

CONFORMED COPY

DATED 16 December 1998

A55 LLANDEGAI TO HOLYHEAD

DBFO CONTRACT

BETWEEN

THE SECRETARY OF STATE FOR WALES

AND

UK HIGHWAYS A55 LIMITED

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THIS AGREEMENT is made 16 December 1998

BETWEEN:

- (1) **THE SECRETARY OF STATE FOR WALES** of Welsh Office, Cathays Park, Cardiff, Wales CF1 3NQ (the "**Secretary of State**"); and
- (2) **UK HIGHWAYS A55 LIMITED**, a company organised and existing under the laws of England and Wales, registered under number 3600964 and having its registered office at PO Box 295, Alexandra Gate, Rover Way, Cardiff, CF2 2UE (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:
 - (a) the operation and maintenance of:
 - (1) approximately 9.3km of trunk road comprising sections of the existing A5 (9.2km) and an unclassified county road (0.1km) all to be reclassified as the A55;
 - (2) the section of the A487 from its junction with the A5 at Parc Menai north eastwards to its junction with the A5122 and A4080; and
 - (3) the section of the A4080 from its junction with the A5122 and A487 northwards to its junction with the B5420 and south westwards to its junction with the A5; and
 - (4) approximately 31km of the existing A5 (to be de-trunked) from the western end of the Llanfair PG Bypass to Holyhead;
 - (b) the design, construction, operation and financing of a dual two lane highway between the existing Llanfair PG Bypass on the A5 (to be reclassified as the A55) and the town of Holyhead; and
 - (c) certain ancillary works and operations as set out in 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 (Project Documents) 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.

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:

"Abnormal Indivisible Load" means any vehicle 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).

"Accommodation Works" means the Works specified in Appendix 1/15 to Annex 5 to Part 2 of Schedule 4.

"Accounts Agreement" means the accounts agreement entered into on or about the date hereof between the DBFO Co and The Dai-Ichi Kangyo Bank, Limited as Security Trustee, Global Agent, Account Bank and Commercial Facility Agent (as such terms are defined therein).

"Additional Amount" has the meaning given to it in Clause 43.6.3.1.

"Additional Works" means any change, improvement or addition to the design, layout or structure of the Project Road 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 date of this Agreement; and
- (b) for the New Road, at any time after the issue of the Completion Certificate,

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

"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 8.9 (Boundaries of Site and Adjacent Areas), the areas, shown or identified as such on the date hereof on drawings numbered 964057/NR/101 to 104, 964057/NR/201 to 203, 964057/NR/301 to 304 and 964057/ER/101 to 103, which do not form part of the Site but upon which part of the Operations are to be carried out, 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 the 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 Traffic as a consequence of an Eligible Change.

"Agent" means any bank, trustee or other financial institution appointed by the Finance Parties to act as the Global Agent under and as defined in the Common Terms Agreement and such substitute as may be appointed from time to time in accordance with the Common Terms Agreement and notified to the Secretary of State in writing.

"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 2.3 of Part 3 of Schedule 14 (DBFO Co's 5 Year Management Plan).

"Annual Reconciliation Notice" has the meaning given in Clause 31.3.2 (Annual Reconciliation).

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

"Appointment" has the meaning given to that term in Clause 50.5.1 (Agency).

"Approval" has the meaning given in Clause 46.2 (Reasonableness).

"Archaeological Works" means those works required to be carried out pursuant to Annex 13 to Part 2 of Schedule 4 (Construction Requirements).

"Archaeologist" means Richards, Moorehead and Laing Limited or such substitute as may be appointed by the DBFO Co for the time being in accordance with Clause 44.4.1 or 44.4.2 (Sub-Contracting).

"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 the Sponsors, 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 a 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).

"Band" means each of the bands of Traffic Payments referred to in Part 2 of Schedule 9 (Traffic Payment).

"Base Case" means the output from the Financial Model on the date of execution of this Agreement, as set out in Part 2 of Schedule 1 (Base Case).

"Blasting Blight Land" means any land or Rights in respect of land which is or may in the opinion of the Secretary of State be or become affected by the creation, exercise or enforcement of any Included Blasting Rights.

"Britannia Bridge Agreement" means an agreement in respect of the Britannia Bridge (Bridge No. 165 Chester to Holyhead line) entered into on 19th April 1977 between the British Railways Board and the Secretary of State, evidenced by a copy initialled on behalf of the Secretary of State for the purpose of identification and provided to the DBFO Co on the date hereof, provided that any reference to the British Railways Board shall be deemed to include a reference to any successor to it or to any organisation, entity or representative which has taken over all or any functions or responsibilities of the British Railways Board.

"CD Rom" means the compact discs 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 The National Computing Centre Limited on the terms set out in the Custody Agreement.

"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 Annex 1(22) to Part 3 of Schedule 4 (Design and Certification Procedure);
- (c)(1) **"Assessment Certificate (Structures)"** means a certificate in the form set out in Annex 1(20) to Part 3 of Schedule 4 (Design and Certification Procedure);
 - (2) **"Assessment Check Certificate (Structures)"** means a certificate in the form set out in Annex 1(21) to Part 3 of Schedule 4 (Design and Certification Procedure);
- (d) **"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);
- (e) **"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);
- (f) **"Communications Certificate"** means a certificate in the form set out in Annex 1(19) to Part 3 of Schedule 4 (Design and Certification Procedure);
- (g) **"Completion Certificate"** means a certificate in the form set out in Annex 1(15) to Part 3 of Schedule 4 (Design and Certification Procedure);

- (h) **"Construction Certificate"** means a certificate in the form set out in Annex 1(12) to Part 3 of Schedule 4 (Design and Certification Procedure);
- (i) **"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);
- (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) **"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);
- (l) **"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);
- (m) **"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);
- (n) **"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);
- (o) **"Ecology Certificate"** means a certificate in the form set out in Annex 1(24) to Part 3 of Schedule 4 (Design and Certification Procedure);
- (p) **"Handback Certificate"** means a certificate in the form set out in Annex 1(17) to Part 3 of Schedule 4 (Design and Certification Procedure);
- (q) **"Landscaping Certificate"** means a certificate in the form set out in Annex 1(23) to Part 3 of Schedule 4 (Design and Certification Procedure);
- (r) **"Road Safety Audit Certificate (Stage 1, Stage 2 or Stage 3)"** means a certificate in the form set out in Annex 1(8) to Part 3 of Schedule 4 (Design and Certification Procedure);
- (s) **"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);
- (t) **"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);
- (u) **"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); and
- (v) **"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 paragraph 5.1 of Part 1 of Schedule 12 (General Change Procedure).

"Change in Capital Costs" has the meaning given in paragraph 10 of Part 1 of Schedule 12.

"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 notice under paragraph 2.1 of Part 1 of Schedule 12 (General Change Procedure). For the avoidance of doubt, this includes Lane Closure Charges and any Change in Capital Costs but does not include any Change in Revenues. The Change in 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 which is binding on the DBFO Co.

"Change in Revenues" means any net increase or decrease in the DBFO Payments receivable by the DBFO Co in respect of a Contract Year as a consequence of an Eligible Change the subject of a notice under paragraph 2.1 of Part 1 of Schedule 12 (General Change Procedure). The Change in Revenues shall be calculated on the assumption that all Traffic Payments in respect of a Contract Year are received on the day which is the mid-point of such Contract Year. For the avoidance of doubt, any decrease in revenues shall be a positive figure and any increase in revenues shall be a negative figure.

"Change in Traffic" means any net increase or decrease in the traffic using the Project Road in a Contract Year as a consequence of an Eligible Change the subject of a notice under paragraph 2.1 of Part 1 of Schedule 12 (General Change Procedure).

"Checker" means any person appointed by the DBFO Co in accordance with paragraph 39 of Section A of Part 3 of Schedule 4 (Design and Certification Procedure) to check a Category III Structure (as defined in paragraph 35 of such Section A of Part 3 of Schedule 4 (Design and Certification Procedure)) or such substitute as may be appointed by the DBFO Co for the time being in accordance with Clause 44.4.1 or 44.4.2.

"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.

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

"Commercial Bank Facility Agreement" means the facility agreement dated on or about the date hereof between the DBFO Co as Borrower, Dresdner Bank AG London Branch and The Dai-Ichi Kangyo Bank, Limited as Arrangers and Issuing Banks, the Commercial Banks and The Dai-Ichi Kangyo Bank, Limited as Commercial Facility Agent (as such terms are defined in the Commercial Bank Facility Agreement).

"Commission" means the Royal Fine Art Commission.

"Common Terms Agreement" means the common terms agreement dated on or about the date hereof for the facilities under the Commercial Bank Facility Agreement and the EIB Facility Agreement for the DBFO Co arranged by The Dai-Ichi Kangyo Bank, Limited and Dresdner Bank AG London Branch.

"Communications Requirements" means the relevant requirements set out or identified or referred to in Part 2 of Schedule 17 (Communications 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 13.2 (O&M Requirements).

"Company Loan Notes" has the meaning given to that term in the Shareholders Agreement.

"Compensation Costs" means all Claims, Losses, compensation and interest payable pursuant to the CPO Legislation to compensate the owners or occupiers of land or owners of Rights in respect of land, whose property is acquired, taken or otherwise affected (including an effect consequent upon rights being created, exercised or enforced) by the Orders, but excluding such Claims, Losses, compensation and interest to the extent that they are or become payable in connection with any Excluded Blasting Rights.

"Compensation Event" means any of the following:

- (a) an event within Clause 25.5.3;
- (b) a failure by the Secretary of State to issue the Commencement Certificate on or before the date 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 Agent to issue the Permit to Use, Completion Certificate or Taking Over Certificate when required to do so in accordance with Clause 12.1 (Permit to Use), 12.2 (Completion Certificate) or 12.3 (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 or in accordance with Clause 41.3.1);
- (f) the disallowance by HM Customs & Excise of the recovery of input VAT incurred by the DBFO Co on expenditure attributable to the Project, which disallowance results from any Change in Law in respect of VAT or any change published by HM Customs and Excise in any published statement of practice or published extra-statutory concession relating to VAT in either case occurring after the date of execution of this Agreement; and
- (g) an event within Clause 25.2.4.4.

"Compulsory Purchase Inquiry Rules" means the Compulsory Purchase by Ministers (Inquiries Procedure Rules) 1994.

"Confidential Information" has the meaning given in Clause 49.1 (Confidential Information).

"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 entitled "Design and Construction Contract for a dual two lane highway between the existing Llanfair PG Bypass on the A5 and the town of Holyhead and certain related works" entered into on or about the date herewith between the DBFO Co and the Contractor in respect of, inter alia, the design and construction of the Works.

"Construction Direct Agreement" means the agreement dated on or about the date hereof between the Contractor, John Laing plc, Tarmac PLC, the Security Trustee and the DBFO Co.

"Construction Plant" means plant, materials and equipment used or to be used by the Contractor in the construction of the Project Facilities but does not include Plant.

"Construction Requirements" means the relevant 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.

"Contingent Equity LC" has the meaning given to that term in the Common Terms Agreement.

"Contracting Associate" means the Designer, Contractor, Operator and any 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 36.4.1 and 36.4.2) 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 Tarmac Laing Joint Venture (comprising Tarmac Construction Limited, a company registered in England and Wales under number 594581, and John Laing Construction Limited, a company registered in England and Wales under number 172161) or such substitute as may be appointed by the DBFO Co for the time being in accordance with Clause 44.4.1 or 44.4.2.

"Contractor's PI Insurance" means the professional indemnity insurance to be maintained until expiry of the period of twelve years from the issue of the Completion

Certificate by the Contractor in the minimum aggregate amount of £20,000,000 (in January 1998 prices) (or if there shall be only one such party the amount of £20,000,000 (in January 1998 prices)) for each and every occurrence but unlimited in the aggregate (other than for claims in respect of pollution or contamination in respect of which the limit of indemnity will be £20,000,000 (in January 1998 prices) in the aggregate for any policy year) covering claims arising out of any act, omission, negligence or other fault of the Contractor and/or the Designer and to include actions brought between the parties;

"Contractor's Quality Documentation" has the meaning given in Clause 22.1.3.2.

"Core Communications Requirements" means the requirements set out or identified or referred to in Part 1 of Schedule 17 (Core Communications Requirements).

"Core Construction Requirements" means the requirements set out or identified or referred to in Part 1 of Schedule 4 (Core Construction Requirements).

"Core O&M Requirements" means the requirements set out or identified or referred to in Part 1 of Schedule 6 (Core O&M Requirements).

"Court" means any court of competent jurisdiction.

"CPO Legislation" means all Laws authorising the compulsory acquisition of land or Rights in respect of land, relating to the ascertaining and payment of compensation due as a consequence of such acquisition, setting out procedures for the compulsory acquisition of land or Rights in respect of land, or dealing with any ancillary matters including the Land Clauses Consolidation Act 1845, the Statutory Orders (Special Procedure) Act 1945 and 1965, the Land Compensation Act 1961, the Compulsory Purchase Act 1965, the Land Compensation Act 1973, the Highways Act, the Compulsory Purchase (Vesting Declarations) Act 1981, the Acquisition of Land Act 1981 and the Town & Country Planning Act 1990.

"CPO Notice" has the meaning given in Clause 8.2.1.

"CPO Period" means the period commencing on the date hereof and ending on the earlier of the Commencement Date and the fourteenth day after the date hereof.

"Custody Agreement" means the agreement for custody of the Financial Model and CD Rom entered into on or about the date herewith between the DBFO Co, the Secretary of State and the National Computing Centre Limited.

"Data Room" means the data room established prior to the date of this Agreement containing certain materials, documents and data in respect of the Project.

"Date for Completion" means the third anniversary of the date of this Agreement, subject to adjustment in accordance with Clause 11.6 (Extension of Time).

"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 Targets" has the meaning given in paragraph 2.1 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 10.4 (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 Quality Documentation" has the meaning given in Clause 22.1.3.1.

"DBFO Co's Representative" means the person appointed by the DBFO Co pursuant to Clause 21.2 (DBFO Co's Representative) or such substitute as may be appointed by the DBFO Co for the time being pursuant to Clause 21.3 (Change of Representatives).

"DBFO Co's Systems" has the meaning given in paragraph 1 of Section C of Part 1 of Schedule 17 (Core Communications Requirements).

"DBFO Co Termination Event" means any of the events set out in Clause 40.1 (DBFO Co Termination Events).

"DBFO Payment" has the meaning given in Clause 31.1.1.

"Debenture" means the debenture to be granted on or about the date hereof by the DBFO Co to The Dai-Ichi Kangyo Bank, Limited, as Security Trustee.

"Deemed Department's Change" means any Change in Law or any legally binding requirement coming into effect after the date of this Agreement of any person exercising powers which at the date of this Agreement are vested in the Secretary of State which requires:

- (a) a variation in the design, quality or quantity of the Works; or
- (b) a variation in the 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 Construction Requirements or the Communications Requirements.

"Deemed Department's Change Notice" has the meaning given in Clause 34.2.1.

"Defective Equipment" has the meaning given in Clause 30.7.2.

"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 Event" means any of the events specified in Part 1 of Schedule 11 (Delay Events).

"Delay Period" has the meaning given in Clause 11.6.6.

"Department" or **"WO"** means the Welsh Office.

"Department's Agent" means Halcrow Group Limited or such substitute as may be appointed by the Secretary of State for the time being pursuant to Clause 21.3 (Change of Representatives).

"Department's Change" means:

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

initiated by the Department's Nominee in accordance with Part 2 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, where referred to in the context of the design, construction, completion, commissioning or testing of the Works or any activities under this Agreement related thereto, the Department's Agent and in all other circumstances the Department's Representative.

"Department's Representative" means the person to be appointed by the Secretary of State as soon as reasonably practicable after the Commencement Date and in any event prior to 28th February 1999 or such substitute as may be appointed by the Secretary of State for the time being pursuant to Clause 21.3 (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 or maintenance of highways, including 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) Highway Construction Details;
- (e) Circulars Roads issued by the Department; and
- (f) the Trunk Roads Maintenance Manual.

"Department's Systems" has the meaning given in paragraph 1 of Section C of Part 1 of Schedule 17 (Core Communications Requirements).

"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 entitled "Scope, Terms and Conditions of Designer's Engagement" entered into on or about the date herewith between the Contractor, the Designer and Hyder plc in respect of, inter alia, the design and examination of the Works.

"Design Data" means all calculations, designs, design or construction information, standards, specifications, plans, 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, Department's Change or Improvement or the operation, maintenance or improvement of the Project Facilities.

"Designer" means Hyder Consulting Limited, a company registered in England and Wales under number 2212959, or such substitute as may be appointed by the Contractor for the time being in accordance with Clause 44.4.1 or 44.4.2.

"Designer's Direct Agreement" means the agreement dated on or about the date hereof between the Designer, the DBFO Co and Hyder plc.

"Designer's PI Insurance" means the professional indemnity insurance to be maintained until expiry of the period of twelve years from the issue of the Completion Certificate by the Designer in the minimum amount of £20,000,000 (in January 1998 prices) for each and every occurrence but unlimited in the aggregate (other than for claims in respect of pollution or contamination in respect of which the limit of indemnity will be £20,000,000 (in January 1998 prices) in the aggregate for any policy year) covering claims arising out of any act, omission, negligence or other fault of the Designer.

"Designer's Quality Documentation" has the meaning given in Clause 22.1.3.3.

"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 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) which is or is to be de-trunked in accordance with an order made pursuant to Section 10(2)(b) of the Highways Act.

"Direct Agreement" means the agreement to be entered into on or about the date hereof between the Secretary of State, the Security Trustee (on behalf of the Finance Parties), the Global Agent (on behalf of the Finance Parties) and the DBFO Co in the form set out in Part 3 of Schedule 1 (Form of Direct Agreement).

"Disclosed Data" has the meaning given in Clause 37.2.1.

"Discount Rate" means 8.1 per cent per annum.

"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 any question of interpretation of this Agreement).

"Disputes Resolution Procedure" means the procedure referred to in Clause 51 (Disputes Resolution Procedure) and set out in Schedule 15 (Disputes Resolution Procedure).

"EIB Facility Agreement" means the finance contract entered into on or about the date hereof between the European Investment Bank and the DBFO Co.

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

"Ecologist" means Hyder Consulting Limited or such substitute as may be appointed by the DBFO Co for the time being in accordance with Clause 44.4.1 or 44.4.2 (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; and
- (d) the imposition or removal of User Paid Tolls or any change in User Paid Tolls within the scope of paragraphs 5 and 6 of Part 5 of Schedule 12 (User Paid Tolls) which results in any reduction in the costs of the DBFO Co in the conduct of the Operations.

"Eligible Force Majeure" has the meaning given to it in paragraph 2 of Part 2 of Schedule 11 (Force Majeure).

"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 Statement" means the environmental statements and reports referred to in Annex 12 to Part 2 of Schedule 4 (Construction and Handback Requirements).

"Event of Default" means any of the events set out in Clause 39.1 (Events of Default).

"Excluded Blasting Rights" means those Rights in respect of land, particulars of which are set out in Section B of Part 6 of Schedule 3.

"Excluded On-Site Equipment" means the equipment, facilities and other items more particularly described in Annex 1/6 to Part 2 of Schedule 6.

"Existing Public Open Space" means that part of the existing public open space shown on drawing numbered 964057/MI/201 in Section 8 of Part 5 of Schedule 4 as is comprised in the Site.

"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 4 of Part 4 of Schedule 13 (Improvements)) the lengths of trunk road described in Part 1 of Schedule 3 (Existing Road) and shown on drawings numbered 964057/ER/101 to 104, including 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) together with all supporting infrastructure and amenity, including 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, 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 12.3.5.2.

"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 Clause 36.4.1 or 36.4.2).

"Fee Letter" has the meaning given to it in the Common Terms Agreement.

"Finance Parties" has the meaning given to it in the Common Terms Agreement.

"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 the assumptions used, the cell logic network for the financial model software, the databook and any other 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"**.

"Force Majeure" means any of those events referred to in Part 2 of 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 entered into on or about the date hereof specified in Clause 2.3.1.3, including any amendments or supplements thereto, and any agreements or instruments 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 re-financing 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 or indexation fluctuations under any of the agreements or instruments referred to in (a) above, including those agreements or instruments entered into by the DBFO Co to effect hedging arrangements specified in Clause 2.3.1.3 and any amendments or supplements thereto, and any agreements or instruments entered into by the DBFO Co to effect additional or substitute hedging arrangements.

"General Change Procedure" means the procedure set out in Part 1 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 the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected 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 including the National Assembly but excluding local government.

"Handback Amount" has the meaning given in Clause 18.6.7.

"Handback Inspection" has the meaning given in Clause 18.6.1.

"Handback Requirements" means the requirements set out or identified or referred to in paragraph 1 of Part 4 of Schedule 4 (Handback Requirements).

"Hedging Agreements" means any agreement referred to in paragraph (b) of the definition of "Funding Agreements".

"HGV" means any motor vehicle greater than 5.2 metres in length.

"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.

"Holdco" means UK Highways A55 (Holdings) Limited, a company organised and existing under the laws of England and Wales, registered number 3600969 and having its registered office at PO Box 295, Alexandra Gate, Rover Way, Cardiff, CF2 2UE.

"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).

"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 Part 2 of Schedule 12 (Department's Change).

"Improvement" means any change, improvement or addition to the design, layout or structure of the Project Road 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 date of this Agreement; and
- (b) for the New Road, 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.

"Included Blasting Rights" means those Rights in respect of land, particulars of which are set out in Section A of Part 6 of Schedule 3.

"Included Off-Site Equipment" means the equipment, facilities and other items more particularly described in Annex 1/5 to Part 2 of Schedule 6.

"Index" has the meaning given in paragraph 1 of Part 5 of Schedule 9 (Indexation).

"Initial Inspection" has the meaning given in Clause 18.2.1.

"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 Agreement" means an intercreditor agreement entered into or on about the date hereof between the DBFO Co, Holdco, The Dai-Ichi Kangyo Bank, Limited as Global Agent and Security Trustee, the European Investment Bank and the senior creditors, junior banks and subordinated creditors named therein.

"Interest Rate" means a rate of interest per annum equivalent to the average of the base lending rates announced by Barclays Bank PLC and National Westminster Bank 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.

"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 the Relevant Authorities and those persons identified in Part 2 of Schedule 8 (Other Interested Parties).

"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 Order 53 of the Rules of the Supreme Court 1965 seeking review of any determination, decision, order or omission of the Secretary of State or any application for a declaration (not made pursuant to Order 53) 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.

"Landscape Architect" means Hyder Consulting Limited or such substitute as may be appointed by the DBFO Co for the time being in accordance with Clause 44.4.1 or 44.4.2.

"Landscape Manager" means Hyder Consulting Limited or such substitute as may be appointed by the DBFO Co for the time being in accordance with Clause 44.4.1 or 44.4.2.

"Lane Closure" has the meaning given in paragraph 1 of Part 3 of Schedule 9 (Lane Closure Charge).

"Lane Closure Charge" means the charge referred to in paragraph 3.1 of Part 3 of Schedule 9 (Lane Closure Charge).

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

"Latent Defect" has the meaning given in Clause 16.1 (Latent Defects).

"Law" means any applicable 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 National Assembly, the Council of the European Union or the Commission of the European Communities which (without further enactment) has legal effect throughout the United Kingdom and/or within Wales.

"Lenders" has the meaning given to it in the Common Terms Agreement.

"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.

"Llanfair PG" means Llanfair Pwllgwyngyll.

"Llanfair PG Bypass" means the Llanfair PG bypass.

"Local Authority Road" means any De-Trunked Segment and any Local Authority Off-Site Facilities, including all carriageways, hard shoulders, slip roads, side roads, access roads, bridges and other highway structures, together with all supporting infrastructure and amenity, including 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 Authority Off-Site Facilities" means each part of the Off-Site Facilities which is shown as:

- (a) route of new highway;
- (b) highway to be improved; or
- (c) highway to be stopped up,

on the plans attached to the Side Roads Orders and Supplementary Side Roads Orders listed in Part 5 of Schedule 3.

"Local Facilities" means any Local Authority Road 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 or De-Trunked Segments are to be handed over in accordance with Clause 12.3 (Local Facilities and De-Trunked Segments).

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

"Maintenance Works" means any works for the maintenance or repair of the Project Road 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 date of this Agreement; and
 - (b) for the New Road, at any time after the issue of the Completion Certificate,
- but excluding any Routine Maintenance.

"Management Services Agreement" means the agreement entered into on or about the date hereof between the DBFO Co and UK Highways Management Services Limited.

"Mandatory Blight" means any blight falling within the terms of Chapter 2 and Schedule 13 of the Town & Country Planning Act 1990.

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

"Measure" means, in respect of the traffic passing a Measurement Point during a period, to count the number of vehicles comprising such traffic and to determine the classification of each such vehicle in accordance with the provisions of Clause 30.3.2, and **"Measurement"** and **"Measured"** shall be construed accordingly.

"Measuring Equipment" has the meaning given in Clause 30.3.1.

"Measurement Limits of Accuracy" has the meaning given in Clause 30.4.2.

"Measurement Point" means any point designated as such pursuant to Clause 30.2 (Measurement Points).

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

"Monthly Traffic Payment" means any provisional payment to be made by the Secretary of State pursuant to Clause 31.2.2 or 31.2.3.

"National Assembly" means the National Assembly for Wales established or to be established under Section 1(1) of the Government of Wales Act 1998.

"NCN" has the meaning given in paragraph 9 of Annex 1 to Part 1 of Schedule 4.

"NCN Guidelines" has the meaning given in paragraph 9 of Annex 1 to Part 1 of Schedule 4.

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

"Net Present Value" means the net present value of any stream of cash flows calculated as at the stated reference date, determined by:

- (a) discounting any such cash flows subsequent to the reference date by the Discount Rate; and
- (b) inflating any such cash flows prior to such reference date by the Discount Rate.

"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 8.9 (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 4 of Part 4 of Schedule 13 (Improvements)) the lengths of trunk road described in Part 2 of Schedule 3 (New Road) located in the areas shown on drawings numbered 964057/NR/101 to 104, 964057/NR/201 to 203, 964057/NR/301 to 304 and constructed or modified or to be constructed or modified by the DBFO Co, including 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 together with all supporting infrastructure and amenity, including 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.

"Non Technical Summary" means a concise summary of an Environmental Statement written in plain English and/or Welsh.

"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 45.1 (Requirement for Writing).

"Notice to Enter" means a notice issued by the Secretary of State pursuant to Section 11(1) of the Compulsory Purchase Act 1965.

"Notice to Treat" means a notice issued by the Secretary of State pursuant to Section 5 of the Compulsory Purchase Act 1965.

"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 13.2 (O&M Requirements).

"Off-Site Facilities" 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 4 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, 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, embankments and cuttings, but excluding any parts thereof which are excluded from this definition from time to time in accordance with Clause 12.3.5.2.

"Off-Site Planting Works" means the works specified in paragraph 1.2.2 of Annex 10 to Part 2 of Schedule 4.

"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.

"Operating and Maintenance Contract" means, as at the date of this Agreement, the contract entitled "Existing Road Maintenance Contract in connection with the A55 DBFO Road Project" entered into on or about the date herewith between the DBFO Co and the Operator for the operation and maintenance of the Existing Road, and any further contract entered into between the DBFO Co and an 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 Gwynedd Council or such substitute as may be appointed by the DBFO Co for the time being in accordance with Clause 44.4.1 or 44.4.2.

"Operator's Quality Documentation" has the meaning given in Clause 22.1.3.4.

"Orders" means the orders, certificates, statutory instruments and other subordinate legislation listed in Part 4 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 the issued ordinary shares of £1 each in the capital of the DBFO Co, and **"Ordinary Share"** means anyone of them.

"Other Party" has the meaning given in paragraph 2.1 of Part 1 of Schedule 12 (General Change Procedure).

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

"Penalty Points" has the meaning given in Clause 25.2 (Penalty Points).

"Performance Guarantee" means the guarantees dated on or about the date hereof provided by Dresdner Bank AG London Branch and The Dai-Ichi Kangyo Bank, Limited to the Secretary of State, substantially in the form set out in Section A of 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 designed, constructed and completed by the DBFO Co in accordance with the Construction Requirements and the Communications Requirements.

"Permit to Use" means the 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 Agent in accordance with Clause 12.1.2.

"Plant" means machinery, apparatus and the like intended to form or forming part of the Permanent Works or the Existing Road.

"Programme" means the programme for the design and construction of the Works appearing in Schedule 2 (Programme) (as amended from time to time in accordance with this Agreement).

"Programme Date" means 24th March 2001, subject to adjustment in accordance with Clause 11.6 (Extension of Time).

"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 Company Loan Notes" has the meaning given to that term in the Shareholders Agreement.

"Project Documents" means the documents referred to in Clause 2.3.1.

"Project Facilities" means:

- (a) the Project Road and the Off-Site Facilities; and
- (b) (other than for the purposes of Clauses 27.4.1, 27.4.2, 27.4.5, 28.3.1, 28.3.2, 28.3.5 and 28.3.7.2 and Parts 2 and 3 of Schedule 19) the Included Off-Site Equipment,

but excluding the Excluded On-Site Equipment.

"Project Quality Director" means the person so appointed in accordance with Clause 22.5 (Project Quality Director).

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

"Proponent" has the meaning given in paragraph 2.1 of Part 1 of Schedule 12 (General Change Procedure).

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

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

"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.

"PTU Contract Year" means the Contract Year during which the Permit to Use is issued.

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

"Quality Manual" means any quality manual or procedure referred to in Clause 22.2 (Quality Manuals, Plans and Procedures).

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

"Railtrack Appointment" has the meaning given to that term in Clause 50.6.1 (Agency).

"Railtrack Works Agreement" means an agreement in respect of various works relating to the Railtrack network to be entered into on or about the date hereof between Railtrack Plc and the Secretary of State, provided that any reference to Railtrack Plc shall be deemed to include a reference to any successor to it or to any organisation, entity or representative which has taken over all or any functions or responsibilities of Railtrack Plc.

"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.

"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 in Law" means any Change in Law the effect of which is to discriminate against:

- (a) the Project Road in relation to other roads;
- (b) roads whose design, construction, financing and operation are procured on a similar basis to the Project Road in relation to other roads and for this purpose other roads shall not include roads whose maintenance is procured on a finance, maintenance and operation basis;
- (c) the DBFO Co in relation to other companies; or
- (d) companies undertaking the functions referred to in paragraph (b) above (under an arrangement similar to this Agreement) in relation to other companies,

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.

"Remedial Period" has the meaning given in Clause 25.1.2.

"Renewal Amount" means the cost of carrying out the Renewal Works as agreed or determined in accordance with Clause 18 (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 18 (Handback), as such programme may be revised or amended at any time in accordance with Clause 18 (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 18 (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 23.1 (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.

"Residual Life" means that part of the Serviceable Life of an element of the Project Facilities that remains at the Termination Date or (in the case of the De-Trunked Segments) the date on which the Completion Certificate is issued or expected to be issued.

"Residual Value" means any value attaching to the Ordinary Shares immediately following termination of this Agreement pursuant to Clause 43 (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 Representative 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 18.7.1.

"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 or, for the purposes of Schedule 12 (Change), any other date on which any Index is to be applied.

"Review Procedure" means the procedure whereby submissions are made to the Department's Nominee as set out in Part 3 of Schedule 7 (Review Procedure).

"Revised Values" has the meaning given in paragraph 6.1.1 of Part 1 of Schedule 12.

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

"Road Length" means each stretch of the Project Road served by a single Measurement Point, as shown in drawing numbered 964057/RMLP/301, as adjusted to reflect the addition of any Measurement Points pursuant to Clause 30.2.1.2.

"Road User's Charter" means (i) the document of that name issued by the Highways Agency in April 1994 or any replacement or substitute therefor or (ii) any equivalent road user's charter applicable in Wales.

"Routine Maintenance" means work which is short term or cyclic in nature and necessary to keep any part of the Project Facilities in good and safe working order, including 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.

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

"Safety Performance Adjustment" means the adjustment referred to in paragraph 2.1 of Part 4 of Schedule 9 (Safety Performance Adjustments) (which may be positive or negative).

"Schedule of Lane Closures" means a schedule submitted:

- (a) by the DBFO Co under Clause 14.3.1 (or any revision thereof submitted under Clause 14.3.2 or 14.3.3) indicating the period or periods during which the DBFO Co plans to effect any Lane Closure in respect of the Project Road; or
- (b) by the Secretary of State under Clause 14.5.2 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" means the road schemes listed in paragraph 1 of Part 2 of Schedule 3 (New Road).

"Second Inspection" has the meaning given in Clause 18.4.1.

"Secretaries of State" means the Secretary of State together with any other appropriate Minister within the meaning given in the Acquisition of Land Act 1981.

"Security Trustee" means any bank, trustee or other financial institution appointed by the Finance Parties to act as their Security Trustee under and as defined in the Common Terms Agreement and such substitute as may be appointed from time to time in accordance with the Common Terms Agreement and notified to the Secretary of State in writing.

"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" means a shareholders agreement entered into on or about the date hereof between John Laing plc, Hyder plc, Tarmac PLC, all of the Sponsors, Holdco and the DBFO Co.

"Shares Charge" means the share charge to be granted on or about the date hereof by Holdco to The Dai-Ichi Kangyo Bank, Limited as Security Trustee.

"Site" means, subject to Clause 8.9 (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 4 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 numbered 964057/NR/101 to 104, 964057/NR/201 to 203, 964057/NR/301 to 304, 964057/ER/101 to 104, 105-1, 105-2 and 106 to 117.

"Site Materials" has the meaning given in Clause 8.10 (Disposal of Materials on Site).

"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.

"Sponsors" means all or any of John Laing Investments Limited, Tarmac (PFI) Limited and Hyder Investments Limited.

"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.

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

"Structure" means (except in Parts 1, 2 and 5 of Schedule 4) any (temporary or permanent):

- (a) bridge, tunnel or culvert having an individual span of 3 metres or more or (in respect of a multi-span structure) a cumulative span of 5 metres or more;
- (b) bridge, tunnel or culvert (other than of corrugated metal) having a span of 1.8 metres or more and where the cover to the road surface is less than 1 metre;
- (c) corrugated metal bridge or culvert having a span of 0.9 metres or more (irrespective of cover to the road surface);
- (d) pedestrian subway (irrespective of span and cover to the road surface);
- (e) retaining wall, including reinforced earth, anchored earth and cribwall systems with slope between 70° and 90° to the horizontal, where the level of the fill at

the back of the wall is greater than 1.5 metres above the finished ground level in front of the wall;

- (f) environmental barrier; and
- (g) sign/signal gantry or high mast for lighting, television cameras and catenary lighting systems.

"Subsequent Scheme" means any change, improvement or addition to the design, layout or structure of the Project Road 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 date of this Agreement; and
- (b) for the New Road, at any time after the issue of the Completion Certificate,

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

"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.

