Certificate, delayed the DBFO Co in completing the Works then the Contract Period shall be extended by a period equal to the period of such delay, provided that the cumulative aggregate of all such extensions pursuant to this Clause 37.4.1 shall not, in any event, exceed 180 days;

37.4.2 has, prior to the issue of the Completion Certificate caused damage to the Works:

37.4.2.1 the DBFO Co shall give notice thereof to the Department's Nominee together with details of the effect thereof and the proposed steps to rectify the damage and the costs thereof;

37.4.2.2 the Parties shall enter into discussions concerning the event of Eligible Force Majeure and the damage with the intent that, as

soon as possible after the cessation of the event of Eligible Force Majeure, rectification work can be commenced;

37.4.2.3 following agreement between the Parties on the rectification works to be carried out, or in default of agreement upon a decision under the Disputes Resolution Procedure, the DBFO Co shall procure that such rectification works are carried out as though the Secretary of State had requested a Department's Change in respect of such Works and the provisions of Annex 1 of Part 1 of Schedule 12 [Department's Change] shall apply, except that:

37.4.2.3.1 the DBFO Co shall not be entitled to give a notice under paragraph 2.1 of Annex 1 to Part 1 of Schedule 12 [Department's Change]; and

37.4.2.3.2 for purposes of determining the Revised Value in accordance with paragraph 6 of Part 2 of Schedule 12 [General Change Procedure], no Change in Revenue shall be taken into account;

37.4.3 occurring after the issue of the Completion Certificate, has substantially affected the vehicle flow and/or vehicle speed on the Project Road in a manner which in itself (and not through any default by the DBFO Co) has the effect of reducing materially the Congestion Management Payments payable to the DBFO Co, then the Contract Period shall be extended by a period equal to the period during which the vehicle flow and/or vehicle speed on the Project Road has been so affected, provided that:

37.4.3.1 there shall be no extension of the Contract Period for any occurrence of Eligible Force Majeure unless such occurrence affects vehicle flow and/or vehicle speed for more than 7 consecutive days, and

37.4.3.2 the aggregate extension of the Contract Period pursuant to this Clause 37.4.3 shall not in any event exceed 180 days;

37.4.4 has, at any time caused damage to the Existing Road (other than any Upgraded Section), or has after the issue of the Completion Certificate caused damage to either the New Road or the Off-Site Facilities then, and subject always to Clause 37.6:

37.4.4.1 the DBFO Co shall give notice thereof to the Department's Nominee together with details of the effect thereof and the proposed steps to rectify the damage and the costs thereof;

37.4.4.2 the Parties shall enter into discussions concerning the event of Eligible Force Majeure and the damage with the intent that, as soon as possible after the cessation of the event of Eligible Force Majeure, rectification work can be commenced;

37.4.4.3 following agreement between the Parties on the rectification works to be carried out, or in default of agreement upon a

decision under the Disputes Resolution Procedure, the DBFO Co shall procure that such rectification works are carried out as though they were Additional Works in accordance with the provisions of Annex 2 of Part 1 of Schedule 13 [Procedure for Additional Works ] and the provisions of Part 1 of Schedule 12 [Additional Works] shall apply, except that for purposes of determining the Revised Value in accordance with paragraph 6 of Part 2 of Schedule 12 [General Change Procedure] no Change in Revenue shall be taken into account.

### 37.5 Right to Terminate

37.5.1 Where an occurrence of Eligible Force Majeure:

37.5.1.1 occurring prior to the issue of the Completion Certificate, has rendered financially or practicably impossible the performance of this Agreement for a period of time so as to have a fundamental effect on the rights or obligations of either of the Parties; or

37.5.1.2 has a material effect on the performance by either Party of this Agreement for a period longer than 180 days or an aggregate period of at least 180 days over any 3 year period;

then either Party may, following consultation for a further period of not less than 90 days to reach a solution acceptable to both Parties, terminate this Agreement in accordance with Clause 42.2 [Termination for Force Majeure].

37.5.2 Where one or more occurrences of Eligible Force Majeure have a material effect on the performance by the DBFO Co of this Agreement for an aggregate period of at least 180 days the DBFO Co may, following consultation for a further period of not less than 90 days to reach a solution acceptable to both Parties, terminate this Agreement in accordance with Clause 42.2 [Termination for Force Majeure].

### 37.6 Limit on Liability

For the avoidance of doubt, save as expressly set out in this Clause 37 [Force Majeure] (other than this Clause 37.6 [Limit on Liability]) none of the Secretary of State, his servants or agents shall have any liability to the DBFO Co in relation to any Loss or Claim which the DBFO Co suffers or incurs as a result of any event of Force Majeure and, accordingly, as between the Parties any such Loss or Claim shall be borne by the DBFO Co.

38. **WARRANTIES, UNDERTAKINGS AND DISCLAIMERS**

38.1 **Warranties and Undertakings by the DBFO Co**

Without prejudice to any warranties or conditions implied by law, the DBFO Co warrants and undertakes that:

- 38.1.1 it will fully comply with and meet the Technical Requirements;
- 38.1.2 the design of the Works and of any other works the subject of a Proposal will in all respects meet the Technical Requirements and all other requirements of this Agreement;
- 38.1.3 the Works and any other works the subject of a Proposal will comprise only materials and goods which will be of sound and satisfactory quality and have been manufactured or prepared in accordance with the Technical Requirements and with the Management Systems established pursuant to Clause 23 [Management Systems] and all workmanship shall be in accordance with sound construction practice applicable at the time of construction;
- 38.1.4 the DBFO Co will, at all times, comply with the requirements of the Department's Nominee as permitted under this Agreement and the Requirements of Interested Parties and any Legal Requirement;
- 38.1.5 the Works and any other works the subject of a Proposal, when constructed, will comply, in all respects, with the Core Construction Requirements, the Construction Requirements, the Core Communications Requirements, the Communications Requirements, the design as received in accordance with Clause 11 [Design and Construction] or Clause 14.6 [Maintenance and Other Works] (as the case may be) and the Design and Certification Procedure;
- 38.1.6 the Construction Requirements, the Communications Requirements and the O&M Requirements will comply with and satisfy the Core Construction Requirements, the Core Communications Requirements and the Core O&M Requirements respectively;
- 38.1.7 subject to the terms of the Design and Certification Procedure, the design of the Works and of any other works the subject of a Proposal will be carried out by or under the supervision of the Designer and the persons carrying out any design and/or supervision are suitably qualified and experienced so to do and in particular have adequate previous experience of the part of the design they are carrying out or supervising;
- 38.1.8 all information, representations and other matters of fact communicated in writing to the Secretary of State or his agents or employees in connection with the DBFO Co's response to the invitation to tender in respect of the Project or in the course of the subsequent negotiations in respect of this Agreement are true, complete and accurate in all respects;
- 38.1.9 it is a limited liability company, duly incorporated and validly existing under the laws of the jurisdiction of its incorporation;

- 38.1.10 it has full power and authority to enter into this Agreement and to carry out the Operations;
- 38.1.11 the entry into and performance by it of this Agreement do not and will not conflict with:
- 38.1.11.1 its constitutional documents; or
- 38.1.11.2 any document which is binding upon it or any of its assets to the extent that such conflict would be reasonably likely to have a material adverse effect on the ability of the DBFO Co to perform its obligations under this Agreement;
- 38.1.12 there has been no material adverse change in the financial condition of the DBFO Co since its incorporation or in the financial condition of the Sponsor since the accounts dated 31<sup>st</sup> December 2002.
- 38.1.13 the Financial Terms when taken together with its share capital, the DBFO Co Loan Note Instrument and the revenue generated under this Agreement are the basis on which the DBFO Co intends to finance the Project;
- 38.1.14 each of the Project Documents, (apart from those specified in Clause 2.3.1A which will be once executed) is in full force and effect and constitutes the valid, binding and (except as may be limited by any relevant bankruptcy, insolvency examination or similar laws affecting creditors' rights generally, the principles of equity or equitable remedies, limitation of claims or defences of set off) enforceable obligations of the parties thereto, the copies of the Project Documents which the DBFO Co has delivered to the Secretary of State are true and complete copies of such documents, and there are not in existence any other agreements or documents replacing or relating to any of the Project Documents which would materially affect the interpretation or application of any of the Project Documents; and
- 38.1.15 any items referred to in Clauses 49.1.1 and 49.1.2 will not infringe any third party's copyright, moral rights, design rights, trade mark or any other intellectual property rights.

## 38.2 Disclaimer

- 38.2.1 The Secretary of State has made available to the DBFO Co, prior to the date hereof, certain materials, documents and data related to the design or construction of the Works, the operation and maintenance of the Project Facilities, the Site, the Adjacent Areas, traffic records and forecasts and other matters which are or may be relevant to the Project and the obligations undertaken by the DBFO Co under this Agreement (the "Disclosed Data"). The Disclosed Data includes, without limitation, all such materials, documents and data which were provided to the DBFO Co in connection with the invitation to tender in respect of the Project (including all such contained on the DVD Rom).
- 38.2.2 The Secretary of State shall not be liable to the DBFO Co (whether in contract, tort, by statute or otherwise howsoever and whether or not arising out of any negligence on the part of the Secretary of State or any agent, servant or contractor of his) in respect of any inaccuracy, error,

omission, unfitness for purpose, defect or inadequacy of any kind whatsoever in the Disclosed Data.

38.2.3 The Secretary of State gives no warranty or undertaking that the Disclosed Data represents all of the information in his possession or power (either during the tender for the Project or at the execution of this Agreement) relevant or material to the Project or the obligations undertaken by the DBFO Co under this Agreement. The Secretary of State shall not be liable to the DBFO Co in respect of any failure to disclose or make available (whether before or after the execution of this Agreement) to the DBFO Co any information, documents or data, nor to keep the Disclosed Data up to date, nor to inform the DBFO Co (whether before or after execution of this Agreement) of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy in the Disclosed Data.

38.2.4 The DBFO Co acknowledges and confirms that:

38.2.4.1 it has conducted its own analysis and review of the Disclosed Data and has before the execution of this Agreement satisfied itself as to the accuracy, completeness and fitness for purpose of all such Disclosed Data upon which it places reliance; and

38.2.4.2 it shall not be entitled to make any claim against the Secretary of State whether in damages or for extensions of time or additional payments under this Agreement on the grounds of any misunderstanding or misapprehension in respect of the Disclosed Data or the matters referred to in Clause 6.1 [Site Inspection] or Clause 38.2.4.1 or on the grounds that incorrect or insufficient information relating thereto or to the Site or Adjacent Areas was given to it by any person, whether or not in the employ of the Secretary of State. Nor shall the DBFO Co be relieved from any risks or obligations imposed on or undertaken by it under this Agreement on any such ground.

### 38.3 Savings

The warranty by the DBFO Co under any provision of this Agreement shall be without limitation to any warranty by the DBFO Co under any other provision of this Agreement.

### 38.4 Secretary of State's Warranty

The Secretary of State warrants to the DBFO Co that (at the date of this Agreement) the Orders listed in Part 6 of Schedule 3 [Scheme Orders] have (save for the draft order numbered 6 and the two draft orders together numbered 13 in Part 6 of Schedule 3 [Scheme Orders]) been properly made and (other than the De-Trunking Order numbered 5 in Part 6 of Schedule 3 [Scheme Orders], the draft order numbered 6 and the two draft orders together numbered 13 in Part 6 of Schedule 3 [Scheme Orders]) are in full force and effect.

39. **INDEMNITIES**

39.1 **DBFO Co's Indemnities**

Save to the extent that the DBFO Co is entitled to an indemnity from the Secretary of State under Clause 39.4 [Secretary of State's Indemnities], the DBFO Co shall indemnify and keep indemnified the Secretary of State, his servants and agents in respect of any Claims or Losses of any person (including, for the avoidance of doubt, the DBFO Co and the Secretary of State) which may arise out of, or in the course of or in connection with, the Operations or the performance of or failure to perform any obligation under this Agreement and, without limitation to the generality of the foregoing, in respect of:

- 39.1.1 any criminal penalties or fines arising out of or resulting from the breach by the DBFO Co of any of its obligations under this Agreement;
- 39.1.2 any damages or compensation payable to any workman or other person in the employment of the DBFO Co or any contractor or sub-contractor of any tier of the DBFO Co;
- 39.1.3 any loss or damage to the Works or the Project Facilities or any materials or Plant to be used in the construction of the Works or the Project Facilities from any cause (other than as provided in Clause 37 [Force Majeure]);
- 39.1.4 any Loss or Claim caused by any defect (including without limitation any Latent Defect) in the Existing Road including without limitation all costs of any remedial action taken in respect of any such defect and any loss of income as a consequence of any such defect or any such remedial action save to the extent that the DBFO Co is not obliged to bear the costs of such defect by virtue of Clauses 17.4.1.1, 17.4.1.2 and 17.4.1.3;
- 39.1.5 any Claim for damage suffered by any user of the Project Facilities or any other third party which arises out of the execution of the Works or the operation, maintenance or improvement of the Project Facilities (including without limitation any Claims in respect of environmental mitigation measures);
- 39.1.6 any Claim made by any person in respect of any CPA Works or IAPA Works which the DBFO Co has performed or agreed to perform whether pursuant to any requirement of this Agreement or otherwise;
- 39.1.7 any Loss or Claim arising whether directly or indirectly out of or in connection with:
  - 39.1.7.1 a breach of the provisions of Clause 28 [Statutory Undertakers]; or
  - 39.1.7.2 any Diversionary Works (as defined in Clause 28.1.6); or
  - 39.1.7.3 the DBFO Co's exercise, purported exercise or failure to exercise any Authorised Functions (as defined in Clause 28.1.2); or

- 39.1.7.4 the Secretary of State performing or engaging others to perform any Authorised Function (as defined in Clause 28 [Statutory Undertakers]) as a result of the Secretary of State withdrawing or suspending any such Authorised Function in accordance with Clause 28.4.10;
- 39.1.8 any Loss or Claim arising whether directly or indirectly out of or in connection with:
  - 39.1.8.1 a breach by the DBFO Co of the provisions of Clause 29 [Other Functions of the Secretary of State]; or
  - 39.1.8.2 the DBFO Co's exercise, purported exercise or failure to exercise any Third Party Authorised Function (as defined in Clause 29.1.4); or
  - 39.1.8.3 the Secretary of State performing or engaging others to perform any Third Party Authorised Function (as defined in Clause 29 [Other Functions of the Secretary of State]) as a result of the Secretary of State withdrawing or suspending any such Third Party Authorised Function in accordance with Clause 29.3.11;
- 39.1.9 any Loss or Claim which is to be borne by the DBFO Co in accordance with Clause 10 [Security of the Site] or which arises out of or in connection with any measures taken (or the failure to take measures which should have been taken) by the DBFO Co against or in connection with Protestors or Trespassers;
- 39.1.10 any Loss which is to be borne by the DBFO Co in accordance with Clause 30.2 [Claims Against Third Parties];
- 39.1.11 any Loss or Claims which may arise out of or in connection with any breach of the warranties and undertakings set out in Clause 38.1 [Warranties and Undertakings by the DBFO Co];
- 39.1.12 any Loss or Claim arising out of the carrying out of any Investigation and any Loss or Claim arising whether directly or indirectly out of the carrying on of works pursuant to Clause 6.4 [Works by Relevant Authorities];
- 39.1.13 any costs, charges, Losses or Claims to be borne by the DBFO Co in accordance with Clause 8.4 [Additional Access];
- 39.1.14 any Loss or Claim arising whether directly or indirectly out of any act or omission of the DBFO Co which directly or indirectly causes any breach by the Secretary of State of any of his statutory duties;
- 39.1.15 any Loss or Claim arising whether directly or indirectly out of any damage to the Connecting Roads as a consequence of or in connection with the Operations including, without limitation, where caused by site traffic operating in connection with the Project;
- 39.1.16 [Not used];

- 39.1.17 any Loss or Claim arising out of or in connection with any breach of the Regulations referred to in Clause 11.8 [Health and Safety] (whether in relation to obligations, requirements and duties of the client (as defined in Clause 11.8.1.2) or otherwise);
- 39.1.18 any Loss or Claim referred to in Clause 47.1.2;
- 39.1.19 any Loss or Claim which may arise out of, or in the course of or in connection with, any excavation, extraction, disposal, exploitation of or other dealing with any Site Materials or any breach by the DBFO Co of the provisions of Clause 8.10 [Disposal of Materials Won on Site];
- 39.1.20 any Loss or Claim made or brought by any person for or on account of infringement of any Intellectual Property (other than any Intellectual Property provided by the Secretary of State to the DBFO Co) used in connection with the Works or the Operations or which arise out of or in connection with the use of any plant, machinery or equipment in connection with the Works or Operations;
- 39.1.21 any Loss or Claim made or brought by any person arising in respect of or as a result of the Transfer of Undertakings (Protection of Employment) Regulations 1981;
- 39.1.22 any Loss or Claim suffered by the Secretary of State which may arise out of or in the course of or in connection with the taking of any measures authorised by the Secretary of State pursuant to Schedule 22 [Security of the Site] including without limitation the taking of any legal proceedings, enforcement of any Court order or enforcement of legal rights without a Court order or the doing of anything whatsoever taken, enforced or done or purported to be taken, enforced or done in the name of or on behalf of the Secretary of State;
- 39.1.23 any Loss or Claim arising from any inaccuracy, error, omission, unfitness for purpose, defect or inaccuracy of any kind whatsoever in the Disclosed Data or material as referred to in Clause 38.2 [Disclaimer] (whether or not arising from any negligence on the part of the Secretary of State or any servant, agent or contractor of his), except to the extent that such Loss or Claim arises from the use by a third party (other than an Associated Company of the DBFO Co or a Contracting Associate) of the Disclosed Data for a purpose unconnected with the Project;
- 39.1.24 any Loss or Claim made or brought by any Injurious Affection Party,

and in the case of Clauses 39.1.1 to 39.1.24 whether arising out of the act, neglect or omission of the DBFO Co, its Funders, agents, contractors or sub-contractors of any tier or its or their employees.

