

A13 THAMES GATEWAY

DBFO CONTRACT
(Tranche 2)

**THE SECRETARY OF STATE FOR THE
ENVIRONMENT, TRANSPORT AND THE REGIONS**

AND

ROAD MANAGEMENT SERVICES (A13) plc

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THIS DBFO CONTRACT (this "Agreement") is made the 12th day of April 2000

BETWEEN:

- (1) **THE SECRETARY OF STATE FOR THE ENVIRONMENT, TRANSPORT AND THE REGIONS** of Eland House Bressenden Place, London SW1E 5DU (the "Secretary of State"); and
- (2) **ROAD MANAGEMENT SERVICES (A13) plc**, a company organised and existing under the laws of England, registered under number 03917644 and having its registered office at Sandiway House, Hartford, Northwich, Cheshire CW8 2YA, UK (the "DBFO Co").

WHEREAS:

- (A) The Government of the United Kingdom desires to have the private sector invest and participate in the development of the nation's transport system.
- (B) In accordance with the foregoing policy, interested persons were invited to submit proposals for investing in the Project.
- (C) The Project will comprise the design and construction of certain improvements to Ironbridge/Canning Town; Woolwich/Manor Way; Movers Lane; Old Roding Bridge and of certain other works; the operation and maintenance of the A13 (including the aforementioned new build and other works) between Butcher Row and Wennington, and the design and construction but not the operation and maintenance of a communications system and a traffic signals system for the A13 between Butcher Row and Wennington. The Project also includes the design, construction, operation and maintenance of certain improvements at Prince Regent Lane and may also include the operation and maintenance of the Docklands Roads.
- (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 where so indicated been entered into on or prior to the date hereof, or where not indicated are in Agreed Form.
- (F) The Secretary of State and the DBFO Co have reached agreement as set out in this Agreement.
- (G) The Secretary of State is satisfied that this Agreement would be of benefit to the public.

- (H) This Agreement is being entered into by the Secretary of State under the Private Finance Initiative and satisfies the conditions set out in Section 4(2) of the Construction Contract (England and Wales) Exclusion Order 1998.
- (I) With the exception of [Clause 5.1.1](#), this Agreement will come into force only on the issue of the RMS Bonds and payment therefore in full and confirmation from MBIA that all conditions precedent contained in Schedule 1 of the Collateral Deed and Schedule 1 of the EIB Facility Agreement have been satisfied (other than any precondition relating to the coming into force of this Agreement).
- (J) It is acknowledged by the parties that this Agreement will be transferred pursuant to the provisions of the Greater London Authority Act 1999 from the Secretary of State to Transport for London.

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).

"Actual BRW Commencement Date" means, in relation to a Part of the BRW New Road, the date specified as such in the BRW Commencement Certificate for that Part of the BRW New Road, provided that such BRW Commencement Certificate is not withdrawn on or prior to such date pursuant to [Clause 9.12.2](#) [Bridge Replacement Works: Conditions to Commencement]

"Actual CS Commencement Date" means the date specified as such in the CS Commencement Certificate provided that the CS Commencement Certificate is not withdrawn on or prior to such date pursuant to [Clause 9.3.2](#).

"Actual DR Commencement Date" means the date specified as such in the Docklands Roads Certificate, provided that the Docklands Road Certificate is not withdrawn on or prior to such date pursuant to [Clause 9.8.2](#).

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

- (a) for the Existing Road (other than any Upgraded Section) at any time after the date of this Agreement but in the case of Road Segment 2 at any time after the date set out in the By-Pass Notice;
- (b) for the New Road (other than the New CS Road and the BRW New Road but including any Upgraded Section that will form part of the New Road but will not form part of the New CS Road or the BRW New Road) and Off-Site Facilities located on Main Site Adjacent Areas, at any time after the issue of the Completion Certificate;
- (c) for the New CS Road (including any Upgraded Section that will form part of the New CS Road) and Off-Site Facilities located on CS Adjacent Areas, at any time after the issue of the CS Completion Certificate;

- (d) for the Docklands Roads, at any time after the Actual DR Commencement Date;
- (e) in respect of the CS Upgraded Section, at any time after the issue of a notice pursuant to [Clause 9.1.2](#) or [9.3.2](#) in respect of the Contingent Scheme;
- (f) for any Part of the BRW New Road (including any Upgraded Section that will form part of such Part of the BRW New Road), at any time after the issue of the BRW Completion Certificate for that Part of the BRW New Road; and
- (g) in respect of a BRW Upgraded Section, prior to the issue of the relevant BRW Commencement Certificate or at any time after a notice pursuant to [Clause 9.12.2](#) or [Clause 9.17](#) in respect of the Part of the BRW New Road with which such BRW Upgraded Section is associated;

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 8.8](#) [Boundaries of Site and Adjacent Areas] and [Clause 8.9](#) [CS Boundaries]:

- (a) the Main Site Adjacent Areas;
- (b) from the Actual CS Commencement Date, the CS Adjacent Area;
- (c) from the Actual BRW Commencement Date in relation to a Part of the BRW New Road until either the date of issue of the BRW Completion Certificate in relation to that Part of the BRW New Road or the date of issue of a notice pursuant to [Clause 9.17](#) in relation to that Part of the BRW New Road, the BRW Temporary Adjacent Areas associated with the Bridge Replacement Works for that Part of the BRW New Road; and
- (d) from the Actual DR Commencement Date, the DR Adjacent Areas.

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

"Agreed Form" means in relation to a document that its form and content have been agreed between the parties thereto and the document has been initialled at execution of this Agreement by or on behalf of the parties thereto for identification.

"Agreed Form List" means the list of persons from which the DBFO Co may select those to fulfil the roles referred to in [Clause 45.4.1.10 to 45.4.1.13](#) inclusive.

"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 32.3.2](#) [Annual Reconciliation].

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

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

"Archaeologist" means Chris Place of Chris Blandford Associates or such substitute as may be appointed by the DBFO Co for the time being in accordance with [Clause 45.4.1.](#) or [45.4.2](#) [Sub-Contracting].

"Archaeological Works" means those works required to be carried out pursuant to [Annex 14 to Part 2 of Schedule 4](#) [Construction Requirements].

"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].

"Availability Categories" means the categories A-E (inclusive) set out in [paragraph 3.1 of Part 2 of Schedule 9](#) and "Availability Category" shall mean any one of them as applicable.

"Availability Monitoring Equipment" means:

- (a) equipment to monitor Carriageway Availability, FC Availability, DR Carriageway Availability and DRFC Availability meeting the specification set out in [Schedule 17](#) [Core Communications and Traffic Signals Requirements];
- (b) all other equipment (together with necessary housings, appliances and buildings) required to monitor all of the carriageways, footways and cycleways of the Project Road in each direction and the traffic passing the Monitoring Point;
- (c) communications links (together with other equipment and systems as necessary) to connect the equipment referred to in paragraphs (a) and (insofar as applicable) (b) above to premises specified from time to time by the Department's Nominee and so as to enable the Secretary of State directly to interrogate and to view in real time images received by such equipment and to record such images; and
- (d) communications links from the equipment referred to in paragraphs (a) and (insofar as applicable) (b) above to permit the connecting of the infrastructure at Chigwell Police Control Office together with sufficient equipment and systems to enable the viewing in real time of the images received by such equipment and to record such images.

"Availability Payment" means, in relation to any period, the aggregate of the Carriageway Availability Payment and the FC Availability Payment for that period.

"Band" means each of the bands of Usage Payments referred to in [Part 1 of Schedule 9](#) [Usage Payment].

"Base Case" means the output from the Financial Model after the input of the issue price of the RMS Bonds and the other proposed financial criteria agreed by the Parties on or before the Fixing Date (as defined in the Bond Pricing Deed), pursuant to the Bond Pricing Deed, and which Base Case will on the issue of the RMS Bonds become [Part 3 of Schedule 1](#) and shall produce the figures for Base Case Items 1 and 2 in [Clauses 32.2.2 and 32.2.4](#) and permit [Schedule 9](#) to be finalised;

"Bond Pricing Deed" means a deed of even date herewith between the Parties governing the rights and obligations of the Parties with respect to the launch of the RMS Bonds, the pricing of the EIB Facility Agreement, and the settling of the Base Case of [Schedule 9](#).

"Boundary Change Dates" means, in relation to the Contingent Scheme, each of the following dates:

- (a) the Actual CS Commencement Date; and

- (b) the date of any notice given by the Secretary of State pursuant to any of the CS Stop Clauses.

"Bridge Replacement Cost" has the meaning set out in [Clause 9.14.1](#) [Bridge Replacement Cost].

"Bridge Replacement Site" means those parts of the Site which from the Actual BRW Commencement Date in respect of a Part of the BRW New Road are required to carry out the Bridge Replacement Works in respect of such Part of the BRW New Road.

"Bridge Replacement Works" means that part of the Works required for the design, construction, completion, commissioning and testing of the BRW New Road (including, without limitation, those works listed at [paragraph 4 of Annex 1 to Part 1 of Schedule 4](#) [Core Construction Requirements]).

"BRW Conditions Date" means, in relation to a Part of BRW New Road, the date which is 7 days prior to the date specified in the BRW Commencement Certificate for such Part of the BRW New Road as being the Actual BRW Commencement Date.

"BRW Construction Contract" means, in relation to a Part of the BRW New Road, the contract entered into on or around the time of the BRW Conditions Date between the DBFO Co and the Contractor (or another contractor of sufficient financial strength, skill and experience to perform its obligations under the BRW Construction Contract and approved by the Secretary of State and appointed on terms approved by the Secretary of State such approvals not to be unreasonably withheld or delayed) in respect of, inter alia, the [design and] construction of the Bridge Replacement Works for that Part of the BRW New Road.

"BRW Cost Date" means the date which is 126 months prior to the expected Expiry Date.

"BRW Design Contract" means, in relation to a Part of the BRW New Road, the contract entered or to be entered into between the Contractor and the Designer in respect of, inter alia, the design and examination of the Bridge Replacement Works for that Part of the BRW New Road.

"BRW New 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 road described in [Part 2 of Schedule 3](#) located in the areas shown on drawings in Folio 16B and constructed or modified or to be constructed or modified by the DBFO Co which, subject to the provision below, is intended to form part of the New Road, including without limitation:

- (a) all carriageways, hard shoulders, slip roads, side roads and access roads bridges and other highway structures whether over or under such road; and

(b) unless otherwise expressly provided, any Upgraded Sections,

together with all supporting infrastructures and amenity, including, without limitation, all fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, cycleways, road markings, road traffic signs, road lighting, Measurement Installations, embankments and cuttings, provided that any Part of the BRW New Road shall only become part of the New Road if and when the Actual BRW Commencement Date occurs in relation to such Part of the BRW New Road.

"BRW Notice Date" has the meaning given in [Clause 9.11.1](#) [Bridge Replacement Works].

"BRW Retention Account" means:

- (a) in relation to the New Lodge Avenue Flyover, the Lodge Avenue Flyover Retention Account; or
- (b) in relation to the New River Lea Crossing, the River Lea Crossing Retention Account.

"BRW Scheme" has the meaning given in [Clause 49.2.1.1](#)

"BRW Subsequent Procurement Event" means, in relation to a Part of the BRW New Road, the procurement of completion of the Bridge Replacement Works for that Part of the BRW New Road by the Secretary of State at any time after:

- (a) the issue of a notice pursuant to [Clause 9.12.2](#) in relation to that Part of the BRW New Road; or
- (b) the issue of a notice pursuant to [Clause 9.17](#) in relation to that Part of the BRW New Road.

"BRW Temporary Adjacent Areas" means those areas so designated from time to time by the Secretary of State which do not form part of the Site but upon which part of the Bridge Replacement Works are to be carried out.

"BRW Upgraded Section" means those lengths of existing trunk road (including, without limitation, bridges under such road) described as such in [Part 1 of Schedule 3](#) which are to be or have been widened or otherwise modified in accordance with the Construction Requirements, the Communications Requirements and drawings in Folio 16B.

"By-Pass Notice" means the notice given by the Secretary of State in relation to the commencement of the DBFO's obligations to operate and maintain Road Segment 2, specifying a date no earlier than 35 days after the date of the By-Pass Notice.

"Carriageway Availability" means, the extent to which a Carriageway Section is determined by reference to the criteria set out in [paragraph 3.4 of Part 2 of Schedule 9](#), to be available for the purposes of determining the figure for PP_{ps} pursuant to [paragraph 3.1 of Part 2 of Schedule 9](#).

"Carriageway Availability Monitoring Contractor" means such person as may be appointed by the DBFO Co for the time being in accordance with [Clause 45.4.1](#), or [45.4.2](#).

"Carriageway Availability Payment" means, in relation to any calendar month, the payment to be made to the DBFO Co in respect of such period calculated in accordance with [paragraph 1 of Part 2 of Schedule 9](#).

"Carriageway Availability Period" means each of the following periods:

- (a) from (and including) 6.00 a.m. to (but excluding) 8.00 a.m;
- (b) from (and including) 8.00 a.m. to (but excluding) 10.00 a.m;
- (c) from (and including) 10.00 a.m. to (but excluding) 12.00 p.m;
- (d) from (and including) 12.00 p.m. to (but excluding) 2.00 p.m;
- (e) from (and including) 2.00 p.m. to (but excluding) 4.00 p.m;
- (f) from (and including) 4.00 p.m. to (but excluding) 6.00 p.m;
- (g) from (and including) 6.00 p.m. to (but excluding) 8.00 p.m;
- (h) from (and including) 8.00 p.m. to (but excluding) 10.00 p.m;
- (i) from (and including) 10.00 p.m. to (but excluding) 12.00 a.m.

"Carriageway Matrices" means the matrices so titled set out in [Annex 3 to Part 2 of Schedule 9](#) as varied, from time to time, in accordance with [paragraph 6 of Part 2 of Schedule 9](#) and "Carriageway Matrix" shall mean any one of them, as applicable.

"Carriageway Section" means each of the eight sections of the Project Road (excluding the FC Availability Sections) (four eastbound and four westbound) described in [Annex 4 to Part 2 of Schedule 9](#).

"Carriageway Sub-Section" means those parts of Carriageway Sections 1E and 1W described in [Annex 5 to Part 2 of Schedule 9](#) each comprising three sub-sections.

"CD-ROM" means the compact disc 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.

"Census Limits of Accuracy" has the meaning given in [Clause 31.4.2](#).

"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\(23\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (c) "Assessment Certificate (Structures)" means a certificate in the form set out in [Annex 1 \(21\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (d) "Assessment Check Certificates (Structures)" means a certificate in the form set out [Annex 1\(22\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (e) "BRW Completion Certificate" means a certificate in the form set out in [Annex 1\(30\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (f) "BRW Commencement Certificate" means a certificate in the form set out in [Annex 1\(29\) to Part 3 of Schedule 4](#) [Design and Certification Procedure].
- (e) "Check Certificate (Structures/Strengthened Earthworks)" means a certificate in the form set out in [Annex 1\(4\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (g) "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];
- (h) "Commissioning Certificate" means a certificate in the form set out in [Annex 1\(28\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (i) "Completion Certificate" means a certificate in the form set out in [Annex 1\(15\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (j) "Construction Certificate" means a certificate in the form set out in [Annex 1\(12\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (k) "CS Commencement Certificate" means a certificate in the form set out in [Annex 1\(19\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];

- (l) "CS Completion Certificate" means a certificate in the form set out in [Annex 1\(26\) to Part 3 of Schedule 4](#) [Design and Certification Procedure].
- (m) "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];
- (n) "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];
- (o) "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];
- (p) "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];
- (q) "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];
- (r) "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];
- (s) "Docklands Roads Certificate" means a certificate in the form set out in [Annex 1\(20\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (t) "Ecology Certificate" means a certificate in the form set out in [Annex 1\(25\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (u) "Handback Certificate" means a certificate in the form set out in [Annex 1\(17\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (v) "Internal Test Confirmation Certificate" means a certificate in the form set out in [Annex 1\(27\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (w) "Landscaping Certificate" means a certificate in the form set out in [Annex 1\(24\) to Part 3 of Schedule 4](#) [Design and Certification Procedure];
- (x) "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];
- (y) "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];

- (z) "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];
- (aa) "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
- (bb) "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 6.1 of Part 1 of Schedule 12](#) [General Change Procedure].