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

"TAF" has the meaning given in paragraph 2.10 of Section A of Part 3 of Schedule 4 (Design and Certification Procedure).

"Taking Over Requirements" means the requirements set out or identified or referred to in Annex 2 (Taking Over Requirements) of Part 1 of Schedule 4.

"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 and the Handback Requirements.

"Temporary Adjacent Areas" means those parts of the Adjacent Areas shown or identified as such on drawings numbered 964057/NR/101 to 104, 964057/NR/201 to 203 and 964057/NR/301 to 304.

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

"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 43.1 (Termination Accounts).

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

"Testing Contractor" means Tarmac Laing Joint Venture (comprising Tarmac Construction Limited, a company registered in England and Wales under number 594581, and John Laing Construction Limited, a company registered in England and Wales under number 172161) or such substitute as may be appointed by the DBFO Co for the time being in accordance with Clause 44.4.1 or 44.4.2.

"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 16.5.1.

"Toll Event" means the issue of the Permit to Use.

"Toll Period" means, in relation to a Contract Year n :

- (a) if the Permit to Use is issued in that Contract Year n , the period commencing on the date of issue of the Permit to Use up to and including the last day of Contract Year n ; or
- (b) otherwise the period commencing on the first day of Contract Year n up to and including the last day of Contract Year n .

"Traffic Data" means the information relating to traffic in the reports submitted pursuant to paragraphs 2 and 3 of Part 2 of Schedule 14 (Reports) and any information relating to traffic obtained by the Secretary of State by direct interrogation of any Measuring Equipment.

"Traffic Payment" means the amount determined in accordance with Part 2 of Schedule 9 (Traffic Payment) in respect of a Contract Year.

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

"Traffic Signs Manual" means the manual of that name published by The Stationery Office and any associated advice (including 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 (Welsh and English Language Provisions) Regulations and General Directions 1985 (S.I. 1985/713), The Traffic Signs Regulations and General Directions 1994 (S.I. 1994/1519), any authorisation given under Section 64, or direction given under Section 65, of the Road Traffic Regulation Act 1984, The Traffic Signs Regulations and General Directions 1981 (S.I. 1981/859), The Traffic Signs (Amendment) Regulations 1982 (S.I. 1982/1879), The Traffic Signs General (Amendment) Directions 1982 (S.I. 1982/1880), The Traffic Signs General (Amendment) Directions 1983 (S.I. 1983/1086), The Traffic Signs (Amendment) Regulations 1983 (S.I. 1983/1088) and The Traffic Signs (Amendment) Regulations and General Directions 1984 (S.I. 1984/966).

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

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

"Upgraded Sections" are those lengths of Existing Road which are to be modified in accordance with the Construction and the Communications Requirements.

"User Paid Toll" has the meaning given in paragraph 1 of Part 5 of Schedule 12 (User Paid Tolls).

"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 47.1.5.

"Verification" means the process of testing any of the Measuring Equipment for the purpose of assessing any error in Measurement, and **"Verify"** shall be construed accordingly.

"Warning Notice" has the meaning given in Clause 25.3 (Warning Notices).

"Welsh Language Scheme" means any Welsh language scheme prepared in accordance with Section 21 of the Welsh Language Act 1993 and approved or imposed by the Welsh Language Board in relation to the Department, the Secretary of State or the DBFO Co as from time to time amended, revised or replaced.

"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 paragraph 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, the Accommodation Works, the Off-Site Planting Works and any works in respect of any De-Trunked Segment 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, embankments and cuttings and archaeological and ecological works.

"Works Programme" means the detailed programme of design, investigations, construction and related works, based upon the Programme, to be submitted by the DBFO Co in accordance with Clause 11.3.1 or any amended or varied version thereof submitted by the DBFO Co in accordance with Clause 11.3.2.

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, 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, office, 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;
- 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;
- 1.2.14 all monetary amounts are expressed in pounds sterling;
- 1.2.15 references to amounts or sums being expressed in January 1998 prices are references to amounts or sums which have been or 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 February 1998 for the month of January 1998. Amounts or sums expressed in January 1998 prices shall be calculated by applying the following formula:

$$R_{(\text{January 1998})} = \frac{R_n \times RPI_{(\text{January 1998})}}{RPI_n}$$

where:

$R_{(\text{January 1998})}$	=	the relevant amount or sum expressed in January 1998 prices;
n	=	the calendar month in respect of which the January 1998 price comparison is to be made;
$RPI_{(\text{January 1998})}$	=	the RPI published in February 1998 for the month of January 1998;
R_n	=	the actual amount or sum pertaining in month n ;
RPI_n	=	the RPI published or which is to be published in month $n+1$ for the preceding month n ;

- 1.2.16 wherever this Agreement obliges the Secretary of State to pay any amount to the DBFO Co (including 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 Representative and the Department's Agent) who have responsibilities in connection with the conduct of the Operations or the Project;
- 1.2.18 any references to the Secretary of State shall include the National Assembly from the date when, pursuant to the Government of Wales Act 1998, his rights and/or obligations under this Agreement are assigned, transferred or novated to the National Assembly and shall also include any person to whom the Secretary of State's or the National Assembly's (as the case may be) rights and/or obligations under this Agreement have been assigned, transferred or novated; and
- 1.2.19 the words "**include**", "**including**" and "**in particular**" shall be construed as being by way of illustration or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any foregoing words.

1.3 **Language**

The language of this Agreement is English. All Notices, correspondence, drawings, Design Data, test reports, certificates, specifications and information shall be entirely in English and/or Welsh, provided that if in Welsh, the relevant document shall be accompanied by an English version. 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 and (so far as is both reasonably appropriate in the circumstances and reasonably practicable) Welsh, as shall instructions and notices to the public and staff and all other signing and information notices.

1.4 Provisions applicable to the Existing Road and the 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 the 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, the 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 Clauses and the provisions in any Schedule or between the provisions of any Schedules, the Department's Nominee (or, if the ambiguity or discrepancy affects both the Works and any other Operations, the Department's Representative) shall at the request of the DBFO Co determine by notice to the DBFO Co 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 or the Department's Representative (as the case may be) under Clause 2.1 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 or the Department's Representative (as the case may be) shall be treated as a Department's Change in accordance with Part 2 of Schedule 12 (Department's Changes).

2.3 Project Documents

2.3.1 Prior to the execution of this Agreement the DBFO Co has provided to the Secretary of State copies of the following documents, which copies have been initialled by the Parties for the purposes of identification:

- 2.3.1.1 the Shareholders Agreement;
- 2.3.1.2 the Memoranda and Articles of Association of the DBFO Co and Holdco;
- 2.3.1.3
 - 2.3.1.3.A the Common Terms Agreement;
 - 2.3.1.3.B the EIB Facility Agreement;

- 2.3.1.3.C the Commercial Bank Facility Agreement;
- 2.3.1.3.D the Intercreditor Agreement;
- 2.3.1.3.E the Accounts Agreement;
- 2.3.1.3.F the Company Loan Notes;
- 2.3.1.3.G the Project Company Loan Notes;
- 2.3.1.3.H the Shares Charge;
- 2.3.1.3.I the Debenture;
- 2.3.1.3.J each Fee Letter; and
- 2.3.1.3.K the equity guarantees granted by each of John Laing plc, Tarmac PLC and Hyder plc, in favour of the DBFO Co and The Dai-Ichi Kangyo Bank, Limited as Security Trustee on or about the date hereof;
- 2.3.1.3.L the 1992 ISDA Master Agreement(s) (including the Schedule to any such ISDA Master Agreement) entered into between the DBFO Co and each of The Royal Bank of Scotland PLC, Dresdner Bank AG and The Dai-Ichi Kangyo Bank, Limited respectively and the confirmation or confirmations relating to each swap transaction entered into thereunder for the purposes of hedging the exposure of the DBFO Co to interest rate and/or indexation fluctuations under any of the Funding Agreements.
- 2.3.1.4 the Direct Agreement;
- 2.3.1.5 the Construction Contract which includes the terms of the appointment of the Contractor as Testing Contractor;
- 2.3.1.6 the Design Contract;
- 2.3.1.7 the terms and conditions of engagement of the Archaeologist, Landscape Architect, Landscape Manager and Ecologist;
- 2.3.1.8 the Operating and Maintenance Contract;
- 2.3.1.9 waivers of liability from the Contractor, Operator, Designer, Archaeologist, Landscape Manager, Landscape Architect and Ecologist in the form referred to in the last sentence of Clause 44.4.2;
- 2.3.1.10 the Designer's Direct Agreement;
- 2.3.1.11 the Management Services Agreement;
- 2.3.1.12 the Construction Direct Agreement; and

2.3.13 the guarantee granted by John Laing plc and Tarmac PLC in favour of the DBFO Co on or about the date hereof guaranteeing the Contractor's obligations under the Construction Contract,

provided that upon execution, any Contingent Equity LC issued in the form of and in accordance with the terms of the Common Terms Agreement shall be a Project Document.

2.3.2 The DBFO Co shall (i) perform its obligations under and observe all the terms of the Project Documents to which it is a party; (ii) use its reasonable endeavours to procure that each Contracting Associate shall perform its obligations under and observe all the terms of the Project Documents to which such Contracting Associate is a party; and (iii) not and shall use its reasonable endeavours to procure that no Contracting Associate shall:

2.3.2.1 terminate or permit the termination of any Project Document to which it (or, as the case may be, such Contracting Associate) is a party;

2.3.2.2 make or agree to any material amendment to or variation of any Project Document to which it (or, as the case may be, such Contracting Associate) is a party provided that an amendment to the definitions contained in the Common Terms Agreement which are used in this Agreement or the Direct Agreement shall be deemed to be a material amendment and provided further that a reduction of the amount of any Contingent Equity LC shall not be a material amendment or variation;

2.3.2.3 in any material respect depart from, or waive or fail to enforce any rights it may have under, any Project Document to which it (or, as the case may be, such Contracting Associate) is a party;

2.3.2.4 enter into any agreement or document which would materially affect the interpretation or application of any Project Document; or

2.3.2.5 enter into any Funding Agreement other than those listed in Clause 2.3.1.3,

unless the relevant document or proposed course of action has been submitted to the Department's Nominee and there has been no objection in accordance with the Review Procedure provided that the DBFO Co shall not be in breach of its obligations under this Clause 2.3.2 unless (a) it has failed to use its reasonable endeavours under this Clause 2.3.2 (ii) or (iii) and (b) such failure has a material adverse effect on its ability to perform its obligations under this Agreement.

2.3.3 The Department's Nominee shall only be entitled to object to a document or proposed course of action submitted to the Review Procedure pursuant to Clause 2.3.2 on the grounds set out in paragraph 3.1 of Part 3 of Schedule 7 (Review Procedure).

2.3.4 If at any time any Project Document is terminated, an amendment or variation is made to any Project Document, the DBFO Co or any Contracting Associate

is granted a waiver or release of any of the obligations under any Project Document, any agreement is entered into which would affect the interpretation or application of any of the Project Documents, or any Funding Agreement other than those listed in Clause 2.3.1.3 is entered into, then the DBFO Co shall deliver to the Secretary of State a conformed copy of each such document or (so far as it is not in writing) a true and complete record thereof in writing within 15 Working Days of the date of its execution or creation, certified as a true copy by an officer of the DBFO Co.

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;
- 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 10.4 (DBFO Co's Changes), Clause 13.6 (Maintenance and Other Works), Clause 35.3 (Subsequent Schemes), Clause 35.4 (Improvements), Part 3 of Schedule 13 (Subsequent Schemes) 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 12.3.5.2 and to Clause 14.3 (Lane Closures), keep from 1st April 1999 the Existing Road open for public use; and
- 3.3.1.2 from the date of issue of the Permit to Use, open and, subject to Clause 14.3 (Lane Closures), keep open the New Road for public use.

3.3.2 Without prejudice to Clause 27.2 (Primary Duty of Co-ordination), all Operations shall be carried on so as not to interfere unnecessarily with the convenience of the public or the access to, use and occupation of, public or private roads or footpaths, whether under the control or in the possession of the Secretary of State or any other person.

3.4 **Standard of Performance**

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

- 3.4.1.1 in a safe manner and (save where a specification or standard of performance is set out in the relevant Technical Requirements) in accordance with Good Industry Practice and the Quality Documentation;
- 3.4.1.2 in a manner that is not likely to be injurious to health or to cause damage to property;
- 3.4.1.3 in such manner as to enable the Secretary of State as the highway authority to discharge his statutory duties and the undertakings or objectives and observe the principles set out in the Road User's Charter; and
- 3.4.1.4 in compliance with all applicable Legal Requirements.

3.4.2 Not used.

3.5 **Discrimination**

The DBFO Co shall not, and confirms that it will use reasonable endeavours to 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 the DBFO Co shall not discriminate on the grounds of nationality in the selection of sub-contractors and shall use reasonable endeavours to procure that the Contractor, the Designer and the Operator shall not so discriminate.

4. **GUARANTEES**

4.1 **Performance Guarantee**

4.1.1 The DBFO Co shall, prior to the issue of the Commencement Certificate, unconditionally deliver to the Secretary of State the Performance Guarantee in the sum of £1,000,000 in aggregate, duly executed in an amount of £500,000 by each of Dresdner Bank AG London Branch and The Dai-Ichi Kangyo Bank, Limited and in full force and effect.

4.1.2 The Secretary of State shall be entitled to make a demand or demands under the Performance Guarantee if on or before the Guarantee Expiry Date (as defined in the Performance Guarantee):

- 4.1.2.1 this Agreement is terminated by the Secretary of State pursuant to Clause 39.3.4 or Clause 39.5 (Termination in Full); or
- 4.1.2.2 a Termination Notice (as defined in the Direct Agreement) is given by the Secretary of State, is not revoked and no Step-In Undertaking (as defined in the Direct Agreement) has been given.

4.2 **Release**

The Secretary of State shall unless there is any accrued liability under the Performance Guarantee with due expedition following the Guarantee Expiry Date or the earlier

termination of this Agreement pursuant to Clause 40 (Termination by the DBFO Co) or Clause 41 (Non-Default Termination), undertake such action as the DBFO Co may reasonably request to release the surety from the Performance Guarantee.

5. FINANCIAL MODEL AND CD ROM

5.1 Custody Arrangements

5.1.1 Immediately on execution of this Agreement, 2 copies of the Financial Model and 2 copies of the 3½ inch disk shall be lodged by the DBFO Co (after verification of the identity of the Financial Model on behalf of the Secretary of State) with The National Computing Centre Limited to be held in custody upon the terms set out in the Custody Agreement. The Parties shall agree a substitute custodian in the event that such person ceases to act as custodian.

5.1.2 The DBFO Co shall in addition promptly lodge with The National Computing Centre Limited (or the substitute custodian) 2 copies of any revisions to the Financial Model from time to time in accordance with paragraph 8 of Part 1 of Schedule 12 (General Change Procedure), to be held in custody upon the terms set out in the Custody Agreement.

5.2 Costs

The cost of these custody arrangements shall be met in the first instance by the Secretary of State and he shall be reimbursed one half of such costs by the DBFO Co on demand.

5.3 Base Case

A copy of the Base Case is attached as Part 2 of Schedule 1 (Base Case).

PART II OPERATIONS

6. PRE-COMMENCEMENT PERIOD

6.1 Site Inspection

Without limitation to any other provision of this Agreement (including Clause 37.2.2), 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 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 or 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 has conducted its own analysis and review of the other materials, documents and data referred to in Clause 37.2.1 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).

- 6.2 Not used.
- 6.3 Not used.
- 6.4 Not used.

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 any conditions relating to the issue of the Commencement Certificate or achievement of the Commencement Date) to the availability under the Funding Agreements of the funds required by the DBFO Co for all Operations have been satisfied or waived;
 - 7.1.1.2 that 200 Ordinary Shares have been unconditionally allotted and issued 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 of compliance with Clause 13.5.1 (Emergencies and Liaison);
- 7.1.4 Not used;

7.1.5 the Department's Nominee having received such evidence as he may reasonably require of compliance with Clause 19.1.1.2; and

7.1.6 Not used.

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 and 7.1.5 immediately following and on the date of the execution of this Agreement.

7.3 Commencement Certificate

7.3.1 The Secretary of State shall (subject to all the conditions referred to in Clause 7.1 (Conditions to Commencement) being satisfied) issue the Commencement Certificate on the date hereof.

7.3.1.1 Not used.

7.3.1.2 Not used.

7.3.2 The Commencement Certificate shall state the Commencement Date, which shall be the date of issue of the Commencement Certificate.

7.4 Not used.

7.5 Commencement of Operation and Maintenance

7.5.1 Save as provided for in Clause 7.5.2 and subject to Clause 13.1, the DBFO Co shall be responsible for the operation and maintenance of the Project Facilities from the Commencement Date.

7.5.2 The DBFO Co shall be responsible for Routine Maintenance and any other obligations to operate and maintain the Existing Road pursuant to this Agreement with effect from 1st April 1999.

7.5.3 The DBFO Co shall provide to the Secretary of State prior to 1st March 1999 such evidence as he may reasonably require that adequate procedures have been agreed between the DBFO Co and the North West Trunk Road Agency, Gwynedd Council, for the transfer of the operation and maintenance of the Existing Road to the DBFO Co with effect from 1st April 1999 and that the DBFO Co is ready to commence operation and maintenance of the Existing Road with effect from 1st April 1999.

7.6 Commencement in relation to De-Trunked Segments

Prior to the issue of the Permit to Use the DBFO Co shall not undertake any Works (or Major Maintenance Works to the extent that the DBFO Co's obligations under Schedule 6 can be met by Routine Maintenance) on any De-Trunked Segments.

8. **LAND**

8.1 **Access for DBFO Co**

Subject to the conditions set out in Clause 7.1 (Conditions to Commencement) having been satisfied as at the Commencement Date and subject to the provisions of Clauses 8.2 (Compulsory Purchase Order Rights), 8.3 (Duration) and 8.4 (Limitations), the Secretary of State shall make available to the DBFO Co for the periods referred to in Clause 8.3 (Duration) access to so much of the Site and the Adjacent Areas 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 subject to the provisions of Clause 13.4.2, the right of any Relevant Authority under any Law or Legal Requirement to have access to the Site or the Adjacent Areas;
- 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 13.4.1;
- 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; and
- 8.1.7 the provisions of Clause 9 (Security of the Site) and Schedule 22 (Security of the Site).

8.2 **Compulsory Purchase Order Rights**

- 8.2.1 The Secretary of State agrees that, if so requested by the DBFO Co in a notice (a "**CPO Notice**") issued to the Secretary of State within the CPO Period he shall not in respect of any Included Blasting Rights identified in such notice which are the subject of a compulsory purchase order issue a Notice to Treat or Notice to Enter prior to the date specified by the DBFO Co by not less than 2 months' notice, provided that the Secretary of State shall issue a Notice to Treat or Notice to Enter if and as soon as reasonably practicable after he is satisfied that the DBFO Co has taken all reasonable steps to obtain but has failed to obtain temporary occupation of the plots of land thereby affected for the purposes of blasting by agreement with the landowners and occupiers thereof, and, subject to Clause 9 (Security of the Site), he shall use all reasonable endeavours to grant access thereto to the DBFO Co subject to and in accordance with the relevant compulsory purchase order, and for that purpose the Secretary of State will, if necessary, authorise the DBFO Co to take such further steps on his behalf at the DBFO Co's cost as may be necessary in accordance with the relevant compulsory purchase order to obtain temporary occupation of the relevant plots of land, and provided further that the Secretary

of State shall be entitled to issue a Notice to Treat or Notice to Enter in respect of any such Included Blasting Rights at any time after the date which is 3 months prior to the expiry of the relevant compulsory purchase order. No CPO Notice shall be issued in respect of Excluded Blasting Rights.

- 8.2.2 The Secretary of State shall have no obligation to the DBFO Co to grant access, or liability to the DBFO Co for any failure to grant access, to any land the subject of Included Blasting Rights which is the subject of a CPO Notice other than in respect of (i) the access rights to which the Secretary of State is entitled (subject to any restrictions on such rights) as a result of the issue of or (ii) the failure to issue a Notice to Treat or Notice to Enter properly requested by the DBFO Co pursuant to Clause 8.2.1.

Without prejudice to the foregoing, the Secretary of State shall in any event have no such obligations or liability to the DBFO Co in relation to:

- (a) the Excluded Blasting Rights; or
- (b) the Included Blasting Rights to the extent that the DBFO Co has failed to satisfy the Secretary of State that it has taken all reasonable steps to obtain temporary occupation of the plots of land thereby affected for the purposes of blasting by agreement with the landowners and occupiers thereof.

- 8.2.3 The DBFO Co shall take all steps (including the carrying out of work) necessary to ensure that any compulsory purchase order, Notice to Treat or Notice to Enter or General Vesting Declaration in respect of any land or Rights in respect of land comprised in the Site and the Adjacent Areas does not lapse or otherwise cease to have effect or become liable to be quashed.

- 8.2.4 If, at the date of service of the CPO Notice, the Secretary of State has already served a Notice to Enter or a Notice to Treat or made a General Vesting Declaration relating to the land or Rights in respect of land or made any other commitment to any person that conflicts with the CPO Notice, he may in his absolute discretion give notice within 28 days to the DBFO Co that he cannot comply with the relevant CPO Notice which shall then be rescinded and shall be of no further effect.

- 8.2.5 For the avoidance of doubt the choice of mode of acquisition of land or Rights in respect of land (by Notice to Treat, Notice to Enter or General Vesting Declaration or otherwise) shall be in the absolute discretion of the Secretary of State.

8.3 **Duration**

Subject to Clauses 8.2, 8.4 and 42.1 (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:

- 8.3.1 in respect of the Site (other than the Existing Public Open Space and the Existing Road), from the Commencement Date (and in respect of the Existing Road, from 1st April 1999) 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 12.3.5 (save to the extent necessary to perform the obligations set out in Clause 12.3.5.3);

- 8.3.2 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 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 12.3 (Local Facilities and De-Trunked Segments);
- 8.3.3 in respect of the Adjacent Areas (other than 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 Adjacent Areas under the Programme and thereafter until the end of the Contract Period;
- 8.3.4 in respect of the Existing Public Open Space, from the date on which the Department's Agent confirms to the DBFO Co that it is satisfied that those works to be undertaken by the DBFO Co under paragraph 6 of Schedule 4, Part 1 Annex 1 have in all respects been completed in accordance with the requirements specified therein.

8.4 **Limitations**

- 8.4.1 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 particular activity only and shall not grant or be deemed to grant any legal estate or other interest in land.
- 8.4.2 Without prejudice to the generality of Clause 8.4.1, where land or Rights in respect of land forming part of the Site or the Adjacent Areas has been acquired:
 - 8.4.2.1 by compulsory purchase order for landscaping or any other specified purpose; or
 - 8.4.2.2 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.

8.5 **Additional Access**

- 8.5.1 Any request by the DBFO Co that the Secretary of State exercise in respect of any land outside the Site and the Adjacent Areas (other than land affected by any Included Blasting Rights) 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 26 (Statutory Powers), and the DBFO Co shall bear all costs and

charges in respect of and any Loss or Claims arising from such entry. No such request shall be made in respect of Excluded Blasting Rights.

- 8.5.2 Save as provided in Clause 8.5.1, 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) (including access to any land the subject of a CPO Notice pursuant to Clause 8.2.1, other than any such land in respect of which the Secretary of State has failed to issue a Notice to Treat or Notice to Enter or General Vesting Declaration properly requested by the DBFO Co pursuant to Clause 8.2.1).

8.6 Off-Site Works

Subject to Clause 9.1.2, 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:

- 8.6.1 the DBFO Co shall not be required to carry out the Off-Site Works relating to such area; and
- 8.6.2 the Secretary of State shall not be required to make available to the DBFO Co access to such area; and
- 8.6.3 the provisions of Clause 8.6A shall apply.

8.6A Off-Site Works Further Provisions

If, pursuant to Clause 8.6, the DBFO Co, having used its reasonable endeavours, is unable to (i) agree with the relevant highway authority access to any area required to carry out the Off-Site Works, or (ii), having agreed such access in advance or having previously complied with Clause 8.6A in respect of such area, is unable to gain access to such area, then:

- 8.6A.1 the DBFO Co shall notify the Department's Agent of the situation as soon as reasonably practicable, and, in the case of (i) above, in any event no later than 9 months from the Commencement Date; provided in each case that such notice shall contain full details of the situation, including, in respect of each such area:
- (a) the relevant highway authority or other person who is refusing to agree or grant access to the area required to carry out the Off-Site Works;
 - (b) the details of such refusal, including the area involved, whether the refusal to grant access to such area is complete or partial, and if partial, giving details of any timing or other restrictions imposed and the steps taken by the DBFO Co, if necessary, to adjust its Works Programme accordingly;
 - (c) the ground(s) for such refusal;

- (d) the steps taken by the DBFO Co to negotiate or gain access to such areas, provided in the case of (ii) above, such steps shall include evidence of the prior written agreement between the DBFO Co and the relevant highway authority or other person who is subsequently refusing to agree or grant access to such areas; and
- (e) such other information and/or documentation as the Department's Agent may reasonably require.

8.6A.2 The Department's Agent shall, within a reasonable time, consider the notice given to him by the DBFO Co pursuant to Clause 8.6A.1 and shall if he deems appropriate (acting reasonably) do any one or more of the following:

- (a) use his reasonable endeavours to persuade the relevant highway authority or other person to agree or grant such access to the DBFO Co as will enable the DBFO Co to carry out the Off-Site Works prior to the Date for Completion;
- (b) not used;
- (c) if the DBFO Co has demonstrated to the reasonable satisfaction of the Department's Agent that access to any area required to carry out the Off-Site Works is not and will not become available within the necessary time to enable completion of the Works to the extent and standard required for the issuance of the Permit to Use prior to the Date for Completion, relieve the DBFO Co of its obligations to carry out the Off-Site Works relating to such area prior to the issuance of the Permit to Use and, subject to Clause 8.6A.2(d), instead oblige the DBFO Co to carry out such Works prior to the issuance of the Completion Certificate;
- (d) if the DBFO Co has demonstrated to the reasonable satisfaction of the Department's Agent that access to any area required to carry out the Off-Site Works is not and will not become available within the time by which the DBFO Co would otherwise be likely to obtain the Completion Certificate, relieve the DBFO Co of its obligation to carry out the Off-Site Works relating to such area completely or require the DBFO Co to carry out such Off-Site Works within a specified period following the issue of the Completion Certificate.

8.7 **Acquisition of Land by DBFO Co**

8.7.1 Subject to Clause 8.7.3, 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.

8.7.2 Without prejudice to Clause 8.7.1 or paragraph 2.5.7 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 or for the permanent support of the Project Facilities (other than land or Rights in respect of land purchased from the Secretary of State pursuant to Clause 8.7.3) shall within 6 months of (a) the issue of the Completion Certificate; or (b) the acquisition of the relevant land, 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.

8.7.3 In the event that the Secretary of State (i) becomes obliged to acquire any Blasting Blight Land pursuant to CPO Legislation or (ii) proposes (acting reasonably) to acquire any Blasting Blight Land the Secretary of State shall be entitled at any time prior to the Date for Completion to give notice to the DBFO Co requiring it to acquire such Blasting Blight Land from him. Such notice shall specify the price (which shall be equal to that paid by the Secretary of State), together with the Secretary of State's legal, surveying and administrative costs in connection with such acquisition and disposal ("**Expenses**"), the terms for such acquisition and the date on which such acquisition shall be completed; provided that the terms thereof shall be substantially similar to those applying in relation to the sale of such Blasting Blight Land to the Secretary of State by the person from whom he acquired (or agreed to acquire) the same; and provided that the price of such sale to the Secretary of State shall not have exceeded the value thereof as determined by the Secretary of State in consultation with the District Valuer or as set by any Lands Tribunal and provided further that the date specified for completion of the acquisition from the Secretary of State shall be not less than 10 Working Days after the date of such notice. The giving of such notice shall oblige the DBFO Co to complete the acquisition of such Blasting Blight Land at the price and on the terms and date therein specified, without prejudice to the rights of the DBFO Co to refer the Expenses to the Disputes Resolution Procedure.

8.7.4 The Secretary of State shall not be liable for any delay in the progress of the Works resulting from the exercise, activation or enforcement of any Included Blasting Rights or the taking of any steps which the Secretary of State may reasonably consider necessary or appropriate in connection therewith.

8.8 **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.

8.9 **Boundaries of Site and Adjacent Areas**

8.9.1 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 964057/NR/101 to 104, 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.

8.9.2 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 8.9.1 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).

8.9.3 If the Secretary of State exercises the right referred to in Clause 8.9.2 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 964057/NR/202 and 203, 964057/NR/301 to 304 and 964057/NR/101 to 104 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.

- 8.9.4 For the avoidance of doubt, if and so long as the Secretary of State does not exercise the right referred to in Clause 8.9.2 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.

8.10 **Disposal of Materials on Site**

The DBFO Co may only excavate, extract, dispose of, exploit or otherwise deal with any materials, including 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**"):

- 8.10.1 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;
- 8.10.2 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;
- 8.10.3 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
- 8.10.4 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.

9. **SECURITY OF THE SITE**

9.1 **Responsibility for Protestors and Trespassers**

- 9.1.1 Without prejudice to the provisions of Part 1 of Schedule 22 and except as expressly provided by paragraph 4 of Part 1 of Schedule 22 (Security Measures), 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 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;

- 9.1.2 Without prejudice to the provisions of Part 1 of Schedule 22 and subject to paragraph 4 of Part 1 of Schedule 22 (Security Measures), the DBFO Co shall not be relieved by Clause 8.6 (Off-Site Works) or Clause 8.6A (Off-Site Works Further Provisions) 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 Contract Period).

9.2 DBFO Co to Bear Loss

- 9.2.1 As between the Secretary of State and the DBFO Co, the DBFO Co shall bear, without recourse to the Secretary of State (save as expressly provided by paragraph 4 of Part 1 of Schedule 22 (Security Measures)), any Loss suffered by any person which is caused by any Protestor or Trespasser, including any damage to property, any personal injury or death and any loss of income (including any reduction in DBFO Payments).

- 9.2.2 For the avoidance of doubt, nothing in Clause 9.2.1 shall affect:

- 9.2.2.1 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
- 9.2.2.2 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.

9.3 No Payments to Protestors

The DBFO Co shall not give directly or indirectly 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.

9.4 Measures to Deal with Protestors and Trespassers

The provisions of Part 1 of Schedule 22 shall apply.

10. DESIGN AND CONSTRUCTION

10.1 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 the Communications Requirements (subject to Clause 10.4 (DBFO Co's Changes) and Part 2 of Schedule 12 (Department's Change)), 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.

10.2 Design and Certification Procedure

10.2.1 The DBFO Co shall procure that:

10.2.1.1 the Designer shall prepare or supervise the preparation of all Design Data in respect of the Works (including the Detailed Design) in accordance with the Construction Requirements and the Communications Requirements (subject to Clause 10.4 (DBFO Co's Changes) and Part 2 of Schedule 12 (Department's Change)) and shall comply with the Design and Certification Procedure;

10.2.1.2 without prejudice to Clause 10.2.1.1:

10.2.1.2.1 where, in accordance with paragraph 4 of Part 3 of Schedule 4 (Design and Certification Procedure) Design Data is prepared by the Contractor, the Contractor shall prepare such Design Data in accordance with the Construction Requirements and the Communications Requirements (subject to Clause 10.4 (DBFO Co's Changes) and Part 2 of Schedule 12 (Department's Change)) and shall comply with the Design and Certification Procedure;

10.2.1.2.2 the Archaeologist shall prepare in accordance with the Construction Requirements (subject to Clause 10.4 (DBFO Co's Changes) and Part 2 of Schedule 12 (Department's Change)) 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;

10.2.1.2.3 the Landscape Architect shall prepare in accordance with the Construction Requirements (subject to Clause 10.4 (DBFO Co's Changes) and Part 2 of Schedule 12 (Department's Change)) 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

10.2.1.2.4 the Ecologist shall prepare in accordance with the Construction Requirements (subject to Clause 10.4

(DBFO Co's Changes) and Part 2 of Schedule 12 (Department's Change)) 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.

- 10.2.2 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.
- 10.2.3 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 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.
- 10.2.4 Without limitation to Clause 50.3 (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 Audit Team, the Testing Contractor, the Archaeologist, the Landscape Architect, the Landscape Manager, the Ecologist, 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.
- 10.2.5 Design Data the subject of a Certificate which has been submitted to the Department's Agent 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.

10.3 **Review Procedure**

- 10.3.1 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 Design Certificates, Archaeology Certificates, Ecology Certificates, Landscaping Certificates, Check Certificates and Traffic Management Certificates, as appropriate, under the Design and Certification Procedure.
- 10.3.2 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.

10.4 **DBFO Co's Changes**

- 10.4.1 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 3.4 of Part 3 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 Agent in accordance with paragraph 7 of Part 3 of Schedule 7 (Review Procedure).
- 10.4.2 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 Agent 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 10.4.1) 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).

10.5 **Breaches**

- 10.5.1 In the event that the DBFO Co becomes aware of a breach of any of Clauses 10.1 (Responsibility) to 10.4 (DBFO Co's Changes) (both inclusive), the DBFO Co shall:
- 10.5.1.1 forthwith notify the Department's Agent of the fact of such breach and the subject matter thereof; and
 - 10.5.1.2 as soon as reasonably practicable make a submission in respect of such breach to the Review Procedure, including in such submission:
 - 10.5.1.2.1 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 10.5.1.1;
 - 10.5.1.2.2 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

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

10.5.2 The Department's Agent shall deal with a submission pursuant to Clause 10.5.1 above as soon as reasonably practicable (but without being subject to any specific time limit). The Department's Agent 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 Agent shall have regard to all the circumstances, including:

10.5.2.1 whether the breach is inadvertent on the part of the DBFO Co or the Contractor or any person referred to in Clause 10.2.4;

10.5.2.2 whether there has been culpable delay in making the relevant notification under Clause 10.5.1.1 or submission under Clause 10.5.1.2;

10.5.2.3 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 recurrence,

provided that in the circumstances set out in Clause 10.5.1 the Department's Agent 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.

10.6 **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 Landscape Manager, the Ecologist 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.

10.7 **Site Safety and Security**

10.7.1 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.

10.7.2 Without limitation to Clause 9 (Security of the Site) or Clause 29.3 (Conduct of Claims against Third Parties) or Schedule 22 (Security of the Site), the DBFO Co shall take such measures as are reasonably required in accordance with Good Industry Practice to prevent the trespass onto the Site or the Adjacent Areas of any persons (other than Protestors) or

livestock not entitled to be there including fencing of the Site and the Adjacent Areas where appropriate.