## 39.2 Savings

- 39.2.1 The DBFO Co's liability to the Secretary of State arising under any indemnity in this Agreement shall be without prejudice to any other right or remedy available to the Secretary of State and in particular shall not prejudice in any way the ability of the Secretary of State to enforce any guarantee given pursuant to Clause 4 [Guarantees] at any time and in any manner whatsoever.

- 39.2.2 The indemnity by the DBFO Co under any provision of this Agreement shall be without limitation to any indemnity by the DBFO Co under any other provision of this Agreement.
- 39.2.3 The DBFO Co shall not be liable under Clause 39.1 for any Loss or Claim to the extent arising out of:
- 39.2.3.1 any failure of the Secretary of State to comply with its obligations under this Agreement or any applicable Law; or
  - 39.2.3.2 any act or decision of the Department's Nominee where such act or decision is carried out or made in excess of the authority vested in him from time to time by the Secretary of State unless and save to the extent that such act or decision is subsequently ratified by the Secretary of State; or
  - 39.2.3.3 any liability of the Secretary of State to Network Rail pursuant to clause 5 of the Network Rail Agreement save to the extent that such liability is for compensation for injury or damage which arises as a direct consequence of the Operations or the performance of or failure to perform any obligation of the DBFO Co under this Agreement.

39.3 Conduct of Claims Subject to DBFO Co's Indemnities

- 39.3.1 If the Secretary of State receives any notice, demand, letter or other document concerning any Claim from which it appears that the Secretary of State is or may become entitled to indemnification under this Agreement, the Secretary of State shall give notice in writing to the DBFO Co as soon as reasonably practicable.
- 39.3.2 Subject to Clauses 39.3.3, 39.3.4, 39.3.5 and 39.3.6 and, where applicable, the provisions of Clause 28 [Statutory Undertakers] and Clause 29 [Other Functions of the Secretary of State], on the giving of a notice pursuant to Clause 39.3.1 the DBFO Co shall, be entitled to and shall resist the Claim in the name of the Secretary of State at its own expense and shall have the conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations, and the Secretary of State will give the DBFO Co all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim.
- 39.3.3 With respect to any Claim subject to Clause 39.3.2:
- 39.3.3.1 the DBFO Co shall keep the Secretary of State fully informed and consult with him about the conduct of the Claim;
  - 39.3.3.2 to the extent that the Secretary of State is not entitled to be indemnified by the DBFO Co for all of the liability arising out of the act or omission which is the subject of the Claim, no action shall be taken pursuant to Clause 39.3.2 which shall increase the amount of any payment to be made by the Secretary of State in respect of that part of the Claim which is not covered by the indemnity from the DBFO Co; and

- 39.3.3.3 the DBFO Co shall not pay or settle such Claim without the consent of the Secretary of State, such consent not to be unreasonably withheld or delayed; provided that such consent shall not be required to the payment or settlement of a Claim subject to the indemnity in Clause 39.1.6 if the Claim is paid or settled in full and the amount of such payment or settlement does not exceed £20,000 (in December 2002 prices).
  - 39.3.4 The Secretary of State shall be free to pay or settle any Claim on such terms as he may, in his absolute discretion, think fit and without prejudice to his rights and remedies under this Agreement if:
    - 39.3.4.1 within 28 days of the notice from the Secretary of State under Clause 39.3.1 the DBFO Co fails to notify the Secretary of State of its intention to dispute the Claim; or
    - 39.3.4.2 the DBFO Co fails to comply in any material respect with the provisions of Clause 39.3.3.
  - 39.3.5 The Secretary of State shall be free at any time to give notice to the DBFO Co that he is taking over the conduct of any defence, dispute, compromise or appeal of any Claim subject to Clause 39.3.2 or of any incidental negotiations. Upon receipt of such notice the DBFO Co shall promptly take all steps necessary to transfer the conduct of such Claim to the Secretary of State and shall provide to the Secretary of State all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim. If the Secretary of State gives any notice pursuant to this Clause 39.3.5, then the DBFO Co shall be released from its indemnity in respect of such Claim save where such notice was given as a consequence of a failure of the DBFO Co to deal properly with any such Claim.
  - 39.3.6 The DBFO Co shall have no rights under Clause 39.3.2 to conduct or resist any Claim which is the subject of the indemnity in Clause 39.1.24 and the provisions of Clauses 39.3.3, 39.3.4 and 39.3.5 shall not apply in relation to such a Claim.

#### 39.4 Secretary of State's Indemnities

The Secretary of State shall indemnify and keep indemnified the DBFO Co in respect of:

- 39.4.1 any Loss or Claim to the extent resulting from any negligent act or omission of the Secretary of State, his agents, employees or other contractors (not being employed by the DBFO Co) save in respect of:
  - 39.4.1.1 the matters referred to in Clauses 17.5 [Enforcement of Rights against Third Parties], 36.5 [Defects in Additional Works], 39.1.4, 39.1.9, 39.1.21, 39.1.23 and 39.1.24;
  - 39.4.1.2 acts or omissions occurring prior to the date of this Agreement;
  - 39.4.1.3 omissions occurring between the date of this Agreement and the O&M Commencement Date which affect the condition of

the Existing Road but do not constitute a breach by the Secretary of State of his obligations under Clause 14.1.4.

- 39.4.2 the costs of acquiring all land or Rights in respect of land the subject of the rights of access and occupation set out in Clause 8.1 [Access for the DBFO Co] other than:
  - 39.4.2.1 any costs arising from any matter referred to in Clauses 39.1.6 and 39.1.24; and
  - 39.4.2.2 without prejudice to Clause 39.4.2.1, the costs of carrying out any CPA Works;
- 39.4.3 any Loss to be borne by the Secretary of State in accordance with Clause 17.5 [Enforcement of Rights against Third Parties];
- 39.4.4 any Loss which is to be borne by the Secretary of State in accordance with Clause 37 [Force Majeure];
- 39.4.5 any Loss which is to be borne by the Secretary of State in accordance with Clause 36.5.4 [Defects in Additional Works].

#### 39.5 Disclaimer

Save as expressly provided in Clause 39.4 [Secretary of State's Indemnities], the Secretary of State shall not under any circumstances be liable to the DBFO Co whether in contract, tort, by statute or otherwise and whether or not arising from any negligence on the part of the Secretary of State or any of his agents or employees, for any Claims or Losses of any person arising out of, or in the course of or in connection with, the Project. This Clause 39.5 [Disclaimer] shall not apply in relation to:

- 39.5.1 any failure by the Secretary of State to make proper payment to the DBFO Co in accordance with the terms of this Agreement;
- 39.5.2 any negligent act or omission of the Secretary of State or any of his agents or employees giving rise to death or personal injury; and
- 39.5.3 any liability of the Secretary of State for any breach of his obligations under this Agreement, save where (and to the extent that) the DBFO Co has an express remedy under this Agreement in respect of such breach, which remedy shall be exhaustive of its rights in respect of such breach.

#### 39.6 Conduct of Claims Subject to Secretary of State's Indemnities

- 39.6.1 If the DBFO Co receives any notice, demand, letter or other document concerning any Claim from which it appears that the DBFO Co is or may become entitled to indemnification under this Agreement, the DBFO Co shall give notice in writing to the Secretary of State as soon as reasonably practicable.
- 39.6.2 Subject to Clauses 39.6.3 and 39.6.4, on the giving of a notice pursuant to Clause 39.6.1 the Secretary of State shall be entitled to resist the Claim in the name of the DBFO Co at his own expense and to have the conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations, and the DBFO Co will give the Secretary of State

all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim.

39.6.3 With respect to any Claim subject to Clause 39.6.2:

39.6.3.1 the Secretary of State shall keep the DBFO Co fully informed and consult with it about the conduct of the Claim;

39.6.3.2 to the extent that the DBFO Co is not entitled to be indemnified by the Secretary of State for all of the liability arising out of the act or omission which is the subject of the Claim, no action shall be taken pursuant to Clause 39.6.2 which shall increase the amount of any payment to be made by the DBFO Co in respect of that part of the Claim which is not covered by the indemnity from the Secretary of State; and

39.6.3.3 the Secretary of State shall not pay or settle such Claim without the consent of the DBFO Co, such consent not to be unreasonably withheld or delayed.

39.6.4 The DBFO Co shall be free to pay or settle the Claim on such terms as it may in its absolute discretion think fit and without prejudice to its rights and remedies under this Agreement if:

39.6.4.1 within 28 days of the notice from the DBFO Co under Clause 39.6.1 the Secretary of State fails to notify the DBFO Co of its intention to dispute the Claim; or

39.6.4.2 the Secretary of State fails to comply in any material respect with the provisions of Clause 39.6.3.

40. **DEFAULT**

40.1 **Events of Default**

The following shall be Events of Default:

40.1.1 the occurrence of any of the following in respect of the DBFO Co or Holdco or any Contracting Associate or any Sponsor:

40.1.1.1 any meeting of creditors of the person in question being convened or held to discuss any arrangement or composition with or for the benefit of its creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) or any such arrangement or composition being proposed or entered into by or in relation to the person in question (other than for the purposes of a bona fide solvent company re-organisation or amalgamation which has been consented to in advance by the Secretary of State);

40.1.1.2 a supervisor, receiver, administrator, administrative receiver or other encumbrancer taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within 7 days) upon the whole or any material part of the assets of the person in question;

40.1.1.3 the person in question ceasing or threatening to cease to carry on business, or being or becoming unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986 (without the need to prove any fact or matter to the satisfaction of the court) but for these purposes substituting the figure of £10,000 for the sum of £750 in Section 123(1)(a) of that Act;

40.1.1.4 a notice of intention to appoint an administrator being issued or filed or a petition being presented or an application being made, or a meeting being convened for the purpose of considering a resolution, for or with a view to the making of an administration order or for the winding-up, bankruptcy or dissolution of the person in question (other than for the purposes of a bona fide solvent internal reorganisation or amalgamation which has been consented to in advance by the Secretary of State) unless such petition or application (other than in the case of an administration petition or application) is withdrawn, set aside or revoked within 14 days of its being made; or

40.1.1.5 if the person in question shall suffer any event analogous to any of the foregoing in any jurisdiction in which it is incorporated or resident,

but in the case of any of the foregoing affecting a Contracting Associate or Holdco or the Sponsor, only if the occurrence will have a material adverse effect on the ability of the DBFO Co to perform its obligations under this Agreement;

- 40.1.2 the occurrence of any change in control as referred to in Clause 45.3 [Change in Control];
- 40.1.3 the DBFO Co or Holdco or a Contracting Associate or the Sponsor sells, transfers, leases or otherwise disposes of the whole or any part (which is material in the context of the performance of the DBFO Co's obligations under this Agreement) of its undertakings, properties or assets by a single transaction or a number of transactions (whether related or not and whether at the same time or over a period of time and other than in respect of the grant of security pursuant to Clause 45.2.2) without prior consent of the Secretary of State, but in the case of Holdco or a Contracting Associate or the Sponsor, only if the disposal would have a material adverse effect on the ability of the DBFO Co to perform its obligations under this Agreement;
- 40.1.4 the failure of the conditions referred to in Clause 7.1 [Conditions to Commencement] (other than Clause 7.1.6) to be satisfied by the date referred to in Clause 7.2 [Satisfaction of Conditions];
- 40.1.5 the repudiation of this Agreement by the DBFO Co;
- 40.1.6 the DBFO Co commits a serious breach of its obligations under this Agreement, including, without limitation, the DBFO Co otherwise than as a consequence of a breach by the Secretary of State of his obligations under this Agreement:
  - 40.1.6.1 abandoning the Works; or
  - 40.1.6.2 ceasing to maintain or operate the Project Facilities or any, or any material part of any, of them;
- 40.1.7 the DBFO Co neglects persistently to comply with any of its obligations under this Agreement and following the issue of a Persistent Neglect Notice in accordance with Clause 26.7.1 any one or more of the following occurs:
  - 40.1.7.1 where such Persistent Neglect Notice relates to breach of an obligation which is capable of remedy, the DBFO Co fails to remedy such breach in accordance with the Persistent Neglect Remedy Programme agreed or determined in accordance with Clause 26.7.3;
  - 40.1.7.2 the DBFO Co fails to comply with its obligations under Clause 26.7.2;
  - 40.1.7.3 the DBFO Co fails to implement its Persistent Neglect Notice Plan; or
  - 40.1.7.4 the DBFO Co breaches its undertaking given in a Persistent Neglect Undertaking within the Relevant PN Period after the issue of the relevant Persistent Neglect Notice, provided that where the relevant Persistent Neglect Notice has been issued in respect of a breach by the DBFO Co which is a breach of a specific obligation under this Agreement and also a breach of

any of Clauses 3.5, 3.6 and/or 3.7 then for the purposes of determining whether a subsequent breach by the DBFO Co constitutes a breach of the relevant Persistent Neglect Undertaking a breach of Clauses 3.5, 3.6 and/or 3.7 which is not also a breach of the relevant specific obligation shall be ignored;

- 40.1.8 without limitation to the generality of Clause 40.1.7:
  - 40.1.8.1 the DBFO Co receiving a total number of three or more Warning Notices in any 5 year period unless the third such Warning Notice to be issued to the DBFO Co within that 5 year period is the first of those Warning Notices to be issued in respect of a material breach of the DBFO Co's obligations (rather than for the accumulation of Penalty Points in excess of the threshold specified in Clause 26.3) in which case an Event of Default under this Clause 40.1.8.1 shall not occur in relation to those three Warning Notices until the service of a further Warning Notice within the same 5 year period irrespective of whether such Warning Notice is issued in respect of a material breach of the DBFO Co's obligations or for the accumulation of Penalty Points in excess of the threshold specified in Clause 26.3;
  - 40.1.8.2 the DBFO Co being awarded a total of 100 or more Penalty Points in any 1 year period;
- 40.1.9 any of the warranties in or referred to in Clauses 38.1.8 to 38.1.14 (inclusive) shall prove to be materially untrue or incorrect in the case of the warranties contained in Clauses 38.1.8 and 38.1.12 as at the date of this Agreement or, in the case of the warranties contained in Clauses 38.1.9, 38.1.10, 38.1.11, 38.1.13 and 38.1.14 at any time and, in the case of Clause 38.1.14 where the untruth or incorrect subject matter of such warranty relates to the enforceability of a Project Document, the unenforceability of such Project Document would:
  - 40.1.9.1 materially adversely affect the ability of the DBFO Co to perform its obligations under this Agreement or any right of the Secretary of State under this Agreement or the Secretary of State's ability to enforce any such right or his ability to perform his obligations under this Agreement or to perform any statutory duty; or
  - 40.1.9.2 be inconsistent with the Secretary of State's statutory duties or the provisions of this Agreement; or
  - 40.1.9.3 give rise to or be in breach of any Legal Requirement;
- 40.1.10 any of the Project Documents:
  - 40.1.10.1 or this Agreement:
    - 40.1.10.1.1 ceases to be in full force and effect; or

40.1.10.1.2 no longer constitutes the valid, binding and enforceable obligations of the parties thereto other than the Secretary of State,

except in accordance with its terms or where a substitute agreement has been entered into in accordance with Clause 2.3.2 or where this Agreement ceases to be in full force and effect due to any act of the Secretary of State which he is not entitled to carry out under this Agreement or any failure to act by the Secretary of State where he is required so to act under this Agreement or it is necessary for him to so act in order either to authorise his entering into this Agreement or his performance of his obligations under this Agreement; or

40.1.10.2 is materially amended, varied or departed from (other than in accordance with Clause 2.3.2),

and, in any such case where the DBFO Co is not a party to such Project Document or, in the case of Clause 40.1.10.2, where the Project Document is departed from by a party other than the DBFO Co, this would materially adversely affect the ability of the DBFO Co to perform its obligations under this Agreement or any right of the Secretary of State under this Agreement or his ability to enforce any such right or to perform his obligations under this Agreement or to perform any statutory duty;

40.1.11 the DBFO Co fails to pay any sum due to the Secretary of State hereunder (which sum is not in dispute) and such failure continues for 120 days after the Secretary of State has notified the DBFO Co that such sum has not been paid; or

40.1.12 any breach by the DBFO Co of Clause 10.3 [No Payments to Protestors].