"Change in Availability Payments" means any net increase or decrease in the Availability Payments and (if applicable) the DR Availability Payments receivable by the DBFO Co in respect of a Contract Year as a consequence of an Eligible Change the subject of a notice given (or deemed given) pursuant to [paragraph 2.1 of Part 1 of Schedule 12](#) [General Change Procedure]. The Change in Availability Payments shall be calculated on the assumptions that all Availability Payments (and if applicable) all DR Availability Payments in respect of a Contract Year are receivable on the day which is the mid-point of such Contract Year.

"Change in Capital Costs" has the meaning given in [paragraph 12 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 given (or deemed given) pursuant to [paragraph 2.1 of Part 1 of Schedule 12](#) [General Change Procedure]. For the avoidance of doubt, this includes any Change in Capital Costs but does not include any Change in Usage Payments or any Change in Availability Payments. The Change in Costs (other than any Change in Capital Costs) shall be calculated on the assumption that all costs in respect of a Contract Year are incurred on the day which is the mid point of such Contract Year. For the avoidance of doubt, any increase in costs shall be a positive figure and any decrease in costs shall be a negative figure.

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

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

(but excluding in either such case any lawful requirements of any Relevant Authority and any change in the interpretation of any Legislation and also excluding any change

in law resulting from the making of any CS Orders or New Orders) which is binding on the DBFO Co.

"Change in PIA (MSPR)" means any net increase or decrease in the number of Personal Injury Accidents occurring on the Main Section of the Project Road as a consequence of an Eligible Change the subject of a notice given (or deemed given) pursuant to [paragraph 2.1 of Part 1 of Schedule 12](#) [General Change Procedure] in the period of 365 days from (and including) the date which, in accordance with [paragraph 3 of Part 1 of Schedule 12](#) [General Change Procedure] is agreed or determined as being, in respect of such Eligible Change, the PIA Change Effective Date in respect of the Main Section of the Project Road. Any net increase in the number of Personal Injury Accidents shall be a positive figure and any net decrease in the number of Personal Injury Accidents shall be a negative figure.

"Change in PIA (DR)" means any net increase or decrease in the number of Personal Injury Accidents occurring on the Dockland Roads, as a consequence of an Eligible Change the subject of a notice given (or deemed given) pursuant to [paragraph 2.1 of Part 1 of Schedule 12](#) [General Change Procedure], in the period of 365 days from (and including) the date which, in accordance with [paragraph 3 of Part 1 of Schedule 12](#) [General Change Procedure] is agreed or determined as being, in respect of such Eligible Change, the PIA Change Effective Date in respect of the Docklands Roads. Any net increase in the number of Personal Injury Accidents shall be a positive figure and any net decrease in the number of Personal Injury Accidents shall be a negative figure.

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

"Change in Traffic" means any net increase or decrease in the Long Vehicles using the Project Road in a Contract Year as a consequence of an Eligible Change the subject of a notice given (or deemed given) pursuant to [paragraph 2.1 of Part 1 of Schedule 12](#) [General Change Procedure].

"Change in Usage Payments" means any net increase or decrease in the MSPR Usage Payments or DR Usage Payments receivable by the DBFO Co in respect of a Contract Year as a consequence of an Eligible Change the subject of a notice given (or deemed given) pursuant to [paragraph 2.1 of Part 1 of Schedule 12](#) [General Change Procedure]. The Change in Usage Payments shall be calculated on the assumption that all MSPR Usage Payments and (if applicable) all DR Usage Payments in respect of a Contract Year are received on the day which is the mid point of such Contract Year.

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

"Checker" means 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 45.4.1.](#) or [45.4.2.](#)

"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.

"Clause 9.3.2 Scheme" has the meaning given in [Clause 49.2.1.](#)

"Collateral Deed" has the meaning given in [Clause 2.3.1.3\(a\).](#)

"Commencement Date" means, in relation to Firm Schemes, the date specified as such in the Commencement Certificate.

"Communications Installations" means the Traffic Control and Communications Systems and the Traffic Signals Systems as defined in [Schedule 17](#) which the DBFO Co is obliged to design, supply, install and test pursuant to [Schedule 17.](#)

"Communications Requirements" means the relevant requirements set out or identified or referred to in [Part 2 of Schedule 17](#) [Core Communications and Traffic Signals Requirements] as amended or supplemented from time to time by any DBFO Co's Change, Alternative Proposal or Department's Change.

"Compensation Event" means any of the following:

- (a) an event within [Clause 26.5.3](#);
- (b) a failure by the Secretary of State to issue the Commencement Certificate on or before the date 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 a Permit to Use, Completion Certificate, CS Completion Certificate, BRW Completion Certificate or Taking Over Certificate when required to do so in accordance with [Clause 13.1](#) [Permit to Use], [13.2](#) [Completion Certificate] or [13.3](#) [Local Facilities and De-Trunked Segments] as appropriate;

- (e) the occurrence of a Relevant Change in Law (but only if such Relevant Change in Law does not give rise to a right for either Party to terminate this Agreement in accordance with [Clause 42.3.1](#));
- (f) a failure by the Secretary of State to issue a BRW Commencement Certificate on or before the relevant date determined in accordance with [Clause 9.11.2](#);
- (g) after the Department's Nominee has issued a stop notice pursuant to [Clause 11.3.3](#), it being agreed or determined by the Disputes Resolution Procedure that the Department's Nominee should have endorsed the relevant submission under the Review Procedure "received"; and
- (h) the prevention of performance of the DBFO Co's obligations to carry out and complete the Works where prior to the issue of the Completion Certificate and in accordance with [Schedule 22](#) the DBFO Co has requested authority to enforce legal rights in the name of or on behalf of the Secretary of State and the Secretary of State has refused to grant such authority, or has revoked authority previously granted, and providing:-
 - it is substantially more onerous due to the presence or activities of Protesters on the Site or Adjacent Areas for the DBFO Co to carry out and complete the Works without the enforcement of legal rights which are vested in the Secretary of State to remove and exclude such persons (and which the DBFO Co requested authority to enforce in the relevant request) and the Secretary of State is not himself taking steps to enforce such rights);
 - the DBFO Co has taken and continues to take all steps necessary to mitigate the effects of the refusal of the Secretary of State to grant the authority requested under [Schedule 22](#); and
 - such refusal is not the result of any breach by the DBFO Co of its obligations under this Agreement.

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

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

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

"Construction Contract" means the contract [so titled] [of even date herewith] between the DBFO Co and the Contractor in respect of, inter alia, the [design and] construction of the Works comprised in the Firm Schemes and Contingent Scheme.

"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 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 Scheme" means that road scheme listed in [paragraph 2.1 of Part 2 of Schedule 3](#) [Prince Regent Lane Scheme.]

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

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

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

"Contractor" means AMEC Civil Engineering, Brown & Root Limited, Alfred McAlpine Construction Limited and Dragados (Roads) Limited acting as an unincorporated joint venture, or such substitute as may be appointed by the DBFO Co for the time being in accordance with [Clause 45.4.1](#). or [45.4.2](#).

"Contractor's Quality Documentation" has the meaning given in [Clause 23.1.3.2](#).

"Contractor's Representative" means Dave Andrews who shall have the functions and powers set out in [Clause 22.2.3](#) until a substitute is appointed by the Contractor in accordance with [Clause 22.3.3](#).

"Core Communications and Traffic Signals Requirements" means the requirements set out or identified or referred to in [Part 1 of Schedule 17](#) [Core Communications and Traffic Signals 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.

"CS Adjacent Areas" means, subject to [Clause 8.8](#) [Boundaries of Site and Adjacent Areas] and [Clause 8.9](#) [CS Boundaries], areas which do not form part of the CS Site but upon which part of the Operations are to be carried out, as shown or identified as such on the date hereof on the limit of Site drawings in Folio 10, or as the Secretary of State may from time to time specify, provided that each part of the CS Temporary Adjacent Areas identified on such drawings shall cease to be part of the CS Adjacent Areas from the date upon which a Taking Over Certificate is issued in respect of the Local Facilities located on such part.

"CS Change" means a change in the boundaries of the Site, the Adjacent Areas, the CS Site, the CS Adjacent Areas or other definition pursuant to [Clause 8.9](#) [CS Boundaries].

"CS Conditions Date" means, in relation to the Contingent Scheme, the date which is 7 days prior to the date specified in the CS Commencement Certificate as being the Actual CS Commencement Date.

"CS Construction End Date" means:

- (a) the date of issue of the CS Completion Certificate, if the CS Commencement Certificate has been issued prior to the CS Cut-Off Date and has not been withdrawn pursuant to [Clause 9.3.2](#);
- (b) the date of any notice given pursuant to [Clause 9.3.2](#), if the CS Commencement Certificate has been issued prior to the CS Cut-Off Date;
- (c) the CS Cut-Off Date, if the CS Commencement Certificate has not been issued by such date and no notification has been given pursuant to [Clause 9.1.2](#); or
- (d) the date of any notification given by the Secretary of State pursuant to [Clause 9.1.2](#).

"CS Cut-Off Date" means the date specified in [paragraph 1 of Schedule 23](#) [Scheme Specific Information].

"CS Eligible Change" means any of the following:

- (a) a CS Orders Change Event; and
- (b) a CS Subsequent Procurement Event.

"CS Milestone Event" means the event described in [Part 2 of Schedule 1](#) [Financial Matters].

"CS Orders" means, at any time, those orders authorising the acquisition of the CS Site and CS Adjacent Areas, and the construction and operation of the New CS Road

and Local Facilities, and all ancillary matters in relation to the Contingent Scheme. Where the context so requires it shall mean any of the individual orders comprising the CS Orders.

"CS Orders Change Event" means the CS Orders as made being materially different from the Draft CS Orders.

"CS Performance Guarantee" means a performance guarantee in relation to the CS Works in the form set out in [Section B of Part 1 of Schedule 1](#) [Form of Performance Guarantee].

"CS PTU" means the Permit to Use issued in respect of the Contingent Scheme.

"CS Site" means, subject to any CS Change, the land, spaces, waterways, road and any surface required for the Contingent Scheme shown or identified as such at the date hereof on the limit of Site drawings in Folio 10.

"CS Stop Clauses" means, so far as is applicable in relation to the Contingent Scheme, [Clauses 9.1.2 and 9.3.2](#).

"CS Subsequent Procurement Event" means the procurement of completion of the Contingent Scheme by the Secretary of State at any time after the issue of a notice pursuant to [Clause 9.3.2](#).

"CS Temporary Adjacent Areas" means subject to any CS Change, those parts of the CS Adjacent Areas shown on the limit of Site drawings in Folio 10.

"CS Upgraded Sections" means those lengths of existing trunk road or motorway described as such in [paragraph 4.2 of Part 1 of Schedule 3](#) [Existing Roads] which are to be or have been widened or otherwise modified in accordance with the Construction Requirements, the Communications Requirements and the Existing Road drawings in Folio 6.

"CS Works" means that part of the Works required for the design, construction, completion, commissioning and testing of the Contingent Scheme.

"Custody Agreement" means the agreement for custody of the Financial Model and CD-ROM [of even date herewith] between the DBFO Co, the Secretary of State and the National Computing Centre Limited.

"Data Processing Authority" means the London Accident Analysis Unit of the London Research Centre or any other subsequent or replacement authority responsible for producing data relating to PIA's required for the calculation of Safety Performance Adjustment.

"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.

"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 11.4](#) [DBFO Co's Changes] and may include additions, omissions, substitutions, alterations in design and/or variations in or to the Construction Requirements or the Communications Requirements.

"DBFO Co Quality Director" means the person so appointed in accordance with [Clause 23.5](#) [DBFO Co Quality Director].

"DBFO Co's Quality Documentation" has the meaning given in [Clause 23.1.3.1](#).

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

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

"DBFO Payment" has the meaning given in [Clause 32.1.1](#).

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

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

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

"Deemed Department's Change Notice" has the meaning given in [Clause 35.2.1](#).

"Defective Equipment" has the meaning given in [Clause 31.7.2](#).

"Defective Work" means:

- (a) any defective or negligent work by any Third Party Contractor in relation to the Project Facilities under a contract entered into before the date of this Agreement giving rise to a Latent Defect;

- (b) any defective or negligent work carried out by a Third Party Contractor in relation to the Project Facilities under a contract entered into before the date of this Agreement in relation to Road Segment 2.

"Delay Period" has the meaning given in [Clause 12.6.6](#).

"Department" or "DOT" or "DTp" or "MOT" or "DETR" means the Department of the Environment, Transport and the Regions or, as the case may be any predecessor or successor department.

"Department's Agent" means Keith Shaw or such substitute or substitutes as may be appointed by the Secretary of State for the time being pursuant to [Clause 22.3](#) [Change of Representatives].

"Department's Change" means:

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

initiated by the Department's Nominee in accordance with [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, and, subject to [Clause 22.1.2](#), the Department's Agent and in all other circumstances the Department's Representative.

"Department's Representative" means Keith Shaw or such substitute as may be appointed by the Secretary of State for the time being pursuant to [Clause 22.3](#) [Change of Representatives].

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

- (a) the Design Manual for Roads and Bridges including all Department Technical Advice Notes and Technical Design Notes;
- (b) the Specification for Highway Works;
- (c) the Notes for Guidance;
- (d) Highway Construction Details;

- (e) Circulars Roads issued by the Department; and
- (f) the Trunk Roads Maintenance Manual.

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

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

in any such case approved by the Secretary of State on or prior to the date of execution of this Agreement, and any relaxation in any of the Department's Standards in force at the date of execution of this Agreement not requiring approval by the Secretary of State in accordance with the DMRB.

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

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

"Design Data" means all calculations, designs, design or construction information, standards, specifications, plans, drawings, graphs, sketches, models and other materials, including all eye readable or computer or other machine readable data, used, prepared or to be prepared by or on behalf of the DBFO Co (and/or any of the DBFO Co's agents, employees, contractors or sub-contractors of any tier) or the Secretary of State relating to the design or construction of the Works or any DBFO Co's Change, Alternative Proposal, Department's Change or Improvement or the operation, maintenance or improvement of the Project Facilities or to the extent that they relate to the Docklands Roads, the Availability Monitoring Equipment and the Measuring Equipment.

"Designer" means Parkman Limited or such substitute as may be appointed by the Contractor for the time being in accordance with [Clause 45.4.1](#). or [45.4.2](#).

"Designer's Quality Documentation" has the meaning given in [Clause 23.1.3.3](#).

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

"Design Sub-Contract" means the contract so titled of even date herewith between the Designer and Brown & Root.

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

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

"DETR Statistics Division" means the Transport Statistics Roads Division of the Department or any other subsequent or replacement body responsible for producing details of lengths of the benchmark roads referred to in the definitions of the expressions "LDL_y", and "LSL_y" in [paragraph 1.1 of Part 6 of Schedule 9](#).