10.8 **Health and Safety**

10.8.1 In this Clause 10.8 (Health and Safety):

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

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

10.8.2 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. The DBFO Co shall forthwith send a copy of the declaration to the Department's Agent 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 Agent. 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.

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

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

10.8.3.2 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.

10.9 **Access and Facilities for Department's Agent**

Without limitation to Clause 13.4 (Access), the DBFO Co shall procure that:

10.9.1 subject to complying with all relevant safety procedures, the Department's Agent 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;

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

10.9.3 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 Agent and by any other person authorised by the Department's Agent.

11. PROGRAMME AND DATE FOR COMPLETION

11.1 Programme

The 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.

11.2 Variations to Programme

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

11.2.1 submit to the Department's Agent a report identifying the reasons for such non-conformity; and

11.2.2 submit to the Department's Agent, in accordance with the Review Procedure, a revised Programme, which shall:

11.2.2.1 where relevant, provide for the Works to be:

11.2.2.1.1 Not used.

11.2.2.1.2 pursued diligently in such manner as to achieve Permit to Use as soon as practicable and in any event on or before the Date for Completion.

The Department's Agent shall be entitled to raise comments in respect of the revised Programme only on the grounds set out in paragraph 3.5 of Part 3 of Schedule 7 (Review Procedure).

11.3 Preparation of Works Programme

11.3.1 The DBFO Co shall procure the preparation of:

11.3.1.1 an initial Works Programme, which shall be in all respects consistent with the Programme, and shall submit to the Department's Agent, in accordance with the Review Procedure, a copy of the same in relation to Works within 28 days of the date of execution of this Agreement.

11.3.1.2 a revised Works Programme in respect of each revised Programme submitted in accordance with Clause 11.2 (Variations to Programme), which shall be in all respects consistent with the Programme, and shall submit to the Department's Agent, in accordance with the Review Procedure, a copy of the revised Works Programme at the same time as the revised Programme is submitted in accordance with Clause 11.2 (Variations to Programme).

- 11.3.2 Other than in the circumstances referred to in Clause 11.3.1.2, if the DBFO Co wishes to make any amendment to the Works Programme or should it appear to the Department's Agent or the DBFO Co at any time that the actual progress of the Works does not conform with the Works Programme then, prior to making any such amendment or within 28 days of being so required by the Department's Agent or (if earlier) becoming aware of such non-conformity, the DBFO Co shall:
- 11.3.2.1 submit to the Department's Agent a report identifying the reasons for such amendment or non-conformity; and
 - 11.3.2.2 submit to the Department's Agent in accordance with the Review Procedure a revised Works Programme, which shall be in all respects consistent with the Programme.
- 11.3.3 The Department's Agent shall be entitled to raise comments in respect of the initial Works Programme or any revised Works Programme only on the grounds set out in paragraph 3.5 of Part 3 of Schedule 7 (Review Procedure).
- 11.3.4 Subject to Clause 11.4 (Works Programme), the Works Programme shall be provided for the information of the Secretary of State and the Department's Agent. In the event of any conflict between the Programme and the Works Programme, the Programme shall (unless otherwise agreed by the Secretary of State) prevail. For the avoidance of doubt, the Works Programme shall be amended to reflect any variation or amendment of the Programme pursuant to the provisions of this Clause 11 including any Delay Event determined in accordance with Clause 11.6, provided that the Date for Completion shall only be amended to reflect Delay Events in accordance with Clause 11.6.

11.4 Works Programme

The initial Works Programme and any revised Works Programme submitted in accordance with Clause 11.3 (Preparation of Works Programme) shall:

- 11.4.1 be in accordance with Good Industry Practice;
- 11.4.2 satisfy the requirements of paragraph 3 of Appendix 1/13 to Annex 5 to Part 2 of Schedule 4 (Construction and Handback Requirements);
- 11.4.3 without prejudice to Clause 11.4.2, be in sufficient detail so as to enable the Department's Agent to resource itself appropriately; and
- 11.4.4 provide for the Works to be:
 - 11.4.4.1 in respect of the initial Works Programme and any revised Works Programme submitted prior to the Commencement Date, commenced promptly, as far as practicable in accordance with the Programme and in any event promptly following the Commencement Date; and
 - 11.4.4.2 pursued diligently in such manner as to achieve completion of the Works in accordance with the Programme by the Date for Completion.

11.5 Achievement of Completion

The DBFO Co shall diligently pursue the Works to procure that they are completed to such extent and standard as would require the issue of the Permit to Use on or before the Date for Completion, subject only to any change in the Date for Completion pursuant to Clause 11.6 (Extension of Time).

11.6 Extension of Time

11.6.1 To the extent that a delay in achieving completion of the Works to such extent and standard as would require the issue of the Permit to Use by the Programme Date is caused by a Delay Event affecting the performance of the DBFO Co's obligations under this Agreement (except and to the extent that the same shall arise out of any act, neglect or omission of the DBFO Co), the DBFO Co shall:

11.6.1.1 notify the Department's Agent of such Delay Event in accordance with Clause 11.6.2 and provide such further written information as the Department's Agent may reasonably require regarding the nature and likely duration of such event in accordance with Clause 11.6.2;

11.6.1.2 afford the Department's Agent reasonable facilities for investigating the validity of the DBFO Co's claim, including on-site inspection; and

11.6.1.3 take all steps necessary and consistent with Good Industry Practice to minimise the period of such delay beyond the third anniversary of the date of this Agreement.

11.6.2 The DBFO Co shall give notice to the Department's Agent as soon as it can foresee a Delay Event occurring which will cause material delay to or materially impede completion of the Works to such extent and standard as would require the issue of the Permit to Use by the Programme Date or, if the same is not foreseeable, as soon as it shall become aware of such Delay 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 Agent, which shall include:

11.6.2.1 a statement of which Delay Event the claim is based upon;

11.6.2.2 details of the circumstances from which the delay or impediment arises;

11.6.2.3 details of the contemporary records which the DBFO Co will maintain to substantiate its claim;

11.6.2.4 details of the consequences, whether direct or indirect, which such delay or impediment may have on achievement of the Permit to Use; and

11.6.2.5 details of any measures which the DBFO Co proposes to adopt to mitigate the consequences of delay or impediment.

- 11.6.3 Within 21 days of the DBFO Co receiving or becoming aware of any supplemental information which may further substantiate or support the DBFO Co's claim then, provided that there shall have been no undue delay in either the receipt or becoming aware of such information, the DBFO Co may submit further particulars based on such information to the Department's Agent.
- 11.6.4 If the DBFO Co has failed to comply with the requirements as to the giving of notice under Clause 11.6.2, then the Department's Agent may require the DBFO Co to submit details of the reasons for such failure. If the Department's Agent 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, and if either the Department's Agent is satisfied, or the decision of the Disputes Resolution Procedure is that the said failure is excusable, then the Department's Agent shall proceed to the evaluation of the request for an extension of time in accordance with Clause 11.6.6. If the decision of the Disputes Resolution Procedure is that the failure is not excusable, then the DBFO Co shall not be entitled to an extension of the Date for Completion and the Programme Date in respect of the relevant Delay Event.
- 11.6.5 The Department's Agent will be entitled, after receipt of written details under Clause 11.6.2 or of further particulars under Clause 11.6.3, by notice to require the DBFO Co to provide such further supporting particulars as it may reasonably consider necessary.
- 11.6.6 Subject to Clause 36.4.1 and to:
 - 11.6.6.1 the DBFO Co complying with Clause 11.6.2 or, if the Department's Agent has issued a request pursuant to Clause 11.6.4, the sufficiency of the reasons for default being accepted by the Secretary of State or under the Disputes Resolution Procedure;
 - 11.6.6.2 the DBFO Co putting forward proposals where required pursuant to Clause 11.6.2.5 as to the reasonable steps which it intends to take in order to mitigate any delay; and
 - 11.6.6.3 the delay caused by the Delay Event being material;

the Department's Agent shall, as soon as reasonably practicable, grant to the DBFO Co in writing (either prospectively or retrospectively) an extension to the Date for Completion and the Programme Date equal to the period by which the DBFO Co's achievement of the Permit to Use by the Programme Date has been or is anticipated to be delayed (the period of such extension being the "**Delay Period**"). In determining the Delay Period, the Department's Agent may take into account, inter alia, the impact of the Delay Event on the ability of the DBFO Co to achieve the Permit to Use by the Programme Date. If the Department's Agent declines to grant an extension of time as aforesaid or the DBFO Co considers that the extension is insufficient, then the DBFO Co shall be entitled to refer the matter to the Disputes Resolution Procedure.

- 11.6.7 Where the DBFO Co may have a claim for additional payment as a result of:
 - 11.6.7.1 a Delay Event referred to in paragraph 1.1 of Part 1 of Schedule 11, the provisions of Clauses 36.4 and 36.5 shall have effect;

11.6.7.2 a Delay Event referred to in paragraph 1.2 of Part 1 of Schedule 11, the provisions of Part 2 of Schedule 12 (Department's Change) shall have effect; or

11.6.7.3 a Delay Event referred to in paragraph 1.3, 1.5 or 1.6 of Part 1 of Schedule 11, the provisions of Part 4 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 extension of time in respect of any delay (including a delay caused by the Secretary of State) which is not a Delay Event or for any additional payment as a result of any delay which is not a Delay Event referred to in Clauses 11.6.7.1, 11.6.7.2 and 11.6.7.3 above, unless otherwise expressly provided in this Agreement.

12. INSPECTION AND COMPLETION

12.1 Permit to Use

12.1.1 Not later than 28 days (and again not later than 14 days) prior to the date upon which the DBFO Co expects the Works (or any part thereof identified in the Liaison Procedures agreed with the Department's Agent pursuant to this Agreement) will be completed to such extent that the New Road (or such relevant identified part thereof) 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 Agent a notice to that effect. Upon the DBFO Co confirming that completion as aforesaid has occurred and subject to the provision of 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 Agent shall as soon as reasonably practicable and in any event within 5 Working Days of receipt of such confirmation commence an inspection of the New Road (or the relevant identified part thereof).

12.1.2 The Department's Agent shall as soon as reasonably practicable and in any event within 10 Working Days of the commencement of such inspection of the final part of the Works to be inspected either:

12.1.2.1 issue the Permit to Use, whereupon the New Road shall as soon as practicable be made available for public use without traffic management restrictions; or

12.1.2.2 notify the DBFO Co in writing of his decision not to issue the Permit to Use and state the reasons for such decision.

12.1.3 The Department's Agent may refuse to issue the Permit to Use if:

12.1.3.1 the New Road has not been completed to such extent as to be suitable and safe for use by members of the public without traffic management restrictions;

12.1.3.2 the Department's Agent believes on reasonable grounds that any lane or any part of any lane 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 save for the purposes of undertaking any planting pursuant to the requirements of Annex 10 to Part 2 of Schedule 4 (Landscape Requirements);

12.1.3.3 there has been and continues to be material non-compliance with the Design and Certification Procedure;

12.1.3.4 satisfactory evidence of compliance with Clause 19.1.1.3(ii) (Insurance Cover) has not been adduced; or

12.1.3.5 the Department's Agent considers that any of the works, obligations or documents (as the case may be) identified in Appendix 1 to Annex 1 to Part 1 of Schedule 4 have not been completed, complied with or obtained, as appropriate.

12.1.4 In the event of service of a notice by the Department's Agent under Clause 12.1.2.2 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 the Permit to Use, the DBFO Co may give notice to the Department's Agent that such further works have been completed or measures taken and the Department's Agent shall inspect such further works or measures as soon as reasonably practicable and in any event within 5 Working Days of such notice and the provisions of Clauses 12.1.2 and 12.1.3 and this Clause 12.1.4 shall thereafter apply to such notice mutatis mutandis.

12.2 Completion Certificates

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

12.2.2 Not later than 28 days (and again not later than 14 days) prior to the date upon which the DBFO Co expects the whole of the Works (or any part thereof identified in the Liaison Procedures agreed with the Department's Agent pursuant to this Agreement) to be completed, the DBFO Co shall issue to the Department's Agent a notice to that effect. Upon the DBFO Co confirming completion as aforesaid, the Department's Agent shall as soon as reasonably practicable and in any event within 5 Working Days of receipt of such confirmation commence an inspection of the relevant Works.

12.2.3 The Department's Agent shall as soon as reasonably practicable and in any event within 10 Working Days of the commencement of such inspection of the final identified part of the Works to be inspected either:

12.2.3.1 issue the Completion Certificate; or

12.2.3.2 notify the DBFO Co in writing of his decision not to issue a Completion Certificate and state the reasons for such decision.

12.2.4 The Department's Agent may refuse to issue a Completion Certificate if:

12.2.4.1 the Works 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;

12.2.4.2 there has been and continues to be material non-compliance with the Design and Certification Procedure; or

12.2.4.3 in relation to any De-Trunked Segment, no Taking Over Certificate has been issued.

12.2.5 In the event of service of a notice by the Department's Agent under Clause 12.2.3.2 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 Agent that such further works have been completed or measures taken and the Department's Agent shall inspect such further works or measures as soon as reasonably practicable and in any event within 5 Working Days of such notice and the provisions of Clauses 12.2.3 and 12.2.4 and this Clause 12.2.5 shall thereafter apply to such notice mutatis mutandis.

12.2.6 The issue of a Completion Certificate shall be without prejudice to:

12.2.6.1 the obligation of the DBFO Co to operate and maintain the Project Facilities in accordance with this Agreement; or

12.2.6.2 any warranties given by the DBFO Co under this Agreement.

12.3 **Local Facilities and De-Trunked Segments**

12.3.1 Not later than 28 days (and again not later than 14 days) prior to the date upon which the DBFO Co expects:

12.3.1.1 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

12.3.1.2 that part of the Works in respect of any other Local Facilities (other than those referred to in Clause 12.3.1.5) will be completed in accordance with the Core Construction Requirements and the Construction Requirements; or

12.3.1.3 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; or

12.3.1.4 that the Works required in respect of all De-Trunked Segments will be completed in accordance with the Taking Over Requirements; or

12.3.1.5 that all of:

12.3.1.5.1 the Accommodation Works will be completed in accordance with the Core Construction Requirements and the Construction Requirements; and

12.3.1.5.2 the Off-Site Planting Works will be completed in accordance with the Construction Requirements and the O&M Requirements,

the DBFO Co shall issue a notice to that effect to the Department's Agent. Upon the DBFO Co confirming that completion as aforesaid has occurred then the Department's Agent shall as soon as reasonably practicable and in any event within 5 Working Days of receipt of such confirmation commence an inspection of (as the case may be) the Local Authority Road, Local Facilities, section of the New Road or De-Trunked Segments in question (the "**Relevant Facilities**"), and the DBFO Co shall not object to the participation in such inspection of any Local Person to whom such Relevant Facilities are intended to be handed over.

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

12.3.2.1 issue a Taking Over Certificate; or

12.3.2.2 notify the DBFO Co in writing of his decision not to issue a Taking Over Certificate and state the reasons for such decision.

12.3.3 Where notice is given pursuant to Clauses 12.3.1.1, 12.3.1.2 or 12.3.1.5 the Department's Agent may refuse to issue a Taking Over Certificate in accordance with Clause 12.3.2.2 if:

12.3.3.1 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;

12.3.3.2 without limitation to Clause 12.3.3.1, in the case of a De-Trunked Segment, the works relating thereto have not been completed in accordance with the Taking Over Requirements or the Permit to Use has not been issued in respect of the New Road which will replace such De-Trunked Segment;

12.3.3.3 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 (and, in relation to the Off-Site Planting Works, the O&M Requirements); or

12.3.3.4 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.

- 12.3.4 Where notice is given pursuant to Clause 12.3.1.3 the Department's Agent may refuse to issue a Taking Over Certificate in accordance with Clause 12.3.2.2 if, in the case of a De-Trunked Segment, the Permit to Use has not been issued.
- 12.3.5 Upon the issue of a Taking Over Certificate in respect of any Local Facilities:
- 12.3.5.1 either the Secretary of State shall procure that the relevant Local Person assumes responsibility for the operation and maintenance (subject to Clause 12.3.5.3) 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 12.3.5.3) of such Local Facilities or De-Trunked Segment;
- 12.3.5.2 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**" 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 12.3 (Local Facilities and De-Trunked Segments)); and
- 12.3.5.3 the DBFO Co shall execute all such work of amendment, reconstruction, and remedying of defects, shrinkages or other faults as the Department's Agent 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 14 days after the expiration of such period, as a result of an inspection made by or on behalf of the Department's Agent prior to its expiration.
- 12.3.6 In the event of service of a notice by the Department's Agent under Clause 12.3.2.2 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 Agent that such further works have been completed or measures taken. The Department's Agent 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 Local Person to whom the Relevant Facilities are intended to be handed over. The provisions of Clauses 12.3.2 to 12.3.6 (inclusive) shall thereafter apply to such notice mutatis mutandis.
- 12.3.7 For the avoidance of doubt, all work referred to in Clause 12.3.5.3 shall be executed by the DBFO Co at its own cost.
- 12.3.8 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 12.3 (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 12.3 (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 12.3.8.

12.3.9 If the Secretary of State assumes responsibility for the operation and maintenance of any Local Facilities or De-Trunked Segment in accordance with Clause 12.3.5.1, 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:

12.3.9.1 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

12.3.9.2 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.

12.3.10 Subject to Clause 12.3.9, 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 Agent.

12.3.11 Subject to Clause 12.3.9, 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.

12.4 **Disputed Certificate**

12.4.1 If there shall be any Dispute as to whether the Permit to Use, Completion Certificate or Taking Over Certificate is required to be issued in accordance with the terms of Clause 12.1 (Permit to Use), Clause 12.2 (Completion Certificate) or Clause 12.3 (Local Facilities and De-Trunked Segments) respectively, then either the Department's Agent or the DBFO Co may refer such Dispute for resolution under the Disputes Resolution Procedure.

12.4.2 The issues for resolution in any such referral to the Disputes Resolution Procedure shall be:

12.4.2.1 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 12.1 (Permit to Use), Clause 12.2 (Completion Certificate) or Clause 12.3 (Local Facilities and De-Trunked Segments) respectively; and

12.4.2.2 if so, the date on which such Permit to Use, Completion Certificate or Taking Over Certificate should have been issued.

12.4.3 The provisions of Part 4 of Schedule 12 (Compensation Events) shall, if applicable, be given effect.

13. OPERATION AND MAINTENANCE

13.1 Operation and Maintenance

13.1.1 Subject to Clause 7.5.2 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 this Agreement, including Clause 8.1 (Access for DBFO Co), from the Commencement Date or such later date as is specified in Clause 7.5 (Commencement of Operation and Maintenance) and thereafter throughout the Contract Period (or, in the case of any De-Trunked Segments and any Local Facilities, until the date of issue of the relevant Taking Over Certificate) the DBFO Co shall operate and maintain the Project Facilities (other than the New Road) in accordance with the terms of this Agreement (including the O&M Requirements) and in such manner as to procure satisfaction of the Core O&M Requirements.

13.1.2 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 this Agreement, including Clause 8.1 (Access for DBFO Co), from the date of issue of the Permit to Use in respect of the New Road and thereafter throughout the Contract Period, the DBFO Co shall operate and maintain the New Road in accordance with the terms of this Agreement (including the O&M Requirements) and in such manner as to procure satisfaction of the Core O&M Requirements.

13.2 O&M Requirements

The DBFO Co may at any time hereafter submit to the Department's Representative in accordance with the Review Procedure any proposed revision to or substitution for the O&M Requirements or (so far as they relate to operation and maintenance of the DBFO Co's Systems) the Communications Requirements (as set out in Part 2 of Schedule 6 (O&M Requirements) or Part 2 of Schedule 17 (Communications Requirements) or as previously varied in accordance with this Clause 13.2 (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 3.12 of Part 3 of Schedule 7 (Review Procedure)), then the O&M Requirements or the Communications Requirements (as the case may be) as so varied shall be the O&M Requirements or the Communications Requirements (as the case may be) 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.

13.3 **Inspections**

- 13.3.1 The DBFO Co shall give the Department's Representative timely notice of any general or principal inspection or any other inspection of structures to be conducted in accordance with the O&M Requirements.
- 13.3.2 The Department's Representative 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 13.3.1) upon giving reasonable notice to the DBFO Co.

13.4 **Access**

- 13.4.1 Subject to compliance with relevant health and safety requirements, the DBFO Co shall procure that:
 - 13.4.1.1 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
 - 13.4.1.2 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:
 - 13.4.1.2.1 to perform any obligations or exercise any rights of the Secretary of State under this Agreement; or
 - 13.4.1.2.2 to fulfil any statutory functions of the Secretary of State; or
 - 13.4.1.2.3 without limitation to Clauses 13.4.1.2.1 and 13.4.1.2.2, 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 13.7 (Trials).
- 13.4.2 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 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. Whenever consistent with the requirements of the Relevant Authority in carrying out such work, such access may be limited so as not unnecessarily to impede or restrict traffic flows or any works being carried out by the DBFO Co.
- 13.4.3 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.

13.5 Emergencies and Liaison

- 13.5.1 Prior to the issue of the Commencement Certificate the DBFO Co shall develop the Liaison Procedures set out in paragraph 6 of Part 2 of Schedule 16 (Liaison Procedures).
- 13.5.1.A As soon as practicable after the date hereof and in any event within 30 days of the issue of the Commencement Certificate the DBFO Co shall develop the Liaison Procedures set out in paragraph 3 of Part 2 of Schedule 16 (Liaison Procedures).
- 13.5.1.B As soon as practicable after the date hereof and in any event by the earlier of 90 days from the issue of the Commencement Certificate and 1st February 1999 the DBFO Co shall develop the Liaison Procedures set out in paragraph 1 of Part 2 of Schedule 16 (Liaison Procedures).
- 13.5.1.C As soon as practicable after the date hereof and in any event by the earlier of 60 days from the issue of the Commencement Certificate and commencement of the Works the DBFO Co shall develop the Liaison Procedures set out in paragraphs 4 and 5 of Part 2 of Schedule 16 (Liaison Procedures).
- 13.5.1.D Prior to the issue of the Permit to Use the DBFO Co shall either (i) develop the Liaison Procedures set out in paragraph 2 of Part 2 of Schedule 16 (Liaison Procedures), or (ii) demonstrate to the satisfaction of the Secretary of State that it has used its reasonable endeavours to procure satisfaction of the same by such date, including by the making of reasonable proposals in respect of such procedures.

Provided that all such Liaison Procedures referred to in Clause 13.5.1 and Clauses 13.5.1.A to 13.5.1.D inclusive shall be developed in accordance with the provisions of Part 1 of Schedule 16 and paragraph 1 of Part 2 of Schedule 16 (Liaison Procedures).

- 13.5.2 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).
- 13.5.3 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.

13.6 Maintenance and Other Works

The provisions of Clause 10 (Design and Construction) and paragraphs 3.4, 3.11, 3.14, 3.19, 4 and 7 of Part 3 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:

- 13.6.1 the Works being deemed a reference to such works the subject of the Proposal;
- 13.6.2 the Department's Agent being deemed a reference to the Department's Representative;

- 13.6.3 a DBFO Co's Change being deemed a reference to an Alternative Proposal; and
- 13.6.4 a DBFO Co's Change Certificate being deemed a reference to an Alternative Proposal Certificate.

13.7 **Trials**

Any study or trial referred to in Clause 13.4.1.2.3 shall:

- 13.7.1 be conducted in such manner as to minimise any adverse effect on traffic flows on the Project Road;
- 13.7.2 not 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; and
- 13.7.3 subject to Clauses 13.7.1 and 13.7.2, be conducted in such manner as to be neutral in terms of cost to the Parties.

13.8 **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 operate and maintain the Project Road 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. The DBFO Co shall not be in breach of this Agreement, nor shall owe any liability to the Secretary of State in respect of any failure to meet either or both of the DBFO Co's 5 Year Performance Targets and the Annual Performance Targets save to the extent that such failure constitutes a breach of any of the express provisions of this Agreement, other than this Clause 13.8.

13.9 **Operations affecting Excluded On-Site Equipment or Department's Systems**

The DBFO Co shall give the Secretary of State and any affected Relevant Authority reasonable notice of Operations which may affect the operation or maintenance of any of the Excluded On-Site Equipment or the Department's Systems.

14. **TRAFFIC MANAGEMENT**

14.1 **Traffic Management**

- 14.1.1 Subject to Clause 14.2 (Liaison), general management of traffic on the Project Road shall be the responsibility of the DBFO Co.
- 14.1.2 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.

14.2 **Liaison**

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.

14.3 Lane Closures

- 14.3.1 Within 60 days after the date of execution of this Agreement the DBFO Co shall submit to the Department's Representative 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 Representative 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.
- 14.3.2 Not later than 60 days prior to the commencement of any Quarter, the DBFO Co may submit to the Department's Representative in accordance with the Review Procedure a revision of the Schedule of Lane Closures submitted pursuant to Clause 14.3.1 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.
- 14.3.3 The Department's Representative 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 14.3.1 or Clause 14.3.2 in accordance with paragraph 3.13 of Part 3 of Schedule 7 (Review Procedure). In such event, the Department's Representative shall notify the DBFO Co thereof with reasons and shall indicate, in the case of an objection pursuant to paragraph 3.7.3 of Part 3 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 rescheduled, on the basis that each such rescheduled 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 Representative, 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 Representative in accordance with the Review Procedure.
- 14.3.4 The DBFO Co shall not effect any Lane Closures save:
- 14.3.4.1 in accordance with a Schedule of Lane Closures to which no objection has been made under the Review Procedure;
 - 14.3.4.2 in accordance with the procedures set out in Clause 14.3.6;
 - 14.3.4.3 in an emergency, in accordance with Clause 14.3.7; or
 - 14.3.4.4 for Type C lane closures (as defined in Section 6 of Chapter 8 of the Traffic Signs Manual).

The DBFO Co shall not effect any Lane Closure without first obtaining any order in respect of such Lane Closure necessary under any Law.

- 14.3.5 Notwithstanding that there has been no objection to a Schedule of Lane Closures in accordance with the Review Procedure, the Department's Representative may upon 90 days' prior written notice require the DBFO Co to reschedule a period of Lane Closure if due to a change in any circumstances such rescheduling is necessary to satisfy the standards set out in paragraph 3.13.1 or 3.13.2 of Part 3 of Schedule 7 (Review Procedure), provided, however, that the Department's Representative may not require:
- 14.3.5.1 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
- 14.3.5.2 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.
- 14.3.6 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 Representative of such need and request approval of the proposed commencement date and estimated duration of the requisite Lane Closures. The Department's Representative's approval of such works shall not be unreasonably withheld or delayed, having regard to the factors set out in paragraph 3.13 of Part 3 of Schedule 7 (Review Procedure).
- 14.3.7 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 may effect such Lane Closures, provided that the DBFO Co shall as soon as reasonably practicable advise the Department's Representative of such closure and the reasons therefor and shall take all reasonable steps to minimise the duration of such Lane Closure.
- 14.3.8 In the event of an emergency occurring on a Connecting Road, at the request of the Department's Representative 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.
- 14.3.9 The DBFO Co shall promptly remove traffic cones which are no longer required.

14.4 **Information Requirements**

- 14.4.1 The DBFO Co shall provide to the Secretary of State and/or to such other persons as the Secretary of State from time to time may reasonably require such information (including 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.

- 14.4.2 The DBFO Co shall, in accordance with Clause 15.9 (Information for the Public), operate a telephone service.

14.5 Secretary of State's Maintenance

- 14.5.1 Without prejudice to Clause 14.3.8, 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.
- 14.5.2 Within 90 days after the date of execution of this Agreement the Department's Representative 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 Representative shall provide to the DBFO Co a Schedule of Lane Closures in respect of the Connecting Roads for the next succeeding Contract Year.
- 14.5.3 Other than in the case of emergency, the Department's Representative 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 14.5.2.
- 14.5.4 The Schedule of Lane Closures provided to the DBFO Co pursuant to Clause 14.5.2 and any revisions thereto provided pursuant to Clause 14.5.3 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.

15. SIGNING AND COMMUNICATIONS

15.1 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:

- 15.1.1 to the extent required by any contrary provision in the Technical Requirements;
- 15.1.2 to the extent required by any Department's Change; and
- 15.1.3 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.

15.2 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 the signs referred to in Clause 15.5 (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 3.8 of Part 3 of Schedule 7 (Review Procedure).

15.3 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. Subject to Clause 8.6A, the DBFO Co shall, at its own cost, procure the installation of any new signs and modifications to any existing signs which are required on any Local Authority Road as a consequence of the construction of the New Road.

15.4 Directional Signs

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 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.

15.5 Notification Signs

The Secretary of State may require the DBFO Co to install on the Project Road at distances not further than 1 kilometre from each Class A Road which is an access to or exit from the Project Road signs giving the telephone number required pursuant to Clause 14.4 (Information Requirements) and in accordance with Clause 15.9 (Information for the Public) or such other telephone number as the Secretary of State may from time to time require, for enquiries in respect of the Project Road.

15.6 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 15.4 (Directional Signs) and 15.5 (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.

15.7 Removal of Signs

The DBFO Co shall, at its own cost, remove all signs referred to in Clause 15.5 (Notification Signs) within 30 days following termination of this Agreement.

15.8 Communications

15.8.1 The DBFO Co shall comply with the Communications Requirements.

- 15.8.2 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.

15.9 Information for the Public

In relation to any provision of information to the public pursuant to this Agreement including pursuant to Clauses 14.4 (Information Requirements) and 15.5 (Notification Signs) the DBFO Co shall comply with the requirements set out in paragraph 2.7.2 of Part 2 of Schedule 6 (O&M Requirements).

16. DEFECTS IN THE EXISTING ROAD

16.1 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 the information referred to in Clause 37.2.1).

16.2 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.

16.3 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 any Latent Defect.

16.4 Costs of Defects

- 16.4.1 All costs of and associated with any defect in the Project Road (including any Latent Defect) and any remedial or other works in respect thereof shall be borne by the DBFO Co.
- 16.4.2 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.

16.5 Enforcement of Rights against Third Parties

- 16.5.1 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 (the "**Existing Rights**"), 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**");
- 16.5.2 The Third Party Contractor Claim Notice shall:
- 16.5.2.1 describe such claim in a level of detail sufficient to enable the Secretary of State to understand the basis for such claim;
 - 16.5.2.2 set out the DBFO Co's detailed estimate of the value of such claim; and
 - 16.5.2.3 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 reasonably incurred by the Secretary of State in pursuing such claim.
- 16.5.3 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.
- 16.5.3A Subject to Clause 16.5.3, if the Secretary of State considers and it is agreed by the DBFO Co or decided by an Expert that there is reasonable prospect of making a successful and financially worthwhile claim against a Third Party Contractor the Secretary of State shall, in his sole discretion, either:
- 16.5.3A.1 proceed to enforce or compromise the Existing Rights against or with the relevant Third Party Contractor at the cost of and in accordance with the reasonable directions of the DBFO Co, provided that in relation to any such reasonable directions the DBFO Co may require the Secretary of State to provide estimates of the costs incurred or likely to be incurred in relation thereto; or
 - 16.5.3A.2 take such actions as may be reasonably necessary to enable the DBFO Co (at its own expense) to enforce or compromise any relevant claim against or with the relevant Third Party Contractor in the name of the Secretary of State, and in such circumstances the DBFO Co shall keep the Secretary of State fully informed and consult with him on a regular basis about the conduct of the proceedings,
- provided that the Secretary of State may prescribe such conditions relating to the conduct of any such proceedings or actions as he shall reasonably require.

- 16.5.3B The Secretary of State may at any time, if the DBFO Co is enforcing or seeking to enforce the relevant claim in a frivolous or vexatious manner by notice to the DBFO Co in writing recover full control of the proceedings, including the right to compromise or discontinue. In such event the DBFO Co shall not be released from its indemnity for costs.
- 16.5.3C In addition to and without prejudice to Clauses 16.5.3A or B, the Secretary of State may at any time, if he considers in his absolute discretion that he is required to do so on policy grounds, by notice to the DBFO Co recover full control of the proceedings, including the right to compromise or discontinue. In such event (except where Clause 16.5.3B applies), the DBFO Co shall from the date of such notice be released from its indemnity for costs (in respect of 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 given in accordance with Clause 16.5.2.3.
- 16.5.3.D Where, pursuant to a contract with the Secretary of State, the Third Party Contractor is entitled as against the Secretary of State to perform itself remedial or maintenance work in respect of Defective Work, the DBFO Co shall on request of the Secretary of State grant reasonable access for the Third Party Contractor to the relevant part of the Project Facilities to enable the Third Party Contractor to carry out the necessary remedial or maintenance work. If the DBFO Co fails to grant such access it shall in respect of that Defective Work not be entitled to any recourse against the Secretary of State under this Clause 16.5, but without prejudice to any Claim the Secretary of State may have against the DBFO Co in respect of its failure to provide access to the Third Party Contractor.
- 16.5.4 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 following the expiry of the time for any appeal or other related proceedings.
- 16.5.5 Nothing in this Clause 16.5 (Enforcement of Rights against Third Parties) shall derogate from or relieve the DBFO Co of any of its obligations under this Agreement.

17. FOSSILS AND ANTIQUITIES

17.1 Archaeological Works

- 17.1.1 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 17.3 (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.
- 17.1.2 The DBFO Co shall carry out the Archaeological Works.

- 17.1.3 In connection with Maintenance Works, the DBFO Co shall undertake such further archaeological surveys and consultations with Cadw and the curational section of the regional Archaeological Trust as is consistent with Annex 13 to Part 2 of Schedule 4 (Construction Requirements), mutatis mutandis.
- 17.1.4 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.
- 17.2 **Ownership**
- As between the Secretary of State and the DBFO Co, all Fossils and Antiquities shall be the property of the Secretary of State.
- 17.3 **Disposal**
- The DBFO Co shall take all reasonable precautions to prevent the removal of, or damage to, any such Fossils and Antiquities. It shall immediately inform the Department's Nominee of the discovery of any such Fossils and Antiquities and shall carry out any orders of the Department's Nominee regarding the examination and disposal of the same.
- 17.4 **Costs**
- If there will be a material delay in or material increase in the cost of the execution of the Works or the conduct of the Operations as a consequence of compliance with Clause 17.3 (Disposal), the Department's Nominee shall as soon as reasonably practicable request a Department's Change pursuant to Part 2 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 Part 2 or Part 3 of Schedule 12, no increases in costs will be allowed as a consequence of compliance with Clause 17.3 (Disposal).
18. **HANDBACK**
- 18.1 **Handback Requirements**
- Upon the Expiry Date, each element of the Project Facilities shall comply with the Handback Requirements.
- 18.2 **Initial Inspection**
- 18.2.1 Not less than 57 months nor more than 63 months prior to the expected Expiry Date, the DBFO Co and the Department's Representative 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 Representative, the Department's Representative 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.

- 18.2.2 Such inspection shall comply with the requirements set out in paragraph 2 of Part 4 of Schedule 4 (Handback Requirements).