#### 40.2 Notification of Events of Default

The DBFO Co undertakes that it shall notify the Secretary of State of the occurrence and details of any Event of Default and of any event or circumstance which would, with the passage of time or otherwise, constitute or give rise to an Event of Default, in either case promptly upon the DBFO Co becoming aware of the occurrence thereof.

#### 40.3 Remedies

Upon the occurrence of an Event of Default (which has not been remedied at the time the Secretary of State first exercises such option), the Secretary of State may at his option and without prejudice to any of his other rights or remedies and to any rights of action which shall accrue or shall have already accrued to the Secretary of State do any or all of the following:

40.3.1 subject to Clause 40.3A, suspend payment of the DBFO Payment and any other payments otherwise due hereunder or retain any amount due from the Secretary of State to the DBFO Co howsoever arising;

40.3.2 apply any sums standing to the credit of the Retention Account in accordance with Clause 19.7.11;

- 40.3.3 without determining this Agreement, by notice in writing having immediate effect suspend performance by the DBFO Co of all or part only of the functions to be performed by it under this Agreement until such time as the DBFO Co shall have demonstrated to the reasonable satisfaction of the Secretary of State that it will perform and is capable of performing its obligations under this Agreement and thereafter himself perform or procure a third party to perform such part of the functions for such period provided that the Secretary of State shall only be entitled to suspend performance by the DBFO Co in accordance with this Clause 40.3.3 to the extent that:
- 40.3.3.1 members of the public are unable to use the Project Facilities (or part thereof) either safely, without undue delay or at all; or
  - 40.3.3.2 such suspension relates to functions which are directly connected to the Event of Default in question or which have been affected by such Event of Default;
- 40.3.4 in the case of the Events of Default referred to in Clauses 40.1.1 to 40.1.5 (inclusive), 40.1.7, 40.1.8, 40.1.11 and 40.1.12 and any other Event of Default which is incapable of remedy, terminate the Agreement in its entirety by notice in writing having immediate effect. For the purposes of this Clause 40.3.4 a breach shall be treated as "incapable of remedy" if it is as a matter of fact not capable of remedy by the DBFO Co provided that, where the breach would otherwise be treated as irremediable by reason only of the fact that it has occurred and the breach constitutes the occurrence of a particular default or series of defaults, such breach shall be deemed to be capable of remedy and to have been remedied if, within the period referred to in Clause 40.3.5,:
- 40.3.4.1 the matter or matters giving rise to the effects of the default or defaults have been duly corrected;
  - 40.3.4.2 the consequence of the default or defaults have been duly corrected; and
  - 40.3.4.3 all reasonable steps have been taken to prevent a recurrence of the default or defaults;
- 40.3.5 in the case of any Event of Default other than those referred to in Clause 40.3.4, serve notice of default on the DBFO Co requiring the DBFO Co, at the DBFO Co's option, either:
- 40.3.5.1 to remedy the breach or breaches referred to in such notice of default within 28 days of such notice (or such longer period as may be agreed by the Secretary of State in his absolute discretion); or
  - 40.3.5.2 to put forward within 14 days of such notice a reasonable programme for the remedying of the breach or breaches, such programme to specify in reasonable detail the manner in which such breach or breaches is or are proposed to be remedied and the latest date by which it is proposed that such

breach or all such breaches shall be remedied, and the provisions of Clause 40.5 [Termination in Full] shall apply.

#### 40.3A Suspension of Payments

40.3A.1 The rights of the Secretary of State under Clause 40.3.1 to suspend payment of or retain the amount of any payment which would have been due and payable to the DBFO Co but for the exercise by the Secretary of State of his rights under such Clause (together "Relevant Payments") shall be exercisable in accordance with and subject to the following provisions of this Clause 40.3A.

40.3A.2 In this Clause 40.3A:

"Service Obligation" means the Primary Service Obligations together with all other obligations of the DBFO Co under this Agreement which are incidental to the Primary Service Obligations but excluding any obligations of the DBFO Co to make any payment of monies to the Secretary of State under this Agreement.

"Primary Service Obligations" means activities in connection with the design, construction, completion, commissioning or testing of the Works and any Additional Works Services, the operation and maintenance of the Project Facilities or any other works or operations on or in relation to the Project Facilities, the Site or the Adjacent Areas required by, or in accordance with, this Agreement (including, without limitation, the performance of any Maintenance Works, Routine Maintenance, Trial Maintenance Work and traffic management, the provision of Reports, compliance with the Design and Certification Procedure, the Review Procedure, the Liaison Procedures and the Quality Plans, the effecting of insurance, the maintenance of records and compliance with the requirements of this Agreement relating to Relevant Authorities, Third Party Authorised Functions and Users and other Interested Parties).

40.3A.3 If the DBFO Co is performing none of the Service Obligations at any time following the occurrence of an Event of Default, the Secretary of State may suspend or retain Relevant Payments in full, without prejudice to the Secretary of State's obligations to resume the making of Relevant Payments under Clause 40.3A.5 if performance of the Service Obligations is subsequently resumed in full or in part, as the case may be.

40.3A.4 For so long as the DBFO Co performs all of the Service Obligations in full continuously and at all times following the occurrence of an Event of Default, the Secretary of State shall continue to make Relevant Payments in full (subject to the Secretary of State's rights of set-off under Clause 33.9 and to the prior deduction of any costs reasonably incurred by the Secretary of State arising from or in connection with such Event of Default, including without limitation all administrative expenses of the Secretary of State including general staff costs and overheads).

40.3A.5 If and for so long as neither Clause 40.3A.3 nor Clause 40.3A.4 applies following the occurrence of an Event of Default, the Secretary of State may suspend or retain Relevant Payments in full until such time as the DBFO Co has demonstrated to the reasonable satisfaction of the

Secretary of State that it is capable of performing all of the Service Obligations and the DBFO Co resumes such performance. Upon resumption of such performance, and subject to there being no continuing Event of Default or other material unperformed obligations under this Agreement:

40.3A.5.1 the Secretary of State shall resume the making of Relevant Payments with effect from, and in respect of periods commencing after, such resumption of performance (provided that if the amount of the costs referred to in Clause 40.3A.5.2.2 exceeds the amount of the Accrued Relevant Payments (as defined in Clause 40.3A.5.2.1) the Secretary of State shall be entitled to deduct the amount of such excess from such Relevant Payments until discharged); and

40.3A.5.2 subject to the DBFO Co performing to the satisfaction of the Secretary of State all of the Service Obligations falling due to be performed during the period of not less than one month after such resumption of such performance, the Secretary of State shall pay to the DBFO Co an amount equal to the lesser of:

40.3A.5.2.1 such proportion of those payments (the "Accrued Relevant Payments") constituting the Relevant Payments accrued (but unpaid) during the period (the "Default Period") from the occurrence of the relevant Event of Default to the date of such resumption of performance as equates to the proportion which the actual amount of the Service Obligations performed by the DBFO Co during the Default Period bears to the full amount of Service Obligations falling due to be performed by it during such Period; and

40.3A.5.2.2 the amount of the Accrued Relevant Payments less the amount of any costs of the Secretary of State arising from or in connection with the relevant Event of Default, including without limitation all costs reasonably incurred by him in performing or engaging others to perform the functions of the DBFO Co and all administrative expenses of the Secretary of State including general staff costs and overheads.

#### 40.4 Suspension under Clause 40.3.3

In the case of a suspension of the performance by the DBFO Co under this Agreement in accordance with Clause 40.3.3, the DBFO Co shall reimburse the Secretary of State for all costs incurred by him in performing or engaging others to perform the functions of the DBFO Co which are suspended (including, without limitation, the relevant

administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads).

#### 40.5 Termination in Full

40.5.1 Where the DBFO Co puts forward a programme in accordance with Clause 40.3.5.2 the Secretary of State shall have 28 days within which to notify the DBFO Co that he does not accept such programme as being reasonable, failing which the Secretary of State shall be deemed to have accepted such programme. Where the Secretary of State notifies the DBFO Co that he does not accept such programme as being reasonable, the parties shall endeavour within the following 7 days to agree any necessary amendments to the programme put forward. In the absence of agreement within such 7 day period, the question of whether or not the programme (as the same may have been amended by agreement) is reasonable may be referred by either Party to the Disputes Resolution Procedure.

40.5.2 If:

40.5.2.1 the breach or breaches notified in a notice of default served under Clause 40.3.5 is or are not remedied:

40.5.2.1.1 before the expiry of the period referred to in Clause 40.3.5.1 (if applicable); or

40.5.2.1.2 where the DBFO Co puts forward a programme pursuant to Clause 40.3.5.2 which has been accepted by the Secretary of State or determined by the Disputes Resolution Procedure as being reasonable, in accordance with such programme; or

40.5.2.2 such programme as is put forward by the DBFO Co pursuant to Clause 40.3.5.2 is rejected by the Secretary of State as not being reasonable, and the Disputes Resolution Procedure does not find against that rejection,

the Secretary of State may terminate this Agreement in its entirety by notice in writing having immediate effect.

#### 40.6 Savings

The rights of the Secretary of State under this Clause 40 [Default] are in addition and without prejudice to any other right the Secretary of State may have to claim the amount of any loss or damage suffered by the Secretary of State on account of the acts or omissions of the DBFO Co, whether pursuant to any bond or guarantee given in accordance with the requirements of this Agreement or otherwise.

41. **TERMINATION BY THE DBFO CO**

41.1 **DBFO Co Termination Events**

The following are DBFO Co Termination Events:

- 41.1.1 the Government sequesters, requisitions or otherwise seizes the Project Facilities or any, or any material part of any, of them otherwise than pursuant to any express provision of this Agreement;
- 41.1.2 the Secretary of State shall fail to issue the Commencement Certificate on or before the date which is 1 year after the date of issue determined in accordance with Clause 7.3.1;
- 41.1.3 the Secretary of State shall be in material breach of its obligations under Clause 8.1 [Access for DBFO Co] and such breach shall materially adversely affect the ability of the DBFO Co to perform its obligations under this Agreement for a period of not less than 180 days;
- 41.1.4 the Secretary of State or any successor of the Secretary of State under this Agreement shall cease to be the highway authority in respect of the Project Road or any material part of the Project Road (but excluding by way of any temporary or permanent delegation of the whole or any part of his statutory functions as highway authority);
- 41.1.5 the obligations of the Secretary of State under this Agreement shall (without the prior consent of the DBFO Co, such consent not to be unreasonably withheld or delayed) be novated or otherwise transferred (whether by virtue of any Law or any scheme pursuant to any Law or otherwise) to another person other than:
  - 41.1.5.1 any department of the Government or a Minister of the Crown pursuant to the Ministers of the Crown Act 1975; or
  - 41.1.5.2 any person who is not a department or office of the Government whose obligations under this Agreement are guaranteed by the Government or any department or office of the Government; or
- 41.1.6 the Secretary of State shall fail to pay any sum due to the DBFO Co hereunder (which sum is not in dispute), and such failure continues for 90 days.

41.2 **Termination Procedure**

- 41.2.1 Upon the occurrence of a DBFO Co Termination Event and so long as such DBFO Co Termination Event is subsisting, the DBFO Co may, at its option, serve notice on the Secretary of State of the occurrence of such DBFO Co Termination Event. If the relevant matter or circumstance has not been rectified or remedied by the Secretary of State or otherwise within 60 days of such notice, the DBFO Co may serve a further notice on the Secretary of State terminating this Agreement with immediate effect.

- 41.2.2 Upon a termination of this Agreement pursuant to Clause 41.2.1, the DBFO Co shall be entitled to compensation in accordance with Clause 44 [Compensation on Termination].
- 41.2.3 The DBFO Co may give notice to the Secretary of State terminating this Agreement only in accordance with the provisions of this Clause 41.2 [Termination Procedure], Clause 42.2.1, Clause 42.3.1 or Clause 42.4.1.

42. **NON-DEFAULT TERMINATION**

42.1 **Expiry of Term**

This Agreement shall terminate automatically upon the Expiry Date unless it shall have previously been terminated in accordance with the provisions of this Agreement.

42.2 **Termination for Force Majeure**

42.2.1 In the circumstances referred to in Clause 37.5 [Right to Terminate] and so long as such circumstances continue, either the Secretary of State or the DBFO Co may terminate this Agreement by notice to the other having immediate effect.

42.2.2 In the event of any termination pursuant to Clause 42.2.1, the Secretary of State shall pay to the DBFO Co the amounts determined in accordance with Clause 44.2 [Pre-Commencement Termination] or Clause 44.3 [Post-Commencement Termination], as the case may be.

42.3 **Termination on Relevant Change in Law**

42.3.1 If a Relevant Change in Law comes into effect which renders illegal or impossible (but not merely more expensive) all or substantially all of the DBFO Co's obligations under this Agreement, then either Party may terminate this Agreement by notice to the other.

42.3.2 In the event of any termination pursuant to Clause 42.3.1, the Secretary of State shall pay to the DBFO Co the amounts determined in accordance with Clause 44.2 [Pre-Commencement Termination] or Clause 44.3 [Post-Commencement Termination] (as the case may be) and Clause 44.5 [Additional Compensation].

42.4 **Termination under Clause 27**

42.4.1 If the entitlement of the DBFO Co to terminate this Agreement under Clause 27.5.3 arises, then the DBFO Co may terminate this Agreement by notice to the Secretary of State having immediate effect.

42.4.2 In the event of any termination pursuant to Clause 42.4.1 the Secretary of State shall pay to the DBFO Co the amounts determined in accordance with Clause 44.2 [Pre-commencement Termination] or Clause 44.3 [Post-Commencement Termination] (as the case may be) and Clause 44.5.7.

42.5 **Schedule 12 Termination**

42.5.1 If the DBFO Co serves a notice of objection in accordance with paragraph 2.1.5 of Annex 1 to Part 1 of Schedule 12 and the Parties are unable, despite having used reasonable endeavours, to reach a solution which is acceptable to both Parties within 90 days after receipt by the Secretary of State of such notice, then the Secretary Of State may terminate this Agreement by notice to the DBFO Co having immediate effect.

42.5.2 In the event of any termination pursuant to Clause 42.5.1:

42.5.2.1 if the Department's Change to which the DBFO Co objected in accordance with paragraph 2.1.5 of Annex 1 was a Department's Change which was required to be implemented in order for the Secretary of State to comply with his statutory duties and/or functions, then the Secretary of State shall pay to the DBFO Co the amounts determined in accordance with Clause 44.2 [Pre-commencement Termination] or Clause 44.3 [Post-Commencement Termination] (as the case may be) and Clause 44.5.7; or

42.5.2.2 if the Department's Change to which the DBFO Co objected in accordance with paragraph 2.1.5 of Annex 1 was not a Department's Change which was required to be implemented in order for the Secretary of State to comply with his statutory duties and/or functions, then the Secretary of State shall pay to the DBFO Co the amounts determined in accordance with Clause 44.2 [Pre-Commencement Termination] or Clause 44.3 [Post-Commencement Termination] and Clause 44.5 [Additional Compensation] (as the case may be).