"De-Trunked Segment" means, subject to any CS Change, 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 in the form set out in [Part 4 of Schedule 1](#) [Form of Direct Agreement] and ancillary letter relating to extension of the step-in period in terms agreed by the parties, both to be entered into between (1) the Secretary of State, (2) the Credit Providers, (3) the Bond Trustee, (4) the Security Trustee (as each of those terms are defined therein) and (5) the DBFO Co.

"Disclosed Data" has the meaning given in [Clause 38.2.1](#).

"Discount Rate" means the weighted average cost of capital as referred to in the Base Case (cell Sum E30 of the Financial Model) or such other rate agreed between the Parties as required for [Schedule 12](#).

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

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

"Docklands Roads" 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]) Road Segments 3 and 4 described in [paragraph 1 of Part 1 of Schedule 3](#) [Land] and shown on drawings in Folio 9, including without limitation 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 [paragraph 5 of Part 1 of Schedule 3](#) [Land] to the extent so specified), together with all supporting infrastructure and amenity, including without limitation all fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, cycleways, road markings, road traffic signs, road traffic signals, road lighting, communications installations, public toilets, picnic sites, lay-bys, embankments and cuttings.

"DR Adjacent Areas" means the areas, shown or identified as such, on the date hereof on the drawings in Folio 9, which do not form part of the Site but upon which part of the Operations in respect of the Docklands Roads are to be carried out.

"DR Availability Categories" means the categories A-E (inclusive) set out in [paragraph 3.1.1 of Part 4 of Schedule 9](#) and "DR Availability Category" shall mean any of them as applicable.

"DR Availability Payment" means, in relation to any period, the aggregate of the DR Carriageway Availability Payment and the DRFC Availability Payment for that period.

"DR Carriageway Availability" means the extent to which a DR Carriageway Availability Sub-Section is determined, by reference to the criteria set out in [paragraph 3.3 of Part 4 of Schedule 9](#), to be available for the purposes of determining the figure for PP_{DR} pursuant to [paragraph 3.1 of Part 4 of Schedule 9](#).

"DR Carriageway Availability Payment" means, in relation to any calendar month, the payment to be made to the DBFO Co in respect of such period calculated in accordance with [paragraph 1 of Part 4 of Schedule 9](#).

"DR Carriageway Matrices" means the matrices so titled set out in [Annex 2 to Part 4 of Schedule 9](#), as varied from time to time in accordance with [paragraph 6 of Part 4 of Schedule 9](#) and "DR Carriageway Matrix" shall mean any of them as applicable.

"DR Carriageway Section" means each of the two sections of the Docklands Roads (one eastbound and one westbound) (excluding the DRFC Availability Section) described in [Annex 4 to Part 4 of Schedule 9](#) comprising the DR Carriageway Sub-Sections.

"DR Carriageway Sub-Sections" means those parts of the DR Carriageway Sections described in [Annex 5 to Part 4 of Schedule 9](#) each comprising three sub-sections in each direction.

"DR Conditions Date" means the date which is 7 days prior to the date specified in the Docklands Roads Certificate as being the Actual DR Commencement Date.

"DR Cut-Off Date" means the date which is 36 months after the Commencement Date.

"DR Matrix Measurement Point" means each of the points so designated in [Annex 3 to Part 4 of Schedule 9](#).

"DR Usage Payment" means that element of the Usage Payment calculated in respect of the Docklands Roads in accordance with [paragraph 1 of Part 1 of Schedule 9](#).

"DR Site" means the land, spaces, waterways, roads and any surface required for the Docklands Roads shown or identified as such on the date hereof on Docklands Roads limit of site drawings in Folio 9.

"DR Trigger Date" means the later of the date of issue of the Completion Certificate and the Actual DR Commencement Date.

"DRFC Availability" means the extent to which the DRFC Availability Section is determined, by reference to the criteria set out in [paragraph 3.1 of Part 5 of Schedule 9](#), to be available for the purposes of determining the value of PP_{FCDR} in [paragraph 1 of Part 5 of Schedule 9](#).

"DRFC Availability Payment" means, in relation to any period, the payment to be made to the DBFO Co in respect of such period calculated in accordance with [paragraph 1 of Part 5 of Schedule 9](#).

"DRFC Availability Section" means that section of the footways and cycleways forming part of the Docklands Roads described in [Annex 1 to Part 5 of Schedule 9](#).

"Draft CS Orders" means the draft orders, certificates, statutory instruments or other subordinate legislation listed in [paragraph 2 of Part 6 of Schedule 3](#) [Scheme Orders], copies of which are appended in [Appendix 1 to Part 6 of Schedule 3](#).

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

"Ecologist" means Philip Masters of Chris Blandford Associates or such substitute as may be appointed by the DBFO Co for the time being in accordance with [Clause 45.4.1](#). or [45.4.2](#) [Sub-Contracting].

"EIB Facility Agreement" has the meaning given in [Clause 2.3.1.3\(d\)](#).

"Eligible Change" means any of the following:

- (a) a Department's Change;

- (b) any Additional Works which result in any change in the costs of or revenues to the DBFO Co in the conduct of the Operations;
- (c) any Compensation Event;
- (d) the imposition or removal of User Paid Tolls or any change in User Paid Tolls within the scope of [paragraph 6 of Part 5 of Schedule 12](#) [User Paid Tolls];
- (e) a CS Eligible Change; and
- (f) a BRW Subsequent Procurement Event.

"Eligible Force Majeure" has the meaning given to it in [paragraph 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:

- (a) in relation to any Firm Scheme, the environmental statements and reports referred to in [Annex 13 to Part 2 of Schedule 4](#) [Construction and Handback Requirements]; and
- (b) in relation to the Contingent Scheme, the environmental statements and reports referred to in [Annex 13 to Part 2 of Schedule 4](#) [Construction and Handback Requirements] together with any further environmental statement prepared in connection with the Contingent Scheme prior to the issue of the CS Commencement Certificate;

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

"Excepted Lane Closure" means any of the following:

- (a) the use of a narrow lane that is not itself closed, obstructed, blocked or interfered with, provided that Good Industry Practice applicable to minimum lane widths has at all times been complied with in respect of such lane; or
- (b) lane closures and obstructions of a lane or lanes (other than those which result from construction, maintenance or other works or which are due to an act or omission of the DBFO Co), the duration of which does not exceed the Minimum Period; or
- (c) prior to the issue of the Scheme 3 PTU, the closure of the inside lane of the westbound carriageway of the Project Road where this is necessary due to the loading restriction on the westbound Old Roding Bridge; or

- (d) prior to the opening of the East India Dock Link Tunnel to traffic in both directions, the closure of lanes inside and approaching the East India Dock Link Tunnel, within the eastbound DR carriageway section; or
- (e) lane closures that arise from the Secretary of State's trials carried out pursuant to [Clause 14.4.1.2.3](#); or
- (f) after the issue of the Completion Certificate, or in the case of the Contingent Scheme the CS Completion Certificate, closures of lanes by reason of Statutory Undertakers works which in aggregate over a calendar year result in deductions of greater than £500,000 October 1998 prices from Availability Payments; and

for the avoidance of doubt for the purposes of this definition traffic congestion or slow moving traffic on the Project Road shall not be considered to be an obstruction or blockage or interference.

"Existing Road" means (subject to any CS Change, [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 or motorway described in [Part 1 of Schedule 3](#) [Existing Road] and shown on the Existing Road drawings in Folio 6, including without limitation:

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

together with all supporting infrastructure and amenity, including without limitation all fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, cycleways, road markings, road traffic signs, road lighting, measurement installations, public toilets, picnic sites, lay-bys, embankments and cuttings, but excluding any parts thereof which are excluded from this definition from time to time in accordance with [Clause 13.3.5.2](#), provided that Road Segment 2 shall not be treated as Existing Road until the date set out in the By-Pass Notice.

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

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

"Extension Period " has the meaning set out in [Clause 9.18.6](#).

"FC Availability" means the extent to which a FC Availability Section is determined by reference to the criteria set out in [paragraph 3.1 of Part 3 of Schedule 9](#), to be available for the purposes of determining the value of PP_{FCps} in [paragraph 1 of Part 3 of Schedule 9](#).

"FC Availability Payment" means, in relation to any calendar month, the payment to be made to the DBFO Co in respect of such period calculated in accordance with [paragraph 1 of Part 3 of Schedule 9](#).

"FC Availability Period" means each period of twenty-four hours commencing at midnight.

"FC Availability Section" means each of the two sections of the footways and cycleways forming part of the Project Road described in [Annex 1 to Part 3 of Schedule 9](#).

"FC Minimum Performance Criteria" means that, in relation to a FC Availability Section or, in the case of the Docklands Roads, the DRFC Availability Section, as the case may be, throughout the relevant FC Availability Period:

- (a) the FC Availability Section or the DRFC Availability Section, as the case may be, is not affected by any Category 1 Defect (as described in Chapter 1.1 of Part 1 of Volume 2 of Version 2 of TRMM issued on 4th February 1996); and
- (b) minimum widths of 1.5 metres are maintained at all times throughout the FC Availability Section or the DRFC Availability Section, as the case may be, save that, in locations where a width of less than 1.5 metres is permitted in accordance with the relevant design standards and guidance contained in [Annex 3 to Part 2 of Schedule 4](#), the width at such location shall not be less than the minimum width so specified by such design standards and guidance provided that, for the avoidance of doubt, where there are separate footways and cycleways running contiguously in a FC Availability Section or the DRFC Availability Section, as the case may be, the requirement for a 1.5 metre (or other) minimum width specified in this paragraph shall apply separately to each of them; and
- (c) the FC Availability Section or the DRFC Availability Section, as the case may be, is capable of reasonable use and passage by cyclists and pedestrians including, without limitation, wheel chair users and persons travelling with prams, pushchairs or similar equipment.

"FC Minimum Period" means, in relation to any FC Availability Section or the DRFC Availability Section, as the case may be, the following periods:

- (a) in the case of a failure to satisfy the standards specified in paragraph (a) of the definition of FC Minimum Performance Criteria in [Clause 1.1](#), twenty four hours commencing on the earlier of the time that either the FC Availability

Section was identified in a condition survey as failing to satisfy any of the relevant criteria or the DBFO Co first became aware of the relevant defect; and

- (b) in the case of a failure to satisfy the standards specified in paragraphs (b) and (c) of the definition of FC Minimum Performance Criteria in [Clause 1.1](#), forty-five minutes, commencing at the earlier of the time that any part of such FC Availability Section or the DRFC Availability Section, as the case may be, either ceased to satisfy all of the FC Minimum Performance Criteria or was first partially or totally closed, obstructed, blocked or subject to any other interference impeding its reasonable use and passage by cyclists and pedestrians, howsoever occurring.

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

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

"Firm Schemes" means those road schemes listed in [paragraph 1 of Part 2 of Schedule 3](#) [New Road].

"Firm Schemes Upgraded Sections" means those lengths of existing trunk road or motorway shown on the Existing Road drawings number in Folio 6 and identified as such which are to be or have been widened or otherwise modified in accordance with the Construction Requirements and the Communications Requirements.

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

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

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

"FS PTU Date" means the date of issue of a Permit to Use in respect of a Firm Scheme.

"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 all or any of the agreements or instruments 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, except to the extent any such agreements or instruments relate to loan stock, loan notes or debt (whether or not subordinated) of the DBFO Co issued or owing to the Sponsors or any Associated Company of the Sponsors or of the DBFO Co.

"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, at any time, the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected at such time from a skilled and experienced operator seeking in good faith to comply with its contractual obligations, complying with all applicable laws and engaged in the same type of undertaking and under the same or similar circumstances and conditions.

"Government" means the government of the United Kingdom.

"Greater London Authority Act" means the Greater London Authority Act 1999.

"Handback Amount" has the meaning given in [Clause 19.6.7](#).

"Handback Inspection" has the meaning given in [Clause 19.6.1](#).

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

"Hedging Termination Amounts" means the breakage Costs as defined in and payable under the Guaranteed Investment Contracts referred to in [Clause 2.3.1.3\(n\)](#) and [\(o\)](#) on termination of the interest rate hedging transaction(s) entered into by National Westminster Bank Plc in support of those contracts.

"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.

"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 Facilities made or proposed to be made by the DBFO Co on or after the following dates:

- (a) for the Existing Road (other than any Upgraded Section), at any time after the date of this Agreement but in the case of Road Segment 2 at any time after the date set out in the By-Pass Notice;
- (b) for the New Road (other than the New CS Road but including any Upgraded Section that will form part of the New Road but will not form part of the New CS Road and the BRW New Road), and Off-Site Facilities located on Main Site Adjacent Areas, at any time after the issue of the Completion Certificate;
- (c) for the New CS Road (including any Upgraded Section that will form part of the New CS Road) and Off-Site Facilities located on CS Adjacent Areas, at any time after the issue of the CS Completion Certificate;
- (d) for the Docklands Roads at any time after the Actual DR Commencement Date;
- (e) in respect of the CS Upgraded Section, at any time after the issue of a notice pursuant to [Clause 9.1.2](#) or [9.3.2](#) in respect of the Contingent Scheme, provided that the Secretary of State has confirmed in writing that he is not himself intending to procure the Contingent Scheme;
- (f) for a Part of the BRW New Road, at any time after the issue of the BRW Completion Certificate for that Part of the BRW New Road; and
- (g) in respect of a BRW Upgraded Section, prior to the issue of the relevant BRW Commencement Certificate or at any time after the issue of a notice pursuant to [Clause 9.12.2](#) or [Clause 9.17](#), provided that the Secretary of State has confirmed in writing that he is not intending himself to procure the Bridge Replacement Works,

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

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

"Index" has the meaning given in [Part 7 of Schedule 9](#) [Indexation].

"Initial Inspection" has the meaning given in [Clause 19.2.1](#).

"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" has the meaning given in [Clause 2.3.1.3\(c\)](#).

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

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

"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 Rule 50(3) RSC of the Civil Procedure Rules seeking review of any determination, decision, order or omission of the Secretary of State or any application for a declaration (not made pursuant to 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.

"LAF Completion Date" means the date which is 72 months prior to the expected Expiry Date, or such later date as may be determined in accordance with [Clause 9.18](#) [Bridge Replacement Works: Delay].

"Landscape Architect" means Joe Jackson of Chris Blandford Associates or such substitute as may be appointed by the DBFO Co for the time being in accordance with [Clause 45.4.1](#) or [45.4.2](#).

"Landscape Manager" means David Withycombe of Chris Blandford Associates or such substitute as may be appointed by the DBFO Co for the time being in accordance with [Clause 45.4.1](#) or [45.4.2](#).

"lane" means, in relation to the Project Road, any delineated or running traffic lane and shall (without limitation) include all traffic lanes on slip roads and on roundabouts forming part of the Project Road and in relation to a Carriageway Section or the DR Carriageway Section, as the case may be, shall mean any lane of traffic within that Carriageway Section or the DR Carriageway Section, as the case may be, and shall, without limitation, include all traffic lanes on slip roads and roundabouts forming part thereof but in all cases shall exclude the hard shoulder unless it is being used under approved traffic management restrictions in substitution for a delineated traffic lane.

"Lane Closure" means any partial or total closure or other restriction of one or more lanes of traffic (in one direction of travel) using the Project Road, but excluding any Type C lane closures (as defined in Section 6 of Chapter 8 of the Traffic Signs Manual) and for the avoidance of doubt, traffic congestion or slow moving traffic on the Project Road shall not be considered in and of itself to be a partial or total closure of a lane of traffic.