18.3 Renewal Programme

- 18.3.1 Within 90 days after the completion of the Initial Inspection, the DBFO Co shall provide to the Department's Representative a report on the condition of the pavement of the Project Road and the Structures referred to in Clause 18.2.1 and a notice setting out:
- 18.3.1.1 the DBFO Co's proposals as to the Renewal Works;
 - 18.3.1.2 the DBFO Co's proposals as to the Renewal Programme; and
 - 18.3.1.3 the DBFO Co's estimate of the Renewal Amount.
- 18.3.2 The proposals referred to in Clause 18.3.1.1 shall be made, inter alia:
- 18.3.2.1 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
 - 18.3.2.2 on the assumption that the Project Facilities will be maintained in accordance with the O&M Requirements for the remainder of the Contract Period.
- 18.3.3 The Department's Representative may, within 90 days after receipt of the notice from the DBFO Co in accordance with Clause 18.3.1, 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 Representative shall give details of the grounds for such objection and shall give the Department's Representative's proposals in respect of the Renewal Works and Renewal Programme and his estimate of the Renewal Amount.
- 18.3.4 If no agreement is reached between the DBFO Co and the Department's Representative as to any matter referred to in the notice given in accordance with Clause 18.3.3 within 60 days of receipt by the DBFO Co of such notice, then either the DBFO Co or the Department's Representative may refer the matter to the Disputes Resolution Procedure for determination:
- 18.3.4.1 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 Representative 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 18.3.2);
 - 18.3.4.2 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
 - 18.3.4.3 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.

- 18.3.5 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.
- 18.3.6 For the avoidance of doubt, neither the agreement of the Department's Representative to any Renewal Works, Renewal Programme or Renewal Amount nor the participation of the Department's Representative in any inspection under this Clause 18 (Handback) nor the complete or partial carrying out of the Renewal Works shall relieve or absolve the DBFO Co from:
 - 18.3.6.1 its obligation under Clause 18.1 (Handback Requirements); or
 - 18.3.6.2 any obligation to conduct any other inspection or perform any other works in accordance with the O&M Requirements.

18.4 **Second Inspection**

- 18.4.1 Not less than 15 months nor more than 18 months prior to the expected Expiry Date, the DBFO Co and the Department's Representative shall conduct a joint inspection (the "**Second Inspection**") of all elements of the Project Facilities, including the pavement and the Structures referred to in Clause 18.2.1 (whether or not the Renewal Works in respect of the pavement and such Structures have been carried out).
- 18.4.2 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.

18.5 **Revised Renewal Programme**

- 18.5.1 Within 60 days after the completion of the Second Inspection, the DBFO Co shall provide to the Department's Representative a report on the condition of the Project Facilities and a notice setting out:
 - 18.5.1.1 the DBFO Co's proposals as to any revisions or additions to the Renewal Works (including without limitation those referred to in Clause 18.5.6) required in order to procure that all elements of the Project Facilities will, on the Expiry Date, satisfy the Handback Requirements;
 - 18.5.1.2 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
 - 18.5.1.3 the DBFO Co's estimate of any changes in the Renewal Amount as a consequence of such revisions or additions to the Renewal Works.

- 18.5.2 The proposals referred to in Clause 18.5.1.1 shall be made, inter alia, on the basis set out in Clause 18.3.2.
- 18.5.3 The Department's Representative may, within 28 days after receipt of the notice from the DBFO Co in accordance with Clause 18.5.1, 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 Representative shall give details of the grounds for such objection and shall give the Department's Representative's proposals in respect of such matters.
- 18.5.4 If no agreement is reached between the DBFO Co and the Department's Representative as to any matter referred to in the notice given in accordance with Clause 18.5.3 within 28 days of receipt by the DBFO Co of such notice, then either the DBFO Co or the Department's Representative may refer the matter to the Disputes Resolution Procedure for determination:
- 18.5.4.1 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 Representative 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 18.3.2);
 - 18.5.4.2 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 18.5 (Revised Renewal Programme)); and
 - 18.5.4.3 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 18.5 (Revised Renewal Programme)).
- 18.5.5 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 18.5 (Revised Renewal Programme)).
- 18.5.6 The Renewal Works proposed pursuant to Clause 18.5.1.1 shall include, inter alia, the following:
- 18.5.6.1 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

- 18.5.6.2 the renewal of all lamps on the Project Facilities within the last 6 months of the Contract Period.

18.6 **Handback Inspection**

- 18.6.1 Not later than 28 days after the Expiry Date, the DBFO Co and the Department's Representative 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.
- 18.6.2 Within 90 days after the completion of the Handback Inspection, the Department's Representative shall either:
 - 18.6.2.1 issue to the DBFO Co a Handback Certificate; or
 - 18.6.2.2 notify the DBFO Co in writing of his decision not to issue the Handback Certificate and state the reason for such decision.
- 18.6.3 The Department's Representative may refuse to issue the Handback Certificate if:
 - 18.6.3.1 the DBFO Co shall have failed to complete all of the Renewal Works; or
 - 18.6.3.2 the Project Facilities for any other reason do not comply with the Handback Requirements in all respects.
- 18.6.4 Any notice given by the Department's Representative in accordance with Clause 18.6.2.2 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 Representative'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.
- 18.6.5 The DBFO Co may, within 28 days after receipt of a notice given in accordance with Clause 18.6.2.2, by notice to the Department's Representative object to any matter set out in the Department's Representative'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.
- 18.6.6 If no agreement is reached between the DBFO Co and the Department's Representative as to any matter referred to in the notice given in accordance with Clause 18.6.5 within 60 days of receipt by the Department's Representative of such notice, then either the DBFO Co or the Department's Representative may refer the matter to the Disputes Resolution Procedure for determination, as the case may be:
 - 18.6.6.1 whether the Renewal Works have been completed;
 - 18.6.6.2 whether the Project Facilities comply in all respects with the Handback Requirements; and

18.6.6.3 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.

18.6.7 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 18.6.6 (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 18.6 (Handback Inspection).

18.7 **Retention Account**

18.7.1 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 to the DBFO Co, designate the Retention Account as a "**Charged Retention Account**", and in such event, the DBFO Co shall as soon as reasonably practicable execute a deed of charge over the Retention Account in form and substance reasonably acceptable to the Secretary of State. 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 any accrued interest, shall be held on trust for the Secretary of State and the DBFO Co to be applied only in accordance with the following provisions of this Clause 18 (Handback).

18.7.2 Subject to Clause 18.7.3, 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 Monthly Traffic Payment or 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 18.7.2, be due to the DBFO Co.

18.7.3 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 18.7.5.1 the Secretary of State shall not be entitled to withhold any further sums in accordance with Clause 18.7.2 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.

18.7.4 If, following the Initial Inspection, it is agreed or determined in accordance with Clause 18.3 (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 18.7.5.

18.7.5 If, as a result of the Second Inspection:

18.7.5.1 the Renewal Amount is increased, then the provisions of Clause 18.7.2 shall apply, or shall again apply, until the amount held in the Retention Account equals the increased Retention Sum;

18.7.5.2 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 18.5 (Revised Renewal Programme), pay the amount of such excess out of the Retention Account to the DBFO Co.

18.7.6 Within 14 days after the issue of a Handback Certificate in accordance with Clause 18.6.2.1, 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.

18.7.7 If the Department's Representative gives a notice in accordance with Clause 18.6.2.2, 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:

18.7.7.1 the amount standing to the credit of the Retention Account (including accrued interest), and

18.7.7.2 the amount stated by the Department's Representative in the notice given in accordance with Clause 18.6.2.2 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 18.7.6.

18.7.8 If any sum is retained in the Retention Account in accordance with Clause 18.7.7, 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 Representative in accordance with Clause 18.6.2.2.

18.7.9 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.

- 18.7.10 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 18.7.9 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.
- 18.7.11 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 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.
- 18.7.12 The foregoing provisions of this Clause 18.7 (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 payable on demand is provided to the Secretary of State in respect of the DBFO Co's obligations under this Clause 18 (Handback) (other than this Clause 18.7 (Retention Account)) by an OECD bank or bank with equivalent standing, in either case, with a credit rating for long term debt of no less than Standard & Poor's AA rating or an equivalent rating from another rating agency of equivalent status as may be approved by the Secretary of State and in form and substance approved by him, such approval not to be unreasonably withheld.

19. **INSURANCE**

19.1 **Insurance Cover**

19.1.1 The DBFO Co shall take out and maintain in force the insurances specified in Schedule 10 (Insurance), or shall procure that such insurances are taken out and maintained, throughout the relevant stages of the Contract Period as follows:

19.1.1.1 Not used;

19.1.1.2 the insurances identified in paragraph 1 of Schedule 10 (Insurance) shall be taken out prior to and with effect from the issue of the Commencement Certificate and be maintained in force until the issue of the Completion Certificate (or such later date identified in Schedule 10);

19.1.1.3 the insurances identified in paragraph 2 of Schedule 10 (Insurance) shall be taken out prior to and with effect from (i) 1st April 1999 in respect of the Existing Road and (ii) the date of issue of the Permit to Use in respect of the New Road, and in each case shall be maintained in force throughout the Contract Period or, in respect of any De-Trunked Segment or Local Facilities, until the date of the relevant Taking Over Certificate.

19.1.2 Prior to taking out or changing or procuring the taking out or changing of any such insurances, the DBFO Co shall submit to the Department's Agent (in respect of the insurances referred to in paragraph 1 of Schedule 10 (Insurance)) or the Department's Representative (in respect of the insurances referred to in paragraph 2 of Schedule 10 (Insurance)) in accordance with the Review Procedure:

19.1.2.1 the identity of the insurer; and

19.1.2.2 the terms and conditions of such insurances or any revision to such terms and conditions,

and there shall have been no objection in accordance with the Review Procedure:

19.1.2.3 to the proposed insurer, provided that the Department's Nominee shall not unreasonably object to a proposed insurer which is on the acceptable security list of the DBFO Co's insurance broker (up to the levels and limits contained in that acceptable security list); or

19.1.2.4 to the terms and conditions of such insurances on the grounds set out in paragraph 3.9 of Part 3 of Schedule 7 (Review Procedure),

provided that in relation to the initial taking out or procuring the taking out of any insurances referred to in paragraph 2 of Schedule 10 (Insurance) (i) in respect of the Existing Road, the DBFO Co shall comply with this Clause 19.1.2 by 1st March 1999 and (ii) in respect of the New Road, the DBFO Co shall comply with this Clause 19.1.2 by no later than one month before the anticipated date of issue of the Permit to Use.

- 19.1.3 The DBFO Co shall only take out or change or procure the taking out or changing of such insurances with the insurer and on the terms and conditions to which there has been no objection in accordance with the Review Procedure.
- 19.1.4 The DBFO Co shall not take any action nor fail to take any reasonable action, nor (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any such insurance policy.

19.2 Policies and Copies

The DBFO Co shall furnish all insurance policies and other relevant documents (or copies certified in a manner acceptable to the Department's Nominee) to the Department's Nominee on request, together with evidence that the premiums payable thereunder have been paid and that the insurances are in full force and effect. The DBFO Co shall provide such additional evidence of compliance with this Clause 19 (Insurance) as may reasonably be requested by the Department's Nominee.

19.3 Rights of Subrogation and Notice of Cancellation

All such policies of insurance shall contain a clause to the effect that the insurers have agreed to waive all rights of subrogation against the Secretary of State and his servants and agents and shall provide for 30 days' written notice to be given to the Secretary of State prior to any cancellation, non-renewal or material modification of any such policy.

19.4 Renewal Certificates

Renewal certificates in relation to such insurances shall be obtained from the insurer as and when necessary and such certificates (or copies thereof certified in a manner acceptable to the Department's Nominee) shall be forwarded to the Department's Nominee as soon as possible and in any event at least 7 days before the renewal date.

19.5 Secretary of State's Right to Insure

If the DBFO Co fails or refuses to obtain or maintain in force or procure the obtaining or maintenance in force of any insurance required to be effected by it under the provisions of this Clause 19 (Insurance) or to provide the Department's Nominee with the renewal certificates in relation thereto (or copies thereof certified in a manner acceptable to the Department's Nominee) as and when required, the Secretary of State shall, without prejudice to any of his rights under this Agreement or otherwise, have the right himself to procure such insurances, in which event, subject to Clause 19.9.1.2.2, any sums so paid by the Secretary of State in this regard shall immediately become due and payable to the Secretary of State by the DBFO Co and shall be paid on demand. The Secretary of State shall also be entitled to deduct such sums from any moneys due or which may become due to the DBFO Co.

19.6 Claims

The DBFO Co shall maintain a written register of all claims or incidents which might result in a claim under any of the insurance policies referred to in this Clause 19 (Insurance) and shall allow the Department's Nominee to inspect such register at any time.

19.7 Application of Proceeds

19.7.1 The DBFO Co shall ensure that the insurers of any of the insurance policies which the DBFO Co is required to take out and maintain in force or procure are taken out and maintained in force pursuant to Clause 19.1.1 pay the proceeds of:

19.7.1.1 any insurance policy for third party legal liability, contractor's pollution liability (to the extent payable to a third party) or employer's liability:

19.7.1.1.1 directly to the third party or employee concerned; or

19.7.1.1.2 where not paid directly to the third party or employee concerned to the Secretary of State as loss payee (and the Secretary of State shall, promptly upon receipt of such proceeds, pay the same to the relevant third party or employee concerned);

19.7.1.2 any insurance policy for any contractor's all risks, property damage or contractor's pollution liability (to the extent not payable to a third party and excluding any business interruption insurance payable to the DBFO Co under such policy) to the Secretary of State as loss payee except where the DBFO Co has already restored, replaced or reinstated the Project Facilities, in which case the proceeds shall be paid directly to the DBFO Co; provided that where any part of the proceeds of any such insurance policy are paid to the Secretary of State as loss payee (such proceeds received by the Secretary of State as loss payee being the "**Insurance Proceeds**") then either (a) or (b) shall apply:

(a) if the DBFO Co has entered into a contract with a third party for the purpose of the restoration, replacement or reinstatement of the Project Facilities or, as the case may be, that part of the Project Facilities, in respect of which Insurance Proceeds have been paid, and in accordance with such contract, the DBFO Co is required to make a payment to such third party for such purpose, then the Secretary of State shall, on the latest of:

(i) the date which is 5 Working Days after receipt by the Secretary of State of a copy of an invoice from such third party to the DBFO Co accompanied by a written confirmation of the DBFO Co addressed to the Secretary of State that the amount of the invoice is payable in accordance with the relevant contract in respect of the restoration, replacement or reinstatement of the Project Facilities and that the DBFO Co requires such invoice to be discharged out of the Insurance Proceeds;

- (ii) the due date for payment of such invoice by the DBFO Co under the terms of the relevant contract; and
- (iii) the date which is 5 Working Days after receipt of the Insurance Proceeds by the Secretary of State in respect of the relevant restoration, replacement or reinstatement,

pay to the relevant third party an amount equal to the lesser of such Insurance Proceeds and the amount of such invoice; or

- (b) if the DBFO Co itself proceeds to restore, replace or reinstate the Project Facilities or, as the case may be, that part of the Project Facilities in respect of which Insurance Proceeds have been paid, then the Secretary of State shall, on the later of the date which is 5 Working Days after:

- (i) receipt by the Secretary of State of a certificate from the DBFO Co addressed to the Secretary of State confirming in writing the amount of the Insurance Proceeds claimed by the DBFO Co from the Secretary of State, based on the value of restoration, replacement or reinstatement carried out in relation to the Project Facilities, or such part thereof, as the case may be; and
- (ii) receipt of the Insurance Proceeds by the Secretary of State in respect of the relevant restoration, replacement or reinstatement,

pay to the DBFO Co an amount equal to the lesser of such Insurance Proceeds and the amount claimed in such certificate; and

19.7.1.3 any other insurance so as to ensure the performance by the DBFO Co of its obligations under this Agreement.

19.7.2 The DBFO Co shall procure that the terms of all policies of insurance which the DBFO Co is required to take out and maintain in force or procure are taken out and maintained in force in accordance with this Agreement shall (without prejudice to any other requirement of this Agreement) be upon terms which give effect to the provisions of Clause 19.7.1.

19.8 **Savings**

- 19.8.1 Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the DBFO Co of its liabilities and obligations under this Agreement and in particular the DBFO Co's obligation to hold the Secretary of State harmless in compliance with any indemnity provisions contained in this Agreement.
- 19.8.2 The supply to the Department's Nominee of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 19 (Insurance) shall not imply acceptance by the Department's Nominee that the extent of insurance cover is sufficient or that the terms and conditions thereof are satisfactory, in either case for the purposes of the Project.

19.9 **Unavailability of Insurance**

- 19.9.1 If the DBFO Co is unable to take out and maintain in force or procure the taking out and maintenance in force of all or any of the insurances specified in Schedule 10 as a result of the general unavailability of such insurance cover in the global insurance market at reasonable commercial rates, then:

- 19.9.1.1 the DBFO Co shall notify the Secretary of State as soon as possible, giving full details of the following factors ("**Unavailability Factors**"):
- (i) the relevant insurance (the "**Unavailable Insurance**");
 - (ii) the length of time for which such insurance has been and is expected to continue to be Unavailable Insurance;
 - (iii) evidence of the unavailability of cover;
 - (iv) the reasons given for the unavailability;
 - (v) the steps (if any) which DBFO Co has taken and/or is taking to obtain the Unavailable Insurance;
 - (vi) where unavailability is related to the amount of premium, historical details of premium levels for such insurance and the premium currently quoted for such insurance generally; and
 - (vii) any other relevant factors.
- 19.9.1.2 following the DBFO Co's notification under Clause 19.9.1.1 and provided that the Secretary of State, acting reasonably, is satisfied as to the unavailability of the Unavailable Insurance:
- 19.9.1.2.1 the Secretary of State, the DBFO Co and their respective insurance advisers shall consult for a period not exceeding 60 days, commencing on the date of receipt by the Secretary of State of the DBFO Co's notice under Clause 19.9.1.1 (the "**Initial Consultation Period**");

19.9.1.2.2 the provisions of Clause 19.5 shall apply provided that the amount which the Secretary of State shall be entitled to recover from the DBFO Co shall be no greater than the level of premium generally payable in respect of such insurance immediately before such insurance became Unavailable Insurance (where the reason for unavailability was the level of premium); and

19.9.1.2.3 the DBFO Co shall not be in breach of its obligations under this Clause 19 (Insurance) to take out and maintain in force or procure the taking out and maintenance in force of any insurance which is Unavailable Insurance, provided that the DBFO Co shall;

- (i) have complied and be complying with the provisions of this Clause 19.9; and
- (ii) take out and maintain insurance or procure the taking out and maintenance in force of insurance in accordance with this Clause 19 from the date when the Secretary of State reasonably determines in accordance with Clause 19.9.4 that such insurance cover has become available,

provided that the provisions of this Clause 19.9 shall not apply where the unavailability of the Unavailable Insurance is due solely to any act or omission or the insurance claims record of the DBFO Co or any Associated Company of the DBFO Co.

19.9.2 If:

19.9.2.1 it is determined pursuant to Clause 19.9.1 that there is Unavailable Insurance; and

19.9.2.2 the Secretary of State does not procure the taking out of such Unavailable Insurance pursuant to Clause 19.5,

the Secretary of State may act as insurer of last resort in respect of such Unavailable Insurance, until such time as the Unavailable Insurance becomes generally available on the global insurance market at reasonable commercial rates once again.

19.9.3 If the Secretary of State does not exercise his rights under Clause 19.5 or Clause 19.9.2, the Parties shall continue to consult in order to find a solution (such period of consultation being the "**Subsequent Consultation Period**").

19.9.4 In the event that the Unavailable Insurance becomes generally available on the global insurance market at reasonable commercial rates once again, the Initial Consultation Period or the Subsequent Consultation Period and/or any insurance pursuant to Clause 19.5 or 19.9.2 shall cease from the date that the Secretary of State reasonably determines that such insurance cover became available.

19.10 **Further Provisions**

The DBFO Co shall procure that:

19.10.1 under the Construction Contract, the Contractor shall put in place and maintain the Contractor's PI Insurance in full force and effect; and

19.10.2 under the Design Contract, the Designer shall put in place and maintain the Designer's PI Insurance in full force and effect.

20. **SECRETARY OF STATE'S OBLIGATIONS**

20.1 **Connecting Roads**

Without prejudice to Clause 38.1.15, 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.

20.2 **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

21. REPRESENTATIVES

21.1 The Department's Agent and Department's Representative

- 21.1.1 The Secretary of State has appointed the Department's Agent to act as his agent in relation to the design, construction, completion, commissioning and testing of the Works and, prior to the issue of the Completion Certificate, the maintenance of the New Road. The Department's Agent shall exercise the functions set out in Part 1 of Schedule 7 (Department's Agent) and such other functions in respect of this Agreement as the Secretary of State may notify to the DBFO Co from time to time.
- 21.1.2 The Secretary of State has appointed the Department's Representative to act as his agent in connection with all Operations other than those referred to in Clause 21.1.1. The Department's Representative shall exercise the functions set out in Part 2 of Schedule 7 (Department's Representative) and such other functions in respect of this Agreement as the Secretary of State may notify to the DBFO Co from time to time.
- 21.1.3 The functions of the Department's Agent and the Department's Representative shall be separate and apart and neither shall have the power to override the other. In the event of any conflict between the instructions or actions of the Department's Agent and the Department's Representative or of any confusion as to their respective roles, the matter shall be referred to the Secretary of State.
- 21.1.4 During any period when there is no Department's Agent or Department's Representative, the Secretary of State shall carry out the functions which would otherwise be performed by the Department's Agent or Department's Representative, as the case may be.
- 21.1.5 Except as expressly stated in this Agreement, neither the Department's Agent nor the Department's Representative shall have any authority to relieve the DBFO Co of any of its obligations under this Agreement.
- 21.1.6 Except as notified by the Secretary of State to the DBFO Co in writing, the DBFO Co shall be entitled to treat any act of the Department's Agent or the Department's Representative 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.
- 21.1.7 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.

21.2 DBFO Co's Representative

- 21.2.1 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.

- 21.2.2 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, the Department's Agent and the Department's Representative 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, the Department's Agent and the Department's Representative shall not be required to determine whether any express authority has in fact been given.

21.3 **Change of Representatives**

- 21.3.1 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 Agent or Department's Representative or appoint the Department's Representative or one or more substitute Department's Agents or Department's Representatives. Any such notice shall specify the date on which such termination, appointment 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.
- 21.3.2 Save in the case of death or serious illness, the appointment of the DBFO Co's Representative shall not be terminated without the prior approval of the Secretary of State. Immediately upon the DBFO Co's Representative ceasing to act in the case of death or serious illness and prior to termination of the appointment in all other cases, 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, such approval not to be unreasonably withheld or delayed.

22. **QUALITY MANAGEMENT**

22.1 **Quality Management Systems and Documentation**

- 22.1.1 The DBFO Co shall procure that all aspects of the Operations are the subject of Quality Management Systems which comply with the provisions of this Clause 22 (Quality Management).
- 22.1.2 The Quality Management Systems referred to in Clause 22.1.1 shall comply with:
- 22.1.2.1 the relevant part of the BS EN ISO 9000 series;
 - 22.1.2.2 the Technical Requirements; and
 - 22.1.2.3 Good Industry Practice,
- and shall be reflected in appropriate Quality Documentation which complies with the requirements set out in Part 1 of Schedule 5 (Principles for Quality Documentation).

- 22.1.3 Without limitation to the generality of Clause 22.1.2, there shall be:
- 22.1.3.1 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 (Principles for Quality Documentation) (the "**DBFO Co's Quality Documentation**");
 - 22.1.3.2 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 (Principles for Quality Documentation) (the "**Contractor's Quality Documentation**");
 - 22.1.3.3 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 (Principles for Quality Documentation) (the "**Designer's Quality Documentation**");
 - 22.1.3.4 Quality Documentation for the Operator describing its Quality Management System for undertaking the activities covered by the Operating and Maintenance Contract and meeting the requirements set out in Annex 4 to Part 1 of Schedule 5 (Principles for Quality Documentation) (the "**Operator's Quality Documentation**"); and
 - 22.1.3.5 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 (Principles for Quality Documentation).
- 22.1.4 The DBFO Co shall not commence or permit the commencement of any aspect of the Operations before those parts of the Quality 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 3.10 of Part 3 of Schedule 7 (Review Procedure)).
- 22.1.5 Without prejudice to Clause 22.1.8, it shall not be necessary to submit to the Review Procedure in accordance with the provisions of Clause 22.1.4 the Quality Documentation (or parts thereof) included in Part 2 of Schedule 5 (Quality Plans).
- 22.1.6 The DBFO Co shall comply with the DBFO Co's Quality Documentation and shall procure that:
- 22.1.6.1 the Designer complies with the Designer's Quality Documentation;
 - 22.1.6.2 the Contractor complies with the Contractor's Quality Documentation;

- 22.1.6.3 the Operator complies with the Operator's Quality Documentation;
and
- 22.1.6.4 any other party contracting with the DBFO Co complies with that party's Quality Documentation.
- 22.1.7 Where any aspect of the Operations is performed by more than one contractor or sub-contractor, then the provisions of this Clause 22 (Quality Management) shall apply in respect of each of such contractors or sub-contractors, and references in this Clause 22 (Quality Management) to the Designer, Contractor and Operator or any other party shall be construed accordingly.
- 22.1.8 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 the Quality 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 3.10 of Part 3 of Schedule 7 (Review Procedure)).
- 22.1.9 Without limitation to the generality of Clause 22.1.8, the DBFO Co shall from time to time submit to the Department's Nominee in accordance with the Review Procedure any changes to any of the Quality Documentation required for such Quality Documentation to continue to reflect Quality Management Systems which comply with the requirements set out in Clause 22.1.2. The Department's Nominee may object to any such proposed change only on the grounds set out in paragraph 3.10 of Part 3 of Schedule 7 (Review Procedure).
- 22.1.10 If the DBFO Co fails to propose any change required pursuant to Clause 22.1.9, 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.
- 22.1.11 If there is no objection under the Review Procedure to a part of the Quality Documentation referred to in Clause 22.1.4 or a change, addition or revision proposed pursuant to Clause 22.1.8, Clause 22.1.9 or Clause 22.1.10, then the Quality Documentation shall be amended to incorporate such part, change, addition or revision.

22.2 **Quality Manuals, Plans and Procedures**

If any Quality Documentation refers to, relies on or incorporates any quality manual, plan, procedure or like document then such quality 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 Quality Documentation or part of or change, addition or revision to the Quality Documentation is submitted in accordance with the Review Procedure, and the contents of such quality manual, plan, procedure or other document shall be taken into account in the consideration of the relevant Quality Documentation or part of or change, addition or revision to the Quality Documentation in accordance with the Review Procedure. The Department's Nominee may require the amendment of any such quality manual, plan, procedure or other document to the extent necessary to enable the relevant Quality Documentation to satisfy the requirements of Clause 22.1.2.

22.3 **Additional Information**

Notwithstanding any other provision of this Clause 22 (Quality Management), 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 22 (Quality Management) and the provisions of Part 1 of Schedule 5 (Principles for Quality Documentation).

22.4 **Testing**

22.4.1 Where the DBFO Co is required by Table NG 1/1 in the Notes for Guidance to carry out any calibration, sample or test, such calibration, sample or test shall be carried out by the Testing Contractor in accordance with the following provisions of this Clause 22.4 (Testing).

22.4.2 Save as referred to in Clause 22.4.3, all on-site and off-site calibrations, samples and tests shall be carried out by laboratories accredited by the United Kingdom Accreditation Service ("UKAS") for such calibrations, samples and tests. Accreditation shall be Category 0 for an off-site laboratory and Category III for an on-site laboratory.

22.4.3 In respect of any calibration, sample or test to be carried out at an on-site laboratory during an initial period not exceeding 30 days from the first calibration, sample or test to be carried out at that laboratory:

22.4.3.1 the DBFO Co shall take two samples for calibration, sampling or testing, one of which shall be tested at the on-site laboratory; and

22.4.3.2 if the on-site laboratory does not obtain a Category III UKAS accreditation within such initial period, then the calibration, sample or test referred to in Clause 22.4.3.1 shall not constitute a valid calibration, sample or test in accordance with this Agreement and the second set of samples shall be taken to and calibrated, sampled or tested at an off-site laboratory which is Category 0 UKAS accredited.

22.4.4 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 or test required in accordance with this Agreement or as a result of any laboratory not being accredited as required by this Agreement.

22.4A For the avoidance of doubt, where any reference is made elsewhere in this Agreement or the Schedules to Category II UKAS accreditation, Category III UKAS accreditation shall be substituted in its place.

22.5 **Project Quality Director**

The DBFO Co shall at all times maintain a Project 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 Project Quality Director (and any replacement) and his job specification and

responsibilities shall be subject to the approval of the Secretary of State (such approval not to be unreasonably withheld or delayed). The job specification and responsibilities of the Project Quality Director shall include:

- 22.5.1 ensuring the effective operation of the DBFO Co's Quality Management System;
- 22.5.2 auditing the DBFO Co's Quality Management System and the other Quality Management Systems referred to in Clause 22.1.1 at regular intervals and reporting the findings of such audits to the Department's Nominee;
- 22.5.3 reviewing all Quality Management Systems referred to in Clause 22.1.1 at intervals agreed with the Department's Nominee to ensure their continued suitability and effectiveness;
- 22.5.4 liaising with the Department's Nominee on all matters relating to quality management; and
- 22.5.5 ensuring that relevant quality records are retained for the retention periods required by Clause 24 (Records).

22.6 Quality Monitoring

Without limitation to Clause 25 (Monitoring of Performance), the Department's Nominee may carry out audits of the Quality Management Systems referred in Clause 22.1.1 (including all Quality Documentation) at approximate intervals of 3 months and may carry out other periodic monitoring, spot checks and auditing of such Quality Management Systems.

22.7 Welsh Language Scheme

The DBFO Co shall:

- 22.7.1 implement and adhere to the terms of the Welsh Language Scheme, monitor its operation and report to the Secretary of State (at his request) thereon; and
- 22.7.2 impose a contractual obligation on each of its sub-contractors in terms substantially similar to those set out in Clause 22.7.1 (*mutatis mutandis*) and monitor compliance with and take all reasonable steps to enforce the same.

23. REPORTS AND INFORMATION

23.1 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.

23.2 **Form**

The form of such Reports shall be agreed with the Department's Nominee, such agreement not to be unreasonably withheld.

23.3 **Further Information**

The DBFO Co shall at any time and from time to time at its own cost provide to the Department's Agent, the Department's Representative or the Secretary of State, as the case may be, such information with respect to the Project as the Department's Agent, the Department's Representative or the Secretary of State, as the case may be, may reasonably require. The DBFO Co shall use its best endeavours to provide the information requested within any deadlines which may be imposed by the Department's Agent, the Department's Representative or the Secretary of State, as the case may be, and in any event, such information shall be provided promptly.

23.4 **Objections to Reports**

23.4.1 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.

23.4.2 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.

23.5 **Revisions to Reports**

If either:

23.5.1 the resolution (whether by agreement or determination under the Disputes Resolution Procedure) of any objection made pursuant to Clause 23.4.1; or

23.5.2 the correction of any calculation pursuant to Clause 30.7 (Correction of Defects),

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.

23.6 **TUPE Information**

23.6.1 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.

23.6.2 The Secretary of State may disclose TUPE Information to any Prospective Tenderer and, if requested 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:

23.6.2.1 is a servant or agent (including legal adviser) of the Prospective Tenderer; and

23.6.2.2 has undertaken not to disclose that information unless required by law to do so.

23.6.3 Where TUPE Information has been provided, the DBFO Co shall:

23.6.3.1 inform the Secretary of State of any change to the information provided or provide any new TUPE Information not previously provided;

23.6.3.2 use its best endeavours to clarify any matter upon which clarification is requested by the Secretary of State; and

23.6.3.3 use its best endeavours to co-operate with any other reasonable 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.

23.6.4 Subject to Clause 23.6.2 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.

23.6.5 For the purposes of this Clause 23.6 (TUPE Information), "**TUPE Information**" means written details of:

23.6.5.1 the total number of employees employed by the DBFO Co or any of its contractors and sub-contractors whose work (or any part of it) is work undertaken for the purposes of this Agreement;

23.6.5.2 in relation to each employee who falls within the scope of Clause 23.6.5.1 above:

23.6.5.2.1 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

23.6.5.2.2 the employee's salary, 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;

23.6.5.3 information relating to or connected with the employment of employees falling within the scope of Clause 23.6.5.1 above, including details of:

- 23.6.5.3.1 terms and conditions of employment including terms incorporated from any collective agreement;
- 23.6.5.3.2 any outstanding or potential liability for past breaches of such contracts;
- 23.6.5.3.3 any employee who is on sick, maternity or other statutory or contractual leave (other than normal holiday leave) whether paid or unpaid;
- 23.6.5.3.4 any outstanding or potential statutory liability (for example, any claim for unfair dismissal or under non-discrimination legislation); and
- 23.6.5.3.5 any other outstanding or potential liability to be met by the Prospective Tenderer if its tender is accepted; and
- 23.6.5.4 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 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).
- 23.6.6 For the purposes of this Clause 23.6 (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.

23.7 **Changes to the Workforce**

- 23.7.1 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 (which consent shall not be unreasonably withheld or delayed):
 - 23.7.1.1 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 23.6.5.1; or
 - 23.7.1.2 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.
- 23.7.2 In Clause 23.7.1 above, what is material:
 - 23.7.2.1 for the purposes of the phrase "**materially amend**" shall be determined by considering the individual contract of employment as a whole; or
 - 23.7.2.2 for the purposes of the phrase "**materially increase**" shall be determined by considering this Agreement as a whole.