43. **EFFECT OF TERMINATION**

43.1 **Step-in Rights**

43.1.1 Without prejudice to Clause 26.5 [Step-In Rights], in the event that the Secretary of State has given notice of termination under Clause 40.3.4 [Remedies], Clause 40.5 [Termination in Full], Clause 42.2 [Termination for Force Majeure], Clause 42.3 [Termination on Relevant Change in Law] or Clause 42.5 [Schedule 12 Termination] or the DBFO Co has given notice of termination under Clause 41.2 [Termination Procedure], Clause 42.2 [Termination for Force Majeure], Clause 42.3 [Termination on Relevant Change in Law] or Clause 42.4 [Termination under Clause 27], and, in any such case, members of the public shall be unable to use the Project Facilities either safely, without undue delay or at all or, where applicable in the case of Clause 43.1.1.2, such action relates to functions which are directly connected to the event giving rise to such termination or which have been affected by such event, then:

43.1.1.1 the Secretary of State may by 7 days notice to the DBFO Co expel the DBFO Co from the Site and the Adjacent Areas without thereby avoiding this Agreement or releasing the DBFO Co from any of its obligations or liabilities under this Agreement; and

43.1.1.2 whether or not he exercises the right under Clause 43.1.1.1, the Secretary of State may take, or employ others to take, such steps in relation to the operation and maintenance of the Project Facilities as he may think fit to protect the position of such members of the public, or address the functions which are directly connected to such event giving rise to such termination or which have been affected by such event and the Secretary of State may recover all costs of so doing (including, without limitation, the relevant administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads) from the DBFO Co provided that where the DBFO Co (or in the case of Clauses 42.2 and 42.3 either party) has validly served a notice of termination under Clause 41.2, 42.2, 42.3 or 42.4 the Secretary of State shall not be entitled to recover such costs.

43.1.2 For the avoidance of doubt, subject to the exercise by the Secretary of State of any right under Clause 43.1.1, the Parties shall continue to perform their obligations under this Agreement notwithstanding the giving of any notice of termination until the termination of this Agreement becomes final in accordance with the provisions of this Clause 43 [Effect of Termination].

43.1.3 Upon any step-in by the Secretary of State (whether pursuant to this Clause 43.1, Clause 41.3 or Clause 26.5) the Secretary of State agrees (to the extent that to do so does not constitute a fetter upon his discretion in the exercise of his statutory functions) to act in accordance with Good Industry Practice in the exercise of his rights and obligations in relation to such step-in provided that this Clause 43.1.3 shall not require him to put the Project Facilities or any part thereof in any better state or condition

than they are in at the date such step-in takes effect. Any inspections carried out to ascertain such condition at and/or after such step-in shall be undertaken at the cost of the DBFO Co.

#### 43.2 Disputed Termination

43.2.1 Notwithstanding the provisions of Clauses 40.3 [Remedies], 40.5 [Termination in Full], 41.2 [Termination Procedure], 42.2 [Termination for Force Majeure], 42.3 [Termination on Relevant Change in Law], and Clause 42.4 [Termination under Clause 27], Clause 42.5 [Schedule 12 Termination] where either Party has given notice of termination of this Agreement and the other Party has within 14 days of receipt of such notice referred the question of whether or not the purported termination is wrongful to the Disputes Resolution Procedure, termination of this Agreement shall not take effect pursuant to such notice of termination unless and until it is agreed by the Parties or finally determined in accordance with the Disputes Resolution Procedure that such termination is not wrongful.

43.2.2 If at any time a notice of termination has been received and a reference to the Disputes Resolution Procedure has not been made pursuant to Clause 43.2.1, then either Party may (within the 14 day period referred to in Clause 43.2.1) apply to the Court for injunctive or declaratory relief (whichever shall be appropriate) in respect of such purported termination and/or refer to the Court the question whether this Agreement has been wrongfully terminated and, if so, the damages accruing therefrom, in which event such matter shall be dealt with by the Court and not pursuant to the Disputes Resolution Procedure. Termination of this Agreement shall not take effect until it has been finally determined by the Court whether or not injunctive or declaratory relief is to be granted. Any Court proceedings shall be conducted by both Parties with due expedition.

43.2.3 If the Secretary of State has given notice of termination of this Agreement to the DBFO Co and has exercised the right referred to in Clause 43.1.1.1, then such termination shall be final notwithstanding a determination under the Disputes Resolution Procedure that such termination was wrongful and the DBFO Co shall not be entitled to access to any part of the Site or Adjacent Areas but without prejudice to any rights that the DBFO Co may have as a result of such wrongful termination.

#### 43.3 Savings

43.3.1 Save as otherwise expressly provided in this Agreement:

43.3.1.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including without limitation the right of the Secretary of State to recover damages from the DBFO Co where the termination has arisen as a result of an Event of Default); and

43.3.1.2 termination of this Agreement shall not affect the continuing rights and obligations of the DBFO Co and the Secretary of State under Clauses 8.6.2, 16.7 [Removal of Signs], 20 [Insurance], 24 [Reports and Information], 25 [Records], 30.2

[Claims Against Third Parties], 32 [Calculation of Payments], 33 [Invoicing and Payment], 39 [Indemnities], 42.2 [Termination for Force Majeure], 42.3 [Termination on Relevant Change in Law], Clause 42.4 [Termination under Clause 27], Clause 42.5 [Schedule 12 Termination], 44 [Compensation on Termination], 48 [Taxes], 49 [Intellectual Property] and 50 [Confidentiality], 52 [Disputes Resolution Procedure], 57 [Governing Law and Jurisdiction], Schedules 14 [Records and Reports] and 15 [Disputes Resolution Procedure] and this Clause 43 [Effect of Termination] or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

Save as provided in this Clause 43.3 [Savings], all rights and obligations of the Secretary of State and the DBFO Co under this Agreement shall cease and be of no further force and effect upon termination of this Agreement.

43.3.2 Notwithstanding any breach of this Agreement by either Party and without prejudice to any other rights which the other Party may have in relation thereto, the other Party may elect to continue to treat this Agreement as in full force and effect and to enforce its rights hereunder, and failure of either Party to exercise any right hereunder including any right to terminate this Agreement and any right to claim damages shall not be deemed a waiver of such right for any continuing or subsequent breach.

#### 43.4 Transfer of Assets

On the termination of this Agreement (or, in the case of Clause 43.4.5 and where the Secretary of State has exercised his step-in rights under Clause 43.1.1, on and for the duration of the exercise by the Secretary of State of such step-in rights):

43.4.1 the rights of access under Clause 8.1 [Access for DBFO Co] shall automatically terminate;

43.4.2 if, prior to the issue of the Completion Certificate, the DBFO Co shall transfer to and there shall vest in the Secretary of State such part of the Works as shall have been carried out, and if the Secretary of State so elects:

43.4.2.1 the Design Contract and/or the Construction Contract shall be novated to the Secretary of State (and upon such election the DBFO Co shall take all necessary steps as soon as reasonably practicable to procure such novation to the Secretary of State) and all Plant and all materials on the Site or adjacent thereto shall remain available to him for the purposes of completing the Works; and

43.4.2.2 the Construction Plant shall remain available to the Secretary of State for the purposes of completing the Works subject to payment therefor of a reasonable hire charge;

43.4.3 the DBFO Co shall hand over to and there shall vest in the Secretary of State any interest of the DBFO Co in the Project Facilities, which in the

case of the termination of this Agreement in accordance with Clause 42.1 [Expiry of Term], shall be in the state required in accordance with Clause 19 [Handback];

- 43.4.4 if the Secretary of State so elects, the Operation and Maintenance Contract shall be novated to him (and upon such election the DBFO Co shall take all necessary steps as soon as practicable to procure such novation to the Secretary of State);
- 43.4.5 the Secretary of State shall have an option to purchase or (where the Secretary of State has exercised his step-in rights under Clause 43.1.1) hire from the DBFO Co or any of its Associated Companies at a fair market value (as between willing counterparties, with any disputes as to such fair market value being determined by the Expert) and free from any security interest all or any part of the stocks of material, road vehicles, spare parts and other moveable property owned by the DBFO Co, the Contractor or the Operator and reasonably required in connection with the operation and maintenance of the Project Facilities. In calculating any sums payable by the Secretary of State under this sub-clause the Secretary of State shall receive a credit of a fair and reasonable sum to reflect any payment made under Clause 44.4.1.6;
- 43.4.6 the DBFO Co shall deliver to the Secretary of State or his designee "as built drawings" showing all alterations made since the commencement of operation for the Project Facilities;
- 43.4.7 the DBFO Co shall deliver to the Secretary of State operation and maintenance manuals for the Project Facilities, including without limitation in respect of communications, signalling and other systems in service at the Termination Date;
- 43.4.8 the DBFO Co shall procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical equipment included in the Project Facilities is assigned to the Secretary of State;
- 43.4.9 the DBFO Co shall deliver to the Secretary of State or his designee the records referred to in Clause 25.4.3;
- 43.4.10 If the Secretary of State so elects, any of the contracts of engagement between the DBFO Co and those persons listed in Clause 45.4.1 (insofar as they relate to operation and maintenance) specified in such election shall be novated to the Secretary of State (and upon such election the DBFO Co shall take all necessary steps as soon as reasonably practicable to procure such novation to the Secretary of State).

#### 43.5 Handover

On the termination of this Agreement for any reason:

- 43.5.1 the DBFO Co shall cooperate fully with the Secretary of State and any successor operator of the Project Facilities in order to achieve a smooth transfer of the operation of the Project Facilities, so as to protect the safety of and avoid undue delay or inconvenience to the members of the public;

- 43.5.2 the DBFO Co shall, as soon as practicable, remove from the Site and the Adjacent Areas all Plant, materials, Construction Plant, temporary buildings, road vehicles, spare parts and other property not required by the Secretary of State pursuant to Clause 43.4.2 or acquired or hired by the Secretary of State pursuant to Clause 43.4.5, and if it has not done so within 28 days after any notice from the Secretary of State requiring it to do so the Secretary of State may (without being responsible for any Loss) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of the DBFO Co;
- 43.5.3 the DBFO Co shall, within 1 week after the Termination Date, deliver to the Department's Nominee:
- 43.5.3.1 keys to all traffic sign housings; and
  - 43.5.3.2 lifting keys for all types of chamber covers; and
- 43.5.4 the DBFO Co shall, as soon as practicable vacate the Site and the Adjacent Areas and shall leave the Site and the Adjacent Areas in a clean and orderly condition.

44. **COMPENSATION ON TERMINATION**

44.1 **Termination Accounts**

44.1.1 The DBFO Co shall procure that not later than 90 days after termination of this Agreement pursuant to Clause 41 [Termination by the DBFO Co], Clause 42.2 [Termination for Force Majeure], Clause 42.3 [Termination on Relevant Change in Law], Clause 42.4 [Termination under Clause 27] or Clause 42.5 [Schedule 12 Termination] (or such longer period as may be agreed between the Department's Nominee and the DBFO Co's auditors), the Termination Accounts shall be drawn up. The Termination Accounts shall be audited by the DBFO Co's auditors and shall have annexed thereto:

44.1.1.1 a report signed by the DBFO Co's auditors in respect of the amount of the deductions to be made and the amount and nature of any liabilities to be excluded pursuant to Clause 44.4 [Exclusions and Deductions from Compensation]; and

44.1.1.2 where the Secretary of State has a liability under this Clause 44 [Compensation on Termination] or under Clause 42.2 [Termination for Force Majeure], Clause 42.3 [Termination on Relevant Change in Law], Clause 42.4 [Termination under Clause 27] or Clause 42.5 [Schedule 12 Termination] to pay the Pre-Commencement Costs, a report signed by the DBFO Co's auditors as to the amount of such Pre-Commencement Costs,

which reports shall, for the purposes of this Clause 44 [Compensation on Termination], be deemed to form part of the Termination Accounts.

44.1.2 The Termination Accounts shall be presented to the Department's Nominee for review. In order to enable the Department's Nominee to review the Termination Accounts, the DBFO Co will ensure that it keeps up to date and makes available at all reasonable times to the Department's Nominee and its or the Secretary of State's professional advisers all books, records and other information as may be reasonably required by the Department's Nominee or its or the Secretary of State's professional advisers. The DBFO Co shall and shall procure that its auditors shall cooperate with the Department's Nominee and its or the Secretary of State's professional advisers with regard to such review.

44.1.3 If the Department's Nominee does not within 60 days of presentation to it of the Termination Accounts notify the DBFO Co that it agrees with the basis of preparation of the Termination Accounts and the calculations contained therein, the Parties shall attempt in good faith to reach agreement in respect thereof. If they are unable to do so within 28 days of the expiry of such 60 day period or the earlier notification by the Department's Nominee that it does not agree such basis of preparation, any matter over which there is disagreement may be referred to the Expert. The determination by the Expert shall then be reflected in the Termination Accounts which, as so amended, shall be final and binding upon the Parties.

44.2 **Pre-Commencement Termination**

- 44.2.1 If the DBFO Co terminates this Agreement pursuant to Clause 41 [Termination by the DBFO Co] as a consequence of the occurrence of a DBFO Co Termination Event prior to the date of issue of the Commencement Certificate or this Agreement is terminated by either Party pursuant to Clause 42.2.1 [Termination for Force Majeure], Clause 42.3 [Termination on Relevant Change in Law] or Clause 42.4 [Termination under Clause 27] as a consequence of the occurrence of Eligible Force Majeure, a Relevant Change in Law or a refusal to exercise under Clause 27 (as the case may be), or is terminated by the Secretary of State pursuant to Clause 42.5 [Schedule 12 Termination] following the inability of the Parties to reach a solution in accordance with Clause 42.5.1, prior to the date of issue of the Commencement Certificate, then subject to the provisions of Clause 44.4 [Exclusions and Deductions from Compensation] the Secretary of State shall pay to the DBFO Co an amount by way of compensation, such amount (as determined from the Termination Accounts) being equal to the Pre-Commencement Costs incurred by the DBFO Co.
- 44.2.2 If the DBFO Co terminates this Agreement pursuant to Clause 41 [Termination by the DBFO Co] as a consequence of the occurrence of a DBFO Co Termination Event prior to the date of issue of the Commencement Certificate, the Secretary of State shall pay to the DBFO Co, in addition to the amount payable pursuant to Clause 44.2.1, a sum equal to interest on such amount at a rate per annum equivalent to the Interest Rate plus 2 per cent per annum from the relevant date or dates of expenditure by the DBFO Co to the date of termination of this Agreement.

#### 44.2A Delayed Termination

- 44.2A.1 If a termination on the grounds set out in Clause 44.2.1 or 44.2.2 takes effect after the date of issue of the Commencement Certificate as a consequence of a DBFO Co Termination Event occurring prior to the date of issue of the Commencement Certificate of which the DBFO Co was not and could not reasonably have been expected to have been aware in the period prior to the date of issue of the Commencement Certificate, such DBFO Co Termination Event shall be deemed to have occurred after the date of issue of the Commencement Certificate and Clause 44.3 shall apply.
- 44.2A.2 If a termination on the grounds set out in Clause 44.2.1 or 44.2.2 takes effect after the date of issue of the Commencement Certificate as a consequence of a DBFO Co Termination Event occurring prior to the date of issue of the Commencement Certificate of which the DBFO Co becomes aware in the period prior to the date of issue of the Commencement Certificate then, provided that the DBFO Co serves its notice to terminate pursuant to Clause 41.2.1 promptly upon becoming so aware and in any event serves such notice to terminate prior to the date of issue of the Commencement Certificate, upon service of such notice to terminate by the DBFO Co the issue of the Commencement Certificate shall be deemed to have been postponed until 5 Working Days after the earlier of the remedy by the Secretary of State of the DBFO Co Termination Event or the expiry of the period of notice specified in Clause 41.2.1.