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

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

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

"Legal Requirement" means the requirement of any United Kingdom or European Community Law or of any Law, requirement or demand of any Relevant Authority which has jurisdiction with regard to any of the Operations or whose systems may be affected by the conduct of any of the Operations.

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

"Lenders" has the meaning given to it in the Direct 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.

"Local Authority Road" means any De-Trunked Segment and any part of the Off-Site Facilities which is or is to be a highway maintainable at public expense, including without limitation all carriageways, hard shoulders, slip roads, side roads, access roads, bridges and other highway structures, together with all supporting infrastructure and amenity, including without limitation all fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, road markings, road traffic signs, road traffic signals, road lighting, communications installations, embankments and cuttings.

"Local Facilities" means any Local Authority Road 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 13.3](#) [Local Facilities and De-Trunked Segments].

"Lodge Avenue Flyover Deduction" means, in relation to any payment which would otherwise be due to the DBFO Co under this Agreement in respect of any DBFO Payment, a sum which is equal to 17.5% of such payment.

"Lodge Avenue Flyover 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 9.16.1](#) [Lodge Avenue Flyover Retention Account].

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

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

"Main Section of the Project Road" means those sections of the Project Road other than the Docklands Roads.

"Main Site" means, subject to [Clause 8.8](#) [Boundaries of Site and Adjacent Areas], the land, spaces, waterways, roads and any surface required for the Existing Road and the Firm Schemes shown or identified as such on the date hereof on the limit of Site drawings in Folio 7.

"Main Site Adjacent Areas" means, subject to [Clause 8.8](#) [Boundaries of Site and Adjacent Areas] areas which do not form part of the Site but upon which part of the Operations are to be carried out, as shown or identified as such on the date hereof on the limit of Site drawings in Folio 7 or as the Secretary of State may from time to time specify, provided that each part of the Temporary Adjacent Areas identified on such drawings 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.

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

- (a) for the Existing Road, at any time after the date of this Agreement but in the case of Road Segment 2 at any time after the date set out in the By-Pass Notice;
- (b) for the New Road (other than the New CS Road and the BRW New Road) and Off-Site Facilities located on Main Site Adjacent Areas, at any time after the issue of the Completion Certificate;
- (c) for the New CS Road and Off-Site Facilities located on the CS Adjacent Areas, at any time after the issue of the CS Completion Certificate;
- (d) for the Docklands Roads, at any time after the Actual DR Commencement Date; and
- (e) for any Part of the BRW New Road, at any time after the issue of the BRW Completion Certificate for that Part of the BRW New Road,

but excluding any Routine Maintenance.

"Majority Vehicle Category" means, in relation to a Carriageway Section during a particular period, whichever category of vehicles (being either Long Vehicles or Other Vehicles) comprises the greater number of vehicles using that Carriageway Section as measured by a particular set of Measuring Equipment.

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

"Matrix Measurement Point" means each of the points described in [Annex 6 to Part 2 of Schedule 9](#).

"Maximum Annual Availability Payment" means the maximum aggregate amount of Availability Payments that may be made in any Contract Year.

"Maximum Annual Carriageway Availability Payment" means, in relation to any Contract Year, a sum equal to ninety-five per cent (95%) of the Maximum Annual Availability Payment for that Contract Year.

"Maximum Annual DR Availability Payment" means the maximum aggregate amount of DR Availability Payments that may be made in any Contract Year.

"Maximum Annual DR Carriageway Availability Payment" means, in relation to any Contract Year, a sum equal to ninety-five per cent (95%) of the Maximum Annual DR Availability Payment for that Contract Year.

"Maximum Annual DRFC Availability Payment" means, in relation to any Contract Year, a sum equal to five per cent (5%) of the Maximum Annual DR Availability Payment for that Contract Year.

"Maximum Annual FC Availability Payment" means, in relation to any Contract Year, a sum equal to five per cent (5%) of the Maximum Annual Availability Payment for that Contract Year.

"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 31.3.2](#), and "Measurement" and "Measured" shall be construed accordingly.

"Measuring Equipment" has the meaning given in [Clause 31.3.1](#).

"Measurement Installations" means the Measuring Equipment and the Availability Monitoring Equipment;

"Measurement Limits of Accuracy" has the meaning given in [Clause 31.4.2](#).

"Measurement Point" means any point designated as such pursuant to [Clause 31.2](#) [Measurement Points].

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

"Minimum Performance Criteria" has the meaning given in [Annex 1 to Part 2 of Schedule 9](#) and "Minimum Performance Criterion" shall mean one of the Minimum Performance Criteria as appropriate.

"Minimum Period" means, in relation to any lane, the period of forty-five minutes, commencing at the earlier of the time that any part of such lane either ceased to satisfy all of the Minimum Performance Criteria or was first partially or totally closed, obstructed, blocked or subject to any other interference impeding the flow of traffic, howsoever occurring.

"Minority Vehicle Category" means, in relation to a Carriageway Section during a particular period, whichever category of vehicle (being either Long Vehicles or Other Vehicles) comprises the lesser number of vehicles using that Carriageway Section, as measured by a particular set of Measuring Equipment.

"Monitoring Point" has the meaning given in [Clause 31.8](#).

"Monthly Payment Period" means, in respect of a month m in a Contract Year y, the portion of each Payment Period in relation to that Contract Year y which falls within that month.

"Monthly Usage Payment" means any provisional payment to be made by the Secretary of State pursuant to [Clause 32.2.2](#), [Clause 32.2.3](#) or [Clause 32.2.4](#).

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

"MSPR Usage Payment" means, that element of the Usage Payment calculated in respect of the Main Section of the Project Road in accordance with [paragraph 1 of Part 1 of Schedule 9](#).

"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 cashflows 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 CS Road" means (subject to [Clause 8.8](#) [Boundaries of Site and Adjacent Areas], [8.9](#) [CS Boundaries], [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 or motorway described in [Part 2 of Schedule 3](#) [New Road] located in the areas shown on the CS New Road drawings in Folio 10 and constructed or modified or to be constructed or modified by the DBFO Co which, subject to the provisions below, are intended to form part of the New Road, including without limitation:

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

together with all supporting infrastructure and amenity, including without limitation all fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, cycleways, road markings, road traffic signs, road lighting, Measurement Installations, embankments and cuttings, provided that any part of the New CS Road shall only become part of the New Road if and when the Actual CS Commencement Date occurs in relation to the Contingent Scheme.

"New Lodge Avenue Flyover" means the Part of the BRW New Road described in [paragraph 2.2.1 of Part 2 of Schedule 3](#).

"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 (including, without limitation, any CS Orders).

"New River Lea Crossing" means the Part of the BRW New Road described in [paragraph 2.2.2 of Part 2 of Schedule 3](#).

"New Road" means (subject to [Clause 8.8](#) [Boundaries of Site and Adjacent Areas], [8.9](#) [CS Boundaries], [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 or motorway described in [Part 2 of Schedule 3](#) [New Road] located in the areas shown on the New Road drawings in Folio 8 and constructed or modified or to be constructed or modified by the DBFO Co, including without limitation:

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

together with all supporting infrastructure and amenity, including, without limitation, all fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, cycleways, road markings, road traffic signs, road lighting, Measurement Installations, embankments and cuttings, provided that any part of the New CS Road shall only become part of the New Road if and when the Actual CS Commencement Date occurs in relation to the Contingent Scheme and provided that any Part of the BRW New Road shall only become part of the New Road when the Actual BRW Commencement Date occurs in relation to such Part of the BRW New Road.

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

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

"O&M Requirements" means the standards, specifications, procedures and other requirements for the operation and maintenance of the Project Facilities set out or identified or referred to in [Part 2 of Schedule 6](#) [O&M Requirements], as amended

from time to time by any Department's Change or in accordance with [Clause 14.2](#) [O&M Requirements].

"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, pedestrian subways, cycleways, bridges and other highway structures, land under bridges, fences and barriers, drainage systems including outfalls and balancing ponds, grassed areas, hedges and trees, planted areas, footways, road markings, road traffic signs, road lighting, embankments and cuttings, but excluding any parts thereof which are excluded from this definition from time to time in accordance with [Clause 13.3.5.2](#).

"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 Support Agreement" means the contract so titled of even date herewith between the DBFO Co and the Sponsors for the provision of resources to support to the DBFO Co in respect of 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 RMS(A13) plc or such substitute as may be appointed by the DBFO Co for the time being in accordance with [Clause 45.4.1](#) or [45.4.2](#).

"Operator's Quality Documentation" has the meaning given in [Clause 23.1.3.4](#).

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

"Ordinary Shares" means the ordinary shares of £1 each which comprise the authorised share capital of the DBFO Co.

"Original Base Case" means the output from the Financial Model on the date of execution of this Agreement, which will form [Part 3 of Schedule 1](#) [Base Case] unless and until replaced by the Base Case;

"Original Schedule 9" means the version of [Schedule 9](#) which forms part of the DBFO Contract as at its execution but which will be replaced by the final version of [Schedule 9](#) after inputs to it derived from the Base Case have been included

"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 Long Vehicles.

"Other Works" means the works in respect of the Existing Road set out or identified or referred to in [paragraphs 1 and 5 of Annex 1 of Part 1 of Schedule 4](#).

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

"Part of the New Road" means any part of the New Road so designated in [Part 2 of Schedule 3](#) [New Road], the New CS Road and, where applicable, any part of the New CS Road so designated in [Part 2 of Schedule 3](#) [New Road] and each Part of the BRW New Road.

"Payment Percentage" means each percentage to be applied in the calculation of the Carriageway Availability Payment, the FC Availability Payment, the DR Carriageway Availability Payment and the DRFC Availability Payment as respectively determined in accordance with [Parts 2, 3, 4 and 5 of Schedule 9](#).

"Payment Period" means, in relation to a Contract Year y:

- (a)
 - (i) if the Completion Certificate is issued in that Contract Year y, the period commencing on the date of issue of the Completion Certificate up to (but excluding) the next Trigger Event to occur in Contract Year y or if no further Trigger Event occurs in Contract Year y, up to and including the last day of Contract Year y; or
 - (ii) otherwise the period commencing on the first day of Contract Year y up to (but excluding) the first Trigger Event to occur in Contract Year y or, if no Trigger Event occurs in Contract Year y, up to and including the last day of Contract Year y; and
- (b) each period (if any) commencing on a Trigger Event occurring during Contract Year y up to (but excluding) the next Trigger Event to occur in Contract Year y (or, if no further Trigger Event occurs in Contract Year y, up to and including the last day of Contract Year y).
- (c) in the case of the Docklands Roads:
 - (i) if the Completion Certificate has already been issued and the Actual DR Commencement Date occurs in that Contract Year y the period commencing on the Actual DR Commencement Date up to (but excluding)

the next Trigger Event to occur in Contract Year y or if no further Trigger Event occurs in Contract Year y, up to and including the last day of Contract Year y; or

- (ii) if the Actual DR Commencement Date has previously occurred and the Completion Certificate is issued in that Contract Year y the period commencing on the date of the issue of the Completion Certificate up to (but excluding) the next Trigger Event to occur in Contract Year y or if no further Trigger Event occurs in Contract Year y, up to and including the last day of Contract Year y; and
- (iii) otherwise the period commencing on the first day of Contract Year y up to (but excluding) the first Trigger Event to occur in Contract Year y or, if no Trigger Event occurs in Contract Year y, up to and including the last day of Contract Year y.

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

"Performance Guarantee" means a guarantee 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 or have been designed, constructed and completed by the DBFO Co in accordance with the Construction Requirements and the Communications Requirements.

"Permit to Use" means a permit in the form set out in [Annex 1\(14\) to Part 3 of Schedule 4](#) [Design and Certification Procedure] to be issued by the Department's Agent in accordance with [Clause 13.1.2](#).

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

"PIA Change Effective Date" means, in relation to an Eligible Change:

- (a) in respect of the Main Section of the Project Road, the date on which such Eligible Change first has or will have an effect on the number of Personal Injury Accidents on the Main Section of the Project Road; and
- (b) in respect of the Docklands Roads, the date on which such Eligible Change first has or will have an effect on the number of Personal Injury Accidents on the Docklands Roads.

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

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

- (a) all liabilities in respect of such costs arising as a result of termination of this Agreement;
- (b) any financing charges, fees, interest (but not default interest other than default interest arising as a result of a breach by the Secretary of State of any of his obligations under this Agreement) or breakage costs paid or payable under the Funding Agreements in respect of principal sums drawn down to pay any such costs (but not the principal sums themselves or any other amount paid or payable under the Funding Agreements) or breakage costs paid or payable under the Funding Agreements in respect of the committed sums; and
- (c) an amount equal to the Hedging Termination Amounts, if such Hedging Termination Amounts are paid by the DBFO Co under the Guaranteed Investment Contracts referred to in [Clause 2.3.1.3 \(n\)](#) and [\(o\)](#),

all as shown in the Termination Accounts. For the avoidance of doubt there shall be no Pre-Commencement Costs in relation to the Contingent Scheme (other than the breakage costs referred to above), the BRW New Road or the Docklands Roads.

"Pre-Commencement Period" means, in relation to Firm Schemes, the period from the date of this Agreement until the Commencement Date.

"Preliminary Archaeological Investigations" has the meaning given in [Annex 14 of Part 2 of Schedule 4](#).

"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).

"Programmed Completion Date" has the meaning given in [Paragraph 12 of Part 1 of Schedule 12](#) [General Change Procedure].

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

"Project Documents" means the documents referred to in [Clauses 2.3.1, 9.3.1.2, 9.3.1.4, 9.8.1.4 and 9.12.1.3](#).

"Project Facilities" means the Project Road and the Off-Site Facilities and (other than for the purposes of [Clauses 28.4.1, 28.4.2, 28.4.5, 29.3.1, 29.3.2, 29.3.5 and 29.3.7.2](#) and [Parts 2 and 3 of Schedule 19](#)) the equipment and facilities identified in [Annex 6/2 to Part 2 of Schedule 6](#) [O & M Requirements] but not (except for the purposes of their design, supply, installation and testing) the Communications Installations.

"Project Road" means the Existing Road, the New Road and from the Actual DR Commencement Date, the Docklands Roads.

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

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

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

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

"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 23.2](#) [Quality Manuals, Plans and Procedures].

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

"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 Carriageway Matrix" means whichever Carriageway Matrix applies to the relevant Carriageway Section for the day in question.

"Relevant Change in Law" means:

- (i) any Change in the Scope of Value Added Tax in the United Kingdom; or
- (ii) any Change in Law the purpose and 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 by a single contract on a similar basis to the Project Road in relation to other roads;
 - (c) the DBFO Co in relation to other companies; or
 - (d) companies undertaking the functions referred to in paragraph (b) above (under a single contract with the Secretary of State 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, and provided further that Legislation establishing or relating to the establishment of the proposed Greater London Authority shall not be deemed to be discriminatory; and provided further that any Change in the Scope of Value Added Tax in the United Kingdom shall not be treated as a Relevant Change of Law for the purposes of [Schedule 12](#) to the extent that the DBFO Co is otherwise compensated under this Agreement for increases of costs which it suffers as a result of such change in scope.

"Relevant Completion Date" means:

- (a) in respect of the Bridge Replacement Works for the New Lodge Avenue Flyover, the LAF Completion Date; or
- (b) in respect of the Bridge Replacement Works for the New River Lea Crossing, the RLC Completion Date.