23.8 **Parliamentary Questions and Issues**

- 23.8.1 Where the DBFO Co is required to provide any information pursuant to Clause 23.3 and is notified that such information is needed for the purpose of enabling the Secretary of State to prepare statements or responses to questions or issues raised by or on behalf of any public organisation (including the United Kingdom parliament, the National Assembly, any local authority or any member or representatives of the foregoing), then the DBFO Co shall provide such information within any time periods which may be imposed by the Secretary of State (acting reasonably having regard to the purpose of the provision of the information requested and to the nature and extent of the information requested) unless it is impossible for the DBFO Co to do so (in which case the DBFO Co shall forthwith give notice to the Secretary of State, the Department's Agent or the Department's Representative, as applicable, setting out in full the reasons). Nothing in this Clause 23.8.1 shall prejudice the rights and obligations of the Parties under Clause 23.3.
- 23.8.2 Where such questions or issues referred to in Clause 23.8.1 are raised with or addressed to the Secretary of State (and not with the DBFO Co directly), the DBFO Co shall not communicate directly with such public organisation in respect thereof without having obtained the prior written approval from the Secretary of State of the form and terms of its communications save to the extent that it is required to do so by law or by or pursuant to the rules of any order having the force of law of any court, association or agency of competent jurisdiction.
- 23.8.3 The DBFO Co shall promptly inform the Secretary of State of any communications in connection with the subject matter of this Agreement and the Project Road generally (a) with any public organisation and (b) with any other third party where the matters in question might reasonably be expected by the DBFO Co to have political significance or to be in the public interest and shall promptly provide the Department's Agent (prior to the issue of the Completion Certificate) and the Department's Representative (following the issue of the Completion Certificate) with copies of any such communications provided in writing. Communications shall be deemed to be in writing where they are made in documentary, magnetic, electronic, graphic or digitised form, or in any other tangible or visible form.
- 23.8.4 Notwithstanding the provisions of Clause 49 (Confidentiality), the Secretary of State shall be entitled to disclose in the course of carrying out his public functions any information to which Clause 23.3 or this Clause 23.8 applies to the extent that he (acting reasonably) deems necessary or appropriate and shall not (to such extent) be obliged to keep any such information confidential.

23.9 **Development Control**

Without prejudice to Clause 23.2, the DBFO Co shall, upon the request of 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, acting reasonably, 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 a reasonable time, having regard to the circumstances:

- 23.9.1 review the development proposals (including any planning application and related papers);
- 23.9.2 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;
- 23.9.3 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;
- 23.9.4 keep the Secretary of State informed of the progress of the development proposals, including the progress of any planning application,

provided that any investigations or studies commissioned pursuant to a recommendation under Clause 23.9.3 or any other investigations or studies in respect of the development proposals that the Secretary of State determines are necessary shall be commissioned by the Secretary of State at his own expense.

24. **RECORDS**

24.1 **Required Records**

- 24.1.1 The DBFO Co shall maintain and update those records relating to the Project set out in Part 1 of Schedule 14 (Records).
- 24.1.2 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 in respect of the Project Facilities (or copies 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 24.1.1.

24.2 **Audit**

The records referred to in Clause 24.1 (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, the Department's Agent and the Department's Representative at all reasonable times.

24.3 **Copies**

The Secretary of State, the Department's Agent and the Department's Representative shall be entitled to take copies of all such records at the DBFO Co's cost and for that purpose to use such copying facilities as are maintained at the place where the records are kept.

24.4 **Retention of Records**

- 24.4.1 Without prejudice to any Legal Requirement, all records referred to in Clause 24.1 (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.

24.4.2 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.

24.4.3 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 24.1 (Required Records) which were in existence at the Termination Date (or, where those records are required by statute 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 24.4.3, subject to reasonable notice.

24.4.4 The DBFO Co shall retain in safe storage for a period of not less than 15 years following the Termination Date all such records as are referred to in Clause 24.4.3 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:

24.4.4.1 by the DBFO Co where the termination arises as a result of an Event of Default;

24.4.4.2 by the Secretary of State where the termination arises as a result of a DBFO Co Termination Event; and

24.4.4.3 in cases of termination other than those governed by Clauses 24.4.4.1 and 24.4.4.2 by the DBFO Co and the Secretary of State in equal proportions.

24.5 **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.

25. MONITORING OF PERFORMANCE

25.1 Breach of this Agreement

25.1.1 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.

25.1.2 If at any time (including in the circumstances referred to in Clause 25.3) 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 25.1.1) and such failure is capable of remedy, then the Department's Nominee may serve a 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**"). For the avoidance of doubt, a failure to perform shall include a failure to remedy as required by this Clause 25.1.2, save where the DBFO Co validly disputes the underlying failure to perform in accordance with the Disputes Resolution Procedure.

25.2 Penalty Points

25.2.1 If at any time:

25.2.1.1 the DBFO Co has failed to perform any of its obligations under this Agreement save where the failure comprises a breach of any applicable Quality Documentation by a person other than the DBFO Co or a breach of the DBFO Co's 5 Year Management Plan or the failure of the DBFO Co to achieve the DBFO Co's 5 Year Performance Targets and such breach does not of itself otherwise constitute a breach of this Agreement or save where the failure is caused solely by a breach by the Secretary of State of this Agreement; or

25.2.1.2 the Department's Nominee serves a notice under Clause 25.1.2 and the DBFO Co fails to remedy the failure within the Remedial Period,

then, provided he does so within 3 months of becoming aware of his entitlement to do so, 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 that any notice awarding Penalty Points which will result in the DBFO Co having been awarded in excess of 80 Penalty Points in any one year period shall be counter-signed by the head of division or other more senior officer of the Highways Directorate of the Department on behalf of the Secretary of State and provided further that no Penalty Points shall be awarded to the DBFO Co for a breach of the DBFO Co's obligations under this Agreement if such breach was caused by the act or

omission of a third party other than a Contracting Associate to the extent that the DBFO Co did not contribute to such breach.

- 25.2.2 The Parties acknowledge that 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, provided always that the number of Penalty Points which may be awarded in respect of any single occurrence of any matter not listed in Schedule 18 shall be consistent with breaches of a similar severity which are listed in Schedule 18 and shall not exceed 5 Penalty Points. Where a single event or occurrence constitutes a breach of more than one provision of this Agreement, the number of Penalty Points which may be awarded shall not exceed the maximum number of Penalty Points which may be awarded for any of the breaches arising therefrom.
- 25.2.3 The DBFO Co may within 28 days of receipt of any notice pursuant to Clause 25.2.1 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 25.2.2, the issue for decision shall be 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.
- 25.2.4 If the DBFO Co makes a bona fide referral of a Dispute to the Disputes Resolution Procedure pursuant to Clause 25.2.3:
- 25.2.4.1 in relation to the DBFO Co's failure to perform its obligations under this Agreement, any Penalty Points awarded in respect of such disputed failure to perform shall be suspended until such time as the matter has been determined under the Disputes Resolution Procedure. In the event that it is determined under the Disputes Resolution Procedure that there has been a failure to perform by the DBFO Co, then the Penalty Points in respect of such failure shall be deemed to have been awarded on the day on which they were originally awarded. In the event that it is determined under the Disputes Resolution Procedure that there has been no failure to perform by the DBFO Co, then the Penalty Points in respect of such failure shall be cancelled with effect from the day on which they were originally awarded;
- 25.2.4.2 the DBFO Co shall pending the outcome of the Disputes Resolution Procedure and upon receipt of a notice from the Department's Nominee issued within 60 days of the referral of the Dispute to the

Disputes Resolution Procedure by the DBFO Co, proceed to remedy its failure to perform to the extent that it is otherwise required to do so under this Agreement, including under Clause 25.5.2, provided that if no such notice is served, Clause 25.2.4.3 shall apply;

- 25.2.4.3 if the DBFO Co's disputed failure to perform is remediable, but the Department's Nominee fails to serve a notice in accordance with Clause 25.2.4.2, the DBFO Co may defer taking remedial action in respect of its disputed failure to perform until such time as a decision is made under the Disputes Resolution Procedure and such decision confirms the failure to perform. The DBFO Co shall then remedy its failure to perform within a reasonable period following such decision and failure to do so shall entitle the Department's Nominee to award Penalty Points pursuant to Clause 25.2.1;
- 25.2.4.4 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, then the provisions of Part 4 of Schedule 12 (Compensation Events) shall apply.

25.3 **Warning Notices**

Without prejudice to any other right or remedy available to the Secretary of State, if at any time the DBFO Co has:

- (a) committed any material breach of its obligations under this Agreement; or
- (b) been awarded a total of 150 or more Penalty Points in respect of the Works in any 3 year period ending prior to the issue of the Completion Certificate; or
- (c) has been awarded a total of 150 or more Penalty Points in respect of the O & M Requirements in any 3 year period ending prior to the issue of the Completion Certificate; or
- (d) has been awarded an aggregate total of 200 or more Penalty Points in any 3 year period ending prior to the issue of the Completion Certificate; or
- (e) has been awarded 150 or more Penalty Points in any 3 year period ending up to and including 12 months from and including the issue of the Completion Certificate; or
- (f) has been awarded 125 or more Penalty Points in any 3 year period ending more than 12 months from and including the issue of the Completion Certificate,

(including, in the case of (e) and (f) above, any Penalty Points awarded prior to the issue of the Completion Certificate in respect of the O & M Requirements but not in respect of the Works and which fall within such 3 year period), then the Department's Nominee may give 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 the head of division or other more senior officer of the Highways Directorate of the Department on behalf of the Secretary of State.

25.3A **Warning Notice for Material Breach**

The Department's Nominee may not award the DBFO Co a Warning Notice in respect of a material breach of its obligations under this Agreement unless that breach is incapable of remedy or, if it is capable of remedy, the Department's Nominee has given the DBFO Co the opportunity to remedy the breach in accordance with the provisions of Clause 25.1.2 and the DBFO Co has failed to do so within the relevant Remedial Period.

25.4 **Increased Monitoring**

In the event of the DBFO Co either:

25.4.1 being awarded a total of 50 or more Penalty Points in respect of the Works or 50 or more Penalty Points in respect of the O & M Requirements in any 1 year period ending prior to the issue of the Completion Certificate, or 75 or more Penalty Points in aggregate during such period, or 50 or more Penalty Points in any 1 year period ending after the issue of the Completion Certificate (such total to include any Penalty Points awarded prior to the issue of the Completion Certificate in respect of the O & M Requirements but not in respect of the Works, falling within that 1 year period); or

25.4.2 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 properly incurred by him as a result of such increased level of monitoring (including the relevant administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads).

25.5 **Step-In Rights**

25.5.1 Without prejudice to Clause 25.5.2, if at any time the Department's Nominee serves a notice under Clause 25.1.2 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 25.5.3 and 25.5.4 shall apply.

25.5.2 Notwithstanding any other provision of this Agreement and without prejudice to any other right or remedy of the Secretary of State:

25.5.2.1 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;

25.5.2.2 in the event of an emergency; or

25.5.2.3 where it appears to the Secretary of State necessary or expedient in the interests of road or rail safety,

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 25.5.3 and 25.5.4 shall apply.

25.5.3 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 25.5.1) or the Secretary of State was not reasonable in requiring the DBFO Co to take such steps as are referred to in Clause 25.5.2 or, in the case of Clause 25.5.2.1, that no such breach had occurred (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 Part 4 of Schedule 12 (Compensation Events) shall apply.

25.5.4 Except in the circumstances referred to in Clause 25.5.3, 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 25.5.1 or Clause 25.5.2 (including the relevant administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads).

25.6 **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. **STATUTORY POWERS**

26.1 **Application**

Whenever the exercise by the Secretary of State of any statutory power is necessary to enable the DBFO Co to perform any obligation under this Agreement, the provisions of this Clause 26 (Statutory Powers) shall apply, save:

26.1.1 where the provisions of Part 1 of Schedule 22, Clause 27.4.4 and/or Clause 28.3.4 apply; or

26.1.2 in respect of any action required to gain access to any land the subject of a CPO Notice pursuant to Clause 8.2.1, other than any such land in respect of which the Secretary of State has failed to issue a Notice to Treat or Notice to Enter or

General Vesting Declaration properly requested by the DBFO Co pursuant to Clause 8.2.1.

26.2 Procedure

- 26.2.1 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.
- 26.2.2 Any notice given by the DBFO Co in accordance with Clause 26.2.1 shall:
 - 26.2.2.1 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;
 - 26.2.2.2 indicate the time by which the requested action is required; and
 - 26.2.2.3 set out any recommendation by the DBFO Co in respect of the requested action.
- 26.2.3 Within 21 days after receipt of a notice given in accordance with Clause 26.2.1, 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.
- 26.2.4 The Secretary of State shall respond to the merits of the request contained in the notice given in accordance with Clause 26.2.1 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.

26.3 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 26.2.1. 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 26.4 (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.

26.4 Relevant Considerations

The considerations referred to in Clause 26.3 (No Fetter on Discretion) are the following:

- 26.4.1 whether the Secretary of State has the statutory power to take the action requested;

- 26.4.2 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;
- 26.4.3 the effect the requested action would have on the interests of any third parties;
- 26.4.4 whether the timing and substance of the request are 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
- 26.4.5 whether the action requested would have any implications for safety, either of Users or of any other third parties.

26.5 **Refusal of Request**

- 26.5.1 Subject to Clause 26.5.2, 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 26.2.1.
- 26.5.2 The DBFO Co shall be relieved of its liability in accordance with Clause 26.5.1 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.
- 26.5.3 If the failure to take any action requested in a notice given in accordance with Clause 26.2.1 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:
 - 26.5.3.1 consultation for a period of not less than 120 days from the date of the Secretary of State's response under Clause 26.2.4 to reach a solution acceptable to both Parties; and
 - 26.5.3.2 (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 41.4 (Termination under Clause 26).

26.6 **Traffic Regulation Orders**

Whether or not Clause 26.1 (Application) applies, the DBFO Co (at its 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 (but in any event no later than 26 weeks prior to the date of issue of the Permit to Use) as to enable the Secretary of State to, and following such provisions the Secretary of State shall, diligently pursue the process of making any traffic regulation order in respect of the Project Road having regard to the anticipated date of issue of the Permit to Use, including the following:

- 26.6.1 a clearway order in respect of the New Road
- 26.6.2 an order imposing a speed limit of 50 mph on:
 - 26.6.2.1 the westbound carriageway of the New Road from chainage 11900, as shown on drawing 964057/ED/302 in Section 5 to Part 5 of Schedule 4, to the Penllech Nest Footbridge, referred to in paragraph 2.2.2.13 in Annex 1 to Part 1 of Schedule 4; and
 - 26.6.2.2 the eastbound carriageway of the New Road from the roundabout, referred to in paragraph 2.2.1.10 in Annex 1 to Part 1 of Schedule 4, to chainage 11900, as shown on drawing 964057/ED/302 in Section 5 to Part 5 of Schedule 4.
- 26.6.3 a designating order in respect of cycle tracks and shared-use footways and cycle tracks.

27. STATUTORY UNDERTAKERS

27.1 Definitions

For the purpose of this Clause 27 (Statutory Undertakers):

- 27.1.1 "**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;
- 27.1.1A "**Authorisation Date**" means in relation to a function of the Secretary of State the later of the date on which a Contracting Out Order comes into force and the authorisation (if any) of the DBFO Co pursuant to the Order;
- 27.1.2 "**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 27.4.1 or 27.4.5, as the case may be;
- 27.1.3 "**Authorisation Period**" means either whichever is the shorter of (i) the period from the Authorisation Date to the expiry of the Contract Period or (ii) the period commencing on the Authorisation Date and expiring 10 years therefrom or such shorter period as may be specified in the notice giving the authorisation;
- 27.1.4 "**Bridge Authority**" has the meaning given in Section 88 (1)(b) of the 1991 Act;
- 27.1.5 "**Contracting Out Order**" means an order made pursuant to Sections 69 and 77 of the Deregulation and Contracting Out Act 1994 which provides that any of the functions of the Secretary of State listed in Part 1 of Schedule 19 (Authorised Functions) may be exercised by, or by the employees of, such person (if any) as may be authorised by the Secretary of State;
- 27.1.6 "**Codes of Practice**" means the codes of practice issued from time to time pursuant to Part III of the 1991 Act;

- 27.1.7 **"Diversiory 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;
- 27.1.8 **"Highway Authority"** has the same meaning as ascribed in the Highways Act;
- 27.1.9 **"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;
- 27.1.10 **"the Regulations"** means regulations issued pursuant to Part III of the 1991 Act;
- 27.1.11 **"Renewed Authorisation Period"** has the meaning given in Clause 27.4.5.2;
- 27.1.12 **"Street Authority"** has the meaning given in Section 49(1) of the 1991 Act;
- 27.1.13 **"Street Works Licences"** has the meaning given in Section 50(1) of the 1991 Act;
- 27.1.14 **"Sample Inspections"** has the meaning given to it in the Code of Practice entitled Code of Practice for Inspections;
- 27.1.15 **"Traffic Authority"** has the meaning given in Section 121A of the Road Traffic Regulation Act 1984;
- 27.1.16 **"Works for Road Purposes"** has the meaning given in Section 86(2) of the 1991 Act;
- 27.1.17 **"1991 Act"** means the New Roads and Street Works Act 1991;
- 27.1.18 **"affected"** or **"affecting"** shall be regarded as including the meaning given to **"affected"** in Section 105(4) of the 1991 Act; and
- 27.1.19 **"Street Works Register"** means the register referred to in Section 53(1) of the 1991 Act.

27.2 **Primary Duty of Co-ordination**

- 27.2.1 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:
 - 27.2.1.1 in the interests of safety;
 - 27.2.1.2 so as to minimise the inconvenience to persons using the Project Facilities having regard in particular to the needs of people with disabilities; and
 - 27.2.1.3 so as to protect the structure of the Project Facilities and the integrity of Apparatus,

and in accordance with all relevant Codes of Practice.

- 27.2.2 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.

27.3 **The 1991 Act**

- 27.3.1 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.
- 27.3.2 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 27 (Statutory Undertakers).
- 27.3.3 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.
- 27.3.4 Subject to Clauses 27.3.5 and 27.6.2 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.
- 27.3.5 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 Contract Period and the DBFO Co shall pay to the Secretary of State any contribution received if the contribution relates to costs incurred or likely to be incurred outside the Contract Period.
- 27.3.6 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.
- 27.3.7 Other than where the DBFO Co keeps the Street Works Register pursuant to Clause 27.4 (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.

- 27.3.8 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:
- 27.3.8.1 it shall be non-assignable;
 - 27.3.8.2 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 Facilities; and
 - 27.3.8.3 it shall only be exercisable after consultation with any affected Relevant Authority or person owning Apparatus.
- 27.3.9 In performing its obligations and functions pursuant to this Agreement, the DBFO Co shall act in a manner consistent with the following sections of the Project Road having been designated as traffic sensitive within the meaning of Section 64 of the 1991 Act:
- 27.3.9.1 the A5 from the west end of Black/Station Bridge to its junction with the A5025 near Valley, from 1200 hours to 1700 hours, 7 days per week during August;
 - 27.3.9.2 the A5 from its junction with A5025 near Valley to its junction with the A5114, from 1200 to 1800 hours, 7 days per week during July and August;
 - 27.3.9.3 the A5 from its junction with the A5114 to the west end of the Llanfair PG By-pass, from 0800 hours to 1900 hours, 7 days per week;
 - 27.3.9.4 the A55 (currently A5) across Britannia Bridge, from 0800 hours to 2000 hours, 7 days per week;
 - 27.3.9.5 the A487 from its junction with the A5 at Parc Menai to its junction with the A5122 and the A4080, from 0800 hours to 0900 hours and from 1400 hours to 1800 hours, 7 days per week during each month and from 0800 hours to 1900 hours, 7 days per week during July and August; and
 - 27.3.9.6 the A4080 from its junction with the A5122 and A487 to its junction with the B5420 at Menai Bridge, from 1500 hours to 1800 hours, 7 days per week from April to July, September and October inclusive and from 1100 hours to 1800 hours during August.
- 27.3.10 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.
- 27.3.11 The DBFO Co will at all times assist and facilitate the Secretary of State in carrying out, and shall take all steps reasonably necessary to enable the

Secretary of State to comply with, his duties under the 1991 Act, the Regulations and the Codes of Practice.

- 27.3.12 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 27.4 (Contracting Out of Functions) and 27.5 (Management of Operations affecting Apparatus).

27.4 **Contracting Out of Functions**

- 27.4.1 Subject to the provisions of this Clause 27.4 (Contracting Out of Functions) with effect from the Authorisation Date, the DBFO Co shall be 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 all or any of the functions of the Secretary of State listed in Part 1 of Schedule 19 (Authorised Functions) which shall be specified by the Secretary of State by notice to the DBFO Co. The decision whether or not to make 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. Following the Authorisation Date the DBFO Co shall take such actions as are necessary for the efficient transfer of any such function to the DBFO Co.
- 27.4.2 The DBFO Co shall exercise properly and fully each of the Authorised Functions in respect of the Project Facilities with effect from the Authorisation Date for as long as any authorisation made under this Clause 27.4 (Contracting Out of Functions) is effective.
- 27.4.3 Any authorisation made pursuant to this Clause 27.4 (Contracting Out of Functions) in respect of an Authorised Function shall be made on the following terms:
- 27.4.3.1 it shall be non-assignable; and
- 27.4.3.2 the DBFO Co shall not delegate any such Authorised Function but, for the avoidance of doubt, shall be entitled to require its contractors to provide services in relation thereto.
- 27.4.4 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.
- 27.4.5 If, following a request under Clause 27.4.4, 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:
- 27.4.5.1 the function of the Secretary of State which the DBFO Co is authorised to exercise in respect of the Project Facilities; and

- 27.4.5.2 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"**).
- 27.4.6 If following the Authorisation Date any Contracting Out Order 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 26.2 (Procedure), 26.3 (No Fetter on Discretion) and 26.4 (Relevant Considerations) (but for the avoidance of doubt not Clause 26.5 (Refusal of Request)) shall apply mutatis mutandis to any such request.
- 27.4.7 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:
- 27.4.7.1 obey all relevant Legal Requirements, and administrative and procedural requirements;
- 27.4.7.2 not take any decisions or actions which may be considered perverse and liable to be quashed; and
- 27.4.7.3 obey the rules of natural justice.
- 27.4.8 For so long as any authorisation under this Clause 27.4 (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 details of:
- 27.4.8.1 all notices given and received;
- 27.4.8.2 all directions and consents given to Statutory Undertakers;
- 27.4.8.3 all agreements, commitments or compromises reached with Statutory Undertakers with regard to Diversionary Works; and
- 27.4.8.4 any arbitration proceedings commenced or proposed.
- 27.4.9 Without prejudice to the generality of Clause 27.4.8, 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.
- 27.4.10 If the DBFO Co fails to exercise any Authorised Function in the manner set out in Clause 27.4.7 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.
- 27.4.11 If an authorisation under this Clause 27.4 (Contracting Out of Functions) is revoked by the Secretary of State, other than in accordance with Clause 27.4.10, then for the purposes of Section 73 of the Deregulation and

Contracting Out Act 1994 "**relevant contract**" shall mean this Clause 27.4 (Contracting Out of Functions) and no other provision of this Agreement.

- 27.4.12 On the expiry or revocation of an authorisation under this Clause 27.4 (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.

27.5 **Management of Operations Affecting Apparatus**

- 27.5.1 The DBFO Co shall not exercise any Authorised Function prior to the Authorisation Date. Subject to Clause 27.5.3 the DBFO Co shall perform those services set out in Part 2 of Schedule 19 (Services in relation to the Secretary of State's Functions). If at any time an authorisation under Clause 27.4 (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 27.5.3, 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.
- 27.5.2 In addition to its obligations under Clause 27.4 (Contracting Out of Functions) or Clause 27.5.1 (as the case may be) but subject to Clause 27.5.3, the DBFO Co shall throughout the Contract Period perform the services set out in Part 3 of Schedule 19 (Other Services).
- 27.5.3 In carrying out its services pursuant to this Clause 27.5 (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.
- 27.5.4 For the purposes of Clause 27.5.3, 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.

27.6 **The Secretary of State's Responsibility**

- 27.6.1 Without prejudice to the DBFO Co's obligations pursuant to Clause 27.3.12 the Secretary of State shall:
- 27.6.1.1 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 27 (Statutory Undertakers), the DBFO Co will be exercising the Authorised Functions or will be performing the services set out in Clause 27.5 (Management of Operations affecting Apparatus) (as the case may be); and
- 27.6.1.2 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.

- 27.6.2 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 27.3.4.

28. OTHER FUNCTIONS OF THE SECRETARY OF STATE

28.1 Definitions

For the purpose of this Clause 28 (Other Functions of the Secretary of State):

- 28.1.1 **"Highway Authority"** has the same meaning as ascribed in the Highways Act;
- 28.1.2 **"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 28.3.7.3) the provisions of any statute or regulation which the Secretary of State has authorised the DBFO Co to exercise pursuant to Clause 28.3.7;
- 28.1.3 **"Third Party"** means any third party (but excluding any Statutory Undertaker to the extent that the provisions of Clause 27 (Statutory Undertakers) apply in relation to such Statutory Undertaker in any particular case);
- 28.1.3A **"Third Party Authorisation Date"** means in relation to a function conferred on the Secretary of State by the Statutory Provisions the later of the date on which a Contracting Out Order comes into force and the authorisation (if any) of the DBFO Co pursuant to the Order;
- 28.1.4 **"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 28.3.1, Clause 28.3.5 or (subject to Clause 28.3.7.3) Clause 28.3.7;
- 28.1.5 **"Third Party Authorisation Period"** means, in the case of an authorisation pursuant to Clause 28.3.1 and subject to Clause 28.3.2, whichever is shorter of (i) the period from the Third Party Authorisation Date to the expiry of the Contract Period or (ii) the period commencing on the Third Party Authorisation Date and expiring 10 years therefrom or such shorter period as may be specified in the notice giving authorisation, or, in the case of an authorisation pursuant to Clause 28.3.7.3, the period specified in the notice given by the Secretary of State pursuant to Clause 28.3.7.2.2;
- 28.1.6 **"Third Party Renewed Authorisation Period"** has the meaning given in Clause 28.3.5.2; and
- 28.1.7 **"Contracting Out Order"** means an order made pursuant to Sections 69 and 77 of the Deregulation and Contracting Out Act 1994 which provides that any of the functions conferred on the Secretary of State by the Statutory Provisions

may be exercised by, or by the employees of, such person (if any) as may be authorised by the Secretary of State.

28.2 General

- 28.2.1 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.
- 28.2.2 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 28.3 (Contracting Out of Functions) and 28.4 (Management of Operations).

28.3 Contracting Out of Functions

- 28.3.1 Subject to the provisions of this Clause 28.3 (Contracting Out of Functions) with effect from the Third Party Authorisation Date, the DBFO Co shall be 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 all or any of the functions of the Secretary of State listed in Schedule 20 (Contracted Out Functions of the Secretary of State) which shall be specified by the Secretary of State by notice to the DBFO Co. The decision whether or not to make 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. Following the Third Party Authorisation Date the DBFO Co shall take such actions as are necessary for the efficient transfer of any such function to the DBFO Co.
- 28.3.2 The DBFO Co shall exercise properly and fully each of the Third Party Authorised Functions in respect of the Project Facilities from the Third Party Authorisation Date for as long as any authorisation made under this Clause 28.3 (Contracting Out of Functions) is effective.
- 28.3.3 Any authorisation made pursuant to this Clause 28.3 (Contracting Out of Functions) in respect of a Third Party Authorised Function shall be made on the following terms:
 - 28.3.3.1 it shall be non-assignable; and
 - 28.3.3.2 the DBFO Co shall not delegate any such Third Party Authorised Function but, for the avoidance of doubt, it shall be entitled to require its contractors to provide services in relation thereto.
- 28.3.4 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.

- 28.3.5 If, following a request under Clause 28.3.4, 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:
- 28.3.5.1 the function of the Secretary of State which the DBFO Co is authorised to exercise in respect of the Project Facilities; and
 - 28.3.5.2 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"**).
- 28.3.6 If following the Third Party Authorisation Date any Contracting Out Order 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 26.2 (Procedure), 26.3 (No Fetter on Discretion) and 26.4 (Relevant Considerations) (but for the avoidance of doubt not Clause 26.5 (Refusal of Request)) shall apply mutatis mutandis to any such request.
- 28.3.7 The DBFO Co may at any time and from time to time following the coming into force of the Contracting Out Order 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 to which such Contracting Out Order applies and which are relevant to the Project Facilities (other than those functions authorised pursuant to Clause 28.3.1 and Clause 27.4.1) and the following provisions shall apply to any such request by the DBFO Co:
- 28.3.7.1 the provisions of Clauses 26.2 (Procedure), 26.3 (No Fetter on Discretion) and 26.4 (Relevant Considerations) (but for the avoidance of doubt not Clause 26.5 (Refusal of Request)) shall apply mutatis mutandis in relation to any such request pursuant to this Clause 28.3.7;
 - 28.3.7.2 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:
 - 28.3.7.2.1 the function(s) of the Secretary of State which the DBFO Co is authorised to exercise in respect of the Project Facilities; and
 - 28.3.7.2.2 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
 - 28.3.7.3 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 28 (Other Functions of the Secretary of State) applicable to Third Party Authorised Functions (other than this Clause 28.3.7) 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 28.3.7 in whole or in part shall not be subject to review under the Disputes Resolution Procedure.

- 28.3.8 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:
- 28.3.8.1 obey all relevant Legal Requirements, and administrative and procedural requirements;
 - 28.3.8.2 not take any decisions or actions which may be considered perverse and liable to be quashed in a court of law; and
 - 28.3.8.3 obey the rules of natural justice.
- 28.3.9 For so long as any authorisation under this Clause 28.3 (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 details of:
- 28.3.9.1 all notices given and received;
 - 28.3.9.2 all directions, permissions and consents given to Third Parties in the exercise of any Third Party Authorised Functions;
 - 28.3.9.3 all agreements, commitments or compromises reached with Third Parties in the exercise of any Third Party Authorised Functions; and
 - 28.3.9.4 any legal proceedings (including 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.
- 28.3.10 Without prejudice to the generality of Clause 28.3.9, 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 any appeals) commenced against the DBFO Co in respect of any Statutory Provision or the exercise of any Third Party Authorised Function.
- 28.3.11 If the DBFO Co fails to exercise any Third Party Authorised Function in the manner referred to in Clause 28.3.8 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.
- 28.3.12 If an authorisation under this Clause 28.3 (Contracting Out of Functions) is revoked by the Secretary of State, other than in accordance with Clause 28.3.11, then for the purposes of Section 73 of the Deregulation and Contracting Out Act 1994 "**relevant contract**" shall mean this Clause 28.3 (Contracting Out of Functions) and no other provision of this Agreement.

- 28.3.13 On the expiry or revocation of an authorisation under this Clause 28.3 (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.

28.4 Management of Operations

- 28.4.1 The DBFO Co shall not exercise any Third Party Authorised Function prior to the Third Party Authorisation Date. Subject to Clause 28.4.5 unless and until otherwise directed by the Secretary of State the DBFO Co shall instead perform those services set out in Clause 28.4.2 insofar as they apply to the same functions of the Secretary of State as the Statutory Provisions.
- 28.4.1.1 if at any time and from time to time an authorisation under Clause 28.3 (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 28.4.5 and unless otherwise directed by the Secretary of State, the DBFO Co shall instead perform those services set out in Clause 28.4.2 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;
- 28.4.1.2 if at any time and from time to time 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 28.4.5 and unless otherwise directed by the Secretary of State, the DBFO Co shall perform those services set out in Clause 28.4.2 insofar as they apply to the Other Function.
- 28.4.2 In the circumstances referred to in Clauses 28.4.1.1 and 28.4.1.2, in relation to:
- 28.4.2.1 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;
- 28.4.2.2 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;

- 28.4.2.3 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;
- 28.4.2.4 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;
- 28.4.2.5 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
- 28.4.2.6 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.
- 28.4.3 As part of the Liaison Procedures the DBFO Co shall establish with the Department's Representative a procedure for the communication of the matters referred to in Clause 28.4.2 to the Secretary of State.
- 28.4.4 Without limitation to Clause 3.4 (Standard of Performance), the DBFO Co shall deal with all matters relating to its obligations pursuant to Clause 28.4.2 in a timely and expeditious manner so as to enable the Secretary of State to discharge or exercise any relevant duty, power or discretion within the time required by Law.
- 28.4.5 In carrying out its services pursuant to this Clause 28.4 (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.
- 28.4.6 For the purposes of Clause 28.4.5, 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.

- 28.4.7 Actions taken by the DBFO Co pursuant to this Clause 28.4 (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 28.4.2 shall not be subject to review under the Disputes Resolution Procedure.

28.5 The Secretary of State's Responsibility

Without prejudice to the DBFO Co's obligations pursuant to Clause 28.2.2, the Secretary of State shall:

- 28.5.1 from time to time, at the request of the DBFO Co, notify Third Parties that, subject to the terms and conditions set out in this Clause 28 (Other Functions of the Secretary of State) and following the Third Party Authorisation Date, the DBFO Co will be exercising the Third Party Authorised Functions or will be performing the services set out in Clause 28.4 (Management of Operations) (as the case may be); and
- 28.5.2 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.

29. OTHER THIRD PARTIES

29.1 Third Party Claims

- 29.1.1 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.
- 29.1.2 If the DBFO Co receives any Claim from a third party relating wholly to any period prior to the Commencement Date (or prior to 1st April 1999 in relation to the Existing Road (including any operation or maintenance thereof), save to the extent caused or contributed by the DBFO Co), it shall promptly forward such Claim to the Secretary of State. The DBFO Co shall have no liability to the Secretary of State or any third parties in respect of any such Claims forwarded to the Secretary of State. All other Claims from third parties shall be dealt with in accordance with the provisions of Clause 38 (Indemnities).

29.2 Claims Against Third Parties

- 29.2.1 As between the Secretary of State and the DBFO Co, the DBFO Co will bear, without recourse to the Secretary of State, any Claim or Loss suffered by the Secretary of State, the DBFO Co, his or its agents, contractors or sub-contractors of any tier or the employees of any of them which is caused by the acts or omissions of any User of the Project Facilities (other than the Existing Road prior to 1st April 1999) including any damage to property, any personal

injury or death, and any loss of income (including any reduction in DBFO Payments).

29.2.2 For the avoidance of doubt, nothing in Clause 29.2.1 shall affect:

29.2.2.1 any right of the Secretary of State to make or recover any Claim against any person referred to in Clause 29.2.1 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

29.2.2.2 any right of the DBFO Co to make or recover any Claim against any person referred to in Clause 29.2.1 for damage suffered by the DBFO Co, its agents, contractors or sub-contractors of any tier, or the employees of any of them.

29.3 **Conduct of Claims Against Third Parties**

29.3.1 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 9.2.1 or Clause 29.2.1 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.

29.3.2 With respect to any action brought under Clause 29.3.1 and without prejudice to any terms which the Secretary of State may reasonably require in accordance with such Clause 29.3.1:

29.3.2.1 the DBFO Co shall keep the Secretary of State fully informed about the conduct of any such action;

29.3.2.2 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

29.3.2.3 the DBFO Co shall not settle any such action 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 settlement of any action if the amount of the claim at issue does not exceed £10,000 (in January 1998 prices).

29.4 **Police**

The DBFO Co shall comply at all times with all instructions of the police in respect of the Project Facilities.

29.5 **Interested Parties**

29.5.1 The DBFO Co shall discharge the Requirements of Interested Parties.

- 29.5.2 Without limitation to Clause 29.5.1, the DBFO Co shall be responsible for discharging any lawful requirements of any Relevant Authorities of which the DBFO Co has notice or ought reasonably to be aware from time to time.