### 44.3 Post-Commencement Termination

44.3.1 If:

44.3.1.1 the DBFO Co terminates this Agreement pursuant to Clause 41 [Termination by the DBFO Co] as a consequence of the occurrence of a DBFO Co Termination Event:

44.3.1.1.1 after the date of issue of the Commencement Certificate; or

44.3.1.1.2 prior to the date of issue of the Commencement Certificate where the DBFO Co was not (and could not reasonably have been expected to have been) aware of such DBFO Co Termination Event prior to the date of issue of the Commencement Certificate; or

44.3.1.2 this Agreement is terminated by either Party pursuant to Clause 42.2.1, Clause 42.3.1 or Clause 42.4.1 as a consequence of the occurrence of Eligible Force Majeure, a Relevant Change in Law or a refusal to exercise under Clause 27 (as the case may be), or is terminated by the Secretary of State pursuant to Clause 42.5 [Schedule 12 Termination] following the inability of the Parties to reach a solution in accordance with Clause 42.5.1:

44.3.1.2.1 after the date of issue of the Commencement Certificate; or

44.3.1.2.2 (in the case of a termination pursuant to Clause 42.3.1 or Clause 42.4.2) prior to the date of issue of the Commencement Certificate where the DBFO Co was not (and could not reasonably have been expected to have been) aware of such Eligible Force Majeure or Relevant Change in Law prior to the date of issue of the Commencement Certificate,

then subject to the provisions of Clause 44.4 [Exclusions and Deductions from Compensation] the Secretary of State shall pay to the DBFO Co an amount by way of compensation, such amount (as determined from the Termination Accounts) being equal to the aggregate of the amounts set out in Clause 44.3.2.

44.3.2 The aggregate referred to in Clause 44.3.1 is the aggregate of:

44.3.2.1 all outstanding amounts in respect of principal, interest up to the date of termination of this Agreement, fees, commissions, costs and expenses and prepayment charges and other breakage costs (including Hedging Termination Amounts paid or to be paid by the DBFO Co) owing by the DBFO Co to the Funders under the Funding Agreements at the date of termination of this Agreement or which arise from such termination; and

44.3.2.2 all other liabilities and obligations of the DBFO Co to third parties (including employees) arising out of or in connection with the Project which are in existence at the date of termination or arise as a result of or in connection with such termination, but excluding any sums payable under or in respect of the Funding Agreements.

#### 44.4 Exclusions and Deductions from Compensation

44.4.1 There shall be excluded from any amount payable pursuant to Clause 44.2.1 [Pre Commencement Termination] or Clause 44.3 [Post Commencement Termination]:

44.4.1.1 any liability of the DBFO Co in respect of subscription monies paid by or any other obligations owed to holders of the Ordinary Shares in respect of such Ordinary Shares and any liability of the DBFO Co in respect of any moneys advanced or other financial accommodation made available to the DBFO Co by any Associated Company of the DBFO Co;

44.4.1.2 any sums received in respect of the Project from the Funders, or otherwise derived from the Project, and subsequently applied for purposes other than the Project, such other purposes not to include the application of sums by way of the return of principal or capital or the payment of interest, dividends or distributions to Funders or otherwise pursuant to the Funding Agreements and being, in the case of such principal and capital, in reduction of amounts owing to Funders thereunder;

44.4.1.3 any costs, expenses, liabilities and obligations owing by the DBFO Co to the Funders to the extent that they arise as a result of or in connection with:

44.4.1.3.1 a Qualifying Refinancing in respect of which the prior written consent of the Secretary of State was not obtained in accordance with Schedule 25 [Refinancing]; or

44.4.1.3.2 any amendment, modification or variation of the terms of the Funding Agreements other than:

44.4.1.3.2.1 a Qualifying Refinancing in respect of which the prior written consent of the Secretary of State was obtained in accordance with Schedule 25 [Refinancing]; or

44.4.1.3.2.2 any such amendment, modification or variation (other than a Qualifying

Refinancing), which has been submitted to the Review Procedure pursuant to Clause 2.3.2 and in respect of which (i) there has been no objection under the Review Procedure; and (ii) (other than in the case of an Unapproved Rescue Refinancing) the DBFO Co has complied with its obligations under paragraphs 2.2, 2.6 and 2.7 of Schedule 25 [Refinancing] to the extent applicable; or

44.4.1.3.2.3 any such amendment, modification or variation (other than a Qualifying Refinancing or an Unapproved Rescue Refinancing) (i) which is not required to be submitted to the Review Procedure pursuant to Clause 2.3.2 and (ii) in respect of which the DBFO Co has complied with its obligations under paragraphs 2.2, 2.6 and 2.7 of Schedule 25 [Refinancing] to the extent applicable; or

44.4.1.3.2.4 any such amendment, modification, or variation that constitutes or gives rise to an Unapproved Rescue Refinancing;

44.4.1.4 all liabilities and obligations arising out of agreements or arrangements entered into by the DBFO Co prior to such termination (other than under the Project Documents or under any amendment, modification or variation which has been submitted to the Review Procedure pursuant to Clause 2.3.2 and in respect of which there has been no objection under the Review Procedure), to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

44.4.1.5 all liabilities and obligations arising out of agreements or arrangements entered into by the DBFO Co on or following such termination and any agreements or arrangements entered into at whatever time with any professional advisers or consultants of the DBFO Co, the Funders or any Contracting Associate:

- 44.4.1.5.1 regarding any claim or potential claim against the Secretary of State arising from or in connection with such termination; or
- 44.4.1.5.2 in respect of the payment of any amounts due as a consequence of the termination of the engagement of any such adviser or consultant which are not directly attributable to work done or services performed or costs reasonably incurred by such adviser or consultant as a consequence of the termination of this Agreement;
- 44.4.1.6 any sum payable or liability in respect of any loss of profit for work not executed, loss of income or indirect or consequential loss (provided that this Clause 44.4.1.6 shall not operate so as to exclude any amount properly due and payable by the DBFO Co to the Operator under the Operation and Maintenance Contract to compensate the Operator for its Unrecovered Fixed Investment Costs save to the extent that the amount of the Unrecovered Fixed Investment Costs exceeds an amount equal to the Operator Fees (as defined in the Operation and Maintenance Contract) which would have been payable in respect of the three month period commencing on the date on which the Operation and Maintenance Contract is terminated but for such termination);
- 44.4.1.7 subject to Clause 44.4.1A, all liabilities and obligations of the DBFO Co arising as a result of a breach of a contract relating to the Project except:
  - 44.4.1.7.1 any breach of contract arising as a direct result of termination of this Agreement which could not be avoided by the DBFO Co taking reasonable measures; or
  - 44.4.1.7.2 to the extent that (i) such liability or obligation is one to which Clause 44.3.2.2 applies and would have been discharged by a policy of insurance of the DBFO Co referred to in paragraphs 1.3, 1.4, 1.7, 2.3, 2.4 and 2.7 of Part 1 of Schedule 10 [Insurances] but for the risk arising from such breach of contract becoming and continuing to be Uninsurable (as defined in Clause 20.7) and (ii) this Agreement has been terminated in accordance with Clause 20.7.4 by reason of such risk becoming Uninsurable;
- 44.4.1.8 without prejudice to Clauses 44.9, any liability of the DBFO Co in respect of taxation (excluding (but without prejudice to the other provisions of this Clause 44.4.1) any liability under Clause 13.2 of the Credit Agreement);

44.4.1.9 subject to Clause 44.4.1A, the amount of any obligation or liability incurred or arising under any of the Funding Agreements as a result of:

44.4.1.9.1 any breach of any undertaking, warranty or representation under the terms of any of the Funding Agreements;

44.4.1.9.2 the occurrence of any event of default (however described) under any of the Funding Agreements;

44.4.1.9.3 any failure to satisfy any condition under the terms of any of the Funding Agreements;

44.4.1.9.4 the cancellation, suspension or revocation by the DBFO Co of a request by it for the advance to it of funds or for the issue of any guarantee, letter of credit or the Performance Guarantee,

(except to the extent that any of the events referred to in Clauses 44.4.1.9.1 to 44.4.1.9.4 (inclusive) arises as a result of termination of this Agreement or arises as a result of any breach by the Secretary of State of his obligations under this Agreement);

44.4.1.10 any amount payable under any of the Funding Agreements in respect of:

44.4.1.10.1 any demand under the Performance Guarantee;  
or

44.4.1.10.2 any liability owing, or any amount paid, to the Secretary of State under the Direct Agreement or any Step-In Undertaking or Step-In Indemnity (each as defined in the Direct Agreement) other than, in the case of termination of this Agreement by the DBFO Co pursuant to Clause 41 [Termination by the DBFO Co] or termination of this Agreement by either Party pursuant to Clause 42.3 [Termination on Relevant Change in Law] only, any such liability owing or amount paid to the Secretary of State to the extent that:

44.4.1.10.2.1 it relates to sums notified by the Secretary of State under clauses 4.4.1, 4.4.1A or 5.1 of the Direct Agreement, notified by the Security Trustee under clause 4.4.2 of the Direct Agreement or notified by the Step-In Obligor under clause 5.1 of the Direct Agreement; and

44.4.1.10.2.2 it does not exceed in aggregate an amount equal to the Maximum Rescue Refinancing Compensation Amount applicable on the relevant Step-In Date;

44.4.1.11 any liability of the DBFO Co, under or in respect of any contract relating to the Project, to pay any amount by way of reimbursement of, or indemnification in respect of, costs and expenses incurred by any other party to any such contract if and to the extent that:

44.4.1.11.1 such costs and expenses were not properly incurred; or

44.4.1.11.2 such costs and expenses were properly incurred but exceed a reasonable amount;

44.4.1.12 any liability of the DBFO Co for interest on overdue amounts under clause 10.5 (Interest on overdue amounts) of the Credit Agreement to the extent that the amount of such interest exceeds the amount of interest that would have been chargeable under clause 10.1 (Calculation of interest) of the Credit Agreement in respect of that overdue amount if that overdue amount constituted a Loan (as defined in the Credit Agreement) but not excluding any liability of the DBFO Co under clause 10.5 (Interest on overdue amounts) of the Credit Agreement arising as a result of a breach by the Secretary of State of any of his obligations under this Agreement; and

44.4.1.13 any liability of the DBFO Co under the Funding Agreements arising other than in connection with the financing of the Project.

44.4.1A Clauses 44.4.1.7 and 44.4.1.9 shall not in any circumstances have the effect or be construed as having the effect of excluding or otherwise entitling the Secretary of State to exclude from any amount payable by the Secretary of State pursuant to Clause 44.2.1 [Pre-Commencement Termination] or Clause 44.3 [Post-Commencement Termination]:

44.4.1A.1 any of the principal sums (including accelerated principal) owing to the Funders under the Funding Agreements at the date of termination or which arise from such termination and interest thereon (but excluding default interest which becomes payable to the Funders under the Funding Agreements other than any default interest arising as a result of the termination of this Agreement or any breach by the Secretary of State of his obligations under this Agreement); and

44.4.1A.2 any fees, commissions, costs and expenses and prepayment charges and other breakage costs referred to in Clause 44.3.2.1 to the extent that they do not arise as a consequence of a breach of contract relating to the Project, except any breach of contract arising as a direct result of termination of

this Agreement which could not be avoided by the DBFO Co taking reasonable measures.

44.4.2 The Secretary of State shall be entitled to deduct from any amount payable pursuant to Clause 44.2.1 or Clause 44.3 [Post-Commencement Termination]:

44.4.2.1 Hedging Termination Amounts paid or to be paid to the DBFO Co under the Hedging Agreements or (if the relevant Hedging Agreement has not been terminated on or prior to the date on which any payment is or is to be made by the Secretary of State to the DBFO Co pursuant to Clause 44.2.1 or Clause 44.3 [Post-Commencement Termination]) Hedging Termination Amounts which would have been paid or payable to the DBFO Co under such Hedging Agreement had such Hedging Agreement been terminated on such date;

44.4.2.2 the amount of any cash (whether or not in Sterling) or guarantee or the value realised by the Funders (or which could have been realised by the Funders acting diligently (but not in contravention of their duty at law) in the enforcement of their rights under the Funding Agreements) of any other security deposited, placed or made available by or on behalf of the DBFO Co, Holdco, any Sponsor or any Associated Company with, to, or for the benefit of the Funders (together "Security Sums") to secure obligations owed to any of the Funders under any of the Funding Agreements where and to the extent that, had any of such Security Sums been received prior to the date of the termination which gives rise to the obligation to make a payment under Clause 44.2.1 or Clause 44.3 [Post-Commencement Termination], any of the Funders would have been entitled (other than by reason of such termination) to apply such Security Sums upon receipt in or towards payment or discharge of any of the amounts, liabilities and other matters referred to in Clause 44.2.1 or Clause 44.3 [Post-Commencement Termination];

44.4.2.3 an amount equal to the proceeds of any insurances in respect of the Project received by the DBFO Co, any Contracting Associate or any Funder at any time prior to the date on which any payment is made by the Secretary of State to the DBFO Co pursuant to Clause 44.2.1 or Clause 44.3 [Post-Commencement Termination] and which proceeds in any such case are or are to be applied in or towards payment or discharge of:

44.4.2.3.1 the Pre-Commencement Costs;

44.4.2.3.2 any of the amounts, liabilities and other matters referred to in Clause 44.3.1; or

44.4.2.3.3 any of the other liabilities and obligations of the DBFO Co referred to in Clause 44.3.2.

The DBFO Co shall pay to the Secretary of State, or procure the payment to the Secretary of State of, any such proceeds of insurance received by the DBFO Co, any Contracting Associate or any Funder after the date on which any payment is made by the Secretary of State pursuant to Clause 44.2.1 or Clause 44.3 [Post-Commencement Termination] except to the extent that any proceeds of insurance are payable in respect of any liability or obligation not taken into account in computing the amount of such compensation payable; and

44.4.2.4 where, following an Unapproved Rescue Refinancing, any such amount is payable other than as a result of the termination by DBFO Co of this Agreement pursuant to Clause 41 [Termination by the DBFO Co], an amount equal to the aggregate of:

44.4.2.4.1 the amount of all Distributions made by the DBFO Co at any time between the date of the first Unapproved Rescue Refinancing and the date of termination of this Agreement; and

44.4.2.4.2 the amount standing to the credit of the Distributions Account (as defined in the Accounts Mandate) as at the date of termination of this Agreement,

up to a maximum amount equal to the Distributions Cap Amount. The DBFO Co shall pay to the Secretary of State, or procure the payment to the Secretary of State of, an amount equal to all Distributions made or to be made by the DBFO Co after the date on which any payment is made by the Secretary of State pursuant to Clause 44.2.1 or Clause 44.3 [Post-Commencement Termination] up to a maximum amount equal to the Distributions Cap Amount less the amount of any deduction the Secretary of State has made pursuant to this Clause 44.4.2.4.

#### 44.5 Additional Compensation

44.5.1 If Clause 44.3 [Post-Commencement Termination] shall apply as a consequence of the termination of this Agreement pursuant to Clause 41 [Termination by the DBFO Co], Clause 42.3 [Termination on Relevant Change in Law] or Clause 42.5.1 [Schedule 12 Termination] in the circumstances referred to in Clause 42.5.2.2 the Secretary of State shall, in addition to any amounts payable pursuant to Clause 44.3 [Post-Commencement Termination], pay to the DBFO Co as at the date of termination of this Agreement a sum which shall be the aggregate of:

44.5.1.1 an amount per Ordinary Share calculated in accordance with Clause 44.5.2 or Clause 44.5.5 as applicable; and

44.5.1.2 an amount in respect of the outstanding Subordinated Shareholder Debt which shall be the fair market value of such outstanding Subordinated Shareholder Debt (determined on the

basis of and in accordance with the procedure set out in Clause 44.5.3).

44.5.1A The amount payable by the Secretary of State pursuant to Clause 44.5.1 shall be calculated:

44.5.1A.1 in the case of a DBFO Co Termination Event referred to in any of Clauses 41.1.1, 41.1.2, 41.1.4 and 41.1.5, as at the Working Day immediately preceding the date upon which such DBFO Co Termination Event occurs;

44.5.1A.2 in the case of a DBFO Co Termination Event referred to in Clauses 41.1.3 and 41.1.6, as at the Working Day immediately preceding the date upon which the DBFO Co gives notice terminating this Agreement;

44.5.1A.3 in the case of the event referred to in Clause 42.3 [Termination on Relevant Change in Law], as at the Working Day immediately preceding the date on which the Relevant Change in Law is enacted or, if earlier, such other date as is agreed between the Secretary of State and the DBFO Co;

44.5.1A.4 in the case of any event referred to in Clause 42.5.2.2, as at the Working Day immediately preceding the date upon which the Secretary of State gives notice terminating this Agreement in accordance with Clause 42.5.1.

44.5.2 If, as at the date of termination of this Agreement, the Ordinary Shares have not been admitted to the Official List of the UK Listing Authority and/or admitted to trading on the London Stock Exchange, the amount payable per Ordinary Share under Clause 44.5.1 shall be the fair market value of such Ordinary Share (determined on the basis and in accordance with the procedure set out in Clause 44.5.3), less the Residual Value (if any) of such Ordinary Share.