"Relevant DR Carriageway Matrix" means whichever DR Carriageway Matrix applies to the relevant DR Carriageway Availability Sub-Section for the day in question.

"Relevant Regulatory Authority" means the European Commission or the Office of Fair Trading or such other regulator who may have concurrent jurisdiction with the Office of Fair Trading under the Competition Act 1988.

"Relevant Toll Annex" means, in relation to a Payment Period, the [Annex to Part 1 of Schedule 9](#) [Usage Payment] in respect of that Payment Period which shows all (and only those) Trigger Events which have occurred prior to that Payment Period.

"Remedial Period" has the meaning given in [Clause 26.1.2](#).

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

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

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

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

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

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

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

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

such value to be as agreed by the Department's 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 19.7.1](#).

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

"Review Date" means the last day of a Contract Year 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 7.1.1 of Part 1 of Schedule 12](#).

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

"River Lea Crossing Deduction" means, in relation to any payment which would otherwise be due to the DBFO Co under this Agreement in respect of any DBFO Payment, a sum which is equal to 7.5% of such payment.

"River Lea Crossing 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 9.15.1](#) [River Lea Crossing Retention Account].

"RLC Completion Date" means the date which is 72 months prior to the expected Expiry Date, or such later date as may be determined in accordance with [Clause 9.18](#) [Bridge Replacement Works: Delay].

"RMS Bonds" means index-linked guaranteed secured bonds listed on the London Stock Exchange or other recognised stock exchange as referred to in [Clause 2.5](#) proposed to be issued by the DBFO Co to fund (inter alia) part of the cost of the Project on terms substantially the same as the terms set out in the "red herring" Offering Circular referred to in [Clause 2.3.1.3 \(g\)](#).

"Road Length" means each stretch of the Project Road served by a single Measurement Point as described in [Annex 2 to Part 1 of Schedule 9](#) and as shown on the Carriageway Availability and Usage Payment details drawings in Folio 22, as adjusted to reflect the addition of any Measurement Points pursuant to [Clause 31.2.1.2](#).

"Road Segment" means a segment of the Existing Road or the Docklands Roads identified in [paragraph 1 of Part 1 of Schedule 3](#), and numbered 1 to 4.

"Road User's Charter" means the document of that name issued by the Highways Agency in April 1994 or any replacement or substitute therefor.

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

"RPI" means the Retail Prices Index (all items) published by the Office for National Statistics, or any comparable index which may replace that index.

"Safety Performance Adjustment" means the adjustment referred to in [paragraph 1.1 of Part 6 of Schedule 9](#) [Safety Performance Adjustments] (which may be positive or negative).

"Schedule 9" means the replacement for the original Schedule 9, which will include inputs derived from the Base Case.

"Schedule of Lane Closures" means a schedule submitted:

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

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

"Scheme" means either a Firm Scheme or the Contingent Scheme as the context requires.

"Scheme 1" means A13 Ironbridge-Canning Town Improvement.

"Scheme 1 PTU" means the Permit to Use issued in respect of Scheme 1.

"Scheme 2" means A13/A117 Woolwich Manor Way Improvement.

"Scheme 2 PTU" means the Permit to Use issued in respect of Scheme 2.

"Scheme 3" means A13 Movers Lane Improvement.

"Scheme 3 PTU" means the Permit to Use issued in respect of Scheme 3.

"Second Inspection" has the meaning given in [Clause 19.4.1](#).

"Security Trustee" means any bank, trustee or other financial institution appointed by the Lenders to act in the capacity of security trustee and such substitute as may be appointed from time to time in accordance with the Direct 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.

"Shares Charge" means the RMSH Debenture referred to in [Clause 2.3.1.3 \(m\)](#).

"Site" means, subject to [Clause 8.8](#) [Boundaries of Site and Adjacent Areas], [Clause 8.9](#) [CS Boundaries], [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]:

- (a) the Main Site;
- (b) from the Actual CS Commencement Date, the CS Site;
- (c) from the Actual DR Commencement Date, the DR Site.

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

"SPA Period" means, in respect of Contract Year y, the three year period ending on the 30th September last occurring prior to the last day of Contract Year y.

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

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

"Specified Date" means the date on which the final adjustment of the Specified Percentage occurs being 01.04.2015.

"Specified Date 2" means the date on which the adjustment of the Specified Percentage P₅ occurs being 01.04.2028.

"Specified Date 3" means the date on which the adjustment of the Specified Percentage P₄ ceases being 01.04.2029.

"Specified Notices" means the draft orders and notices to be prepared by the DBFO Co in accordance with [Part 7 of Schedule 4](#) which shall include, without limitation, the following:

- (a) notice advising the public on the right for claims to be made under Part 1 of the Land Compensation Act 1973;
- (b) notice to relevant local highways authority confirming that in accordance with any Side Road Order, the highways affected will be its responsibility;
- (c) notice of Noise Insulation Appeal procedure;
- (d) Notice to relevant highway(s) authorities in accordance with the requirements of any Detrunking Order;
- (e) Traffic Regulation Orders and Notices both temporary and permanent;
- (f) Any notices required to be given under the Orders;
- (g) Any notices required to be given to any of the Interested Parties.

"Specified Percentage" means the figure from time to time represented by the expression 'SP_{ym}' as that expression is determined in accordance with [paragraph 1 of Part 2 of Schedule 9](#).

"Sponsors" means all or any of AMEC Investments Limited, Brown & Root Limited, Alfred McAlpine plc, Dragados Concessions Limited.

"Statutory Process" means, all administrative and executive decisions and actions required in order for the Secretary of State to make the CS Orders including the conduct and conclusion of any Judicial Review or Statutory Review. For the avoidance of doubt the Statutory Process shall exclude any steps necessary to obtain entry to land or to acquire the land pursuant to the CS Orders.

"Statutory Review" means a challenge made in connection with any CS Orders pursuant to Schedule 2 of the Highways Act or Section 23 of the Acquisition of Land Act 1981, including any appeal to a higher court following judgment of a lower court, and any similar challenge following a rehearing or redetermination of the CS Orders following the quashing of the CS Orders or any of them.

"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 without limitation 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 1.5m 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 Design Contract" means any contract entered into between the Contractor and the Designer in respect of, inter alia, the design and examination of the works in relation to a Proposal (other than the Works).

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

- (a) for the Existing Road (other than any Upgraded Section), at any time after the date of this Agreement or in the case of Road Segment 2 at any time after the date set out in the By-Pass Notice;
- (b) for the New Road (other than the New CS Road but including any Upgraded Section that will form part of the New Road but will not form part the New CS Road and the BRW New Road) and Off-Site Facilities located on the Main Site Adjacent Areas, at any time after the issue of the Completion Certificate;
- (c) for the New CS Road (including any Upgraded Section that will form part of the New CS Road) and Off-Site Facilities located on the CS Adjacent Areas, at any time after the issue of the CS Completion Certificate;
- (d) for the Docklands Roads, at any time after the Actual DR Commencement Date;

- (e) in respect of the CS Upgraded Section, at any time after the issue of a notice pursuant to [Clause 9.1.2](#) or [9.3.2](#) in respect of the Contingent Scheme, provided that the Secretary of State has confirmed in writing that he is not himself intending to procure the Contingent Scheme;
- (f) for a Part of the BRW New Road, at any time after the issue of the BRW Completion Certificate for that Part of the BRW New Road; and
- (g) in respect of a BRW Upgraded Section, prior to the issue of the relevant BRW Commencement Certificate or at any time after the issue of a notice pursuant to [Clause 9.12.2](#) or [Clause 9.17](#), provided that the Secretary of State has confirmed in writing that he is not intending himself to procure the Bridge Replacement Works,

which cannot 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.

"TAF" means Technical Appraisal Form.

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

"Technical Requirements" means the Construction Requirements, the O&M Requirements, the Communications Requirements, the Handback Requirements, the requirements set out in [Clause 23. 1.2.1](#) in respect of Quality Management Systems.

"Temporary Adjacent Areas" means, subject to [Clause 8.8](#) [Boundaries of the Site and Adjacent Areas] and [Clause 8.9](#) [Boundaries of the CS Site and CS Adjacent Areas]:

- (a) those parts of the Main Site Adjacent Areas shown or identified as Temporary Adjacent Areas on the limit of Site drawings in Folio 7 or identified as such from time to time by the Secretary of State;
- (b) from the Actual CS Commencement Date in relation to the Contingent Scheme, those parts of the CS Adjacent Areas associated with the Contingent Scheme shown or identified as Temporary Adjacent Areas on the CS limit of Site drawings in Folio 10 or identified as such from time to time by the Secretary of State; and

- (c) from the Actual BRW Commencement Date in relation to a Part of the BRW New Road until the issue of the BRW Completion Certificate or the issue of a notice pursuant to [Clause 9.12.2](#) or [Clause 9.17](#) in respect of that Part of the BRW New Road, the BRW Temporary Adjacent Areas associated with the Bridge Replacement Works in respect of that Part of the BRW New Road.

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

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

"Termination Accounts" means:

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

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

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

"Testing Contractor" means such person as may be appointed by the DBFO Co for the time being in accordance with [Clause 45.4.1](#) or [45.4.2](#).

"Third Party Contractor" means any contractor which, under a contract entered into before the date of this Agreement 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, or has prior to the Actual DR Commencement Date carried out works in respect of the Docklands Roads, or has carried out before or will carry out after the date of execution of this Agreement works in respect of Road Segment 2.

"Third Party Contractor Claim Notice" has the meaning given in [Clause 17.5.1](#).

"Toll Annexes" means those toll annexes set out in the [Appendices to Annex 1 to Part 1 of Schedule 9](#).

"Traffic Control and Communications Testing Contractor" means such person as may be appointed by the DBFO Co for the time being in accordance with [Clause 45.4.1](#) or [45.4.2](#).

"Traffic Data" means the information relating to traffic and the information relating to the availability, use or condition of the Project Road in the reports submitted pursuant to [paragraph 3 of Part 1 of Schedule 14](#), [paragraphs 2 and 3 of Part 2 of Schedule 14](#) [Reports] and any information relating to:

- (a) traffic obtained by the Secretary of State by direct interrogation of any Measuring Equipment or Traffic Census Equipment; or
- (b) the availability, use or condition of the Project Road by the direct interrogation of any Availability Monitoring Equipment.

"Traffic Sensitive Zones" means those parts of the Main Section of the Project Road described in [Annex 2 to Part 2 of Schedule 9](#) and in the case of the Docklands Roads described in [Annex 1 of Part 4 of Schedule 9](#).

"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 without limitation all local transport notes issued from time to time by the Department and published by The Stationery Office).

"Traffic Signs Provisions" means the Road Traffic Regulation Act 1984, The Traffic Signs Regulations and General Directions 1994 (S.I. 1994/1519) and any authorisation given under Section 64, or direction given under Section 65, of the Road Traffic Regulation Act 1984.

"Traffic Signals Testing Contractor" means such person as may be appointed by the DBFO Co for the time being in accordance with [Clause 45.4.1](#) or [45.4.2](#).

"Transport for London" means the body corporate of that name to be constituted pursuant to the Greater London Authority Act.

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

"Trigger Event" means the various Trigger Events specified in the [Appendices to Annex 1 to Part 1 of Schedule 9](#), and the Trigger Event for a Payment Period p means the Trigger Event upon the occurrence of which that Payment Period p commences (or, if Payment Period p commences on the first day of Contract Year, the most recent Trigger Event occurring prior to the first day of Contract Year y).

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

"Upgraded Sections" means the Firm Schemes Upgraded Sections; from the Actual CS Commencement Date, the CS Upgraded Sections; and from the Actual BRW Commencement Date in relation to a Part of the BRW New Road, the BRW Upgraded Section associated with such Part of the BRW New Road.

"Usage Payment" means the amount determined in accordance with [Paragraph 1 of Part 1 of Schedule 9](#) [Usage Payment] in respect of a Contract Year.

"User Paid Tolls" 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 48.1.5](#).

"Verification" means the process of testing either any of the Measuring Equipment for the purpose of assessing any error in Measurement or any of the Availability Monitoring Equipment for the purpose of assessing any error in its monitoring and "Verify" shall be construed accordingly.

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

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

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

"Works" means the Permanent Works (including Plant) and the Temporary Works required in accordance with the Construction Requirements and the Communications Requirements for the design, construction, testing and completion of the New Road, the Off-Site Facilities, the Other 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 lighting, Communications Installations, Measurement Installations, embankments and cuttings and archaeological and ecological works.

"Works Programme" means a detailed programme of design, investigations, construction and related works, based upon the Programme, to be submitted by the DBFO Co in accordance with [Clause 12.3.1](#) or any amended or varied version thereof submitted by the DBFO Co in accordance with [Clause 12.3.2](#).

1.2 Interpretation

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

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses and Schedules are references to Clauses of and Schedules to this Agreement and all references to Parts, Sections, paragraphs, Annexes or Appendices are references to Parts, Sections and paragraphs contained in and Annexes and Appendices to the Schedules;
- 1.2.3 the Schedules to this Agreement (including any Annexes or Appendices thereto) are an integral part of this Agreement and reference to this Agreement includes reference thereto and reference to any Schedule includes reference to any Annex or Appendix thereto;
- 1.2.4 all references to any agreement (including, without limitation, this Agreement), document or other instrument include (subject to all relevant approvals and any other provision of this Agreement expressly concerning such agreement, document or other instrument) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned;
- 1.2.5 all references to any statute or statutory provision (including any subordinate legislation) shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute;
- 1.2.6 all references to time of day shall be a reference to whatever time of day shall be in force in England and Wales;
- 1.2.7 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause, Schedule, Part, Section, paragraph, Annex or Appendix in which such word may be used;
- 1.2.8 words importing the singular include the plural and vice versa;
- 1.2.9 words importing a particular gender include all genders;
- 1.2.10 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, emanation, agency or instrumentality, unincorporated body of persons or association;

- 1.2.11 any reference to a public organisation or representative shall be deemed to include a reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative;
- 1.2.12 references to "Parties" mean the parties to this Agreement and references to a "Party" mean one of the parties to this Agreement;
- 1.2.13 references to drawings are references to drawings appearing in the Schedules hereto having the revision numbers set against the relevant drawings numbers in [Appendix 0/4 to Annex 6 to Part 2 of Schedule 4](#);
- 1.2.14 all monetary amounts are expressed in pounds sterling;
- 1.2.15 references to amounts or sums being expressed in October 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 November 1998 for the month of October 1998. October 1998 prices shall be calculated by applying the following formula:

$$R_{\text{October1998}} = \frac{R_m \times RPI_{\text{October1998}}}{RPI_m}$$

where:

- $R_{\text{October1998}}$ = the relevant amount or sum expressed in October 1998 prices;
- m = the calendar month in respect of which the October 1998 price comparison is to be made;
- $RPI_{\text{October1998}}$ = the RPI published in October 1998 for the month of November 1998;
- R_m = the actual amount or sum pertaining in month m ;
- RPI_m = the RPI published or which is to be published in month $m+1$ for the preceding month m ;

- 1.2.16 wherever this Agreement obliges the Secretary of State to pay any amount to the DBFO Co (including, without limitation, pursuant to [Schedule 12](#)

[Change] or [Schedule 13](#) [Additional Works and Subsequent Schemes]) in respect of any costs, expenses, fees, charges, liabilities, Losses, Claims or other sums incurred by the DBFO Co:

- 1.2.16.1 such obligation shall be construed as applying only to so much of such sums as have been properly incurred on an arm's length commercial basis or, where not incurred on an arm's length commercial basis (including where the payment is made to the Contractor or an Associated Company of the DBFO Co), so much of them as are proper and reasonable; and
- 1.2.16.2 the DBFO Co shall, where requested by the Secretary of State, provide supporting evidence of such costs, expenses, fees, charges, liabilities, Losses, Claims or other sums; and
- 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 reference to the statutory duties or functions of the Secretary of State shall be a reference to such duties or functions (including powers and discretions) from time to time and shall include any common law duties and functions (including powers and discretions).
- 1.2.19 any reference to "day" shall, unless otherwise stated, mean the period of time which begins with one midnight and ends with the next.