29.6 Abnormal Indivisible Loads

- 29.6.1 The Secretary of State shall promptly advise the DBFO Co of any notice it receives of any Abnormal Indivisible 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 Indivisible Load and for carrying out any necessary related works.
- 29.6.2 For the avoidance of doubt, the provisions of Clause 29.2.1 shall apply in respect of any Claim or Loss arising directly or indirectly as a result of any such Abnormal Indivisible Load.

29.7 Litter Authority

- 29.7.1 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.
- 29.7.2 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 29.7.1, the DBFO Co shall procure access for the Relevant Authority in accordance with Clause 13.4.2 to discharge the duties under Sections 89(1) and 89(2) of the Environmental Protection Act 1990.

29.8 Shared Facilities

- 29.8.1 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 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.
- 29.8.2 Without prejudice to Clause 29.8.1, 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:
- 29.8.2.1 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
- 29.8.2.2 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.

- 29.8.3 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:
- 29.8.3.1 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
 - 29.8.3.2 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.

PART IV PAYMENTS

30. MEASUREMENT OF TRAFFIC

30.1 Measurement Method

At all times from and after the date of issue of the Permit to Use, the traffic using the Project Road, other than the De-Trunked Segments, shall be continuously Measured by the DBFO Co at each Measurement Point using the Measuring Equipment.

30.2 Measurement Points

30.2.1 Each of the following shall be a Measurement Point for the purposes of this Agreement:

30.2.1.1 each of the points so designated on drawing numbered 964057/RLMP/301; and

30.2.1.2 if, as a result of any Subsequent Scheme or Additional Works, the Measurement Points specified in Clause 30.2.1.1 shall be insufficient or inadequate to Measure the traffic using the Project Road to a level of accuracy equivalent to that prior to the Subsequent Scheme or Additional Works, such other point or points as necessary to Measure traffic.

30.2.2 If there is any Dispute between the DBFO Co and the Department's Representative as to the need for or location of any Measurement Point referred to in Clause 30.2.1.2 or as to any amendment required to Part 6 of Schedule 9 (Road Lengths) as a consequence of the addition, deletion or change of location of any such Measurement Point, such Dispute shall at the request of either party be submitted to the Disputes Resolution Procedure. In no case shall the addition, deletion or change of location of a Measurement Point have an adverse financial effect upon either Party.

30.2.3 The Secretary of State shall bear the cost of any additional Measurement Point required pursuant to Clause 30.2.1.2 as a result of any Additional Works. The DBFO Co shall bear the cost of any other Measurement Point required pursuant to Clause 30.2.1.2 as a result of any Subsequent Scheme.

30.3 Measuring Equipment

30.3.1 The DBFO Co shall provide and install (at its own cost, save as provided in Clause 30.2.3) the following equipment which, for the avoidance of doubt, may be used to collect real time traffic data pursuant to paragraph 14 of Section C of Part 1 of Schedule 17 (the "**Measuring Equipment**") at each Measurement Point:

30.3.1.1 one set of vehicle detection equipment meeting the specification set out in Section A of Part 1 and Section A of Part 2 of Schedule 17 (Communications Requirements);

- 30.3.1.2 all other measuring and verification equipment (together with necessary housings, appliances and buildings) required to Measure the traffic passing the Measurement Point; and
- 30.3.1.3 such cables or other means of electronic data transmission as necessary to connect the equipment referred to in Clauses 30.3.1.1 and 30.3.1.2 to the public service telephone network and so as to enable the Secretary of State directly to interrogate the Measuring Equipment.
- 30.3.2 The Measuring Equipment shall be capable of classifying each vehicle passing the Measurement Point into one of the following categories:
 - 30.3.2.1 HGVs; and
 - 30.3.2.2 Other Vehicles.
- 30.3.3 Not used.
- 30.3.4 The Measuring Equipment shall include such alternative facilities as may reasonably be required to ensure that failure or withdrawal for maintenance or adjustment of any individual component does not materially affect the Measurement of traffic by the Measuring Equipment.
- 30.3.5 Prior to the installation or replacement of any component of the Measuring Equipment which may materially affect the accuracy of Measurement of such Measuring Equipment, the DBFO Co shall notify the Department's Representative of the design and type of such equipment and such notice shall be dealt with under the Review Procedure.
- 30.3.6 Without limitation to any other provision of this Clause 30.3, the DBFO Co shall design, supply, install, test, commission, maintain, repair, replace and operate all Measuring Equipment in accordance with the provisions of Schedule 17 (Communications Requirements) and with Good Industry Practice.
- 30.3.7 The Secretary of State shall be entitled at any time and from time to time to install and operate (at his own expense and risk) at any Measurement Point:
 - 30.3.7.1 measuring equipment to check the Measurement of the traffic at such Measurement Point; and/or
 - 30.3.7.2 equipment linked directly to the Measuring Equipment,
 to provide at the Secretary of State's premises independent confirmation and/or direct readings of the Measurement of the traffic at such Measurement Point.
- 30.3.8 Any equipment installed by the Secretary of State pursuant to Clause 30.3.7 shall be compatible with and shall not interfere with the use or operation of the Measuring Equipment.

30.4 **Verification**

- 30.4.1 The DBFO Co may at any time submit to the Department's Nominee, in accordance with the Review Procedure, any proposed revision to the

Verification methodology referred to in paragraph 3 of Section A of Part 2 of Schedule 17 (Communications Requirements) or paragraph 3 of Section B of Part 2 of Schedule 17 (Communications Requirements) (as previously revised in accordance with this Clause 30.4.1). The Department's Nominee may object to any such proposed revision only on the grounds that the proposed verification methodology would not meet all of the requirements of paragraph 6 of Section A of Part 1 of Schedule 17 (Core Communications Requirements) or paragraph 6 of Section B of Part 1 of Schedule 17 (Core Communications Requirements) (as applicable). From the date on which there has been no objection to any such revised Verification methodology under the Review Procedure, the DBFO Co shall comply with such revised Verification methodology.

- 30.4.2 The DBFO Co shall Verify the Measuring Equipment at each Measurement Point at least once in every 90 days or at such other frequency as may be agreed by the Department's Representative. Without limitation to Clause 30.7.1 the DBFO Co shall adjust such Measuring Equipment to read centrally and accurately within the limits of accuracy set out in paragraph 2 of Section A of Part 1 of Schedule 17 (Core Communications Requirements) (the "**Measurement Limits of Accuracy**").
- 30.4.3 The DBFO Co shall give to the Department's Representative reasonable notice of the date and time of any Verification pursuant to Clause 30.4.2 and the Department's Representative shall be entitled to attend and witness any such Verification. The Department's Representative may require the DBFO Co to Verify any Measuring Equipment at any other time.
- 30.4.4 Verifications shall be made at the expense of the DBFO Co, except that the Secretary of State shall bear the costs of the attendance of the Department's Representative at any Verification and the whole expense of any Verification (other than periodic) made at the request of the Department's Representative if the Measuring Equipment is found to be registering within the Measurement Limits of Accuracy.

30.5 **Collection of Data**

- 30.5.1 The DBFO Co shall procure that the Traffic Data is collected at such times and in such format as will enable the DBFO Co to prepare the Monthly Report.
- 30.5.2 Subject to Clause 30.7.2, if there is more than one set of vehicle detection equipment measuring the same flow of traffic at a Measurement Point, then the traffic passing the Measurement Point during any period shall be deemed to be the average of the figures produced by each of such sets of vehicle detection equipment during such period. Such average shall be calculated and provided to the Secretary of State in the Monthly Report together with the figures produced for each of such sets of vehicle detection equipment.

30.6 **Inspection and Auditing**

The Department's Representative shall be entitled at all reasonable times to inspect:

- 30.6.1 any Measuring Equipment; and

- 30.6.2 any charts or other measurement or test data relating to the Measuring Equipment.

30.7 **Correction of Defects**

- 30.7.1 If at any time any Measuring Equipment is found to be defective or measuring outside the Measurement Limits of Accuracy, the DBFO Co shall as soon as practicable adjust such equipment to read centrally and accurately within such limits or (if that is not possible) shall replace it with serviceable equipment.
- 30.7.2 If the Measuring Equipment referred to in Clause 30.7.1 (the "**Defective Equipment**") comprises only one of two or more sets of vehicle detection equipment at a Measurement Point, then the calculation for the relevant Measurement Point pursuant to Clause 30.5.2 shall be retrospectively corrected, excluding from such calculations the data from such defective set of vehicle detection equipment from the time when such set of vehicle detection equipment became defective or (where that time cannot be established) from the time which is the mid-point between the last Verification which indicated that the set of vehicle detection equipment was operating within the Measurement Limits of Accuracy and the next following Verification.
- 30.7.3 In all other circumstances where there is any Defective Equipment, the Traffic Data from the relevant Measurement Point or (where there are two or more sets of vehicle detection equipment at a Measurement Point) the calculations for the relevant Measurement Point pursuant to Clause 30.5.2 shall be retrospectively corrected from the time when such equipment became defective (or where two or more sets of vehicle detection equipment are defective, from the time when the second such set of vehicle detection equipment became defective) or (where that time cannot be established) from the time which is the mid-point between the last Verification which indicated that the equipment was operating within the Measurement Limits of Accuracy and the next following Verification.
- 30.7.4 Calculations shall be corrected for purposes of Clause 30.7.3 by applying the methods set out below in the order in which they appear:
- 30.7.4.1 by using the readings recorded by any check measuring equipment, provided that such equipment is operating within the Measurement Limits of Accuracy. If such equipment is not operating accurately or if no such equipment has been installed, then
- 30.7.4.2 by correcting the error if the percentage of error is ascertainable to the satisfaction of the DBFO Co and the Department's Representative by calibration, test or mathematical calculation. If the percentage of error is not so ascertainable, then
- 30.7.4.3 by using readings recorded at the Measurement Point containing the Defective Equipment before and after the period the equipment was defective and at adjacent Measurement Points before during and after the period the equipment was defective, provided always that the relevant equipment was operating within the Measurement Limits of Accuracy during such times. If there is any Dispute between the DBFO Co and the Department's Representative on the

resulting corrections then such Dispute shall at the request of either be submitted to the Disputes Resolution Procedure.

31. CALCULATION OF PAYMENTS

31.1 DBFO Payments

- 31.1.1 In consideration for the conduct of the Operations, the Secretary of State shall pay to the DBFO Co in respect of each Contract Year an amount (the "**DBFO Payment**") determined in accordance with the following formula:

$$P = \sum_{m=1}^x TP - LCC + SPA$$

where:

P	=	the DBFO Payment in respect of the Contract Year.
x	=	the number of months in the relevant Contract Year.
TP	=	the Traffic Payment in respect of the Contract Year, calculated in accordance with Part 2 of Schedule 9 (Traffic Payment).
LCC	=	the Lane Closure Charge in respect of the Contract Year, calculated in accordance with Part 3 of Schedule 9 (Lane Closure Charge).
SPA	=	the Safety Performance Adjustment in respect of the Contract Year (which may be positive or negative), calculated in accordance with Part 4 of Schedule 9 (Safety Performance Adjustment).

- 31.1.2 Monthly instalments in respect of the DBFO Payment in respect of a Contract Year shall be paid in accordance with Clause 31.2 (Monthly Payments). The aggregate of such monthly instalments shall be adjusted in accordance with Clause 31.3 (Annual Reconciliation).

31.2 Monthly Payments

- 31.2.1 Not used.
- 31.2.2 For each whole calendar month during the period in the PTU Contract Year following the month in which the Permit to Use is issued, the Secretary of State shall pay to the DBFO Co, as the Monthly Traffic Payment, an amount which is equal to 90% of the Monthly Traffic Payment due to the DBFO Co for each such month as derived from and calculated in accordance with the Base Case.
- 31.2.3 Subject to Clause 31.2.4, the Secretary of State shall pay to the DBFO Co in respect of each month during a Contract Year following the PTU Contract Year, as a provisional payment in respect of the Traffic Payment for that Contract Year, an amount calculated in accordance with the following formula:

$$MTP_n = \frac{TP_{n-1}}{TPDays_{n-1}} \times \frac{365}{12}$$

where:

- MTP_n = the Monthly Traffic Payment for each month in that Contract Year n .
- TP_{n-1} = the Traffic Payment payable in Contract Year $n-1$.
- $TPDays_{n-1}$ = (a) if Contract Year n is the Contract Year immediately following the PTU Contract Year, the number of days in Contract Year $n-1$ from and including the date of issue of the Permit to Use; and
- (b) for all subsequent Contract Years, 365.

- 31.2.4 If the Traffic Payment for the preceding Contract Year has not been determined in accordance with Part 2 of Schedule 9 (Traffic Payment) at the time the Monthly Traffic Payment in respect of any month is to be determined for the purposes of Clause 31.2.3, then the Monthly Traffic Payment applicable immediately prior to the beginning of the Contract Year in which such month falls shall be used as the Monthly Traffic Payment in respect of such month. For the avoidance of doubt, once the Traffic Payment for the preceding Contract Year has been determined, the Monthly Traffic Payment in respect of all subsequent months in the Contract Year in question shall be determined as provided in Clause 31.2.3, but no adjustment shall be made in respect of any Monthly Traffic Payments previously made other than in accordance with Clause 31.3 (Annual Reconciliation).

31.3 **Annual Reconciliation**

- 31.3.1 Not later than 28 days following the end of each Contract Year the DBFO Co shall notify the Secretary of State of the following information:
- 31.3.1.1 the actual DBFO Payment in respect of such Contract Year, determined in accordance with Clause 31.1.1;
- 31.3.1.2 the total of the Monthly Traffic Payments paid in respect of such Contract Year;
- 31.3.1.3 the amount payable by the Secretary of State to the DBFO Co in respect of the DBFO Payment, being the amount by which the amount in Clause 31.3.1.1 exceeds the amount in Clause 31.3.1.2, or the amount payable by the DBFO Co to the Secretary of State in respect of the DBFO Payment, being the amount by which the amount in Clause 31.3.1.2 exceeds the amount in Clause 31.3.1.1;
- 31.3.1.4 any VAT payable on the amount payable pursuant to Clause 31.3.1.3 or, where the amount is payable to the Secretary of State, the amount of VAT overpaid by the Secretary of State;

- 31.3.1.5 any other adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);
- 31.3.1.6 Not used.
- 31.3.1.7 any interest payable in respect of any amounts owed; and
- 31.3.1.8 the net amount owing by the Secretary of State to the DBFO Co or by the DBFO Co to the Secretary of State.
- 31.3.2 The notice given pursuant to Clause 31.3.1 (the "**Annual Reconciliation Notice**") shall be accompanied by work papers clearly setting forth the derivation of the figures set out in the Annual Reconciliation Notice. The work papers shall illustrate, inter alia, the calculation of:
 - 31.3.2.1 the DBFO Payment (following the formula specified in Clause 31.1.1) and showing separately the calculation of the Traffic Payment in accordance with Part 2 of Schedule 9 (Traffic Payment), the calculation of the Lane Closure Charge in accordance with Part 3 of Schedule 9 (Lane Closure Charge) and the calculation of the Safety Performance Adjustment in accordance with Part 5 of Schedule 9 (Safety Performance Adjustment);
 - 31.3.2.2 any adjustments to reflect previous over-payments and/or under-payments; and
 - 31.3.2.3 Not used.
 - 31.3.2.4 if the Annual Reconciliation Notice reflects any amounts due and owing on which interest is payable, the amount of interest.

31.4 **Britannia Bridge Payments**

The Secretary of State shall promptly inform the DBFO Co of the source and amount of any sum recovered from third parties pursuant to clause 12(e) of the Britannia Bridge Agreement. The DBFO Co shall be entitled to claim such sum in accordance with Clause 32.1.2.4 provided that the Secretary of State shall be entitled to deduct and retain any reasonable administrative expenses in respect of the recovery of and accounting for such sums.

32. **INVOICING AND PAYMENT**

32.1 **Monthly Invoices**

- 32.1.1 The Monthly Traffic Payment shall be payable by the Secretary of State to the DBFO Co monthly in arrears.
- 32.1.2 Within 10 days following the last day of each month in each Contract Year, the DBFO Co shall deliver to the Secretary of State a report setting out the payments payable in respect of such month. The report shall show:

- 32.1.2.1 the Monthly Traffic Payment for the relevant month;
 - 32.1.2.2 any VAT payable for the relevant month;
 - 32.1.2.3 any adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);
 - 32.1.2.4 any other amount due and payable from one Party to the other under this Agreement other than any amount due and payable pursuant to any indemnity or right of reimbursement granted by the DBFO Co to the Secretary of State under this Agreement including amounts due and payable pursuant to Clause 38.1 (DBFO Co's Indemnities);
 - 32.1.2.5 any interest payable in respect of any amounts owed under this Agreement other than any interest payable in respect of any amounts due and payable pursuant to any indemnity or right of reimbursement granted by the DBFO Co to the Secretary of State under this Agreement including amounts due and payable pursuant to Clause 38.1 (DBFO Co's Indemnities); and
 - 32.1.2.6 the net amount owing by the Secretary of State to the DBFO Co or by the DBFO Co to the Secretary of State.
- 32.1.3 The report delivered pursuant to Clause 32.1.2 shall be accompanied by work papers clearly setting forth the derivation of the Monthly Traffic Payment, all other charges and any adjustments. The work papers shall illustrate, inter alia, the calculation of:
- 32.1.3.1 the Monthly Traffic Payment;
 - 32.1.3.2 any adjustments to the invoice to reflect previous over-payments or under-payments;
 - 32.1.3.3 any other amount due and payable from one Party to the other under this Agreement; and
 - 32.1.3.4 if the invoice reflects any amounts due and owing on which interest is being charged, the amount of interest.
- 32.1.4 If the report delivered pursuant to Clause 32.1.2 shows a net amount owing by the Secretary of State to the DBFO Co, it shall be accompanied by an invoice from the DBFO Co to the Secretary of State in respect of such amount (which invoice shall separately identify any additional VAT payable by the Secretary of State). If the report shows a net amount owing by the DBFO Co to the Secretary of State, the Secretary of State shall issue a debit note to the DBFO Co in respect of such amount promptly following his receipt of such report (which debit note shall separately identify any VAT overpaid by the Secretary of State).

32.2 **Annual Invoices**

- 32.2.1 If the Annual Reconciliation Notice shows an amount payable by the DBFO Co to the Secretary of State, the Secretary of State shall issue a debit note to the DBFO Co in respect of such amount promptly following his receipt of the

Annual Reconciliation Notice (which debit note shall separately identify any VAT overpaid by the Secretary of State).

- 32.2.2 If the Annual Reconciliation Notice shows an amount payable by the Secretary of State to the DBFO Co, the DBFO Co shall issue an invoice to the Secretary of State in respect of such amount together with the Annual Reconciliation Notice (which invoice shall separately identify any additional VAT payable by the Secretary of State).

32.3 **Secretary of State's Invoices**

- 32.3.1 If the DBFO Co fails to issue any report or invoice within the time period required pursuant to Clause 32.1 (Monthly Invoices) or Clause 32.2 (Annual Invoices) the Secretary of State may himself prepare such report or invoice and the report or invoice so prepared shall be deemed to have been issued by the DBFO Co.

- 32.3.2 The Secretary of State shall deliver an invoice to the DBFO Co in respect of:

- (i) any sum or sums incurred or to be incurred by him in respect of which he is entitled to be indemnified or reimbursed by the DBFO Co pursuant to this Agreement including interest on any such sum or sums which the Secretary of State is or will be liable to pay to a third party up to and including the date of payment by the Secretary of State to such third party and including any sum or sums incurred or to be incurred by him pursuant to Clause 38.1 (DBFO Co's Indemnities); and
- (ii) any interest thereon at the rate set out in Clause 32.6.3 from the date the expenditure was incurred by the Secretary of State up to the due date,

together with reasonable evidence of such sums.

32.4 **Due Date for Payments**

- 32.4.1 Without prejudice to Clause 32.4.5 (Due Date for Payments) and Clause 32.6 (Disputed Amounts), the Secretary of State shall pay to the DBFO Co the amount of an invoice issued by the DBFO Co pursuant to Clause 32.1.4 not later than the later of:

32.4.1.1 the last day of the month following the month to which the invoice relates; or

32.4.1.2 the twentieth day after the Secretary of State has received both the said invoice and the Monthly Report in respect of such month.

- 32.4.2 Without prejudice to Clause 32.6 (Disputed Amounts), the DBFO Co shall pay to the Secretary of State the amount of a debit note issued by the Secretary of State pursuant to Clause 32.1.4 not later than the later of:

32.4.2.1 the last day of the month following the month to which the debit note relates; or

- 32.4.2.2 the twentieth day after the DBFO Co has received the said debit note.
- 32.4.3 Without prejudice to Clause 32.6 (Disputed Amounts), the Secretary of State shall pay to the DBFO Co the amount of an invoice issued by the DBFO Co pursuant to Clause 32.2.2 not later than the later of:
- 32.4.3.1 30 days after receipt of such invoice; or
- 32.4.3.2 the twentieth day after the Secretary of State has received all of the said invoice, the Annual Reconciliation Notice in respect of the relevant Contract Year and the Annual Report in respect of such Contract Year.
- 32.4.4 Without prejudice to Clause 32.6 (Disputed Amounts), the DBFO Co shall pay to the Secretary of State the amount of a debit note issued by the Secretary of State pursuant to Clause 32.2.1 or an invoice issued by the Secretary of State pursuant to Clause 32.3.2 not later than 30 days after receipt of such debit note or in the case of an invoice issued pursuant to Clause 32.3.2, 30 days after receipt of such invoice and the reasonable evidence supplied therewith.
- 32.4.5 Not used.
- 32.4.6 Should the original due date for any payment pursuant to this Agreement not be a Working Day, then the due date shall be the Working Day next following the original due date.

32.5 **Payments**

All payments under this Agreement shall be made in pounds sterling for value on the due date to the bank account of the recipient (located in the United Kingdom) specified in the invoice or debit note, quoting the invoice or debit note number against which payment is made.

32.6 **Disputed Amounts**

- 32.6.1 Either Party shall have the right to dispute, in good faith, any amount specified in an invoice or debit note referred to in this Agreement. The Party disputing any such amount shall pay such amount of the invoice or debit note in question as is not in dispute and shall be entitled to withhold the balance pending resolution of the Dispute.
- 32.6.2 The Parties shall use all reasonable endeavours to resolve the Dispute in question within 30 days of the Dispute arising. If they fail so to resolve it, either Party may refer the matter to the Disputes Resolution Procedure.
- 32.6.3 Following resolution of the Dispute, any amount agreed or adjudged to be due shall promptly on demand be paid, together with interest thereon at a rate per annum equal to the Interest Rate plus 1 per cent per annum from the day after the date on which payment was due to (and including) the date of payment.

32.7 Late Payments

If any undisputed payment due under this Agreement remains unpaid after its due date, such payment shall bear interest at a rate per annum equal to the Interest Rate plus 2 per cent per annum from the day after the date on which the payment was due to (and including) the date of payment. The right of either Party to receive interest in respect of the late payment of any sum due shall be without prejudice to such other rights as that Party may have under this Agreement.

32.8 Satisfaction of Obligation

If the calculation of any amounts payable by the Secretary of State under this Agreement would (otherwise than for this Clause 32.8 (Satisfaction of Obligation)) require the Secretary of State to pay an amount to more than one person or more than once within the same provision or under more than one provision of this Agreement, in respect of the same costs, expense, liability or obligation, the Secretary of State's obligations in respect thereof shall be discharged if and to the extent that payment of such amount is paid once only.

32.9 Set-Off

Whenever any sum of money shall be recoverable from or payable by the DBFO Co under this Agreement, such sum may be deducted from or reduced by the amount of any sum then due or which at any time thereafter may become due to the DBFO Co under this Agreement or any other contract between the DBFO Co and any department, office, instrumentality or agency of the Government.

32.10 Examination of Records

Without limitation to Clause 24.2 (Audit), the Secretary of State shall have the right at reasonable hours upon giving the DBFO Co reasonable notice and at its own expense to examine the books and records of the DBFO Co relative to this Agreement to the extent necessary to verify the accuracy of any accounting statement, charge, computation or claim made pursuant to any of the provisions of this Agreement, provided that:

32.10.1 such books and records need not (unless the same contain information relating to a bona fide Dispute) be preserved longer than the period specified in respect of such books or records in Part 1 of Schedule 14 (Records) or (if no such period is so specified) a period of 7 years after the end of the Contract Year to which such books or records refer;

32.10.2 if any such examination reveals any inaccuracy in any invoice theretofore made, the necessary adjustments in such invoice and payment shall be made within 14 days after the date that such inaccuracy is established by agreement or adjudication; and

32.10.3 such right to examine must be exercised within the period specified for retention of such books or records in Part 1 of Schedule 14 (Records) or (if no such period is so specified) a period of 7 years after the end of the Contract Year to which the books or records being examined refer.

PART V
CHANGE, LIABILITIES AND TERMINATION

33. 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, or User Paid Tolls are introduced, withdrawn or changed, the provisions of Schedule 12 (Change) shall apply.

34. CHANGE IN LAW

34.1 Relevant Change in Law

34.1.1 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 2.1 of Part 1 of Schedule 12 (General Change Procedure) and the General Change Procedure shall apply in accordance with Part 4 of Schedule 12 (Compensation Events).

34.1.2 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 Part 4 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 34.1.2. 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.

34.2 Deemed Department's Change

34.2.1 Where the DBFO Co believes that a Change in Law constitutes a Deemed Department's Change, it may serve a notice (a "**Deemed Department's Change Notice**") to that effect on the Department's Nominee.

34.2.2 The Deemed Department's Change Notice shall:

34.2.2.1 identify the relevant Change in Law;

34.2.2.2 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

34.2.2.3 set out the basis of its belief that the same should have been effected by means of a Department's Change.

- 34.2.3 Within 60 days of receipt of the Deemed Department's Change Notice, the Department's Nominee shall notify the DBFO Co that either:
- 34.2.3.1 it agrees that a Deemed Department's Change has occurred; or
 - 34.2.3.2 it 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.
- 34.2.4 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 Part 2 of Schedule 12 (Department's Change) shall apply.
- 34.2.5 Where the Department's Nominee gives a notice under Clause 34.2.3.2, the Parties shall negotiate for a period of 60 days in an attempt to agree:
- 34.2.5.1 whether a Deemed Department's Change has occurred; and
 - 34.2.5.2 where a Deemed Department's Change has occurred, the effect, if any, it has on the Works and/or the Operations.
- 34.2.6 If the Parties fail to agree any matter referred to in Clause 34.2.5 within such 60 day period, then either Party may refer the Dispute to the Disputes Resolution Procedure.
- 34.2.7 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 Part 2 of Schedule 12 (Department's Change) shall apply.

35. ADDITIONAL WORKS AND SUBSEQUENT SCHEMES

35.1.1 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).

- 35.1.2 The Secretary of State shall use his best endeavours to procure that any Additional Works Contractor provides to the DBFO Co a collateral warranty in favour of the DBFO Co warranting the performance of the Additional Works Contractor's obligations in respect of the Additional Works.

35.2 Compensation

- 35.2.1 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).

35.2.2 The provisions of Part 3 of Schedule 12 (Additional Works) shall apply with respect to any Change in Costs or Change in Revenues of the DBFO Co consequential upon the carrying out of any Additional Works.

35.3 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.

35.4 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. FORCE MAJEURE

36.1 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.

36.2 Notice

Relief under Clause 36.1 (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 the actions being taken to remedy such failure to perform and an estimate of the period of time required to remedy such failure.

36.3 Obligation to Remedy

As soon as practicable after the occurrence of an event of Force Majeure the Party affected shall take all reasonably necessary steps to remedy the failure to perform and relief under this Clause 36 (Force Majeure) shall cease to be available to a Party if it fails so to take all reasonably necessary steps to remedy the failure.

36.4 Consequences of Force Majeure

36.4.1 If the Parties agree or it is determined through the Disputes Resolution Procedure that Force Majeure has, prior to the issue of the Permit to Use prevented the DBFO Co from, or delayed the DBFO Co in, completing the Works to such extent and standard as would require the issue of the Permit to Use, the DBFO Co may make application to the Department's Agent for an extension of time for completion of the Works pursuant to Clause 11.6 (Extension of Time). Where a grant of extension of time is made in accordance with Clause 11.6, the Contract Period shall be extended by an equivalent period;

- 36.4.2 If the Parties agree or it is determined through the Disputes Resolution Procedure that Eligible Force Majeure:
- 36.4.2.1 has, after the issue of the Permit to Use but prior to the issue of the Completion Certificate, delayed the DBFO Co in completing the Works then, and subject always to Clause 36.5, the Contract Period shall be extended by a period agreed between the Parties or determined under the Disputes Resolution Procedure to be equal to the period of such delay;
- 36.4.2.2 has, prior to the issue of the Completion Certificate, caused damage to the Works then, and subject always to Clause 36.5:
- 36.4.2.2.1 the DBFO Co shall give notice thereof to the Department's Agent together with details of the effect thereof and the proposed steps to rectify the damage and the costs thereof;
- 36.4.2.2.2 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;
- 36.4.2.2.3 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 Part 2 of Schedule 12 (Department's Change) shall apply, except that:
- 36.4.2.2.3.1 the DBFO Co shall not be entitled to give a notice under paragraph 2.1 of Part 2 of Schedule 12 (Department's Change); and
- 36.4.2.2.3.2 for purposes of determining the Revised Values in accordance with paragraph 6 of Part 1 of Schedule 12 (General Change Procedure), no Change in Traffic shall be taken into account;
- 36.4.2.3 has, occurring after the issue of the Permit to Use, substantially affected the traffic flow on the Project Road, then the Contract Period shall be extended by a period equal to the period during which the traffic flow on the Project Road has been so affected, provided that there shall be excluded from such period of extension the first 7 days of each occurrence of an Eligible Force Majeure event so affecting traffic flow.
- 36.4.2.3.1 Not used.
- 36.4.2.3.2 Not used.

- 36.4.2.4 has, prior to the issue of the Completion Certificate, caused damage to the Existing Road or has after the issue of the Completion Certificate caused damage to the Project Facilities then, and subject always to Clause 36.5:
- 36.4.2.4.1 the DBFO Co shall give notice thereof to the Department's Representative together with details of the effect thereof and the proposed steps to rectify the damage and the costs thereof;
- 36.4.2.4.2 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;
- 36.4.2.4.3 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 Part 1 of Schedule 13 (Procedure for Additional Works) and the provisions of Part 3 of Schedule 12 (Additional Works) shall apply, except that for purposes of determining the Revised Values in accordance with paragraph 6 of Part 1 of Schedule 12 (General Change Procedure) no Change in Traffic shall be taken into account.

36.5 **Right to Terminate**

- 36.5.1 Where an occurrence of Eligible Force Majeure:
- 36.5.1.1 occurring prior to the issue of the Completion Certificate has either alone or concurrently with other occurrences of Eligible Force Majeure 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
- 36.5.1.2 has a material effect on the performance of this Agreement for a period longer than 180 days; or
- 36.5.1.3 has a fundamental effect on the performance of this Agreement for a period longer than 90 days,

then either Party may, following consultation for a further period of not less than 90 days after expiry of such period to reach a solution acceptable to both Parties, terminate this Agreement in accordance with Clause 41.2 (Termination for Force Majeure).

- 36.5.2 Where an occurrence of Force Majeure has a material effect on traffic flow on the Project Road for a period longer than 270 days, or causes a delay in the achievement of the Date for Completion of at least 270 days, either Party may terminate this Agreement in accordance with Clause 41.2.1 (Termination for Force Majeure) provided that where such termination is proposed by the Secretary of State, the DBFO Co may in such circumstances by notice to the

Secretary of State within 14 Working Days of the receipt by it of notice under Clause 41.2.1 elect by notice to continue this Agreement on the basis that:

36.5.2.1 the Secretary of State shall not compensate the DBFO Co for any rectification works which the DBFO Co carries out which arise after the date of the notice served by the Secretary of State under Clause 42.2.1 provided that, for the avoidance of doubt, the DBFO Co shall be entitled to compensation approved by the Secretary of State under Clauses 36.4.2.2 and 36.4.2.4 prior to the giving of such notice;

36.5.2.2 there shall be no further extension of the Contract Period to compensate for any period after the issue of the notice under Clause 41.2.1 when such occurrence of Force Majeure was continuing,

in which case this Agreement shall so continue and the Secretary of State's notice under Clause 41.2.1 shall be of no effect.

36.6 **Limit on Liability**

For the avoidance of doubt, save as expressly set out in this Clause 36 (Force Majeure) (other than this Clause 36.6 (Limit on Liability)) neither the Secretary of State nor the DBFO Co (nor their servants or agents) shall have any liability to the other in relation to any Loss or Claim which the other 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 Party initially suffering the same.

36.7 Not used.

37. **WARRANTIES AND DISCLAIMERS**

37.1 **Warranties by the DBFO Co**

Without prejudice to any warranties or conditions implied by law, the DBFO Co warrants and undertakes that:

37.1.1 it will fully comply with and meet the Technical Requirements;

37.1.2 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;

37.1.3 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 quality assurance procedures established pursuant to Clause 22 (Quality Management) and all workmanship shall be in accordance with sound construction practice applicable at the time of construction;

37.1.4 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;

- 37.1.5 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 10 (Design and Construction) or Clause 13.6 (Maintenance and Other Works) (as the case may be) and the Design and Certification Procedure;
- 37.1.6 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;
- 37.1.7 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;
- 37.1.8 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 as at the date of this Agreement true, complete and accurate in all respects;
- 37.1.9 it is a limited liability company, duly incorporated and validly existing under the laws of the jurisdiction of its incorporation;
- 37.1.10 it has full power and authority to enter into this Agreement and to carry out the Operations;
- 37.1.11 the entry into and performance by it of this Agreement do not and will not:
 - 37.1.11.1 conflict with its constitutional documents; or
 - 37.1.11.2 conflict with 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;
- 37.1.12 there has been no material adverse change in the financial condition of the DBFO Co since its incorporation or in the financial condition of:
 - 37.1.12.1 John Laing plc since the annual accounts for the year ended 31 December 1997;
 - 37.1.12.2 Tarmac PLC since the annual accounts for the year ended 31 December 1997; or
 - 37.1.12.3 Hyder plc since the annual accounts for the year ended 31 March 1998;

- 37.1.13 the Financial Terms (together with shareholder equity, Sponsor subordinated debt and the DBFO Payments), as amended from time to time in accordance with this Agreement, are the basis on which the DBFO Co will, and will continue to, finance the Project;
- 37.1.14 each of the Project Documents is in full force and effect and constitutes the valid, binding and 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
- 37.1.15 in respect of any of the items required to be made available to the Secretary of State under Clause 48.1:
 - 37.1.15.1 either:
 - 37.1.15.1.1 each of them is original; or
 - 37.1.15.1.2 if any such item is not original, the DBFO has obtained, or prior to such item being acquired or brought into existence in any manner whatsoever will have obtained, all rights necessary in order to enable:
 - 37.1.15.1.2.1 such item to be so acquired or brought into existence and to be used for the purposes of the Project by the DBFO Co or any of its contractors or sub-contractors of any tier; and
 - 37.1.15.1.2.2 to enable the DBFO Co to comply with its obligations under this Agreement (including under Clause 48); and
 - 37.1.15.2 in any event, no such item infringes or will infringe any third party's copyright, moral rights, design rights, trade mark or other intellectual property rights.