44.5.3 For the purposes of calculating the fair market value of the outstanding Subordinated Shareholder Debt pursuant to Clause 44.5.1.2 and/or the fair market value of the Ordinary Shares pursuant to Clause 44.5.2, the provisions of this Clause 44.5.3 shall apply. The fair market value shall be calculated on the basis:

44.5.3.1 of fair market value as between a willing vendor and a willing purchaser and on the basis that such willing purchaser would be given all the information in the possession of the DBFO Co and of the DBFO Co's shareholders relating to the Project and its prospects; and

44.5.3.2 that the event leading to termination had not occurred and the DBFO Co was a going concern and accordingly would not have received or been entitled to receive any amount by way of compensation under this Agreement.

Such value shall be as agreed between the Department's Nominee and the DBFO Co's financial adviser for the time being or, if no agreement has

been reached within 60 days of such date of termination, by the Expert on reference by either Party.

44.5.4 The DBFO Co shall ensure that it keeps, and shall procure that its Associated Companies keep, up to date and shall make, and shall procure that its Associated Companies make, available at all reasonable times to the Department's Nominee and its or the Secretary of State's professional advisers its or their books, records and other information as the Department's Nominee or its or the Secretary of State's professional advisers reasonably consider necessary for the preparation of the valuation referred to in Clause 44.5.3. The DBFO Co and its Associated Companies and its professional advisers shall cooperate with the Department's Nominee and its or the Secretary of State's professional advisers with regard to the preparation of such valuation.

44.5.5 If as at the date of termination of this Agreement the Ordinary Shares have been admitted to the Official List of the UK Listing Authority and have been admitted to trading on the London Stock Exchange:

44.5.5.1 the amount payable per Ordinary Share under Clause 44.5.1.1 shall be the amount by which the average of the middle market quotations of such Ordinary Share on the London Stock Exchange (ascertained by reference to the London Stock Exchange's Daily Official List) on the last dealing day for each of the twelve months immediately preceding the relevant Working Day referred to in Clause 44.5.1A exceeds the average of such middle market quotations on each of the 60 Working Days immediately succeeding such relevant Working Day, as determined by the Department's Nominee and the DBFO Co's financial adviser for the time being or, if no agreement has been reached within 60 days of such date of termination, by the Expert on reference by either Party;

44.5.5.2 in determining the amount payable per Ordinary Share for the purpose of Clause 44.5.5.1, there shall be such adjustment to the middle market quotations of such Ordinary Share in each of the twelve months referred to in such Clause 44.5.5.1 as shall be fair and reasonable to take account of any capitalization of profits or reserves by the DBFO Co, or consolidation or sub-division in respect of the Ordinary Shares, or any capital distribution (of any nature) or rights issues made by the DBFO Co, in all such cases within such twelve month period. Such adjustment shall be as agreed between the Department's Nominee and the DBFO Co's financial adviser or, if no agreement has been reached within 60 days of the date of termination of this Agreement, as determined by the Expert on reference by either Party. The provisions of Clause 44.5.4 shall apply mutatis mutandis in relation hereto; and

44.5.5.3 if the Ordinary Shares cease to be traded or dealt in, or are suspended from trading or dealing, on the London Stock Exchange as a result of the event giving rise to termination of this Agreement, the average of the middle market quotations on each of the 60 Working Days succeeding the relevant

Working Day referred to in Clause 44.5.5.1 shall be taken as zero. In such circumstances the amount payable per Ordinary Share shall be reduced by an amount, if any, equal to the Residual Value of such Ordinary Share.

44.5.6 The amount payable by the Secretary of State under Clause 44.5.1.1 shall be reduced to the extent that the price or market value as the case may be of such Ordinary Shares reflects payments, rights or privileges in respect of such Ordinary Shares to which the Department's Nominee would have been entitled to object on the grounds referred to in Clause 2.3.3.

44.5.7 If Clause 44.3 [Post-Commencement Termination] shall apply as a consequence of the termination of this Agreement pursuant to Clause 42.4 [Termination under Clause 27] or Clause 42.5.1 [Schedule 12 Termination] in the circumstances referred to in Clause 42.5.2.1, the Secretary of State shall, in addition to any amounts payable pursuant to Clause 44.3 [Post-Commencement Termination], pay to the DBFO Co as at the date of termination of this Agreement a sum which shall (save to the extent included in any amount payable by the Secretary of State under Clause 44.3.2.2) be the aggregate of:

44.5.7.1 the aggregate unredeemed par amount subscribed for any Ordinary Shares of the DBFO Co; and

44.5.7.2 the amount, as shown in the Termination Accounts, of any Subordinated Shareholder Debt excluding any of such amount representing interest whether or not accrued and or capitalised.

#### 44.6 Adjustments to Compensation

If the calculation of amounts payable under any provision of this Clause 44 [Compensation on Termination] gives a negative amount, such amount shall be aggregated with any amount payable under other provisions of this Clause 44 [Compensation on Termination], which shall be reduced accordingly, but in no circumstances shall the calculation of compensation under this Clause 44 [Compensation on Termination] give rise to an obligation on the DBFO Co to make payment to the Secretary of State (but without prejudice to any obligation of the DBFO Co to make any payment to the Secretary of State pursuant to any other provision of this Agreement).

#### 44.7 Interest

44.7.1 The Secretary of State shall pay interest to the DBFO Co on any amount due to the DBFO Co under this Clause 44 [Compensation on Termination] as a consequence of termination of this Agreement pursuant to Clause 41 [Termination by the DBFO Co] or Clause 42.3 [Termination on Relevant Change in Law] from the date of termination of this Agreement to the date of payment at a rate per annum equal to the Interest Rate plus 2 per cent per annum.

#### 44.8 Satisfaction in Full

44.8.1 Without prejudice to Clause 44.9, any payment made in full pursuant to this Clause 44 [Compensation on Termination] in respect of a termination of this

Agreement shall be in full satisfaction of the DBFO Co's claim (if any) in respect of the circumstances leading to that termination and the DBFO Co shall be excluded from all other rights and remedies in respect thereof.

44.8.2 For the avoidance of doubt, in the event of a termination of this Agreement as a result of an Event of Default, the DBFO Co shall not be entitled to the payment of any amount in respect of the value of the Works or the Project Facilities or any other compensation or damages.

44.9 Gross-Up

If any amount of compensation payable by the Secretary of State under Clause 44 is subject to tax in the United Kingdom, then the Secretary of State shall pay to the DBFO Co such additional amount as will put the DBFO Co in the same after tax position as it would have been had the payment not been subject to tax, taking account of any relief, allowances deduction, setting off or credit in respect of tax (whether available by choice or not) available to the DBFO Co to reduce the tax to which the payment is subject.

**PART VI**  
**MISCELLANEOUS**

45. **ASSIGNMENT, SUB-CONTRACTING AND CHANGE IN CONTROL**

45.1 Binding on Successors and Assigns

This Agreement shall be binding on and shall enure to the benefit of the DBFO Co and the Secretary of State and their respective successors and permitted assigns.

45.2 Assignment

45.2.1 Subject to Clause 45.2.2 and Clause 45.6, the DBFO Co shall not, and shall procure that no Contracting Associate shall, in any such case without the prior consent of the Secretary of State, assign, novate, transfer or create or allow to subsist any Encumbrance, trust or interest in:

45.2.1.1 this Agreement, the Design Contract, the Operation and Maintenance Contract, the Construction Contract, or any other contract entered into by the DBFO Co in performing its obligations under this Agreement; or

45.2.1.2 the Retention Account or any sums from time to time standing to the credit thereof,

or any part thereof or any benefit or interest therein or thereunder.

45.2.2 The provisions of Clause 45.2.1 do not apply:

45.2.2.1 in relation to the assignment of the benefit of any of the agreements referred to in Clause 45.2.1.1 by way of security in accordance with the Funding Agreements, provided that in the case of an assignment of the benefit of this Agreement or any part thereof or any benefit or interest therein or thereunder any assignee shall have entered into the Direct Agreement or such other similar agreement in relation to the exercise of its rights as the Secretary of State shall require; or

45.2.2.2 to the novation of this Agreement to a Proposed Substitute on one occasion only in accordance with the provisions of the Direct Agreement.

45.2.3 Without prejudice to Clauses 45.4.1, 45.4.2 and 45.4.3, the DBFO Co shall procure that:

45.2.3.1 the Designer shall not be permitted to assign the Design Contract or any part thereof or any benefit or interest therein or thereunder; and

45.2.3.2 the Contractor shall not be permitted to assign the Construction Contract or any part thereof or any benefit or interest therein or thereunder,

without the DBFO Co having obtained the prior consent of the Secretary of State.

45.2.4 Without prejudice to Clauses 45.4.1, 45.4.2 and 45.4.4, the DBFO Co shall procure that the Operator shall not be permitted to assign the Operation and Maintenance Contract or any part thereof or any benefit or interest therein or thereunder without the DBFO Co having obtained the prior consent of the Secretary of State.

#### 45.3 Change in Control

45.3.1 Subject to Clause 45.3.7, there is a change in control of the DBFO Co for the purposes of Clause 40.1.2 whenever:

45.3.1.1 any person has control of the DBFO Co who did not have control of the DBFO Co when this Agreement was executed;  
or

45.3.1.2 any person has control of Holdco who did not have control of the Holdco when this Agreement was executed; or

45.3.1.3 any person ceases to have control of the DBFO Co or Holdco,

and in any such case (but subject to Clauses 45.3.2, 45.3.3 and 45.3.4) the change in control shall have taken place without the prior consent of the Secretary of State and other than in accordance with clause 6.5 of the Direct Agreement.

45.3.2 Subject to Clauses 45.3.3 and 45.3.4, the Secretary of State may withhold or delay his consent to a change in control in his absolute discretion.

45.3.3 The Secretary of State shall not unreasonably withhold or delay his consent to a change in control in the following circumstances:

45.3.3.1 in the case of a reorganisation for bona fide fiscal purposes where the ultimate control of the DBFO Co does not change;

45.3.3.2 in respect of a change in control proposed at any time after the date of issue of the Completion Certificate;

45.3.3.3 where between (and including) the date of this Agreement and the date of issue of the Completion Certificate the Sponsor transfers up to an aggregate of one half of the issued share capital of Holdco provided that following such transfer(s) the Sponsor retains not less than one half of the issued share capital of Holdco and Holdco retains the whole of the issued share capital of the DBFO Co.

45.3.4 Subject to Clause 45.3.5, the Secretary of State may only withhold or delay consent to a proposed change of control pursuant to the bona fide enforcement of the Holdco Security Agreement following an Event of Default if the Security Trustee has failed to demonstrate to the Secretary of State's reasonable satisfaction:

- 45.3.4.1 the legal capacity, power and authority of the DBFO Co to perform its obligations under this Agreement following such change of control;
- 45.3.4.2 that the technical competence and financial standing of, and the technical and financial resources available to, the DBFO Co are sufficient to perform its obligations under this Agreement after such change of control;
- 45.3.4.3 that:
  - (a) any of the shares in the DBFO Co; or
  - (b) any rights to control and/or influence the activities of the DBFO Co,are to be held or exercisable by entities which have been at all times wholly independent of and unconnected with the DBFO Co and any Associated Company of the DBFO Co or which are Acceptable Associated Companies; and
- 45.3.4.4 (if the enforcement of the Holdco Security Agreement referred to in this Clause 45.3.4 was carried out following the occurrence of the Event of Default referred to in Clause 40.1.2) that any person to whom the shares in the DBFO Co are proposed to be transferred, is wholly independent of and unconnected with any person who acquired an interest in the DBFO Co giving rise to that Event of Default.
- 45.3.5 If, at the time that the Secretary of State is asked to give his consent to a proposed change of control in accordance with Clause 45.3.4:
  - 45.3.5.1 the Performance Guarantee has been provided to the Secretary of State pursuant to Clause 4.1; and/or
  - 45.3.5.2 a performance guarantee has been provided to the Secretary of State pursuant to Clause 19.7.13,

and in any such case such performance guarantee has not been discharged, the Secretary of State may withhold or delay such consent to a proposed change of control where either of such performance guarantees would cease to be in full force and effect following such transfer or, if a replacement guarantee is proposed, where:

- (a) the long term debt of any bank or other financial institution proposed as the issuer of such replacement guarantee is rated below Aa3, in the case of a credit rating by Moody's, or AA-, in the case of a credit rating by S&P, or an equivalent long term credit rating by such other credit rating agency as the Secretary of State may approve; or
- (b) if the terms of any such replacement performance guarantee are not substantially the same as the terms of the performance guarantee being replaced by such replacement performance guarantee, in the absolute discretion of the Secretary of State,

the Secretary of State does not approve of the terms of the proposed performance guarantee.

45.3.6 Subsections (2) and (4) to (6) of Section 416 of the Income and Corporation Taxes Act 1988 shall apply for the purpose of determining whether, for the purposes of this Clause 45.3 [Change in Control], a person has or had control of the DBFO Co or Holdco, with the following modifications:

45.3.6.1 for the words "the greater part" wherever they occur in the said subsection (2) there shall be substituted the words "one third or more"; and

45.3.6.2 in the said Subsection (6), for the word "may" there shall be substituted the word "shall", the words from "and such attributions" onwards shall be omitted and in the other provisions of that subsection any reference to an associate of a person shall be construed as including only a relative of his (as defined by Section 417(4) of that Act), a partner of his and a trustee of a settlement (as defined by Section 660G(1) of that Act) of which he is a beneficiary.

45.3.7 A change in control of the Sponsor or any of its Holding Companies which arises from any bona fide open market transactions in any shares or other securities of the Sponsor or such Holding Company effected on a recognised investment exchange (within the meaning given in section 285 of the Financial Services and Markets Act 2000) shall not constitute a change in control for the purposes of Clause 40.1.2.

#### 45.4 Sub-Contracting

45.4.1 Neither the engagement nor employment of the following persons shall be terminated (and in the case of the Designer, the DBFO Co shall procure that neither the engagement nor employment of the Designer by the Contractor shall be terminated) without the written consent of the Secretary of State to the appointment of any proposed substitute and the terms of engagement or employment of the proposed substitute:

45.4.1.1 the Contractor;

45.4.1.2 the Designer;

45.4.1.3 any Checker;

45.4.1.4 the Operator;

45.4.1.5 the Archaeologist;

45.4.1.6 the Landscape Architect;

45.4.1.7 the Environmental Manager;

45.4.1.8 the Ecologist;

45.4.1.9 the Testing Contractor;

45.4.1.10 the TRACS Contractor;

45.4.1.11 the Surveyor;

45.4.1.12 the Monitoring System Contractor;

45.4.1.13 the Monitoring System Verification Contractor;

45.4.1.14 the Traffic Signal Installation Contractor;

45.4.1.15 the Traffic Signal Maintenance Contractor;

45.4.1.16 the Traffic Signal System Certifier;

45.4.1.17 the Traffic Signal System Designer; and

provided that a termination of any such engagement or employment in accordance with its terms by the relevant counterparty that is not procured or facilitated by the DBFO Co shall not be a breach of this provision.

45.4.1A Without prejudice to Clause 45.4.1, the DBFO Co shall procure that the appointment of the Principal of the following persons (who, for the purposes of this sub-clause are each referred to as a "Relevant Sub-Contractor"):

45.4.1A.1 the Designer;

45.4.1A.2 the Checker;

45.4.1A.3 the Archaeologist;

45.4.1A.4 the Landscape Architect;

45.4.1A.5 the Ecologist;

45.4.1A.6 the Surveyor;

45.4.1A.7 the Traffic Signal System Certifier;

45.4.1A.8 the Traffic Signal System Designer;

shall not be terminated unless such Principal is replaced by a Principal possessing the qualifications and experience that would be required of the Principal of a replacement of the Relevant Sub-Contractor as such qualifications and experience are prescribed in the definition of such Relevant Sub-Contractor set out in Clause 1.1.

45.4.2 If any of the persons referred to in Clause 45.4.1 shall cease to be engaged or employed at any time when the DBFO Co has outstanding obligations under this Agreement with respect to such persons, the DBFO Co shall forthwith appoint (or, in the case of the Designer, procure that the Contractor appoints) a replacement, subject to the prior approval of the Secretary of State (such approval not to be unreasonably withheld or delayed) both as to the substitute to be appointed and the terms of

engagement or employment of the proposed substitute. No such replacement shall perform any of the Operations until the DBFO Co has provided to the Secretary of State a waiver of liability in respect of the Disclosed Data in a form satisfactory to him (acting reasonably).