1.3 Language

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

1.4 Provisions applicable to Existing Road and New Road

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

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

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

1.5 Provisions Applicable to the Contingent Scheme and the BRW New Road

Save as otherwise expressly provided, the provisions of this Agreement applicable to Firm Schemes shall also apply, mutatis mutandis, to the Contingent Scheme and to each Part of the BRW New Road.

2. **DOCUMENTATION AND COMING INTO EFFECT OF THIS AGREEMENT**

2.1 Ambiguities

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

2.2 Additional Payments and Time

The DBFO Co shall not be entitled to any additional payment or extension of time under this Agreement as a result of giving effect to the decision of the Department's Nominee 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 where indicated executed by the parties thereto or otherwise in Agreed Form:

- 2.3.1.1 (a) the shareholders agreement between the Sponsors;
 - (b) the shareholders guarantees between the Sponsors;
 - (c) all the legal opinions which are being given to the Funders and the DBFO Co, directed to the Secretary of State;
 - (d) the Agreed Form List;
 - (e) a quadrapartite agreement between the Secretary of State, the DBFO Co, Railtrack and London Underground Limited;
 - (f) the RMS Subordination Loan Facility;
 - (g) the RMSH Subordination Loan Facility.
- 2.3.1.2 the Memorandum and Articles of Association of the DBFO Co and of its parent holding company;

- 2.3.1.3
- (a) Collateral Deed between inter alia Road Management (A13) Holdings Limited ("Holdings"), the DBFO Co, European Investment Bank ("EIB"), Law Debenture Trustees Limited ("Bond Trustee"), The Law Debenture Trust Corporation ("Security Trustee"), Ambac Assurance Corporation ("Ambac") and MBIA Assurance S.A. ("MBIA");
 - (b) Accounts Agreement between inter alia the DBFO Co, EIB, Holdings, Ambac, Bond Trustee, Security Trustee;
 - (c) Intercreditor Agreement between inter alia the DBFO Co, EIB, Holdings, Security Trustee, Bond Trustee, Ambac and MBIA;
 - (d) EIB Facility Agreement between EIB and the DBFO Co;
 - (e) Insurance and Indemnity Agreement between the DBFO Co, Ambac and MBIA;
 - (f) Bond Trust Deed between the DBFO Co, MBIA and Bond Trustee;
 - (g) "red herring" Offering Circular prepared in connection with the issue of the RMS Bonds;
 - (h) Subscription Agreement between the DBFO Co, MBIA and Greenwich NatWest Limited (as agent for National Westminster Bank PLC);
 - (i) Bond Policy issued by MBIA;
 - (j) MBIA EIB Loan Policy and AMBAC EIB Loan Policy issued by MBIA and AMBAC;
 - (k) Paying Agency Agreement between inter alia the DBFO Co, Bond Trustee and Citibank N.A.;
 - (l) RMS Debenture between the DBFO Co and Security Trustee;
 - (m) RMSH Debenture between Holdings and Security Trustee;

- (n) Guaranteed Investment Contract between DBFO Co, Security Trustee and National Westminster Bank plc relating to a fixed price deposit;
 - (o) Guaranteed Investment Contract between DBFO Co, Security Trustee and National Westminster Bank plc relating to a retail price index linked deposit;
 - (p) Shareholders Undertaking between the Sponsors, Holdings, DBFO Co, Security Trustee, Bond Trustee, Ambac, MBIA and EIB;
 - (q) Subordination Deed between the Sponsors, Holdings, DBFO Co and the Secretary of State.
- 2.3.1.4 the Direct Agreement;
- 2.3.1.5 (a) the Construction Contract;
- (b) the Completion Guarantee between the Contractor, the DBFO Co and Alfred McAlpine plc, Dragados Construction PO, SA, AMEC plc, Halliburton Company;
- (c) Construction Contract Direct Agreement between the Contractor and Alfred McAlpine plc, Grupo Dragados SA, AMEC PLC, Halliburton Holdings Limited, DBFO Co, MBIA Assurance SA, Ambac Assurance Corporation, AMEC Civil Engineering Limited, Dragados Roads Limited, Alfred McAlpine Construction Limited, Brown & Root Limited;
- 2.3.1.6 the Design Contract;
- 2.3.1.7 the terms and conditions of engagement of the Archaeologist, Landscape Architect, Landscape Manager, Ecologist, Traffic Control and Communications Testing Contractor, Testing Contractor, Traffic Signals Testing Contractor, Checker and Carriageway Availability Monitoring Contractor;
- 2.3.1.8 (a) the Operating and Maintenance Support Agreement; and
- (b) the Operating and Maintenance Support Agreement Guarantee between certain of the Sponsors and the DBFO Co;
- 2.3.1.9 waivers of liability from the Contractor, Operator, Designer, Archaeologist, Landscape Manager, Landscape Architect,

Ecologist, Traffic Control and Communications Testing Contractor, Testing Contractor and Traffic Signals Testing Contractor in the form referred to in the last sentence of [Clause 45.4.2](#).

- 2.3.1.10 the SOS Insurance Account First Charge between the DBFO Co and the Secretary of State (EXECUTED).
 - 2.3.1.11 the undertaking by the insurance broker referred to in [Clause 20.6.5](#).
 - 2.3.1.12 charge over the River Lea Crossing Retention Account, the Lodge Avenue Flyover Retention Account and the Handback Retention Account between the Secretary of State and the DBFO Co (EXECUTED).
 - 2.3.1.13 the Bond Pricing Deed (EXECUTED).
 - 2.3.1.14 confirmation of satisfaction of conditions precedent, referred to in [Clause 2.4.2](#).
 - 2.3.1.15 The Design Sub-Contract.
- 2.3.2 The DBFO Co shall, and shall procure that each Contracting Associate shall, perform its obligations under and observe all the terms of the Project Documents to which it is a party and shall not (and shall procure that no Contracting Associate shall):
- 2.3.2.1 once a Project Document to which it is a party has come into full force and effect, terminate it or permit its termination;
 - 2.3.2.2 make or agree to any material amendment to or variation of any Project Document to which it is a party;
 - 2.3.2.3 once a Project Document to which it is a party has come into full force and effect, in any material respect depart from, or waive or fail to enforce any rights it may have under, such Project Document;
 - 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.

- 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.
- 2.3.5 The DBFO Co shall be entitled after the Commencement Date to take any action referred to in [Clauses 2.3.2.2](#) and [2.3.2.3](#) with respect to the Funding Agreements without submitting the relevant document or proposed course of action to the Department's Nominee under [Clause 2.3.2](#) unless the relevant document or proposed course of action would either:
- 2.3.5.1 have the effect that the performance by the DBFO Co or any other party to any of the Funding Agreements or the Direct Agreement of any of its or their respective obligations under such agreement would be liable to be accelerated or (in any manner adverse to the DBFO Co) altered as a result of any default, action or circumstance existing in relation to any other DBFO roads project for the Secretary of State;
 - 2.3.5.2 have a material adverse effect on the ability of the DBFO Co to comply with its obligations under this Agreement; or
 - 2.3.5.3 have the effect of inhibiting the ability of the DBFO Co to comply with the terms of [Clause 20](#).
- 2.3.6 The DBFO Co shall submit to the Department's Nominee at the end of each Contract Year copies of any document entered into and details of any course of action taken with respect to the Funding Agreements during that Contract Year which were not submitted to the Department's Nominee under [Clause 2.3.2](#) in accordance with the Review Procedure during that Contract Year.

2.3.7 Notwithstanding any other provision of this Agreement, no liability of the Secretary of State under this Agreement (whether present, future, actual or contingent) shall be increased by any action referred to in [Clause 2.3.2.2](#), [2.3.2.3](#) or [2.3.5](#) unless the relevant action has been submitted to the Department's Nominee and there has been no objection in accordance with the Review Procedure.

2.4 Coming Into Effect of this Agreement

2.4.1 [Clause 5.1.1](#) shall come into effect immediately upon execution of this Agreement.

2.4.2 The remainder of this Agreement shall not come into effect until (i) the issue of the RMS Bonds and payment in full therefor is received (ii) EIB has confirmed that the conditions referred to in Clause 2.4(a) of the EIB Facility Agreement have been fulfilled (iii) MBIA has confirmed that the conditions precedent contained in Schedule 1 of the EIB Facility Agreement have been satisfied, provided that the issue of payment occurs and the confirmations are given on or before 30 April 2000.

2.4.3 If the requirements of Clause 2.4.2 are met on or before 30 April 2000, the remainder of this Agreement shall come into full force and effect immediately.

2.5 Maintenance of RMS Bond Listing

For so long as the Secretary of State shall require, the DBFO Co shall use all reasonable endeavours to maintain the listing of the RMS Bonds on the London Stock Exchange until none of the RMS Bonds is outstanding. If, however, the maintenance of such listing is unduly onerous, the DBFO Co shall instead use its best endeavours to obtain and maintain a listing of the RMS Bonds on such other stock exchange (being a recognised stock exchange within the meaning of Section 841 of the Income and Corporation Taxes Act 1988) as it may decide.

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 and, subject to [Schedule 17](#) in respect of the Communications Installations, 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 11.4](#) [DBFO Co's Changes], [Clause 14.6](#) [Maintenance and Other Works], [Clause 36.3](#) [Subsequent Schemes] and [Part 3 of Schedule 13](#) [Subsequent Schemes] and [Clause 36.4](#) [Improvements] and [Part 4 of Schedule 13](#) [Improvements].

3.3 Public Use

3.3.1 The DBFO Co shall:

3.3.1.1 subject to [Clause 15.3](#) [Lane Closures], keep the Existing Road open for public use;

3.3.1.2 from the date of issue of the Permit to Use, open and, subject to [Clause 15.3](#) [Lane Closures], keep open the New Road for public use; and

3.3.1.3 subject to [Clause 15.3](#) [Lane Closures], from the Actual DR Commencement Date, keep the Docklands Roads open for public use.

3.3.2 Without prejudice to [Clause 28.2](#) [Primary Duty of Co-ordination], all Operations shall be carried on so as not to interfere unnecessarily with the convenience of the public or the access to, use and occupation of public or private roads or footpaths, cycleways, footways or bridleways whether under the control or in the possession of the Secretary of State or any other person.

3.4 Standard of Performance

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

3.4.1 in an efficient, effective and safe manner and in accordance with Good Industry Practice and the Quality Documentation;

3.4.2 in a manner that is not likely to be injurious to health or to cause damage to property;

3.4.3 in such manner as to enable the Secretary of State to discharge his statutory duties and his undertakings or objectives set out in the Road User's Charter and as not to detract from the image and reputation of the Secretary of State as highway authority; and

3.4.4 in compliance with all applicable Legal Requirements.

3.5 Discrimination

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

■ [REDACTED]

■ [REDACTED]

[REDACTED]

■ [REDACTED]

[REDACTED]

4.3 Release

In respect of:

4.3.1 the Firm Schemes, following the occurrence of the Milestone Event; and

4.3.2 the Contingent Scheme, following the CS Milestone Event, or

in either case the earlier termination of this Agreement pursuant to [Clause 41](#) [Termination by the DBFO Co] or [Clause 42](#) [Non-Default Termination], unless there is any accrued liability under the Performance Guarantee or the CS Performance Guarantee the Secretary of State shall undertake with due expedition such action as the DBFO Co may reasonably request to release the surety from the Performance Guarantee or CS Performance Guarantee (as appropriate).

4.4 Certificates

The Department's Agent shall issue:

4.4.1 a certificate in the form attached to the Performance Guarantee as soon as reasonably practicable after the Milestone Event has occurred; and

4.4.2 a certificate in the form attached to the CS Performance Guarantee as soon as reasonable practicable after the CS Milestone Event has occurred.

5. **FINANCIAL MODEL**

5.1 Custody Arrangements

5.1.1 Immediately on execution of this Agreement, 2 copies of the Financial Model and 2 copies of the CD-ROM 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 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 Original Base Case and Base Case; Original Schedule 9 and Schedule 9; Base Case Items

5.3.1 A copy of the Original Base Case is attached as [Part 3 of Schedule 1](#) [Base Case] as at execution of this Agreement; and

5.3.2 Upon this Agreement coming into effect pursuant to [Clause 2.4](#) the Original Base Case shall be replaced by the Base Case (determined pursuant to the Bond Pricing Deed) which shall become [Part 3 of Schedule 1](#) in substitution for the Original Base Case.

5.3.3 Upon this Agreement coming into effect pursuant to [Clause 2.4](#) the Original Schedule 9 shall be replaced by the [Schedule 9](#) (determined pursuant to the Bond Pricing Deed) in substitution for the Original Schedule 9.

PART II **OPERATIONS**

6. PRE-COMMENCEMENT PERIOD

6.1 Site Inspection

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

6.1.1 inspected and examined to its satisfaction the Site (including, without limitation, Road Segment 2), the CS Site, the DR Site, the Adjacent Areas, the CS Adjacent Areas and the DR Adjacent Areas and their surroundings and, where applicable, any existing structures or works on, over or under the Site (including, without limitation, Road Segment 2), the CS Site, the DR Site, the Adjacent Areas and the CS Adjacent Areas and the DR Adjacent Areas;

6.1.2 satisfied itself as to the nature of the climatic, hydrological, ecological, environmental and general conditions of the Site (including, without limitation, Road Segment 2), the CS Site, the DR Site, the Adjacent Areas, the CS Adjacent Areas and the DR Adjacent Areas, the nature of the ground and subsoil, the form and nature of the Site (including, without limitation, Road Segment 2), the CS Site, the DR Site, the Adjacent Areas, the CS Adjacent Areas and the DR Adjacent Areas, the risk of injury or damage to property adjacent to or affecting the Site (including, without limitation, Road Segment 2), the CS Site, the DR Site, the Adjacent Areas, the CS Adjacent Areas and the DR 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 (including, without limitation, Road Segment 2), the CS Site, the DR Site, the Adjacent Areas, the CS Adjacent Areas and the DR 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 (including, without limitation, Road Segment 2), the CS Site, the DR Site, Adjacent Areas, the CS

Adjacent Areas and the DR 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 (including, without limitation, Road Segment 2), the CS Site, the DR Site, the Adjacent Areas, the CS Adjacent Areas and the DR 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 38.2.1](#) which bear on any of the matters referred to in [Clauses 6.1.1](#), [6.1.2](#) and [6.1.3](#); and
- 6.1.6 generally obtained for itself all necessary information as to:
 - 6.1.6.1 the risks, contingencies and all other circumstances which may influence or affect the Construction Requirements, the Communications Requirements and the O&M Requirements and its obligation to carry out the Operations; and
 - 6.1.6.2 any other factors which would affect its decision to enter into this Agreement or the terms on which it would do so.

The provisions of any Sub-Clause of this Clause 6.1 [Site Inspection] shall be without limitation to the provisions of any other Sub-Clause of this Clause 6.1 [Site Inspection].