37.2 **Disclaimer**

- 37.2.1 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 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 CD Rom and in the Data Room).

- 37.2.2 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.
- 37.2.3 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.
- 37.2.3A Notwithstanding the initialling of the Project Documents by the Secretary of State pursuant to Clause 2.3.1, or any review thereof by him prior to the execution of this Agreement, the Secretary of State shall not be deemed to have approved the terms of those Project Documents or their compliance with this Agreement.
- 37.2.4 The DBFO Co acknowledges and confirms that:
- 37.2.4.1 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, provided that the acknowledgement and confirmation in this Clause 37.2.4.1 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; and
- 37.2.4.2 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 37.2.4.1 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.

37.3 **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.

37.4 **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 4 of Schedule 3 (Scheme Orders) have been properly made and are in full force and effect, other than Article 4 of The Chester-Holyhead Trunk Road (A55) (Llanfair Pwllgwyngyll to Bryngwran) Order 1996 and Article 4 of The Chester-Holyhead Trunk Road (A55) (Bryngwran to Holyhead) Order 1998), which will not come into effect until after such time as the New Road is opened.

38. **INDEMNITIES**

38.1 **DBFO Co's Indemnities**

Save to the extent that the DBFO Co is entitled to an indemnity from the Secretary of State under Clause 38.4 (Secretary of State's Indemnities), the DBFO Co shall indemnify and keep indemnified the Secretary of State, his servants and agents:

- (i) 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
- (ii) without limitation to the generality of the foregoing, in respect of:
 - 38.1.1 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;
 - 38.1.2 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;
 - 38.1.3 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 36 (Force Majeure));
 - 38.1.4 any Loss or Claim caused by any defect (including any Latent Defect) in the Existing Road (excluding any Loss or Claim arising from Routine Maintenance of and/or from any failure to maintain the Existing Road to meet the Secretary of State's obligations in respect of road safety as the highway authority from the Commencement Date to and excluding 1st April 1999), including 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;
 - 38.1.5 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 any Claims in respect of environmental mitigation measures);

- 38.1.6 any Claim made by any person in respect of any works of accommodation or Accommodation Works which the DBFO Co has performed or agreed to perform whether pursuant to any requirement of this Agreement or otherwise;
- 38.1.7 any Loss or Claim arising whether directly or indirectly out of or in connection with:
 - 38.1.7.1 a breach of the provisions of Clause 27 (Statutory Undertakers); or
 - 38.1.7.2 any Diversionary Works (as defined in Clause 27.1.6); or
 - 38.1.7.3 the DBFO Co's exercise, purported exercise or failure to exercise any Authorised Functions (as defined in Clause 27.1.2); or
 - 38.1.7.4 the Secretary of State performing or engaging others to perform any Authorised Function (as defined in Clause 27 (Statutory Undertakers)) as a result of the Secretary of State withdrawing or suspending any such Authorised Function in accordance with Clause 27.4.10;
- 38.1.8 any Loss or Claim arising whether directly or indirectly out of or in connection with:
 - 38.1.8.1 a breach by the DBFO Co of the provisions of Clause 28 (Other Functions of the Secretary of State); or
 - 38.1.8.2 the DBFO Co's exercise, purported exercise or failure to exercise any Third Party Authorised Function (as defined in Clause 28.1.4); or
 - 38.1.8.3 the Secretary of State performing or engaging others to perform any Third Party Authorised Function (as defined in Clause 28 (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 28.3.11;
- 38.1.9 any Loss or Claim which is to be borne by the DBFO Co in accordance with Clause 9 (Security of the Site) or which arises out of or in connection with any measures taken or not taken by the DBFO Co against or in connection with Protestors or Trespassers;
- 38.1.10 any Loss which is to be borne by the DBFO Co in accordance with Clause 29.2 (Claims Against Third Parties);
- 38.1.11 any Loss or Claims which may arise out of or in connection with any breach of the warranties and undertakings set out in Clause 37.1 (Warranties by the DBFO Co);
- 38.1.12 any Loss or Claim arising out of the carrying out of any Investigation;

- 38.1.13 any costs, charges, Losses or Claims to be borne by the DBFO Co in accordance with Clause 8.5 (Additional Access);
- 38.1.14 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;
- 38.1.15 any Loss or Claim arising whether directly or indirectly out of any damage to the Connecting Roads in the course of or in connection with the Operations;
- 38.1.16 not used;
- 38.1.17 any Loss or Claim arising out of or in connection with any breach of the Regulations referred to in Clause 10.8 (Health and Safety) (whether in relation to obligations, requirements and duties of the client (as defined in Clause 10.8.1.2) or otherwise);
- 38.1.18 any Loss or Claim referred to in Clause 46.1.2 being any Loss or Claim made or brought by the DBFO Co, the Designer, Contractor, Operator, Checker, Archaeologist, Landscape Manager, Landscape Architect, Testing Contractor or Ecologist arising 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, notwithstanding any waiver of liability which has or should have been given by any such person in favour of the Secretary of State and the Department's Nominee pursuant to Clause 46.1.2, whether or not such waiver was actually given;.
- 38.1.19 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 on Site);
- 38.1.20 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) or any plant, machinery or equipment used in connection with the Works or Operations;
- 38.1.21 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;
- 38.1.22 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 Part 1 of Schedule 22 (Security Measures) including 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;

- 38.1.23 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 37.2 (whether or not arising from any negligence on the part of the Secretary of State or any servant, agent or contractor of his) save to the extent that action by the Secretary of State in respect of such Loss or Claim is prohibited by the proviso to Clause 37.2.4.1;
- 38.1.24 all Compensation Costs;
- 38.1.25 any Loss or Claim in respect of the Excluded On-Site Equipment arising whether directly or indirectly out of any act or omission of the DBFO Co in connection with the Operations;
- 38.1.26 any Loss or Claim in respect of the Department's Systems arising out of or as a result of any act or omission of the DBFO Co in connection with the Operations;
- 38.1.27 any Loss or Claim arising out of or in connection with:
- (a) the Britannia Bridge Agreement;
 - (b) the Appointment (including the exercise or failure by the DBFO Co to exercise rights and perform obligations under the Appointment); or
 - (c) any breach of the Britannia Bridge Agreement or any obligations on the part of the Secretary of State referred to therein (howsoever arising) by the DBFO Co (whether or not acting as agent of the Secretary of State),
- save in respect of any such Loss or Claim arising out of or in connection with clauses 2, 3, 4, 5, 6, 7, 8, 9, 10, 11(b) or 20 of the Britannia Bridge Agreement;
- 38.1.28 any Loss or Claim arising out of or in connection with:
- (a) the Railtrack Works Agreement;
 - (b) the Railtrack Appointment (including the exercise or failure by the DBFO Co to exercise rights and perform obligations under the Railtrack Appointment); or
 - (c) any breach of the Railtrack Works Agreement or any obligations on the part of the Secretary of State referred to therein (howsoever arising) by the DBFO Co (whether or not acting on behalf of the Secretary of State or as the Secretary of State's Agent);
- 38.1.29 any Loss, Claim or Compensation Costs arising out of or in connection with any Included Blasting Rights (whether or not

exercised, activated or enforced), which shall include any related and properly incurred professional fees and expenses and any Loss or Claim sustained or incurred by the Secretary of State in connection with the acquisition of Blasting Blight Land, provided that:

- (a) the Secretary of State shall not be entitled to recover any sum under this Clause 38.1.29 to the extent that he has been compensated in respect thereof under Clause 8.7.3; and
- (b) any claims by the Secretary of State under this Clause 38.1.29 shall be conclusive in the absence of manifest error and the Disputes Resolution Procedure shall not apply other than in respect of any professional or other fees or amounts payable under any applicable statutory compensation scheme or any statutory scale of fees, charges or expenses; and

38.1.30 any Loss or Claim arising out of, under or in connection with a conveyance of freehold land at Britannia Bridge in the county of Gwynedd and easement between Railtrack Plc and the Secretary of State dated 1st December 1994,

and in the case of Clauses 38.1.1 to 38.1.30 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.

38.2 Savings

- 38.2.1 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.
- 38.2.2 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.

38.3 Conduct of Claims Subject to DBFO Co's Indemnities

- 38.3.1 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.
- 38.3.2 Subject to Clauses 38.3.3, 38.3.4 and 38.3.5 and, where applicable, the provisions of Clause 27 (Statutory Undertakers) and Clause 28 (Other Functions of the Secretary of State), on the giving of a notice pursuant to Clause 38.3.1 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.

38.3.3 With respect to any Claim subject to Clause 38.3.2:

38.3.3.1 the DBFO Co shall keep the Secretary of State fully informed and consult with him about the conduct of the Claim;

38.3.3.2 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 38.3.2 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

38.3.3.3 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 38.1.6 if the Claim is paid or settled in full and the amount of such payment or settlement does not exceed £10,000 (in January 1998 prices).

38.3.4 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:

38.3.4.1 within 28 days of the notice from the Secretary of State under Clause 38.3.1 the DBFO Co fails to notify the Secretary of State of its intention to dispute the Claim; or

38.3.4.2 the DBFO Co fails to comply in any material respect with the provisions of Clause 38.3.3.

38.3.5 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 38.3.2 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 38.3.5, then the DBFO Co shall be released from its indemnity in respect of such Claim.

38.4 **Secretary of State's Indemnities**

The Secretary of State shall indemnify and keep indemnified the DBFO Co in respect of:

38.4.1 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:

- 38.4.1.1 the matters referred to in Clauses 16.5 (Enforcement of Rights against Third Parties), 38.1.4, 38.1.9, 38.1.21 and 38.1.23; and
- 38.4.1.2 acts or omissions occurring prior to the date of this Agreement;
- 38.4.2 the cost 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 DBFO Co) which for this purpose shall include the cost of acquisition (i) of blighted land (as defined in the Town and Country Planning Act 1990) acquired under such Act; and (ii) of any land immediately adjoining the Project Facilities which is acquired as a direct consequence of the acquisition of the land required to fulfil the obligations of the Secretary of State under Clause 8.1;
- 38.4.3 any Claims made by any person in respect of any works of accommodation, other than:
 - 38.4.3.1 any works of accommodation which the DBFO Co has performed or agreed to perform whether pursuant to any requirement of this Agreement or otherwise; and
 - 38.4.3.2 Accommodation Works;
- 38.4.4 any Loss to be borne by the Secretary of State in accordance with Clause 16.5 (Enforcement of Rights against Third Parties);
- 38.4.5 any Loss which is to be borne by the Secretary of State in accordance with Clause 36 (Force Majeure);
- 38.4.6 subject to Clause 38.4.A below, any Loss or Claim to the extent resulting from any sums incurred in connection with the costs of any strengthening works carried out in consequence of recommendations contained in a report prepared by Highpoint Rendel Limited on behalf of Railtrack Plc, commissioned in 1998 pursuant to its assessment of the load carrying capacity of the Britannia Bridge.
- 38.4.6.A
 - 38.4.6.A.1 The Secretary of State shall satisfy his obligations under Clause 38.4.6 above by, at his option, either:
 - (a) making a single payment to Railtrack Plc equal to the amount of the Loss or Claim referred to in Clause 38.4.6; or
 - (b) adjusting the DBFO Payment as if there had been a Department's Change resulting in a Change Figure equal to the lesser of:
 - (i) the amount of the Loss or Claim referred to in Clause 38.4.6; and
 - (ii) the unused residue of the Lump Sum Threshold for the relevant Threshold Period.

38.4.6.A.2 In the case of the application of Clause 38.4.6.A.1(b)(ii), the amount by which the Loss or Claim referred to in Clause 38.4.6 exceeds the Change Figure shall, at the option of the Secretary of State, either be:

- (a) paid by the Secretary of State to Railtrack Plc as a lump sum payment; or
- (b) treated as an Unfinanced Amount in accordance with paragraph 7.2 of Part 1 of Schedule 12.

38.5 Disclaimer

Save as expressly provided in Clause 38.4 (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 Operations. This Clause 38.5 (Disclaimer) shall not apply in relation to:

- 38.5.1 any failure by the Secretary of State to make proper payment to the DBFO Co in accordance with the terms of this Agreement;
- 38.5.2 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
- 38.5.3 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.

38.6 Conduct of Claims Subject to Secretary of State's Indemnities

- 38.6.1 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.
- 38.6.2 Subject to Clauses 38.6.3 and 38.6.4, on the giving of a notice pursuant to Clause 38.6.1 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.
- 38.6.3 With respect to any Claim subject to Clause 38.6.2:
 - 38.6.3.1 the Secretary of State shall keep the DBFO Co fully informed and consult with it about the conduct of the Claim;
 - 38.6.3.2 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 38.6.2 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

38.6.3.3 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.

38.6.4 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:

38.6.4.1 within 28 days of the notice from the DBFO Co under Clause 38.6.1 the Secretary of State fails to notify the DBFO Co of its intention to dispute the Claim; or

38.6.4.2 the Secretary of State fails to comply in any material respect with the provisions of Clause 38.6.3.

38.7 **Effect of Delay**

Any failure by the Secretary of State to perform his obligations under this Agreement shall not relieve the DBFO Co of any obligations to act or refrain from acting within a specific time or timeously except where expressly provided otherwise.

39. **DEFAULT**

39.1 **Events of Default**

The following shall be Events of Default:

39.1.1 the occurrence of any act of insolvency in respect of the DBFO Co or any Contracting Associate or any Sponsor. An act of insolvency for the purposes of this Agreement means:

39.1.1.1 any meeting of creditors of the person in question being convened or held or any arrangement or composition with or for the benefit of its creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) being proposed or entered into by or in relation to the person in question;

39.1.1.2 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;

39.1.1.3 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;

- 39.1.1.4 a petition being presented or a meeting being convened for the purpose of considering a resolution, for the making of an administration order or 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 consented to in advance by the Secretary of State) unless such petition is withdrawn, set aside or revoked within 12 Working Days after being made; or
- 39.1.1.5 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 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;

- 39.1.2 the occurrence of any change in control as referred to in Clause 44.3 (Change in Control);
- 39.1.3 the DBFO Co or a Contracting Associate or a 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 44.2.2) without prior consent of the Secretary of State, but, in the case of a Contracting Associate or a Sponsor, only if the disposal would have a material effect on the ability of the DBFO Co to perform its obligations under this Agreement;
- 39.1.4 Not used;
- 39.1.5 the repudiation of this Agreement by the DBFO Co;
- 39.1.6 the DBFO Co commits a serious breach of its obligations under this Agreement (other than a breach in respect of which a notice is issued pursuant to Clause 25.1 (provided such breach is remedied within the Remedial Period)), including the DBFO Co otherwise than as a consequence of a breach by the Secretary of State of his obligations under this Agreement:
 - 39.1.6.1 abandoning the Works; or
 - 39.1.6.2 failing to complete the Works to such extent and standard as would require the issuance of the Permit to Use by the Date for Completion (provided that if a Delay Event has occurred or been alleged to have occurred and any consequent extension of the Date for Completion has not yet been agreed or determined under the Disputes Resolution Procedure, an Event of Default under this Clause 39.1.6.2 shall not arise until such extension is so agreed or determined and unless either such extension is not agreed or determined or, if such an extension is agreed or determined, the Event of Default has occurred by reference to such extended Date for Completion) provided further that no such Event of Default shall occur if the DBFO Co is

- using all reasonable endeavours to achieve the issuance of the Permit to Use by the earliest practicable date; or
- 39.1.6.3 ceasing to maintain or operate the Project Facilities or any, or any material part of any, of them;
- 39.1.7 Not used;
- 39.1.8 39.1.8.1 the DBFO Co receiving a total number of 4 or more Warning Notices in any 5 year period (excluding after the issue of the Completion Certificate any Warning Notice awarded by reason of the accumulation of Penalty Points issued in respect of the Works, but not in respect of the O&M Requirements, nor in respect of both the Works and the O&M Requirements and any Material Breach Notice awarded in respect of a material breach of the DBFO Co's obligations in respect of the Works but not in respect of the O&M Requirements nor in respect of both the Works and the O&M Requirements) provided that if a fourth or subsequent Warning Notice is awarded to the DBFO Co in respect of a material breach of the DBFO Co's obligations under this Agreement pursuant to Clause 25.3(a) (a "**Material Breach Notice**"), the receipt of such Material Breach Notice shall not constitute an Event of Default unless at least two of the Warning Notices previously awarded to the DBFO Co within the 5 years preceding the date of issue of the latest Warning Notice were also Material Breach Notices;
- 39.1.8.2 the DBFO Co being awarded a total of:
- 39.1.8.2.1 100 or more Penalty Points in respect of the Works in any 1 year period ending prior to the issue of the Completion Certificate; or
- 39.1.8.2.2 100 or more Penalty Points in respect of the O&M Requirements in any 1 year period ending prior to the issue of the Completion Certificate; or
- 39.1.8.2.3 175 or more Penalty Points in aggregate during any 1 year period ending prior to the issue of the Completion Certificate; or
- 39.1.8.2.4 150 or more Penalty Points in any 1 year period ending no later than 12 months after the issue of the Completion Certificate (such total to include any Penalty Points awarded prior to the issue of the Completion Certificate and falling within any such 1 year period in respect of the O&M Requirements but not in respect of the Works); or
- 39.1.8.2.5 125 or more Penalty Points in any 1 year period ending more than 12 months after the issue of the Completion Certificate;
- 39.1.9 any of the warranties in or referred to in Clause 37.1 (Warranties by the DBFO Co) shall prove to be materially untrue or incorrect, in the case of the

warranties contained in Clauses 37.1.8 and 37.1.12 as at the date of this Agreement or, in the case of the warranties contained in Clauses 37.1.9, 37.1.10, 37.1.11, 37.1.13 and 37.1.14 at any time, and the material untruthfulness or incorrectness would in any case:

39.1.9.1 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;

39.1.9.2 be inconsistent with the Secretary of State's statutory duties or the provisions of this Agreement; or

39.1.9.3 give rise to a breach of, or be in breach of, any Legal Requirement.

39.1.10 any of the Project Documents:

39.1.10.1 or (other than as a result of a reason relating solely to the Secretary or State) this Agreement ceases to be in full force and effect or 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

39.1.10.2 is materially amended, varied or departed from (other than in accordance with Clauses 2.3.2 and 2.3.3),

and, in any such case where the DBFO Co is not a party to such Project Document, or in the case of Clause 39.1.10.2 where a 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;

39.1.11 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 90 days after the Secretary of State has notified the DBFO Co that such sum has not been paid; or

39.1.12 any breach by the DBFO Co of Clause 9.3 (No Payments to Protestors).

39.2 **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.

39.3 Remedies

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 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:

- 39.3.1 deduct and be entitled to retain an amount from 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, subject to any such amount retained being proportionate to the breach after taking into account any Loss or Claim suffered by the Secretary of State as a consequence of the occurrence of such Event of Default;
- 39.3.2 apply any sums standing to the credit of the Retention Account in accordance with Clause 18.7.11;
- 39.3.3 without determining this Agreement, by notice in writing having immediate effect suspend performance by the DBFO Co of any part of the functions to be performed by it under this Agreement in respect of which the Event of Default has occurred or to which the Event of Default relates (whether in whole or in part) 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;
- 39.3.4 in the case of the Events of Default referred to in Clauses 39.1.1 to 39.1.5 (inclusive), 39.1.8, 39.1.11, 39.1.12 and 39.1.6 (and, in the case of Clause 39.1.6, if not remediable, or, if remediable, the Department's Nominee has served a remedy notice under Clause 25.1.2, but the DBFO Co has not remedied the breach), and any Event of Default under Clause 39.1.9 or 39.1.10 which is incapable of remedy, terminate the Agreement in its entirety by not less than 30 days' notice;
- 39.3.5 in the case of any Event of Default other than those Events of Default referred to in Clause 39.3.4, and provided that such Event of Default is continuing, serve notice of default on the DBFO Co requiring the DBFO Co at the DBFO Co's option either:
 - 39.3.5.1 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
 - 39.3.5.2 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 39.5 (Termination in Full) shall apply.

39.4 **Partial Suspension**

In the case of a partial suspension of the performance by the DBFO Co under this Agreement in accordance with Clause 39.3.3, 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 the relevant administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads).

39.5 **Termination in Full**

39.5.1 Where the DBFO Co puts forward a programme in accordance with Clause 39.3.5.2 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.

39.5.2 If:

39.5.2.1 the breach or breaches notified in a notice of default served under Clause 39.3.5 is or are not remedied:

39.5.2.1.1 before the expiry of the period referred to in Clause 39.3.5.1 (if applicable); or

39.5.2.1.2 where the DBFO Co puts forward a programme pursuant to Clause 39.3.5.2 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

39.5.2.2 such programme as is put forward by the DBFO Co pursuant to Clause 39.3.5.2 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 not less than 30 days' notice.

39.6 **Savings**

The rights of the Secretary of State under this Clause 39 (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.

40. **TERMINATION BY THE DBFO CO**

40.1 **DBFO Co Termination Events**

The following are DBFO Co Termination Events:

- 40.1.1 the Government sequesters, requisitions or otherwise seizes the Project Facilities or any, or any material part of any, of them otherwise than pursuant to this Agreement;
- 40.1.2 the Secretary of State shall fail to issue the Commencement Certificate on or before the date which is 1 year after the date determined in accordance with Clause 7.3.1;
- 40.1.3 the Secretary of State shall be in material breach of its obligations under Clause 8.1 (Access for DBFO Co) and such breach either alone or together with other material breaches of Clause 8.1 shall materially adversely affect the ability of the DBFO Co to perform its obligations under this Agreement for any period of not less than 180 days or for an aggregate period of not less than 360 days;
- 40.1.4 the Secretary of State 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);
- 40.1.5 the obligations of the Secretary of State under this Agreement shall (without the prior consent of the DBFO Co and, prior to notification by the DBFO Co to the Secretary of State that no monies remain outstanding under the Commercial Bank Facility Agreement and/or the EIB Facility Agreement, of the Security Trustee, such consent or consents 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:
 - 40.1.5.1 the Government or any department, office, instrumentality or agency of Government, having the financial standing of Government; or
 - 40.1.5.2 any person whose obligations under this Agreement are guaranteed by a person falling within Clause 40.1.5.1; or
- 40.1.6 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 after the Secretary of State has been notified by the DBFO Co that such sum has not been paid.

40.2 **Termination Procedure**

- 40.2.1 Upon the occurrence of a DBFO Co Termination Event and so long as such DBFO Co Termination Event is subsisting, the DBFO Co shall if it intends to proceed to terminate the Agreement 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.

40.2.2 Upon a termination of this Agreement pursuant to Clause 40.2.1, the DBFO Co shall be entitled to compensation in accordance with Clause 43 (Compensation on Termination).

40.2.3 The DBFO Co may give notice to the Secretary of State terminating this Agreement only in accordance with the provisions of this Clause 40.2 (Termination Procedure), Clause 41.2.1, Clause 41.3.1 or Clause 41.4.1.

41. NON-DEFAULT TERMINATION

41.1 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.

41.2 Termination for Force Majeure

41.2.1 In the circumstances referred to in Clause 36.5 (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.

41.2.2 In the event of any termination pursuant to Clause 41.2.1, the Secretary of State shall pay to the DBFO Co the amounts determined in accordance with Clause 43.3 (Post-Commencement Termination).

41.3 Termination on Relevant Change in Law

41.3.1 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.

41.3.2 In the event of any termination pursuant to Clause 41.3.1, the Secretary of State shall pay to the DBFO Co the amounts determined in accordance with Clause 43.3 (Post-Commencement Termination) and Clause 43.5 (Additional Compensation).

41.4 Termination under Clause 26

41.4.1 If the entitlement of the DBFO Co to terminate this Agreement under Clause 26.5.3 arises, then the DBFO Co may terminate this Agreement by notice to the Secretary of State having immediate effect.

41.4.2 The DBFO Co shall not be entitled to any compensation as a consequence of any termination pursuant to Clause 41.4.1.

42. EFFECT OF TERMINATION

42.1 Step-in Rights

- 42.1.1 Without prejudice to Clause 25.5 (Step-In Rights), in the event that the Secretary of State has given notice of default or notice of termination under Clause 39.3 (Remedies), Clause 39.5 (Termination in Full), Clause 41.2 (Termination for Force Majeure), Clause 41.3 (Termination on Relevant Change in Law) or Clause 41.4 (Termination under Clause 26) or the DBFO Co has given notice of termination under Clause 40.2 (Termination Procedure), Clause 41.2 (Termination for Force Majeure), Clause 41.3 (Termination on Relevant Change in Law) or Clause 41.4 (Termination under Clause 26) 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, then:
- 42.1.1.1 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
- 42.1.1.2 whether or not he exercises the right under Clause 42.1.1.1, 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, and (other than where the DBFO Co has served a notice of termination under Clause 40 properly in accordance with the provisions of this Agreement and without prejudice to the provisions of Clause 36) the Secretary of State may recover all costs of so doing (including 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.
- 42.1.2 For the avoidance of doubt, subject to the exercise by the Secretary of State of any right under Clause 42.1.1, the Parties shall continue to perform their obligations under this Agreement notwithstanding the giving of any notice of default or notice of termination until the termination of this Agreement becomes final in accordance with the provisions of this Clause 42 (Effect of Termination).

42.2 Disputed Termination

- 42.2.1 Notwithstanding the provisions of Clauses 39.3 (Remedies), 39.5 (Termination in Full), 40.2 (Termination Procedure), 41.2 (Termination for Force Majeure), 41.3 (Termination on Relevant Change in Law), and Clause 41.4 (Termination under Clause 26), 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 until 30 days after it is agreed by the Parties or finally determined in accordance with the Disputes Resolution Procedure that such termination is not wrongful.

- 42.2.2 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 42.2.1, then either Party may (within the 14 day period referred to in Clause 42.2.1) 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 30 days after 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.
- 42.2.3 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 42.1.1.1, 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 which the DBFO Co may have as a result of such wrongful termination.

42.3 **Savings**

- 42.3.1 Save as otherwise expressly provided in this Agreement:
- 42.3.1.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including 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
- 42.3.1.2 termination of this Agreement shall not affect the continuing rights and obligations of the DBFO Co and the Secretary of State under Clauses 8.7.2 and 8.7.3 (Acquisition of Land by the DBFO Co), 15.7 (Removal of Signs), 19.6, 19.7 and 19.8 (Insurance), 23 (but excluding 23.9) (Reports and Information), 24 (Records), 29.2 (Claims Against Third Parties), 31 (Calculation of Payments), 32 (Invoicing and Payment), 38 (Indemnities), 41.2 (Termination for Force Majeure), 41.3 (Termination on Relevant Change in Law), 43 (Compensation on Termination), 47 (Taxes), 48 (Intellectual Property), 49 (Confidentiality), 51 (Disputes Resolution Procedure), 56 (Governing Law and Jurisdiction), Schedules 14 (Records and Reports) and 15 (Disputes Resolution Procedure) and this Clause 42 (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 42.3 (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.
- 42.3.2 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.

42.4 **Transfer of Assets, etc**

On the termination of this Agreement for any reason (or, in the case of Clause 42.4.5 and where the Secretary of State has exercised his step-in rights under Clause 42.1.1, on and for the duration of the exercise by the Secretary of State of such step-in rights):

- 42.4.1 the rights of access under Clause 8.1 (Access for DBFO Co) shall automatically terminate;
- 42.4.2 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:
 - 42.4.2.1 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
 - 42.4.2.2 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;
- 42.4.3 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 41.1 (Expiry of Term) shall be in the state required in accordance with Clause 18 (Handback);
- 42.4.4 if the Secretary of State so elects, the Operating and Maintenance Contract shall be novated to him (where he has exercised his step-in rights under Clause 42.2.1 for the duration of such exercise);
- 42.4.5 the Secretary of State shall have an option to purchase or (where the Secretary of State has exercised his step-in rights under Clause 42.1.1) 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 or any of its Associated Companies and reasonably required in connection with the operation and maintenance of the Project Facilities;
- 42.4.6 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;

- 42.4.7 the DBFO Co shall deliver to the Secretary of State operation and maintenance manuals for the Project Facilities, including in respect of communications, signalling and other systems in service at the Termination Date;
- 42.4.8 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 (where he has exercised his step-in rights under Clause 42.2.1 for the duration of such exercise) provided that where and to the extent that the Secretary of State has a claim against and recovers from a relevant manufacturer of such equipment, such recovery shall be taken into account in any claim against the DBFO Co; and
- 42.4.9 the DBFO Co shall deliver to the Secretary of State or his designee the records referred to in Clause 24.4.3.

42.5 **Handover**

On the termination of this Agreement for any reason:

- 42.5.1 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;
- 42.5.2 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 42.4.2 or acquired or hired by the Secretary of State pursuant to Clause 42.4.5, 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;
- 42.5.3 the DBFO Co shall within 1 week of the Termination Date deliver to the Department's Representative:
 - 42.5.3.1 keys to all traffic sign housings; and
 - 42.5.3.2 lifting keys for all types of chamber covers; and
- 42.5.4 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.

43. **COMPENSATION ON TERMINATION**

43.1 **Termination Accounts**

- 43.1.1 The DBFO Co shall procure that not later than 90 days after termination of this Agreement pursuant to Clause 40 (Termination by the DBFO Co), Clause 41.2 (Termination for Force Majeure) or Clause 41.3 (Termination on Relevant Change in Law) (or such longer period as may be agreed between the Department's Representative 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 a report signed by the DBFO Co's auditors in respect of the amount of the deductions to be made pursuant to Clause 43.3.2, which report shall, for the purposes of this Clause 43 (Compensation on Termination), be deemed to form part of the Termination Accounts.

43.1.1.1 Not used

43.1.1.2 Not used,

43.1.2 The Termination Accounts shall be presented to the Department's Representative for review. In order to enable the Department's Representative 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 Representative 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 Representative 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 Representative and its or the Secretary of State's professional advisers with regard to such review.

43.1.3 If the Department's Representative 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 Representative 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.

43.2 **Not used**

43.2.1 Not used.

43.2.2 Not used.

43.3 **Post-Commencement Termination**

If the DBFO Co terminates this Agreement pursuant to Clause 40 (Termination by the DBFO Co) as a consequence of the occurrence of a DBFO Co Termination Event after the Commencement Date or this Agreement is terminated by either Party pursuant to Clause 41.2.1 or Clause 41.3.1 as a consequence of the occurrence of Force Majeure or a Relevant Change in Law (as the case may be) after the Commencement Date, then subject to the provisions of Clause 43.4 (Exclusions and Deductions from Compensation) the Secretary of State shall pay to the DBFO Co an amount, as determined from the Termination Accounts, equal to the aggregate of:

43.3.1 all outstanding amounts in respect of principal, interest (including interest which accrues from the date of termination of this Agreement to the date of payment under this Clause 43.3 (Post-Commencement Termination)) fees,

commissions, costs and expenses, prepayment charges and other breakage costs (including Swap 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

- 43.3.2 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.

43.4 **Exclusions and Deductions from Compensation**

- 43.4.1 There shall be excluded from any amount payable pursuant to Clause 43.3 (Post-Commencement Termination):

- 43.4.1.1 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 including for the avoidance of doubt any subscription for the Project Company Loan Notes or any other unsecured or subordinated loan notes of the DBFO Co by Holdco or its shareholders;
- 43.4.1.2 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;
- 43.4.1.3 Not used.
- 43.4.1.4 all liabilities and obligations arising out of agreements or arrangements entered into by the DBFO Co prior to such termination, 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;
- 43.4.1.5 without prejudice to any entitlement on the part of the DBFO Co to recover the same as damages or as recoverable costs in any proceedings, 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:

- 43.4.1.5.1 regarding any claim or potential claim against the Secretary of State arising from or in connection with such termination; or
- 43.4.1.5.2 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;
- 43.4.1.6 Not used.
- 43.4.1.7 all liabilities and obligations (other than in respect of principal sums lent by the Funders under the Funding Agreements and interest thereon) of the DBFO Co arising as a result of a breach of a 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);
- 43.4.1.8 Not used.
- 43.4.1.9 the amount additional to the amounts referred to in Clause 43.3.1 of any obligation or liability incurred or arising under any of the Funding Agreements as a result of:
 - 43.4.1.9.1 any breach of any undertaking, warranty or representation under the terms of any of the Funding Agreements;
 - 43.4.1.9.2 the occurrence of any event of default (however described) under any of the Funding Agreements;
 - 43.4.1.9.3 any failure to satisfy any condition under the terms of any of the Funding Agreements;
 - 43.4.1.9.4 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 43.4.1.9.1 to 43.4.1.9.4 (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);
- 43.4.1.10 any amount payable under any of the Funding Agreements in respect of any demand under the Performance Guarantee;
- 43.4.1.11 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:

- 43.4.1.11.1 such costs and expenses were not properly incurred; or
- 43.4.1.11.2 such costs and expenses were properly incurred but exceed a reasonable amount;
- 43.4.1.12 any liability of the DBFO Co in respect of default interest other than default interest arising as a result of the termination of the Agreement where and to the extent that it arises as a result of a breach by the Secretary of State of any of his obligations under this Agreement; and
- 43.4.1.13 any liability of the DBFO Co under the Funding Agreements arising other than in connection with the financing of the Project.
- 43.4.2 The Secretary of State shall be entitled to deduct from any amount payable pursuant to Clause 43.3 (Post-Commencement Termination):
 - 43.4.2.1 Swap 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 43.3 (Post-Commencement Termination)) Swap 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;
 - 43.4.2.2 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 in the enforcement of their rights under the Funding Agreements) in respect of any other security deposited, placed or made available by or on behalf of the DBFO Co, 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 43.3 (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 43.3 (Post-Commencement Termination); and
 - 43.4.2.3 an amount equal to the proceeds of any insurances required under Clause 19 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 43.3 (Post-Commencement Termination) and which proceeds in any such case are or are to be applied in or towards payment or discharge of:
 - 43.4.2.3.1 Not used;

43.4.2.3.2 any of the amounts, liabilities and other matters referred to in Clause 43.3.1; or

43.4.2.3.3 any of the other liabilities and obligations of the DBFO Co referred to in Clause 43.3.2.

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 43.3 (Post-Commencement Termination), save to the extent that any such proceeds of insurance are payable in respect of any liability or obligation not taken into account in computing the amount of such compensation payable.