45.4.3 Without prejudice to any obligation under Clause 23 [Management Systems], the Works may be sub-contracted by the Contractor without the consent of the Secretary of State or the Department's Nominee, subject always to compliance with the Design and Certification Procedure.

45.4.4 Without prejudice to any obligation under Clause 23 [Management Systems], the operation and maintenance of the Project Facilities may be sub-contracted by the Operator without the consent of the Secretary of State or the Department's Nominee, subject always to compliance with the Design and Certification Procedure.

45.4.5 No additional sub-contractor engaged by the DBFO Co shall carry out any Operation until:

45.4.5.1 the Secretary of State has approved the appointment (such approval not to be unreasonably withheld or delayed) both as to the person concerned and to the terms of engagement or employment; and

45.4.5.2 the DBFO Co has provided to the Secretary of State a waiver of liability in relation to the Disclosed Data in a form satisfactory to him (acting reasonably).

#### 45.5 Consents

Save as provided in Clauses 45.3.2, 45.4.1, 45.4.2 and 45.4.5.1, any consent to be given by the Secretary of State under this Clause 45 [Assignment, Sub-Contracting and Change in Control] shall be in his absolute discretion and upon such terms as he may in his absolute discretion determine.

#### 45.6 Encumbrances over Retention Account and SoS Insurance Account

The DBFO Co shall not be entitled and shall not grant any Encumbrance over or in respect of the Retention Account or the SoS Insurance Account (together "the Accounts") or any sums standing to the credit thereof from time to time other than in favour of the Secretary of State, provided that the DBFO Co shall be entitled to grant a security interest to the Funders in and to the Accounts on terms that at all times such security:

45.6.1 is subject to and ranks at all times behind:

45.6.1.1 any Encumbrance in favour of the Secretary of State whether created before or after any such security interest in favour of the Funders over or in respect of any of the Accounts, and all sums from time to time standing to the credit of such Account (including without limitation any accrued interest); and

45.6.1.2 any and all other rights of the Secretary of State in and to the Accounts, and all sums from time to time standing to the credit of the Accounts and all accrued interest;

45.6.2 is subject to the provisions of this Agreement; and

45.6.3 shall not in any way interfere with, prejudice or otherwise affect any of the rights and obligations of the Parties under this Agreement or in respect of the Accounts,

and otherwise upon such terms as the Secretary of State shall approve in writing in advance. The DBFO Co shall (if so required by the Secretary of State) execute such documents and do such things as the Secretary of State may reasonably require to effect to the ranking of any security interest contemplated by this Clause 45.6 [Encumbrances over Retention Account and SoS Insurance Account].

46. **NOTICES**

46.1 **Requirement for Writing**

Wherever in this Agreement provision is made for the giving or issuing of any notice, endorsement, consent, approval, certificate or determination by any person (a "Notice"), unless otherwise specified such Notice shall be in writing and the words "notify", "endorsed", "consent", "approval", "certify" or "determined" shall be construed accordingly.

46.3 **Changes**

Either Party may change its address for notice to another address in England and Wales by prior notice to the other Party with a copy to the Department's Nominee. The Department's Nominee may change its address for notice to another address in England and Wales by prior notice to the Parties.

46.4 **Receipt**

Any Notice shall be deemed to have been received:

46.4.1 if sent by hand or recorded delivery post, when delivered;

46.4.2 if sent by facsimile, upon sending, subject to:

46.4.2.1 confirmation of uninterrupted transmission by a transmission report; and

46.4.2.2 there having been no telephonic communication by the recipient to the sender (any such telephonic communication to be confirmed in writing) that the facsimile has not been received in legible form:

46.4.2.2.1 within 3 hours after sending, if sent on a Working Day and between the hours of 9.00 a.m. and 4.00 p.m.; or

46.4.2.2.2 by noon on the next following Working Day if sent after 4.00 p.m. on a Working Day but before 9.00 a.m. on the next following Working Day,

provided that any Notice (other than a routine Notice) given by fax shall be confirmed by letter sent by hand or post, but without prejudice to the original fax Notice if received in accordance with this Clause 46.4.2.

47. **CONSENTS AND APPROVALS**

47.1 **Review Procedure**

47.1.1 Any proposed document (including without limitation any Design Data) or proposed course of action on the part of the DBFO Co which, under the terms of this Agreement, is required to be submitted to the Review Procedure shall be dealt with in accordance with the provisions of Part 2 of Schedule 7 [Review Procedure].

47.1.2 Without limitation to Clause 47.3 [Effect of Consents, Approvals and Inspections], notwithstanding the application of the Review Procedure, the DBFO Co shall not be entitled to recover from the Secretary of State any Losses or Claims which may arise out of or in connection with any inadequacy, error or failure of any matter which has been subject to the Review Procedure and any comments made by the Department's Nominee in the course thereof. The DBFO Co shall obtain from the Designer, Contractor, Operator, Checker, Archaeologist, Landscape Architect, Environmental Manager, Testing Contractor, TRACS Contractor, Monitoring System Contractor, Monitoring System Verification Contractor, Traffic Signal Installation Contractor, Traffic Signal Maintenance Contractor, Traffic Signal System Certifier, Traffic Signal System Designer, Surveyor and Ecologist, prior to any such party carrying out any part of the Operations, waivers of liability in favour of the Secretary of State and the Department's Nominee in respect of any such Losses and Claims. No comments or absence of comments on any matter in the course of the Review Procedure shall relieve the DBFO Co of any of its obligations under this agreement in connection with the Operations.

47.2 **Reasonableness**

Unless otherwise specified, where any agreement, certificate, consent, permission, expression of satisfaction or other approval or acceptance (an "Approval") is to be given by the Secretary of State or any person on his behalf under the terms of this Agreement, the same shall not be unreasonably withheld or delayed.

47.3 **Effect of Consents, Approvals and Inspections**

47.3.1 Neither the giving of any Approval, knowledge of the terms of any agreement or document (including without limitation the Project Documents), nor the review of any document or course of action pursuant to the Review Procedure by or on behalf of the Secretary of State or the Department's Nominee shall relieve the DBFO Co of any of its obligations under this Agreement or of its duty to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the Approval, knowledge or review under the Review Procedure.

47.3.2 Without limitation to Clause 47.3.1, no examination or lack of examination by the Department's Nominee of the DBFO Co's drawings, documents, calculations, or details relating to the design, construction, completion, commissioning, testing and maintenance of the Works or the operation, maintenance or improvement of the Project Facilities or otherwise nor any comment, rejection or Approval expressed by such person in regard thereto, either with or without modifications, shall in any respect relieve or absolve the DBFO Co from any obligations or liability under or in

connection with this Agreement whether in relation to accuracy, safety, suitability, adequacy of performance or practicality of its design or howsoever otherwise arising.

- 47.3.3 Without limitation to Clause 47.3.1, notwithstanding any inspection by the Department's Nominee under this Agreement or the failure of the Department's Nominee to make any inspection under this Agreement, the DBFO Co's responsibility under this Agreement shall not be relieved or absolved or otherwise modified.
- 47.3.4 Any Approval shall be final, subject to being opened up, reviewed or revised:
  - 47.3.4.1 if errors or further relevant facts are revealed after the Approval has been given; or
  - 47.3.4.2 in accordance with paragraph 6.3 of Schedule 15 [Disputes Resolution Procedure].
- 47.3.5 Without prejudice to Clause 47.3.4, any endorsement, decision, opinion, instruction, notice, statement of objection, finding, determination, requirement or certificate of the Department's Nominee and any determination of an Expert shall be final, subject to the exercise by either Party of any rights of objection under this Agreement and to the terms of the Disputes Resolution Procedure.

48. **TAXES**

48.1 **VAT**

- 48.1.1 All amounts stated to be payable by either Party under this Agreement shall be exclusive of any VAT properly chargeable thereon.
- 48.1.2 Each Party shall pay to the other Party any VAT properly chargeable to it in respect of any supply made to it under this Agreement provided that it shall first have received from the other Party a valid tax invoice in respect of that supply which complies with the requirements of Part III of the Value Added Tax Regulations 1995.
- 48.1.3 If either Party (in this Clause 48 [Taxes] the "First Party") shall consider that any VAT which the other Party (in this Clause 48 [Taxes] the "Second Party") claims to be properly chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain a ruling from the Commissioners of Customs and Excise (or, if relevant, such other body as is charged at the time with the collection and management of VAT) (in this Clause 48 [Taxes] the "Commissioners") as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Commissioners for such a ruling.
- 48.1.4 The following further provisions shall apply in respect of the application for a ruling in accordance with Clause 48.1.3:
- 48.1.4.1 prior to submitting its request for such a ruling and any further communication to the Commissioners in connection with the obtaining of the ruling, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;
- 48.1.4.2 the Second Party shall provide to the First Party copies of all communications received from the Commissioners in connection with the application for a ruling as soon as practicable after receipt; and
- 48.1.4.3 the Second Party shall use all reasonable efforts (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a ruling as soon as reasonably practicable following the initial request.
- 48.1.5 If a ruling is required by the First Party under Clause 48.1.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a ruling is received from the Commissioners which states that a sum of VAT is properly so chargeable. In the event of the receipt of a ruling which states that a sum of VAT (the "VAT Sum") is properly so chargeable, then subject to Clause 48.1.6 and 48.1.7 and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III of the Value Added Tax Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum to the Second

Party together, if applicable, with interest thereon in accordance with Clause 33.7.

48.1.6 In the event that the First Party disagrees with any ruling obtained pursuant to Clause 48.1.3 by the Second Party from the Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such ruling or otherwise to resist or avoid the imposition of VAT on the relevant supply.

48.1.7 The following further provisions shall apply in the event that the First Party shall exercise its rights under Clause 48.1.6:

48.1.7.1 the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of the Commissioners before any VAT tribunal or court of competent jurisdiction and appealing any judgment or decision of any such tribunal or court;

48.1.7.2 in the event that the Second Party shall be required to pay to or deposit with the Commissioners a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to the Commissioners on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with the Commissioners the First Party shall pay such sum to the Second Party;

48.1.7.3 save as specifically provided in Clause 48.1.7.2, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and

48.1.7.4 the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with the Commissioners in accordance with Clause 48.1.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

## 48.2 Deductions from payments

Save as otherwise provided in this Agreement and save only as may be required by law all sums payable by either Party to the other under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation.

### 48.3 Construction Industry Tax Deduction Scheme

- 48.3.1 In this Clause 48.3 [Construction Industry Tax Deduction Scheme]:
- 48.3.1.1 "the Act" means the Income and Corporation Taxes Act 1988;
  - 48.3.1.2 "the Regulations" means the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993 (SI 1993/743);
  - 48.3.1.3 "contractor" means a person who is a contractor for the purposes of the Act and the Regulations;
  - 48.3.1.4 "evidence" means such evidence as is required by the Regulations to be produced to a contractor for the verification of a sub-contractor's tax certificate or registration card;
  - 48.3.1.5 "statutory deduction" means the deduction referred to in Section 559(4) of the Act or such other deduction as may be in force at the relevant time;
  - 48.3.1.6 "sub-contractor" means a person who is a sub-contractor for the purposes of the Act and the Regulations;
  - 48.3.1.7 "tax certificate" is a CIS 5 or CIS 6 certificate issuable under Section 561 of the Act; and
  - 48.3.1.8 "registration card" is a registration card CIS 4 issuable under the Regulations.
- 48.3.2 The provisions of this Clause 48.3 [Construction Industry Tax Deduction Scheme] shall apply throughout the term of this Agreement save for any period during such term in respect of which the DBFO Co has received written confirmation from the Inland Revenue in a form which is reasonably satisfactory to the Secretary of State that this Agreement is not a contract relating to the construction operations to which the provisions of Chapter IV or Part XIII of the Act apply.
- 48.3.3 Not later than 21 days before the first payment under this Agreement is due to be made to the DBFO Co or after this Clause 48.3 [Construction Industry Tax Deduction Scheme] applies for the first time and on each occasion when this Clause 48.3 [Construction Industry Tax Deduction Scheme] applies following a period when it has not so applied the DBFO Co shall either:
- 48.3.3.1 provide the Secretary of State with evidence of a tax certificate entitling the DBFO Co to be paid without the statutory deduction; or
  - 48.3.3.2 provide the Secretary of State with evidence of a registration card entitling the DBFO Co to be paid but with the statutory deduction.
- 48.3.4 If the Secretary of State is not satisfied with the validity of the evidence submitted in accordance with Clause 48.3.3, he shall within 14 days of the DBFO Co submitting such evidence notify the DBFO Co in writing that he

intends either to make the statutory deduction from payments due under this Agreement to the DBFO Co or to defer payment and give his reasons for that decision.

- 48.3.5 Where Clause 48.3.3.2 applies, the DBFO Co shall immediately inform the Secretary of State if it obtains a tax certificate, and thereupon Clause 48.3.3.1 shall apply.
- 48.3.6 If the period for which the tax certificate has been issued to the DBFO Co expires before the final payment is made to the DBFO Co under this Agreement and provided that this Clause 48.3 [Construction Industry Tax Deduction Scheme] applies at that time, the DBFO Co shall not later than 28 days before the date of expiry either:
  - 48.3.6.1 provide the Secretary of State with evidence that the DBFO Co from the said date of expiry is entitled to be paid for a further period without the statutory deduction, in which case the provisions of Clause 48.3.4 shall apply if the Secretary of State is not satisfied with the evidence; or
  - 48.3.6.2 provide the Secretary of State with evidence of a registration card entitling the DBFO Co to be paid but with the statutory deduction after the said date of expiry.
- 48.3.7 The DBFO Co shall immediately inform the Secretary of State in writing if its current tax certificate or registration card is cancelled and give the date of such cancellation.
- 48.3.8 The Secretary of State shall, as a "contractor" in accordance with the Regulations, send promptly to the Inland Revenue any voucher which, in compliance with the obligations of the DBFO Co as a "sub-contractor" under the Regulations, the DBFO Co gives to the Secretary of State.
- 48.3.9 The Secretary of State shall be entitled to make a deduction at the rate specified in Section 559(4) of the Act or at such other rate as may be in force from time to time from the whole of any payment to DBFO Co (and not just that part of such payment which does not represent the direct cost to the DBFO Co or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment the Secretary of State shall have received written confirmation from the Inland Revenue in a form which is reasonably satisfactory to the Secretary of State directing the Secretary of State to make the deduction against only a specified amount or proportion of any such payment to the DBFO Co.
- 48.3.10 Where any error or omission has occurred in calculating or making the statutory deduction then:
  - 48.3.10.1 in the case of an over-deduction, the Secretary of State shall correct that error by payment to the DBFO Co of the sum over-deducted; and
  - 48.3.10.2 in the case of an under-deduction, the DBFO Co shall correct that error or omission by payment to the Secretary of State of the sum which should have been but was not deducted.

- 48.3.11 The DBFO Co shall, at the request of the Secretary of State, produce to the Secretary of State the original of any current tax certificate which it holds and shall permit the Secretary of State to make a copy of such tax certificate and/or to record such details in respect of such tax certificate as the Secretary of State may consider appropriate.
- 48.3.12 If compliance with this Clause 48.3 [Construction Industry Tax Deduction Scheme] involves the Secretary of State or the DBFO Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause 48.3 [Construction Industry Tax Deduction Scheme] shall prevail.
- 48.3.13 Any Dispute arising out of the application of this Clause 48.3 [Construction Industry Tax Deduction Scheme] shall be resolved in accordance with the Disputes Resolution Procedure.

49. **INTELLECTUAL PROPERTY**

49.1 **Design and Other Data**

The DBFO Co shall make available to the Secretary of State, without charge, in paper based or machine readable form as required by the Secretary of State:

49.1.1 all materials, documents and data of any nature (including without limitation all Design Data) acquired or brought into existence in any manner whatsoever by the DBFO Co (and/or any of the DBFO Co's agents, employees, contractors or sub-contractors of any tier) for the purposes of the design or construction of the Works, the operation, maintenance or improvement of the Project Facilities or the conduct of the other Operations and which might reasonably be required by the Secretary of State whether during or after the Contract Period for the purposes of exercising his rights or carrying out his duties under this Agreement or carrying out any other functions; and

49.1.2 all other such materials, documents and data acquired or brought into existence by third parties as may reasonably be required for the purposes referred to in Clause 49.1.1.