6.2 Investigations and Surveys

- 6.2.1 The DBFO Co shall promptly notify the Department's Agent in accordance with the Review Procedure of any Investigation in connection with the Firm Schemes (other than those set out in [Part 1 of Schedule 21](#) [Investigations and Surveys]) which it is intending to carry out during the Pre-Commencement Period.
- 6.2.2 During the Pre-Commencement Period the DBFO Co may carry out any Investigation which is set out in [Part 1 of Schedule 21](#) [Investigations and

Surveys] or which has been so notified to the Department's Agent pursuant to [Clause 6.2.1](#), provided that:

6.2.2.1 prior to commencing any such Investigation the DBFO Co shall have provided to the Department's Agent such evidence as the Department's Agent may reasonably require that the insurance specified in [Clause 20.1.1.1](#) has been effected; and

6.2.2.2 the DBFO Co shall only be entitled to recover the costs of any such Investigation in accordance with [Clause 42.2.2](#) or [Clause 44.2.1](#) if such Investigation is set out in [Part 1 of Schedule 21](#) [Investigations and Surveys] or there has been no objection to the notice of such Investigation in accordance with the Review Procedure (the right to such objection being in the absolute discretion of the Department's Agent).

6.2.3 At the reasonable request of the DBFO Co the Secretary of State shall use his reasonable endeavours to procure, to the extent possible through the proper exercise of his powers under any relevant Legislation, access to such parts of the Site and Adjacent Areas as the DBFO Co may reasonably require for the purpose of carrying out the Investigations referred to in [Clause 6.2.2](#), provided that:

6.2.3.1 prior to the Commencement Date the Secretary of State shall have no obligation to acquire any land or Rights in respect of land prior to the time when he would otherwise be required to do so in order to comply with his obligations under [Clause 8.1](#) [Access for DBFO Co] or to expend any funds in excess of the amounts which he would reasonably expect to expend in order to comply with his obligations under [Clause 8.1](#) [Access for DBFO Co]; and

6.2.3.2 for the avoidance of doubt, the Secretary of State shall have no obligation to procure access to any land outside of the Site and the Adjacent Areas.

Any access given by the Secretary of State under this Clause 6.2 [Investigations and Surveys] 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.

6.2.4 The DBFO Co shall promptly furnish the Department's Agent with copies of all information, records and test results (including any interpretation of such test results) resulting from the Investigations referred to in [Clause 6.2.2](#).

6.3 Other Preparatory Works

During the Pre-Commencement Period the DBFO Co may mobilise such resources and carry out such further design and other works in connection with the Firm Schemes (other than works subject to [Clause 6.2](#) [Investigations and Surveys] or [Clause 6.4](#) [Works by Relevant Authorities]) as are set out in [Part 2 of Schedule 21](#) [Other Preparatory Works] or as shall be appropriate having regard to the expected Commencement Date (based on the information referred to in [Clause 7.4](#) [Estimated Commencement Date]) provided that:

- 6.3.1 the DBFO Co shall have provided to the Department's Nominee such evidence as the Department's Nominee may reasonably require that any insurance specified in [Clause 20.1.1.1](#) has been effected;
- 6.3.2 the DBFO Co shall only be entitled to recover the costs of any such activities in accordance with [Clause 42.2.2](#) or [Clause 44.2.1](#) if such activities are set out in [Part 2 of Schedule 21](#) [Other Preparatory Works] or there has been no objection to the notice of such activities in accordance with the Review Procedure (the right of such objection being in the absolute discretion of the Department's Nominee); and
- 6.3.3 this [Clause 6.3](#) [Other Preparatory Works] shall not authorise the doing of any thing which would affect the physical integrity of the Site or Adjacent Areas.

6.4 Works by Relevant Authorities

- 6.4.1 Works in connection with the Firm Schemes which the DBFO Co wishes during the Pre-Commencement Period to have carried out by any Relevant Authority (including without limitation any Statutory Undertaker) are set out in [Part 3 of Schedule 21](#) [Works by Relevant Authorities].
- 6.4.2 If the DBFO Co wishes during the Pre-Commencement Period to have additional works in connection with the Firm Schemes carried out by any Relevant Authority (including without limitation any Statutory Undertaker), then, the DBFO Co shall give notice of such intended works to the Department's Agent under the Review Procedure.
- 6.4.3 The Secretary of State will either procure the works described in [Clause 6.4.1](#) or [Clause 6.4.2](#) or will instruct the DBFO Co that subject to [Clause 28.5.3](#) it is to manage such works by carrying out such of the services set out in [Parts 2 and 3 of Schedule 19](#) as may be relevant to such works, provided that:
 - 6.4.3.1 the works are set out in [Part 3 of Schedule 21](#) [Works by Relevant Authorities]; or

6.4.3.2 if the works are not set out in [Part 3 of Schedule 21](#) [Works by Relevant Authorities], there has been no objection to such works in accordance with the Review Procedure,

and, in either case, the DBFO Co shall have provided to the Department's Agent such evidence as the Department's Agent may reasonably require that any insurance specified in [Clause 20.1.1.1](#) has been effected.

6.4.4 The Department's Agent shall not be entitled to object to the works set out in [Part 3 of Schedule 21](#) [Works by Relevant Authorities]. The Department's Agent shall only be entitled to object to the works described in a notice given pursuant to [Clause 6.4.2](#) on the grounds set out in [paragraph 3.3 of Part 3 of Schedule 7](#) [Review Procedure].

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

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

6.4.5.2 in respect of the works described in [Clause 6.4.2](#), have entitled the Department's Agent to withhold or defer consent pursuant to [Clause 6.4.4](#).

6.4.6 The DBFO Co shall bear the cost of the carrying out of the works described in [Clause 6.4.1](#) and [Clause 6.4.2](#).

6.4.7 The DBFO Co shall be entitled to recover the costs of the works set out in [Part 3 of Schedule 21](#) [Works by Relevant Authorities] in accordance with [Clause 42.2.2](#) or [Clause 44.2.1](#) on the occurrence of the circumstances envisaged by such Clause.

6.5 Works prior to the Actual CS Commencement Date

6.5.1 In relation to the Contingent Scheme, at its own risk, cost and expense the DBFO Co may carry out or procure the carrying out of the Investigations, surveys, preparatory works and works by Relevant Authorities described in [Part 4 of Schedule 21](#) [Works Prior to Actual CS Commencement Date]. In relation to the Contingent Scheme, such activities shall, unless specifically set out in [Part 4 of Schedule 21](#) [Works prior to the Actual CS Commencement Date], only take place in the period between the date of this Agreement and the earlier of:

6.5.1.1 the Actual CS Commencement Date; and

6.5.1.2 the CS Cut-Off Date.

6.5.2 For the avoidance of doubt, [Clauses 6.2](#) [Investigations and Surveys], [6.3](#) [Other Preparatory Works] and [6.4](#) [Works by Relevant Authorities] shall not authorise the carrying out of any of the activities referred to therein in relation to the Contingent Scheme.

6.5.3 At the reasonable request of the DBFO Co, the Secretary of State shall use his reasonable endeavours to procure, to the extent possible through the proper exercise of his powers under any relevant Legislation, access to such parts of the CS Site and CS Adjacent Areas as the DBFO Co may reasonably require for the purpose of carrying out the works referred to in [Clause 6.5.1](#), provided that in relation to the Contingent Scheme:

6.5.3.1 prior to the Actual CS Commencement Date the Secretary of State shall have no obligation to acquire any land or Rights in respect of land prior to the time when he would otherwise be required to do so in order to comply with his obligations (if any) under [Clause 8.1](#) [Access for DBFO Co] or to expend any funds in excess of the amounts (if any) which he would reasonably expect to expend in order to comply with his obligations under [Clause 8.1](#) [Access for DBFO Co]; and

6.5.3.2 the DBFO Co shall bear the cost of carrying out the works referred to in [Clause 6.5.1](#); and

6.5.3.3 for the avoidance of doubt, the Secretary of State shall have no obligation to procure access to any land outside of the CS Site and the CS Adjacent Areas.

Any access given by the Secretary of State under this Clause 6.5 [Works Prior to the Actual CS Commencement Date] 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.

7. **COMMENCEMENT**

7.1 **Conditions to Commencement**

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

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

7.1.1.1 that all conditions (other than conditions relating to the issue of the Commencement Certificate) to the availability under the Funding Agreements of the funds required by the DBFO Co for

all Operations relating to the Firm Schemes have been satisfied or waived;

7.1.1.2 that 50,004 of the Ordinary Shares of £1 each have been unconditionally allotted to the Sponsors fully paid up in cash; and

7.1.1.3 the DBFO Co has received payment of the net proceeds of the issue of the RMS Bonds and MBIA has confirmed that the conditions precedent referred to in Schedule 1 of the Collateral Deed and Schedule 1 of the EIB Facility Agreement have been satisfied,

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

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

7.1.3 the Secretary of State having received such evidence as he may reasonably require that the Liaison Procedures referred to in [Clause 14.5.1](#) [Emergencies and Liaison] have been developed and agreed with each of the persons referred to in [paragraph 1 of Part 2 of Schedule 16](#) [Operations, Emergencies and Traffic Management] (save to the extent relevant only to the Contingent Scheme or the Docklands Roads);

7.1.4 the Secretary of State having received such evidence as he may reasonably require that adequate procedures have been agreed between the DBFO Co and the Department's Nominee for the transfer of the operation and maintenance of the Existing Road to the DBFO Co with effect from the Commencement Date (or in the case of Road Segment 2, with effect from the date set out in the By-Pass Notice) and that the DBFO Co is ready to commence operation and maintenance of the Existing Road (but not for the avoidance of doubt communications installations) with effect from the Commencement Date (or in the case of Road Segment 2, the date set out in the By-Pass Notice);

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

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

7.1.7 the undertakings referred to in [Clause 20.6](#) having been received by the Secretary of State, in terms satisfactory to the Secretary of State.

7.2 Satisfaction of Conditions

The DBFO Co shall use its reasonable endeavours to procure the satisfaction of the conditions referred to in [Clauses 7.1.1, 7.1.2, 7.1.3, 7.1.4 and 7.1.5](#) [Conditions to Commencement] as soon as practicable after the date of execution of this Agreement and in any event shall procure their satisfaction prior to 11 July 2000.

7.3 Commencement Certificate

7.3.1 The Secretary of State shall (subject to the conditions referred to in [Clause 7.1](#) [Conditions to Commencement] remaining satisfied) issue the Commencement Certificate no later than the later of:

7.3.1.1 the date which is 28 days after the date on which all the conditions referred to in [Clause 7.1](#) [Conditions to Commencement] have been satisfied; and

7.3.1.2 15 May 2000.

7.3.2 The Commencement Certificate shall state the Commencement Date which shall be a date not earlier than 28 days from the date of issue of the Commencement Certificate nor later than 60 days from the date of issue of the Commencement Certificate.

7.4 Estimated Commencement Date

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

7.5 Commencement in relation to Contingent Scheme

The DBFO Co shall use its reasonable endeavours to procure the satisfaction of the conditions referred to in [Clause 9.3.1](#) [Contingent Scheme: Conditions to Commencement] as soon as practicable after the issue of the CS Commencement Certificate and in any event no later than the CS Conditions Date.

7.6 Commencement in relation to the Docklands Roads

The DBFO Co shall use its reasonable endeavours to procure the satisfaction of the conditions referred to in [Clause 9.8](#) [Docklands Roads: Conditions to Commencement] as soon as reasonably practicable after the issue of the Docklands Roads Certificate and in any event shall procure their satisfaction not later than the DR Conditions Date.

7.7 Commencement in relation to the Bridge Replacement Works

The DBFO Co shall use its reasonable endeavours to procure the satisfaction of the conditions referred to in [Clause 9.12](#) [Bridge Replacement Works: Conditions to Commencement] in respect of each Part of the BRW New Road as soon as reasonably practicable after the issue of the relevant BRW Commencement Certificate in respect of that Part of the BRW New Road and in any event shall procure their satisfaction no later than the relevant BRW Conditions Date.

8. **LAND**

8.1 Access for DBFO Co

Subject to the conditions set out in [Clause 7.1](#) [Conditions to Commencement], and also subject to the conditions set out in [Clause 9.3.1](#) in relation to the Contingent Scheme having been and remaining satisfied and subject to the provisions of [Clauses 8.2](#) [Duration], [8.3](#) [Limitations] and [10](#) [Security of the Site], the Secretary of State shall make available to the DBFO Co for the periods referred to in [Clause 8.2](#) [Duration] access to so much of the Site and the Adjacent Areas 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 14.4.2](#), 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 14.4.1](#);
- 8.1.5 the right of any relevant highway authority to have access for the execution on or near the Site or the Adjacent Areas of any work in fulfilling any function of such highway authority under any Law;
- 8.1.6 the terms and conditions of any Rights in respect of land comprising the Site and the Adjacent Areas; and

8.1.7 the provisions of [Clause 10](#) [Security of the Site].

8.2 Duration

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

- 8.2.1 in respect of the Site (other than the DR Site and the CS Site and Road Segment 2), from the Commencement Date and thereafter until the end of the Contract Period or, in respect of any part of the Site comprising a De-Trunked Segment, the date on which the DBFO Co ceases to be responsible for the operation and maintenance thereof in accordance with [Clause 13.3.5](#) (save to the extent necessary to perform the obligations set out in [Clause 13.3.5.3](#));
- 8.2.2 in respect of the Temporary Adjacent Areas (other than the CS Temporary Adjacent Areas and any BRW 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 13.3](#) [Local Facilities and De-Trunked Segments];
- 8.2.3 in respect of the Adjacent Areas (other than any CS Adjacent Areas, the DR Adjacent Areas and 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;
- 8.2.4 in respect of the CS Site, from the Actual CS Commencement Date and thereafter, subject to [Clause 9.3.2](#), until the end of the Contract Period or, in respect of any part of the CS Site comprising a De-Trunked Segment, the date on which a Taking Over Certificate is issued;
- 8.2.5 in respect of the CS Temporary Adjacent Areas, from the later of the Actual CS Commencement Date and the date on which access is required in respect of the relevant part of those CS Temporary Adjacent Areas under the Programme and thereafter, subject to [Clause 9.3.2](#), until a Taking Over Certificate is issued in respect of the Local Facilities on the relevant part of the CS Temporary Adjacent Areas in accordance with [Clause 13.3](#) [Local Facilities and De-Trunked Segments];
- 8.2.6 in respect of the CS Adjacent Areas, from the later of the Actual CS Commencement Date and the date on which access is required in respect of the relevant part of those CS Adjacent Areas under the Programme until, subject to [Clause 9.3.2](#), the end of the Contract Period;

- 8.2.7 in respect of the DR Site, from the Actual DR Commencement Date and thereafter until, subject to [Clause 9.8.2](#), the end of the Contract Period;
- 8.2.8 in respect of the DR Adjacent Areas, from the Actual DR Commencement Date until, subject to [Clause 9.8.2](#), the end of the Contract Period;
- 8.2.9 in respect of Road Segment 2, from the date set out in the By-Pass Notice and thereafter until the end of the Contract Period; and
- 8.2.10 in respect of any BRW Temporary Adjacent Areas in relation to any Part of the BRW New Road, from the later of the Actual BRW Commencement Date and the date on which access is required in respect of the relevant part of the BRW Temporary Adjacent Areas under the Programme, until the issue of the BRW Completion Certificate or the issue of a notice pursuant to [Clause 9.17](#).