43.5 Additional Compensation

43.5.1 If Clause 43.3 (Post-Commencement Termination) shall apply as a consequence of the termination of this Agreement pursuant to Clause 40 (Termination by the DBFO Co) or Clause 41.3 (Termination on Relevant Change in Law), the Secretary of State shall in addition to any amounts payable pursuant to Clause 43.3 (Post-Commencement Termination) pay to the DBFO Co as at the date of termination of this Agreement a sum which shall be equal to an amount per Ordinary Share calculated in accordance with this Clause 43.5 (Additional Compensation). The amount payable by the Secretary of State per Ordinary Share shall be calculated:

43.5.1.1 in the case of a DBFO Co Termination Event referred to in any of Clauses 40.1.1, 40.1.2, 40.1.4 and 40.1.5, as at the Working Day immediately preceding the date upon which such DBFO Co Termination Event occurs;

43.5.1.2 in the case of a DBFO Co Termination Event referred to in Clauses 40.1.3 and 40.1.6, as at the Working Day immediately preceding the date upon which the DBFO Co gives notice terminating this Agreement;

43.5.1.3 in the case of the event referred to in Clause 41.3 (Termination on Relevant Change in Law), as at the Working Day immediately preceding the date on which the notice terminating this Agreement was given.

43.5.2 If as at the date of termination of this Agreement the Ordinary Shares have not been admitted to the Official List of the London Stock Exchange, the amount payable per Ordinary Share under Clause 43.5.1 shall be the fair market value of such Ordinary Share (determined on the basis of and in accordance with the procedure set out in Clause 43.5.3), less the Residual Value (if any) of such Ordinary Share.

43.5.3 The fair market value of the Ordinary Shares for purposes of Clause 43.5.2 shall be calculated on the basis:

- 43.5.3.1 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;
- 43.5.3.2 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; and
- 43.5.3.3 that there shall be in existence as at that date no Project Company Loan Notes.

Such value shall be as agreed between the Department's Representative and the DBFO Co or, if no agreement has been reached within 60 days of such date of termination, by the Expert on reference by either Party.

- 43.5.4 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 Representative and its or the Secretary of State's professional advisers its or their books, records and other information as the Department's Representative or its or the Secretary of State's professional advisers reasonably consider necessary for the preparation of the valuation referred to in Clause 43.5.3. The DBFO Co and its Associated Companies and its professional advisers shall cooperate with the Department's Representative and its or the Secretary of State's professional advisers with regard to the preparation of such valuation.
- 43.5.5 If as at the date of termination of this Agreement the Ordinary Shares have been admitted to the Official List of the London Stock Exchange:
 - 43.5.5.1 the amount payable per Ordinary Share under Clause 43.5.1 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 43.5.1 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 Representative and the DBFO Co or, if no agreement has been reached within 60 days of such date of termination, by the Expert on reference by either Party;
 - 43.5.5.2 in determining the amount payable per Ordinary Share for the purpose of Clause 43.5.5.1 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 43.5.5.1 as shall be fair and reasonable to take account of any capitalisation 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 Representative and the DBFO Co

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 43.5.4 shall apply mutatis mutandis in relation hereto;

43.5.5.3 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 43.5.5.1 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; and

43.5.5.4 the amount payable by the Secretary of State under Clause 43.5.1 above shall be increased by the total par value of all the Project Company Loan Notes then in issue and held by Holdco, its shareholders or any Associated Company.

43.5.6 The amount payable by the Secretary of State under Clause 43.5.1 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 Representative would have been entitled to object on the grounds referred to in Clause 2.3.3.

43.6 **Adjustments to Compensation**

43.6.1 If the calculation of amounts payable under any provision of this Clause 43 (Compensation on Termination) gives a negative amount, such amount shall be aggregated with any amount payable under other provisions of this Clause 43 (Compensation on Termination), which shall be reduced accordingly, but in no circumstances shall the calculation of compensation under this Clause 43 (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).

43.6.2.1 Where any amount paid or payable to the DBFO Co pursuant to Clause 43.3 is subject to any deduction or withholding in respect of taxation, the Secretary of State shall pay to the DBFO Co such sum as will, after such deduction or withholding has been made, leave the DBFO Co with the same amount as it would have been entitled to receive in the absence of any such requirement to make a deduction or withholding. Where such sum is paid and the DBFO Co receives, realises, utilises, retains or is granted a credit or relief from or repayment of taxation in respect of or calculated by reference to the deduction or withholding, the DBFO Co will promptly pay to the Secretary of State the amount attributable to the deduction or withholding so as to leave the DBFO Co (after the payment back to the Secretary of State) in no better position than it would have been in if such deduction or withholding had not been required.

43.6.2.2 The DBFO Co shall provide to the Secretary of State such evidence as the Secretary of State may reasonably require of such credit, relief from or repayment of taxation and the amount of any credit, relief from or repayment of such taxation.

- 43.6.3.1 Where any amount is paid or payable to the DBFO Co pursuant to Clause 43.3 or Clause 43.5 and the DBFO Co becomes liable to any taxation or has any increased taxation liability by reason of such amount being so paid or payable, the sum due to the DBFO Co in respect of such amount shall be increased to the extent necessary to ensure that after payment of such taxation liability or increased taxation liability, the DBFO Co receives a net sum equal to the amount otherwise due to it pursuant to Clause 43.3 or Clause 43.5, as the case may be. The amount by which a payment due to the DBFO Co pursuant to Clause 43.3 or Clause 43.5, as the case may be, is increased as a consequence of this Clause 43.6.3.1 shall be referred to as the "**Additional Amount**".
- 43.6.3.2 Where the DBFO Co receives, realises, utilises, retains or is granted a credit or relief from or repayment of taxation or increased taxation in respect of which the Secretary of State has paid an Additional Amount pursuant to Clause 43.6.3.1, the DBFO Co will promptly pay to the Secretary of State an amount equal to the Additional Amount so as to leave the DBFO Co (after the payment back to the Secretary of State) in no better position than it would have been in if such Additional Amount had not been paid.
- 43.6.3.3 The DBFO Co shall provide to the Secretary of State such evidence as the Secretary of State may reasonably require regarding the existence or extent of such liability to taxation or increased taxation and the amount of any credit, relief from or repayment of such taxation or increased taxation.

43.7 **Interest**

The Secretary of State shall pay interest to the DBFO Co on any amount due to the DBFO Co under this Clause 43 (Compensation on Termination) as a consequence of termination of this Agreement pursuant to Clause 40 (Termination by the DBFO Co), Clause 41.2 (Termination for Force Majeure) or Clause 41.3 (Termination on Relevant Change in Law) (but shall not pay interest on amounts payable in respect of interest accruing under the Funding Agreements, which is excluded from compensation payable by the Secretary of State pursuant to Clause 43.4.1.12) 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.

43.8 **Satisfaction in Full**

- 43.8.1 Any payment made pursuant to this Clause 43 (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.
- 43.8.2 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.

**PART VI
MISCELLANEOUS**

44. ASSIGNMENT, SUB-CONTRACTING AND CHANGE IN CONTROL

44.1 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.

44.2 Assignment

44.2.1 Subject to Clause 44.2.2 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:

44.2.1.1 this Agreement, the Design Contract, the Operating and Maintenance Contract, the Construction Contract or any other contract entered into by the DBFO Co in performing its obligations under this Agreement; or

44.2.1.2 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.

44.2.2 Without prejudice to Clause 42.4 the provisions of Clause 44.2.1 do not apply:

44.2.2.1 in relation to the assignment of the benefit of any of the agreements referred to in Clause 44.2.1.1 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

44.2.2.2 to the novation of this Agreement to a Proposed Substitute in accordance with the provisions of the Direct Agreement.

44.2.3 Without prejudice to Clauses 44.4.1, 44.4.2 and 44.4.3, the DBFO Co shall procure that:

44.2.3.1 the Designer shall not be permitted to assign the Design Contract or any part thereof or any benefit or interest therein or thereunder; and

44.2.3.2 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.

- 44.2.4 Without prejudice to Clauses 44.4.1, 44.4.2 and 44.4.4, the DBFO Co shall procure that the Operator shall not be permitted to assign the Operating 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.
- 44.2.5 The Secretary of State shall be entitled to assign, novate or otherwise dispose of his rights and obligations under this Agreement or any part thereof to any person specified in Clause 40.1.5.
- 44.2.6 Any change in the legal status of the Secretary of State such that he ceases to be a contracting authority (as defined in Regulation 3(1) of the Public Services Contracts Regulations 1993) shall not affect the validity of this Agreement.

44.3 **Change in Control**

- 44.3.1 Subject to Clause 44.3.4, there is a change in control of the DBFO Co for the purposes of Clause 39.1.2 whenever:
- 44.3.1.1 a combination of any two of the following persons, namely John Laing plc, Tarmac PLC or Hyder plc, cease to have control of the DBFO Co.
 - 44.3.1.2 Not used,
- and (but subject to Clause 44.3.2) the change in control shall have taken place without the prior consent of the Secretary of State.
- 44.3.2 The Secretary of State shall not unreasonably withhold or delay his consent to a change in control in the following circumstances:
- 44.3.2.1 in the case of a reorganisation for bona fide fiscal purposes where the ultimate control of the DBFO Co does not change;
 - 44.3.2.2 in respect of a change in control proposed at any time after the date of issue of the Completion Certificate;
 - 44.3.2.3 where the proposed change in control is pursuant to the bona fide enforcement of the Shares Charge following an Event of Default to an entity of financial standing (as reasonably determined by the Secretary of State) at least equivalent to the financial standing at the date of this Agreement of the ultimate Holding Company of the Sponsor whose shares are proposed to be sold (or where such ultimate Holding Company has a Rating in excess of AA (Standard & Poor's) to an entity which has a Rating of or in excess of AA (Standard & Poor's) and which is not an entity to which the Secretary of State had previously refused to give his consent pursuant to this Clause 44.3 (Change in Control). In this Clause 44.3.2.3 "**Rating**" means a credit rating for long term debt from Standard & Poor's or an equivalent rating from Moody's (or any other internationally recognised credit rating agency agreed by the Parties).

In any other circumstances the Secretary of State may withhold or delay his consent to a change in control in his absolute discretion.

- 44.3.3 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 44.3 (Change in Control) a person or persons have or had control of the DBFO Co, with the following modifications:

44.3.3.1 for the words "**the greater part**" wherever they occur in the said subsection (2) there shall be substituted the words "**51 per cent. or more**"; and

44.3.3.2 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.

- 44.3.4 A change in control of any Sponsor or any of its Holding Companies which arises from any bona fide open market transactions in any shares or other securities of such Sponsor or such Holding Company effected on a recognised investment exchange (within the meaning of the Financial Services Act 1986) shall not constitute a change in control for the purposes of Clause 39.1.2.

44.4 **Sub-Contracting**

- 44.4.1 Neither the engagement nor employment of the following persons shall be terminated by the DBFO Co, and in the case of the Designer, the DBFO Co shall procure that the Contractor shall not terminate the engagement or employment of such person without the written consent of the Secretary of State (such consent not to be unreasonably withheld or delayed) to the appointment of any proposed substitute and the terms of engagement or employment of the proposed substitute:

44.4.1.1 the Contractor;

44.4.1.2 the Designer;

44.4.1.3 any Checker;

44.4.1.4 the Operator;

44.4.1.5 the Archaeologist;

44.4.1.6 the Project Quality Director;

44.4.1.7 the Landscape Architect;

44.4.1.8 the Landscape Manager;

44.4.1.9 the Ecologist; and

44.4.1.10 the Testing Contractor.

- 44.4.2 If any of the persons referred to in Clause 44.4.1 shall cease to act at any time, 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 for the Contractor, Operator, Designer, Archaeologist, Landscape Architect or Ecologist 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).
- 44.4.3 Without prejudice to any obligation under Clause 22 (Quality Management) the Works may be sub-contracted by the Contractor without the consent of the Secretary of State or the Department's Agent, subject always to compliance with the Design and Certification Procedure.
- 44.4.4 Without prejudice to any obligation under Clause 22 (Quality Management) 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 Representative, subject always to compliance with the Design and Certification Procedure.
- 44.4.5 No additional sub-contractor shall carry out any Operation until:
- 44.4.5.1 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
- 44.4.5.2 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).

44.5 **Consents**

Save as provided in Clauses 44.3.1, 44.4.1 and 44.4.2, any consent to be given by the Secretary of State under this Clause 44 (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. **NOTICES**

45.1 **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.

45.2 **Addresses**

Any Notice shall be duly given if signed by or on behalf of a duly authorised officer of the person giving the Notice and left at or sent by recorded delivery post or by facsimile transmission to the following addresses:

Secretary of State

Welsh Office/Y Swyddfa Cymreig
Highways Directorate
Cathays Park
Cardiff/Caerdydd CF1 3NQ

Telefax: 01222 826306
Attention: Mr Ray Hooper

DBFO Co

UK Highways A55 Limited
PO Box 295
Alexandra Gate
Rover Way
Cardiff
CF2 2UE
Telefax: 01222 585751
Attention: Company Secretary

Department's Agent

Halcrow Group Limited
Llanthony Warehouse
The Docks
Gloucester
GL1 2NS
Telefax: 01452 393900
Attention: Mr Bryan Bamber

Department's Representative

To be notified in accordance with Clause 21.3.1

45.3 **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 Agent and the Department's Representative. The Department's Agent or the Department's Representative may change its address for notice to another address in England and Wales by prior notice to the Parties.

45.4 **Receipt**

Any Notice shall be deemed to have been received:

45.4.1 if sent by hand or recorded delivery post, when delivered;

45.4.2 if sent by facsimile, upon sending, subject to:

45.4.2.1 confirmation of uninterrupted transmission by a transmission report; and

45.4.2.2 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:

45.4.2.2.1 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

45.4.2.2.2 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 45.4.2.

46. **CONSENTS AND APPROVALS**

46.1 **Review Procedure**

46.1.1 Any proposed document (including 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 3 of Schedule 7 (Review Procedure).

46.1.2 Without limitation to Clause 46.3 (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, Landscape Manager, Testing Contractor,

Ecologist and Audit Team 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.

46.2 **Reasonableness**

Unless otherwise specified, where any agreement, certificate, consent, permission, expression of satisfaction or other approval (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.

46.3 **Effect of Consents, Approvals and Inspections**

46.3.1 Neither the giving of any Approval, knowledge of the terms of any agreement or document (including 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, the Department's Agent or the Department's Representative 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.

46.3.2 Without limitation to Clause 46.3.1, no examination or lack of examination by the Department's Agent or the Department's Representative 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.

46.3.3 Without limitation to Clause 46.3.1, notwithstanding any inspection by the Department's Agent or the Department's Representative under this Agreement or the failure of the Department's Agent or the Department's Representative to make any inspection under this Agreement, the DBFO Co's responsibility under this Agreement shall not be relieved or absolved or otherwise modified.

46.3.4 Any Approval shall be final, subject to being opened up, reviewed or revised:

46.3.4.1 if errors or further relevant facts are revealed after the Approval has been given; or

46.3.4.2 in accordance with paragraph 7.3 of Schedule 15 (Disputes Resolution Procedure).

46.3.5 Without prejudice to Clause 46.3.4, any endorsement, decision, opinion, instruction, notice, statement of objection, finding, determination, requirement

or certificate of the Department's Agent or the Department's Representative 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.

47. **TAXES**

47.1 **VAT**

- 47.1.1 All amounts stated to be payable by either Party under this Agreement shall be exclusive of any VAT properly chargeable thereon.
- 47.1.2 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.
- 47.1.3 If either Party (in this Clause 47 (Taxes) the "**First Party**") shall consider that any VAT which the other Party (in this Clause 47 (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 for 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 47 (Taxes) the "**Commissioners**") as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Commissioners for such a ruling.
- 47.1.4 The following further provisions shall apply in respect of the application for a ruling in accordance with Clause 47.1.3:
 - 47.1.4.1 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;
 - 47.1.4.2 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
 - 47.1.4.3 the Second Party shall use all reasonable efforts (including 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.
- 47.1.5 If a ruling is required by the First Party under Clause 47.1.3, 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 Clauses 47.1.6 and 47.1.7 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.

47.1.6 In the event that the First Party disagrees with any ruling obtained pursuant to Clause 47.1.3 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.

47.1.7 The following further provisions shall apply in the event that the First Party shall exercise its rights under Clause 47.1.6:

47.1.7.1 the action which the First Party shall be entitled to require the Second Party to take shall include 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;

47.1.7.2 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;

47.1.7.3 save as specifically provided in Clause 47.1.7.2, 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

47.1.7.4 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 47.1.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

47.2 **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.

47.3 **Construction Industry Tax Deduction Scheme**

47.3.1 In this Clause 47.3 (Construction Industry Tax Deduction Scheme):

47.3.1.1 "**the Act**" means the Income and Corporation Taxes Act 1988;

47.3.1.2 "**the Regulations**" means the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993 (SI 1993/743);

47.3.1.3 "**contractor**" means a person who is a contractor for the purposes of the Act and the Regulations;

47.3.1.4 "**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;

47.3.1.5 "**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;

47.3.1.6 "**sub-contractor**" means a person who is a sub-contractor for the purposes of the Act and the Regulations; and

47.3.1.7 "**tax certificate**" is a certificate issuable under Section 561 of the Act.

47.3.2 The provisions of this Clause 47.3 (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 Secretary of State has received written confirmation from the Inland Revenue in a form which is reasonably satisfactory to the Secretary of State that it is not a contractor (in which event only Clause 47.3.11 shall apply).

47.3.3 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 47.3 (Construction Industry Tax Deduction Scheme) applies for the first time and on each occasion when this Clause 47.3 (Construction Industry Tax Deduction Scheme) applies following a period when it has not so applied the DBFO Co shall either:

47.3.3.1 provide the Secretary of State with the evidence that the DBFO Co is entitled to be paid without the statutory deduction; or

47.3.3.2 inform the Secretary of State in writing that it is not entitled to be paid without the statutory deduction.

47.3.4 If the Secretary of State is not satisfied with the validity of the evidence submitted in accordance with Clause 47.3.3.1, he shall within 14 days of the DBFO Co submitting such evidence notify the DBFO Co in writing that he

intends to make the statutory deduction from payments due under this Agreement to the DBFO Co and give his reasons for that decision.

- 47.3.5 Where Clause 47.3.3.2 applies, the DBFO Co shall immediately inform the Secretary of State if it obtains a tax certificate, and thereupon Clause 47.3.3.1 shall apply.
- 47.3.6 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 47.3 (Construction Industry Tax Deduction Scheme) applies at that time, the DBFO Co shall not later than 28 days before the date of expiry either:
 - 47.3.6.1 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 47.3.4 shall apply if the Secretary of State is not satisfied with the evidence; or
 - 47.3.6.2 inform the Secretary of State in writing that it will not be entitled to be paid without the statutory deduction after the said date of expiry.
- 47.3.7 The DBFO Co shall immediately inform the Secretary of State in writing if its current tax certificate is cancelled and give the date of such cancellation.
- 47.3.8 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.
- 47.3.9 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.
- 47.3.10 Where any error or omission has occurred in calculating or making the statutory deduction then:
 - 47.3.10.1 in the case of an over-deduction, the Secretary of State shall correct that error or omission by payment to the DBFO Co of the sum over-deducted; and
 - 47.3.10.2 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.

- 47.3.11 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.
- 47.3.12 If compliance with this Clause 47.3 (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 47.3 (Construction Industry Tax Deduction Scheme) shall prevail.
- 47.3.13 Any Dispute arising out of the application of this Clause 47.3 (Construction Industry Tax Deduction Scheme) shall be resolved in accordance with the Disputes Resolution Procedure.

48. INTELLECTUAL PROPERTY

48.1 Design and Other Data

The DBFO Co shall:

- 48.1.1 make available to the Secretary of State without charge in paper based or machine readable form as required by the Secretary of State all materials, documents and data of any nature (including 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 statutory duty; and
- 48.1.2 make available to the Secretary of State 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 48.1.1.

48.2 Licences

- 48.2.1 The DBFO Co:
- 48.2.1.1 hereby grants to the Secretary of State a perpetual, transferable, non-exclusive, royalty-free licence or sub-licence (carrying the right to grant sub-licences or sub-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 statutory 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

48.2.1.2 where any Intellectual Property is vested in any other third party, and the DBFO Co is unable to grant a licence or sub-licence under Clause 48.2.1.1, shall procure the grant of a like licence with effect (subject to Clause 48.2.3) 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, the conduct of any other Operations or the carrying out by the Secretary of State of any statutory functions in respect of the Project Facilities.

48.2.2 The Secretary of State hereby grants to the DBFO Co a non-transferable, non-exclusive, royalty-free licence (but with no right to grant sub-licences other than to its Contracting Associates) 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.

48.2.3 With respect to Intellectual Property arising during the Contract Period, the licence granted pursuant to Clause 48.2.1 or Clause 48.2.2 shall take effect immediately upon the coming into existence of such Intellectual Property.

48.3 **Computerised Data**

48.3.1 To the extent that any of the data, materials and documents referred to in Clause 48.1 (Design and Other Data) are generated by or maintained on a computer or in any other machine readable format, the DBFO Co shall grant a licence or sub-licence to, or procure for the benefit of the Secretary of State at no charge the grant of a licence or sub-licence on equivalent terms to the equivalent licence or sub-licence granted to the DBFO Co for and supply of any relevant software or database to enable the Secretary of State or his nominee to access and otherwise use such data for the purposes set out in 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 the Secretary of State of any statutory functions in respect of the Project Facilities.

48.3.2 Within 28 days after the execution of this Agreement the DBFO Co shall submit to the Department's Agent 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 48.1 (Design and Other Data) and the Department's Agent 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 to which no such objection has been raised by the Department's Agent. 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.

48.4 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 48.2 (Licences).

48.5 Traffic Data

48.5.1 Without prejudice to any rights which the DBFO Co may have in the Traffic Data, the Secretary of State shall be entitled without further consent from the DBFO Co:

48.5.1.1 to use the Traffic Data for the purposes of exercising his rights or carrying out his duties under this Agreement or carrying out any statutory function; and

48.5.1.2 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.

48.5.2 Without prejudice to any rights which the Secretary of State may have in the Traffic Data, the DBFO Co shall be entitled without further consent from the Secretary of State:

48.5.2.1 to use the Traffic Data for the purposes of exercising its rights or carrying out its duties under this Agreement; and

48.5.2.2 to incorporate the Traffic Data in any traffic or other statistics prepared by or on behalf of the DBFO Co 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.

48.6 Termination

This Clause 48 (Intellectual Property) shall survive the termination of this Agreement irrespective of the reason for termination.

49. CONFIDENTIALITY

49.1 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 confidential or proprietary information (including documents, the Financial Model, computer records, specifications, formulae, evaluations, methods, processes, technical descriptions, reports, any police

reports STATS 19 (or any replacement or substitute for such report) and other data, records, drawings and information whether or not included in the Design Data or Traffic Data) provided to or arising or acquired by it pursuant to the terms or performance of this Agreement (including any such documents or information supplied in the course of proceedings under the Disputes Resolution Procedure) (together the "**Confidential Information**").

49.2 **Exceptions**

Notwithstanding Clause 49.1 (Confidential Information), a Party shall be entitled to disclose the whole or any part of the Confidential Information:

- 49.2.1 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
- 49.2.2 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 to the extent that disclosure is in accordance with Government policy on the disclosure of information relating to Government Contracts; or
- 49.2.3 in the case of the DBFO Co, to any bank or financial institution from whom it is seeking or obtaining finance; or
- 49.2.4 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
- 49.2.5 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
- 49.2.6 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
- 49.2.7 to the extent permitted by Clause 48.2 (Licences) and Clause 48.5 (Traffic Data); or
- 49.2.8 in the case of the Secretary of State:
 - 49.2.8.1 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;
 - 49.2.8.2 (without limitation to Clause 49.2.2) 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; or

- 49.2.8.3 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,

and, in the cases of Clauses 49.2.1 and 49.2.3 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 49.2.2 to 49.2.7 shall not apply in respect of any police report STATS 19 (or any replacement or substitute for such report).

49.3 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 49.3 (Return of Confidential Information) shall not apply to:

- 49.3.1 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

- 49.3.2 Traffic Data.

49.4 Continuation of Confidentiality Obligations

The obligations of the Parties under this Clause 49 (Confidentiality) shall continue for a period of 5 years following the Termination Date notwithstanding such termination.

49.5 Publicity Regarding Disputes

The DBFO Co shall not without the prior written authority of the Secretary of State 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 or to the Funders in accordance with the Funding Agreements 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, provided that the DBFO Co shall not be bound by the provisions of this Clause 49.5 to the extent that it wishes to respond to issues which the Secretary of State has already raised in the public domain.

49.6 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 49 (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 49 (Confidentiality).

50. **AGENCY**

50.1 **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 27.4 (Contracting Out of Functions) and Clause 28.3 (Contracting Out of Functions).

50.2 **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.

50.3 **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, Landscape Manager, Ecologist, Testing Contractor, Project Quality Director 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.

50.4 **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, Landscape Manager, Ecologist, Testing Contractor or Project Quality Director in the relevant circumstances.

50.5 **Britannia Bridge Agreement**

50.5.1 The Secretary of State appoints the DBFO Co to act as the Secretary of State's agent solely for the purpose of exercising the rights and performing the obligations to be discharged by the DBFO Co pursuant to paragraph 2 of Annex 1 to Part 1 of Schedule 6 for the purposes of the Britannia Bridge Agreement from the Commencement Date and until such appointment is terminated in accordance with Clause 50.5.5.2 (the "**Appointment**").

50.5.2 The Appointment:

50.5.2.1 for the avoidance of doubt, shall include the DBFO Co acting as Highway Engineer;

50.5.2.2 shall exclude the exercise of the right of the Secretary of State to give notice of intention to close permanently the highway over the Britannia Bridge or the date of such withdrawal or closure pursuant to clause 18 of the Britannia Bridge Agreement;

- 50.5.2.3 shall not extend to permitting the DBFO Co to enter into any obligation or incur any liability on behalf of the Secretary of State pursuant to such Appointment beyond that strictly necessary for the exercise of the rights and performance of the obligations assumed by the DBFO Co pursuant to paragraph 2 of Annex 1 to Part 1 of Schedule 6;
 - 50.5.2.4 shall not include the right to make any amendment, variation or supplement to the Britannia Bridge Agreement nor to enter into any separate agreement contemplated by clause 14(b) or clause 17 of that Agreement save where the terms thereof have previously been specifically approved by the Secretary of State;
 - 50.5.2.5 shall not confer on the DBFO Co the right to assume or exercise any statutory powers of the Secretary of State, nor act in such a way as might result in the Secretary of State being in breach of any of his statutory duties; and
 - 50.5.2.6 shall not confer on the DBFO Co the right to pledge the credit of the Secretary of State.
- 50.5.3 The DBFO Co accepts the Appointment and agrees that it shall at its own cost and expense throughout the duration of the Appointment:
- 50.5.3.1 perform and discharge all obligations, functions, duties, liabilities and responsibilities of the Secretary of State under the Britannia Bridge Agreement;
 - 50.5.3.2 exercise the rights of the Secretary of State under that Agreement;
 - 50.5.3.3 be wholly responsible for taking any decision or action to ensure that all the obligations, functions, duties, liabilities, responsibilities and rights of the Secretary of State under that Agreement are properly fulfilled, satisfied, discharged or exercised as appropriate,
- save to the extent that such obligations, functions, duties, liabilities, responsibilities and rights are expressly excluded in Clause 50.5.2 or paragraph 2.1.2 of Annex 1 to Part 1 to Schedule 6.
- 50.5.4 The DBFO Co and the Secretary of State each confirms that if it or he receives any notice or report from the British Railways Board, Railtrack Plc or any third party pursuant to the Britannia Bridge Agreement, it or he shall promptly inform and provide full details either orally or in writing, as appropriate to the other, provided that if oral notice is given, such notice shall be confirmed promptly by notice in writing to the other.
- 50.5.5 The Appointment shall only be terminated in accordance with the provisions of this Clause 50.5.5.
- 50.5.5.1 The Secretary of State shall be entitled to terminate the Appointment by serving notice on the DBFO Co to that effect (which notice shall have immediate effect):
 - 50.5.5.1.1 upon the occurrence of an Event of Default;
 - 50.5.5.1.2 where the DBFO Co has caused a serious breach of the Britannia Bridge Agreement;

- 50.5.5.1.3 upon the DBFO Co's failure to take such steps as the Secretary of State may think necessary and within such time as the Secretary of State shall think fit pursuant to Clause 25.5.2; or
- 50.5.5.1.4 upon the Secretary of State becoming entitled to exercise his rights under Clause 42.1.1.1.
- 50.5.5.2 The Appointment shall terminate:
 - 50.5.5.2.1 if all of the rights and obligations of the parties to the Britannia Bridge Agreement have expired;
 - 50.5.5.2.2 on the Termination Date or, if earlier, on the date on which the DBFO Co ceases to be a party to this Agreement;
 - 50.5.5.2.3 upon the exercise by the Secretary of State of his rights pursuant to Clause 39.3.3; or
 - 50.5.5.2.4 if the Conditions to Commencement set out in Clause 7.1 have not been satisfied.
- 50.5.6 Notice of the Appointment shall be given to Railtrack Plc by the DBFO Co, such notice to be in the form set out in Part 4 of Schedule 6.
- 50.5.7 Not used.
- 50.6 **Railtrack Works Agreement**
 - 50.6.1 Pursuant to the Railtrack Works Agreement, the Secretary of State appoints the DBFO Co to act as the Secretary of State's Agent (as defined in that Agreement) solely for the purpose of exercising the rights and performing the obligations to be discharged by the DBFO Co pursuant to paragraph 3 of Annex 1 to Part 1 of Schedule 6 for the purpose of the Railtrack Works Agreement from the Commencement Date and until such appointment is terminated in accordance with Clause 50.6.5 (the "**Railtrack Appointment**").
 - 50.6.2 The Railtrack Appointment:
 - 50.6.2.1 shall not extend to permitting the DBFO Co to enter into any obligation or incur any liability on behalf of the Secretary of State pursuant to such Railtrack Appointment beyond that strictly necessary for the exercise of the rights and performance of the obligations assumed by the DBFO Co pursuant to paragraph 3 of Annex 1 to Part 1 of Schedule 6;
 - 50.6.2.2 shall not include the right to make any amendment, variation or supplement to the Railtrack Works Agreement save where the terms thereof have previously been specifically approved by the Secretary of State; and
 - 50.6.2.3 shall not confer on the DBFO Co the right to assume or exercise any statutory powers of the Secretary of State, nor act in such a way as might result in the Secretary of State being in breach of any of his statutory duties.

- 50.6.3 The DBFO Co accepts the Railtrack Appointment and agrees that it shall at its own cost and expense throughout the duration of the Railtrack Appointment:
- 50.6.3.1 perform and discharge all obligations, functions, duties, liabilities and responsibilities of the Secretary of State under the Railtrack Works Agreement;
 - 50.6.3.2 exercise the rights of the Secretary of State under that Agreement;
 - 50.6.3.3 be wholly responsible for taking any decision or action to ensure that all the obligations, functions, duties, liabilities, responsibilities and rights of the Secretary of State under that Agreement are properly fulfilled, satisfied, discharged or exercised as appropriate,
- save to the extent that such obligations, functions, duties, liabilities, responsibilities and rights are expressly excluded in paragraph 3.1.2 of Annex 1 to Part 1 to Schedule 6.
- 50.6.4 The DBFO Co and the Secretary of State each confirms that if it or he receives any notice, report or estimate from Railtrack Plc or any third party pursuant to the Railtrack Works Agreement, it or he shall promptly inform and provide full details either orally or in writing, as appropriate to the other, provided that if oral notice is given, such notice shall be confirmed promptly by notice in writing to the other.
- 50.6.5 The Railtrack Appointment shall only be terminated in accordance with the provisions of this Clause 50.6.5.
- 50.6.5.1 The Secretary of State shall be entitled to terminate the Railtrack Appointment by serving notice on the DBFO Co to that effect (which notice shall have immediate effect):
 - 50.6.5.1.1 upon the occurrence of an Event of Default;
 - 50.6.5.1.2 where the DBFO Co has caused a serious breach of the Railtrack Works Agreement;
 - 50.6.5.1.3 upon the DBFO Co's failure to take such steps as the Secretary of State may think necessary and within such time as the Secretary of State shall think fit pursuant to Clause 25.5.2; or
 - 50.6.5.1.4 upon the Secretary of State becoming entitled to exercise his rights under Clause 42.1.1.1.
 - 50.6.5.2 The Railtrack Appointment shall terminate:
 - 50.6.5.2.1 if all of the rights and obligations of either or both of the parties to the Railtrack Works Agreement have expired; or
 - 50.6.5.2.2 on the Termination Date or, if earlier, on the date on which the DBFO Co ceases to be a party to this Agreement;
 - 50.6.5.2.3 upon the exercise by the Secretary of State of his rights pursuant to Clause 39.3.3; or
 - 50.6.5.2.4 if the Conditions to Commencement set out in Clause 7.1 have not been satisfied.

50.6.6 Notice of the Railtrack Appointment shall be given to Railtrack Plc by the DBFO Co, such notice to be in the form set out in Part 5 of Schedule 6.

50.6.7 Not used.

51. **DISPUTES RESOLUTION PROCEDURE**

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. **WHOLE AGREEMENT**

This Agreement (including the Schedules) and the Custody Agreement 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.

53. **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.

54. **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.

55. **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.

56. **GOVERNING LAW AND JURISDICTION**

56.1 **Law**

This Agreement shall be governed by and construed in all respects in accordance with the law of England and Wales.

56.2 Jurisdiction

Subject to the provisions of Clause 51 (Disputes Resolution Procedure), the Parties agree to submit to the non-exclusive jurisdiction of the Courts of England and Wales as regards any claim or matter arising in relation to this Agreement.

56.3 Not used.

57. ECONOMIC AND MONETARY UNION

The Parties confirm that the provisions of Article 3 of the Council Regulation (EC) No. 1103/97 (continuity of contracts) shall apply to this Agreement and that the introduction of the euro within the meaning of that Regulation shall not:

- (a) have the effect of altering any term of, or discharging, cancelling, rescinding, terminating or otherwise excusing performance under this Agreement; nor
- (b) give a Party the right unilaterally to alter, discharge, cancel, rescind or terminate this Agreement or any Project Document; nor
- (c) give rise to an Event of Default or DBFO Co Termination Event.

IN WITNESS WHEREOF the parties hereto have executed this Agreement as a Deed.

The Official Seal of the)
SECRETARY OF STATE FOR)
WALES hereunto affixed)
is authenticated by)

██████████

**DIRECTOR OF HIGHWAYS
WELSH OFFICE**

The Common Seal of)
UK HIGHWAYS A55 LIMITED)
 is hereunto affixed in the presence of)

██████████

.....
Director

■■■■■■■■■■

Director
BF0297363.13

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