49.2 **Licences**

49.2.1 The DBFO Co:

49.2.1.1 hereby grants to the Secretary of State a perpetual, transferable, non-exclusive, royalty-free licence (carrying the right to grant sub-licences) to use for any purpose (whether during or after the Contract Period) relating to the design, construction, completion, commissioning or testing of the Works, the operation, maintenance or improvement of the Project Facilities, or the conduct of any other Operations or the carrying out by the Secretary of State of any functions in respect of the Project Facilities, all and any Intellectual Property which is or becomes vested in the DBFO Co (and/or any of the DBFO Co's agents, employees, contractors or sub-contractors of any tier) and to make any alterations, adaptations or additions to the Design Data and the Traffic Data which is or becomes vested in the DBFO Co; and

49.2.1.2 where any Intellectual Property is vested in any other third party, shall procure the grant of a like licence with effect (subject to Clause 49.2.3) from the date hereof (having immediate effect from the grant thereof) to the Secretary of State for any purpose (whether during or after the Contract Period) relating to the design, construction, completion, commissioning or testing of the Works, the operation, maintenance or improvement of the Project Facilities (including without limitation the carrying out of any Additional Works), the conduct of any other Operations or the carrying out by the Secretary of State of any functions in respect of the Project Facilities.

- 49.2.2 The Secretary of State hereby grants to the DBFO Co a non-transferable, non-exclusive, royalty-free licence (carrying the right to grant non-transferable, non-exclusive royalty free sub-licences to the Contractor, the Designer, the Checker, the Operator, the Archaeologist, the Landscape Architect, the Environmental Manager, the Ecologist, the Testing Contractor, the TRACS Contractor, the Surveyor, the Monitoring System Contractor, the Monitoring System Verification Contractor, the Traffic Signal Installation Contractor, the Traffic Signal Maintenance Contractor, the Traffic Signal System Certifier and the Traffic Signal System Designer only as necessary to enable that person to comply with its obligations under any relevant Project Document to which such person is party) to use (during the Contract Period only) all and any Intellectual Property which is or becomes vested in the Secretary of State for any purpose relating to the design, construction, completion, commissioning or testing of the Works, the operation, maintenance or improvement of the Project Facilities or the conduct of any other Operations.
- 49.2.3 With respect to Intellectual Property arising during the Contract Period, the licence granted pursuant to Clause 49.2.1 or Clause 49.2.2 shall take effect immediately upon the coming into existence of such Intellectual Property.

#### 49.3 Access to Data

- 49.3.1 To the extent that any of the data, materials and documents referred to in Clause 49 [Intellectual Property] including, without limitation, all Design Data and Traffic Data are generated by or maintained on a computer or other equipment or otherwise in any machine readable format, the DBFO Co shall procure for the benefit of the Secretary of State at no charge the grant of a licence or sub-licence for and supply of any relevant software or database to enable the Secretary of State or any person authorised by him to access and otherwise use such data (including, without limitation, online access and use, as applicable) for the purposes set out in this Agreement or whether during or after the termination of this Agreement as otherwise permitted under this Agreement or following its termination, for the purposes of the design, construction, completion, commissioning or testing of the Works, the operation, maintenance or improvement of the Project Facilities or the carrying out by or on behalf of the Secretary of State of any function.
- 49.3.2 Within 28 days after the execution of this Agreement the DBFO Co shall submit to the Department's Nominee in accordance with the Review Procedure its proposals for backing-up and storage in safe custody of the data, materials and documents referred to in Clause 49.1 [Design and Other Data] and the Department's Nominee shall only be entitled to object and require alterations or additions if the same shall not accord with Good Industry Practice. The DBFO Co shall and shall cause the Contractor, the Designer, the Operator and any other contractor or sub-contractor of the DBFO Co to comply with the procedures in respect of which there has been no objection under the Review Procedure. The DBFO Co may vary its procedures for such back up and storage subject to submitting in accordance with the Review Procedure its proposals for change to the Department's Nominee who may only object on the basis set out above.

#### 49.4 Further Assurances

The DBFO Co and the Secretary of State each undertakes at the request of the other to execute all documents and do all acts which may be necessary to bring into effect or confirm the terms of any licence contained or referred to in Clause 49.2 [Licences].

#### 49.5 Traffic Data

49.5.1 The Secretary of State shall be entitled without further consent from the DBFO Co:

49.5.1.1 to use the Traffic Data for the purposes of exercising his rights or carrying out his duties under this Agreement or carrying out any other function; and

49.5.1.2 to incorporate the Traffic Data in any traffic or other statistics prepared by or on behalf of the Secretary of State and to publish such statistics or the Traffic Data either generally or to a limited category of persons or otherwise to exploit such statistics or the Traffic Data and whether or not in return for any fee.

49.5.2 The DBFO Co shall not be entitled without prior written consent from the Secretary of State (which consent he may withhold in his absolute discretion) to use the Traffic Data except for the purposes of exercising its rights or carrying out its duties under this Agreement.

#### 49.6 Termination

This Clause 49 [Intellectual Property] shall survive the termination of this Agreement irrespective of the reason for termination.

50. **CONFIDENTIALITY**

50.1 **Confidential Information**

Each Party agrees, for itself and its respective directors, officers, employees, servants and agents, to keep confidential and not to disclose to any person (save as hereinafter provided) any of the terms of this Agreement or any information contained in the Confidential Schedules or any confidential or proprietary information provided to or arising or acquired by it pursuant to the terms or performance of this Agreement (including without limitation any such documents or information supplied in the course of proceedings under the Disputes Resolution Procedure) (together the "Confidential Information").

50.2 **Exceptions**

Notwithstanding Clause 50.1 [Confidential Information] and subject to Clause 50.7 [Classified Information], a Party shall be entitled to disclose the whole or any part of the Confidential Information:

- 50.2.1 to its directors, officers, employees, servants, sub-contractors, agents, or professional advisers to the extent necessary to enable it to perform (or to cause to be performed) or to enforce any of its rights or obligations under this Agreement; or
- 50.2.2 when required to do so by law or by or pursuant to the rules or any order having the force of law of any court, association or agency of competent jurisdiction or any governmental agency; or
- 50.2.3 in the case of the DBFO Co, to any bank or financial institution from whom it is seeking or obtaining finance; or
- 50.2.4 to the extent that the Confidential Information has, except as a result of breach of confidentiality, become publicly available or generally known to the public at the time of such disclosure; or
- 50.2.5 to the extent that the Confidential Information is already lawfully in the possession of the recipient or lawfully known to him prior to such disclosure; or
- 50.2.6 to the extent that it has acquired the Confidential Information from a third party who is not in breach of any obligation as to confidentiality to the other Party; or
- 50.2.7 to the extent permitted by Clause 24.8.2 [Parliamentary Questions and Issues], Clause 49.2 [Licences] and Clause 49.5 [Traffic Data]; or
- 50.2.8 in the case of the Secretary of State:
  - 50.2.8.1 to the extent required for the purpose of the design, construction, completion, commissioning and testing of the Works or the operation, maintenance or improvement of the Project Facilities in the event of termination of this Agreement;

- 50.2.8.2 (without limitation to Clause 50.2.2) in relation to the outcome of the procurement process for the Project as may be required to be published in the Official Journal of the European Union or elsewhere;
- 50.2.8.3 to any other department, office or agency of the Crown (including for the avoidance of doubt the National Audit Office) where required for parliamentary, governmental, statutory or judicial purposes;
- 50.2.8.4 in the case of the terms of this Agreement contained in the Confidential Schedules, after the expiry of seven years from the date of this Agreement; or
- 50.2.8.5 to the extent required in order to procure any Additional Works,

and, in the cases of Clauses 50.2.1 and 50.2.3 above, upon obtaining from such person or entity to whom the disclosure is to be made an undertaking of strict confidentiality in relation to the Confidential Information in question and provided that Clauses 50.2.2 to 50.2.7 shall not apply in respect of any police report STATS 19 (or any replacement or substitute for such report).

### 50.3 Return of Confidential Information

On the Termination Date each Party shall return to the other such Confidential Information within its possession or control as may belong to the other Party, save that this Clause 50.3 [Return of Confidential Information] shall not apply to:

- 50.3.1 Confidential Information belonging to the DBFO Co necessary for the design, construction, completion, commissioning and testing of the Works or the operation, maintenance or improvement of the Project Facilities, which Confidential Information may be so used or applied in the design, construction, completion, commissioning and testing of the Works or the operation, maintenance or improvement of the Project Facilities; or

- 50.3.2 Traffic Data.

### 50.4 Continuation of Confidentiality Obligations

The obligations of the Parties under this Clause 50 [Confidentiality] shall, subject to Clause 50.2 [Exceptions] and Clause 50.7 [Classified Information], continue for a period of 5 years following the Termination Date notwithstanding such termination.

### 50.5 Publicity Regarding Disputes

Neither the DBFO Co nor the Secretary of State shall, without the prior written authority of the other, publish alone or in conjunction with any other person any articles or other material relating to any Dispute arising under this Agreement nor impart any information regarding any such Dispute except to its professional advisers under obligations of confidentiality, except and to the extent that such publication shall arise out of any statutory or regulatory obligation applicable to the DBFO Co or any obligation under any Law applicable to the Secretary of State.

### 50.6 Remedies

Without prejudice to any other rights and remedies that the other Party would have, each of the Parties agrees that damages would not be an adequate remedy for any breach of this Clause 50 [Confidentiality] and that the other Party shall be entitled to the remedies of injunction, specific performance and/or other equitable relief for any threatened or actual breach of this Clause 50 [Confidentiality].

#### 50.7 Classified Information

50.7.1 The Secretary of State may notify the DBFO Co that any specified information or category of information that he gives to the DBFO Co, or which it obtains through its performance of its obligations under this Agreement, is to be designated as Classified Information. The limitations on duration contained in Clause 50.4 [Continuation of Confidentiality Obligations] shall not apply in relation to the DBFO Co's obligations in relation to Classified Information.

50.7.2 The DBFO Co shall hold Classified Information in accordance with such guidelines (the "Classified Information Guidelines") as the Secretary of State may issue from time to time. The Classified Information Guidelines may specify, inter alia:

50.7.2.1 which employees of the DBFO Co are to have access to Classified Information;

50.7.2.2 limitations on reproducing Classified Information;

50.7.2.3 where and how any Classified Information is to be stored;

50.7.2.4 when Classified Information is to be returned to the Secretary of State;

50.7.2.5 any designated sub-categories of Classified Information, and any special procedures to be adhered to in respect of any such sub-category.

#### 50.7.3 Change Procedure

If either the DBFO Co or the Secretary of State believes that an Eligible Change has occurred as a result of the implementation of the requirements of a Classified Information Notice or as a result of the withdrawal or modification by the Secretary of State of the requirements of a Classified Information Notice, either Party may give a notice pursuant to paragraph 1.1 of Annex 5 to Part 1 of Schedule 12 [Classified Information] and the General Change Procedure shall apply subject to the provisions of Annex 5 to Part 1 of Schedule 12 [Classified Information].

51. **AGENCY**

51.1 **No Delegation**

For the avoidance of doubt, no provision of this Agreement shall be construed as a delegation by the Secretary of State of any of his statutory authority to the DBFO Co save as specifically provided by Clause 28.4 [Contracting Out of Functions] and Clause 29.3 [Contracting Out of Functions].

51.2 **No Agency, Crown Immunity**

Save as otherwise provided in this Agreement, the DBFO Co shall not be or be deemed to be an agent of the Secretary of State and the DBFO Co shall not hold itself out as having authority or power to bind the Secretary of State in any way. For the avoidance of doubt the DBFO Co shall not have the benefit of any Crown immunity and, unless otherwise agreed by the Secretary of State, shall apply for and obtain all consents, licences and permissions which the DBFO Co would otherwise be obliged to obtain under any Law on the basis that the DBFO Co does not have the benefit of any Crown immunity.

51.3 **DBFO Co Responsibility**

As between the Parties, the DBFO Co shall be responsible for the acts, defaults, omissions and neglect of the Designer, Checker, Contractor, Operator, Archaeologist, Landscape Architect, Environmental Manager, Ecologist, Testing Contractor, TRACS Contractor, Monitoring System Contractor, Monitoring System Verification Contractor, Traffic Signal Installation Contractor, Traffic Signal Maintenance Contractor, Traffic Signal System Certifier, Traffic Signal System Designer, Surveyor and Ecologist and any other contractor or sub-contractor of the DBFO Co of any tier and the agents, employees or workmen of any of them as fully as if they were the acts, defaults, omissions or neglect of the DBFO Co, its agents, employees or workmen.

51.4 **DBFO Co Knowledge**

Without limitation to its actual knowledge, the DBFO Co shall, for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project and the Operations as is held (or as ought reasonably to be held) by the Designer, Checker, Contractor, Operator, Archaeologist, Landscape Architect, Environmental Manager, Ecologist, Testing Contractor, DBFO Co Quality Director, TRACS Contractor, Monitoring System Contractor, Monitoring System Verification Contractor and Surveyor, in the relevant circumstances.

52. **DISPUTES RESOLUTION PROCEDURE**

52.1 Except as expressly provided in any other provision of this Agreement, all Disputes shall be resolved in accordance with the provisions set out in Schedule 15 [Disputes Resolution Procedure].

52.2 No Loss Waiver

The Secretary of State shall not be entitled to reduce or avoid to any extent any amount payable by it to DBFO Co under this Agreement (including by way of indemnity) in reliance solely on the fact that any entitlement of the Contractor or the Operator in respect of the same act or omission of the Secretary of State or other event is conditional on the establishment of the liability of the Secretary of State under this Agreement in respect of that act, omission or other event.

53. **WHOLE AGREEMENT**

This Agreement (including the Schedules), the Custody Agreement, the Direct Agreement and a side letter of even date from the Secretary of State to the DBFO Co concerning the approval of the Checker by Network Rail constitute the whole agreement and understanding of the Parties as to the subject matter hereof and there are no prior or contemporaneous agreements between the Parties with respect thereto.

54. **WAIVER**

Failure by the Secretary of State at any time to enforce any provision of this Agreement or to require performance by the DBFO Co of any of the provisions of this Agreement shall not be construed as a waiver of any such provision and shall not affect the validity of this Agreement or any part thereof or the right of the Secretary of State to enforce any provision in accordance with its terms.

55. **AMENDMENTS**

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Secretary of State and the DBFO Co.

56. **CONFLICTS OF INTEREST**

The DBFO Co shall ensure that no conflict of interest arises between its performance of the Operations and any other matter in which it may be interested whether directly or indirectly.

57. **GOVERNING LAW AND JURISDICTION**

57.1 Law

This Agreement shall be governed by and construed in all respects in accordance with English law.

57.2 Jurisdiction

Subject to the provisions of Clause 52 [Disputes Resolution Procedure], the Parties agree to submit to the non-exclusive jurisdiction of the English Courts as regards any claim or matter arising in relation to this Agreement.

58. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT**

A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

59. **COMPETITION ACT**

- 59.1 In the event that either Party reasonably considers that this Agreement infringes or may infringe the Chapter I Prohibition contained in the Competition Act 1998 and/or Article 81(1) of the EC Treaty, then each Party will co-operate with the other using its respective reasonable endeavours and each bearing its own costs and expenses to persuade and satisfy the Relevant Regulatory Authority of the legality and enforceability of this Agreement in its original form and for such purposes shall jointly undertake all such filings, notifications, discussions, negotiations or settlements with the Relevant Regulatory Authority as the Parties agree shall be necessary or desirable. In particular, without prejudice to the generality of the foregoing, the Parties shall consider together whether a joint application shall be made to the Relevant Regulatory Authority for negative clearance or exemption under Regulation 17/62 in relation to Article 81 of the EC Treaty or under Sections 12 to 14 of the Competition Act 1998 in respect of the Chapter 1 prohibition. The parties shall jointly make any necessary written or oral submissions to the Relevant Regulatory Authority unless requested by the Relevant Regulatory Authority to respond individually.
- 59.2 If any provision of this Agreement is deemed unenforceable by operation of Article 81(1) of the EC Treaty or Chapter I of the Competition Act 1998 then the Parties shall in good faith consult with each other to agree an alternative provision which achieves a result as similar as possible to the result which would have been achieved by the provision deemed unenforceable.

60. **COUNTERPARTS**

This Agreement may be executed in any number of counterparts, each of which when executed shall constitute an original, but all of which when taken together shall constitute one and the same Agreement.

61. **RECYCLED PAPER**

All written work in connection with this Agreement shall (where appropriate and unless otherwise specified) be produced on recycled paper containing at least 80% post consumer waste and used on both sides of the paper.