8.3 Limitations

- 8.3.1 The rights of access referred to in [Clause 8.1](#) [Access for DBFO Co] shall subsist for the purposes of carrying out the Operations and for no other purposes. Any access given under [Clause 8.1](#) [Access for DBFO Co] shall be by way of licence for the particular activity only and shall not grant or be deemed to grant any legal estate or other interest in land.
- 8.3.2 Without prejudice to the generality of Clause 8.3.1, where land or Rights in respect of land forming part of the Site or the Adjacent Areas has been acquired:
 - 8.3.2.1 by compulsory purchase order for landscaping or any other specified purpose; or
 - 8.3.2.2 subject to any restriction relating to the use of such land for landscaping or any other specified purpose,

such land shall not be used by the DBFO Co otherwise than for activities which are necessary for the achievement of such landscaping or such other specified purpose, and the right of access granted by the Secretary of State in respect of such land shall be limited accordingly.

8.4 Additional Access

- 8.4.1 Any request by the DBFO Co (not being a request pursuant to [Clause 6.5.3](#)) that the Secretary of State exercise in respect of any land outside the Site and the Adjacent Areas any power of entry under any Law (to the extent that the exercise of such power of entry is necessary to enable the DBFO Co to perform its obligations under this Agreement) shall be dealt with in accordance with [Clause 27](#) [Statutory Powers], and the DBFO Co

shall bear all costs and charges in respect of and any Loss or Claims arising from such entry.

8.4.2 Save as provided in [Clause 8.4.1](#), 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].

8.4.3 If requested by the Secretary of State the DBFO Co will be responsible for preparing and negotiating for approval and signature by the Secretary of State agreements made pursuant to Section 4 of the Highways Act 1980 necessary to carry out Operations associated with the Project Facilities and to enable the DBFO Co to fulfill its obligations under this Agreement.

8.5 Off-Site Works

8.5.1 Subject to [Clause 10.1.2](#), to the extent that the Works are required to be carried out on land or highways in the control or ownership of a highway authority other than the Secretary of State and such highway authority has not given to the DBFO Co access to areas required to carry out the Off-Site Works, then and during any such period:

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

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

8.5.2 If the areas required to carry out the Off-Site Works have not been made available within one year from the Commencement Date, the DBFO Co shall adduce evidence to the Department's Nominee to show the amount of time which it will require to complete the Off-Site Works.

8.5.3 If the time elapsed between the date on which the areas required to carry out the Off-Site Works have been made available, and the date on which the Permit to Use would have been issued but for the failure to complete the Off-Site Works, is greater than the period of time agreed or determined pursuant to [Clause 8.5.2](#), then the Department's Nominee shall issue the Permit to Use notwithstanding the failure of the DBFO Co to complete such Off-Site Works.

8.5.4 Notwithstanding the issue of a Permit to Use pursuant to [Clause 8.5.3](#), the DBFO Co shall be obliged to complete the Off-Site Works within the period of time agreed or determined pursuant to [Clause 8.5.2](#) as soon as the areas required to carry out such Off-Site Works have been made available.

8.6 Acquisition of Land by the DBFO Co

- 8.6.1 The DBFO Co shall not acquire any land or any Rights in respect of any land required for or for the support of the Project Facilities without the prior consent of the Secretary of State.
- 8.6.2 Without prejudice to Clause 8.6.1 or [paragraph 2.5.7 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 the Project Facilities shall, upon request by the Secretary of State, be conveyed to the Secretary of State free of charge and without any Encumbrances which would impede the Secretary of State's performance of his highway functions.

8.7 Observance by DBFO Co

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

8.8 Boundaries of Site and Adjacent Areas

- 8.8.1 The Parties acknowledge that the boundaries (both vertical and horizontal) of the Site and Adjacent Areas, as they relate to the New Road and as reflected on the limit of Site drawings in Folio 7, have been set by reference to the preliminary design of the New Road as shown in the Construction Requirements on the date of execution of this Agreement.
- 8.8.2 Within 90 days after issuance of the Completion Certificate, and within 90 days after the issue of the CS Completion Certificate, the DBFO Co shall by notice to the Secretary of State specify any area of land falling within the boundaries of the Site and Adjacent Areas as referred to in Clause 8.8.1 (as the same may have been amended pursuant to [Clause 8.9.6](#)) which is not required for the Project. The Secretary of State shall be entitled in his absolute discretion (as between the Secretary of State and the DBFO Co) to return any such area of land to the person who owned it prior to its acquisition by the Secretary of State (or the successors in interest of such person).
- 8.8.3 If the Secretary of State exercises the right referred to in Clause 8.8.2 in respect of any area of land, then such area of land shall be excluded from the definition of the Site (and, if applicable, the CS Adjacent Areas) or the Adjacent Areas (and, if applicable, the CS Site), 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 the limit of Site drawings in Folio 7 and the CS limit of Site drawings in Folio 10 necessary to reflect such exclusion and if they are unable to reach agreement within 90 days of the effective date of such exercise then either Party may refer the Dispute for resolution under the Disputes Resolution Procedure.

8.8.4 For the avoidance of doubt, if and so long as the Secretary of State does not exercise the right referred to in [Clause 8.8.2](#) in respect of any such area of land, then such area shall remain part of the Site (and, if applicable, the CS Site) or the Adjacent Areas (and, if applicable, the CS Adjacent Areas) as the case may be, and the DBFO Co shall remain subject to the terms of this Agreement in respect of such area of land.

8.9 Boundaries of the CS Site and CS Adjacent Areas

8.9.1 This Clause 8.9 relates to the CS Site, the CS Adjacent Areas and any affected De- Trunked Segments, where a relevant Boundary Change Date occurs in relation to the Contingent Scheme. For the purposes of this Clause 8.9 the phrase "affected De-Trunked Segment" shall mean any section of the Existing Road which, as a consequence of the design of the Contingent Scheme, the DBFO Co proposes should be de-trunked pursuant to Section 10(2)(b) of the Highways Act.

8.9.2 The Parties acknowledge that the boundaries (both vertical and horizontal) of the Site, the Adjacent Areas, the CS Site and the CS Adjacent Areas, as they relate to the New CS Road including, where relevant, any affected De-Trunked Segments have been set by reference to the preliminary design of the New CS Road on the date of execution of this Agreement and that the boundaries will therefore need to be reviewed on each of the applicable Boundary Change Dates.

8.9.3 As soon as practicable, and in any event within 28 days, of the Boundary Change Dates the DBFO Co shall submit drawings, in accordance with the Review Procedure, defining the boundaries of the Site, the Adjacent Areas, the CS Site the CS Adjacent Areas, the Temporary Adjacent Areas, the CS Temporary Adjacent Areas and any affected De-Trunked Segments taking account of the CS Orders and design of the New CS Road as then proposed. The submitted drawings shall identify any land or Rights in respect of land proposed for either inclusion within, or exclusion from, the Site, the Adjacent Areas, the CS Site or the CS Adjacent Areas. The Department's Nominee shall only be entitled to comment on the submitted drawings on the grounds set out in [paragraph 3.5 of Part 3 of Schedule 7](#).

8.9.4 The Parties shall use their reasonable endeavours to agree any revisions to the relevant drawings defining the Site, the Adjacent Areas, the CS Site, the CS Adjacent Areas, the Temporary Adjacent Areas, the CS Temporary Adjacent Areas and any affected De-Trunked Segments necessary to reflect such inclusions and exclusions and if they are unable to reach agreement within 90 days of the date of such exercise then either Party may refer the Dispute for resolution under the Disputes Resolution Procedure.

8.9.5 When it is either agreed, or determined under the Disputes Resolution Procedure, that changes to the boundaries of the Site, the Adjacent Areas,

the CS Site, the CS Adjacent Areas, the Temporary Adjacent Areas, the CS Temporary Adjacent Areas and any affected De-Trunked Segments that satisfy the requirements set out in [paragraph 3.6 of Part 3 of Schedule 7](#) are required, the DBFO Co shall promptly prepare and submit drawings which shall define the revised boundaries of the Site, the Adjacent Areas, the CS Site, the CS Adjacent Areas, the Temporary Adjacent Areas, the CS Temporary Adjacent Areas and any affected De-Trunked Segments.

8.9.6 From the date on which the drawings are agreed, or a determination made to such effect under the Disputes Resolution Procedure, the definitions of "the Site", "the Adjacent Areas", "the CS Site", "the CS Adjacent Areas", "the Temporary Adjacent Areas", "the CS Temporary Adjacent Areas", "De-Trunked Segments", "the New CS Road" and such other definitions as also require amendment shall be amended to the extent necessary to reflect such changed boundaries.

8.10 Disposal of Materials Won on Site

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

8.10.1 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.

8.11 Claims for Injurious Affection

The Secretary of State shall be responsible for dealing with and negotiating any Claims made by any person under Section 4 of the Acquisition of Land Act 1981 for severance or injurious affection and the DBFO Co shall:

8.11.1 take all steps necessary to minimise such Claims and any associated Losses;

- 8.11.2 provide the Secretary of State with all administrative and other support and liaison associated with the handling of such Claims required by the Secretary of State and without prejudice to the generality of the foregoing will provide all necessary information, calculations, plans, drawings, sketches, photographs, evidence and other material required by the Secretary of State in connection with his responsibilities in relation to the subject matter of such Claims;
- 8.11.3 immediately provide to the Secretary of State any notices, statements, proofs or other documents sent to it or as part of, or in connection with any such Claim and immediately notify him of any fact or issue relevant to the consideration or negotiation of such Claim and any associated Losses; and
- 8.11.4 not negotiate with, express any opinion to or otherwise make any representation to any person in relation to any such Claim or any associated Losses.

9. **CONTINGENT SCHEME, DOCKLANDS ROADS, BRIDGE REPLACEMENT WORKS AND ROAD SEGMENT 2**

9.1 Secretary of State's Responsibilities

- 9.1.1 The Secretary of State shall, in relation to the Contingent Scheme:
 - 9.1.1.1 be responsible at his own cost and risk for the completion of the Statutory Process;
 - 9.1.1.2 promptly notify the DBFO Co when the CS Orders have been made; and
 - 9.1.1.3 where aware of any such action promptly notify the DBFO Co of the commencement of any Judicial Review or Statutory Review in respect of the Contingent Scheme.

9.2 CS Commencement Certificate

- 9.2.1 The Secretary of State shall issue the CS Commencement Certificate on or before 16 April 2001.
- 9.2.2 Such certificate shall specify the Actual CS Commencement Date for the Contingent Scheme, which shall be a date not earlier than 35 days from the date of issue of the CS Commencement Certificate nor later than 90 days from the date of issue of the CS Commencement Certificate and which may, for the avoidance of doubt be after the CS Cut-off Date and shall be subject to fulfillment of the conditions referred to in [Clause 9.3.1](#).

9.3 Conditions to Commencement

9.3.1 No later than the CS Conditions Date the DBFO Co shall provide to the Secretary of State:

- 9.3.1.1 confirmation that all conditions (other than conditions relating to the occurrence of the Actual CS Commencement Date) to the availability to the DBFO Co under the Funding Agreements of the funds required for the Contingent Scheme have been satisfied or waived;
- 9.3.1.2 the CS Performance Guarantee, duly executed by a bank or insurance company approved by the Secretary of State and in full force and effect;
- 9.3.1.3 confirmation that in relation to the Contingent Scheme, Liaison Procedures have been developed and agreed with each of the persons referred to in [paragraph 1 of part 2 of Schedule 16](#) [Operations, Emergencies and Traffic Management];
- 9.3.1.4 a warranty in the form, mutatis mutandis, set out in [Clause 6.1](#) [Site Inspection] in relation to the CS Site and the CS Adjacent Areas;
- 9.3.1.5 confirmation that all conditions precedent (other than conditions relating to the occurrence of the Actual CS Commencement Date) in the Project Documents in relation to the Contingent Scheme have been satisfied or waived;
- 9.3.1.6 confirmation that any insurance required pursuant to [Clause 20](#) [Insurance] has been obtained and is in full force and effect;

accompanied in the cases of Clauses 9.3.1.1, 9.3.1.3, 9.3.1.5 and 9.3.1.6 by such evidence thereof as may be reasonably required by the Secretary of State.

9.3.2 In relation to the Contingent Scheme, if the DBFO Co fails to satisfy the conditions set out in Clause 9.3.1 prior to the CS Conditions Date, then on or before the date specified in the CS Commencement Certificate as being the Actual CS Commencement Date, the Secretary of State may by notice withdraw the CS Commencement Certificate and from the date of such notice the DBFO Co shall:

- 9.3.2.1 have no further right to carry out the Contingent Scheme and all rights of access to the CS Site and CS Adjacent Areas pursuant to [Clause 8](#) [Access for DBFO Co] in relation to the Contingent Scheme shall cease; and

9.3.2.2 indemnify and hold indemnified the Secretary of State against all Claims or Losses incurred by the Secretary of State, whether arising directly or indirectly, from the failure to satisfy the conditions, including without limitation all costs of re-tendering the Contingent Scheme (or any part of it) and any additional cost of procurement above that which would have been paid had the conditions been fulfilled within the relevant period;

9.3.3 If, following a notice given in respect of the Contingent Scheme pursuant to [Clause 9.3.2](#), the completion of the Contingent Scheme is procured by the Secretary of State then the provisions of [Clause 34](#) [Change Procedure] and [paragraph 1 of Part 6 of Schedule 12](#) [Contingent Scheme] shall apply.

9.3.4 For the avoidance of doubt, in relation to the Contingent Scheme, unless the Secretary of State issues a CS Commencement Certificate (which is not withdrawn pursuant to [Clause 9.3.2](#)), the Secretary of State may procure the Contingent Scheme by way of Additional Works.

9.4 Indemnity for EIB

In the event that the Secretary of State fails to issue the CS Commencement Certificate in accordance with the requirements of [Clause 9.2.1](#), the Secretary of State shall reimburse to the DBFO Co any sums which are properly paid by the DBFO Co to the European Investment Bank for breakage costs pursuant to Clause 2.8 of the EIB Facility Agreement referred to in [Clause 2.3.1.3\(d\)](#).

9.5 DBFO Co's Obligation

9.5.1 Subject to the CS Commencement Certificate having been issued prior to or on the CS Cut-Off Date, the DBFO Co shall be responsible for the design, construction, completion, and, subject to [Schedule 17](#) in respect of the Communications Installations, the commissioning, and testing of the CS Works in relation to the Contingent Scheme, which shall be carried out in strict accordance with the Construction Requirements and the Communications Requirements (subject to any DBFO Co's Change or Department's Changes), 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.

9.5.2 If the CS Commencement Certificate is not issued on or prior to the relevant CS Cut-Off Date, then the DBFO Co will not be required, nor will it have any right, to construct the Contingent Scheme.

9.6 Secretary of State's Contingent Scheme Risks

If in respect of the Contingent Scheme a CS Orders Change Event has occurred the provisions of [paragraph 2 of Part 6 of Schedule 12](#) [Contingent Scheme Change] shall apply.

9.7 Docklands Roads Certificate

9.7.1 Subject to Clause 9.7.2, the Secretary of State may at any time prior to or on the DR Cut-Off Date issue the Docklands Roads Certificate. Such certificate shall specify the Actual DR Commencement Date, which shall be a date not earlier than 35 days from the date of issue of the Docklands Roads Certificate nor later than 90 days from the date of issue of the Docklands Roads Certificate and which may, for the avoidance of doubt be after the DR Cut-Off Date.

9.7.2 The Secretary of State may, in his absolute discretion, at any time prior to the issue of the Docklands Roads Certificate, determine not to require the DBFO Co to operate and maintain the Docklands Roads. The Secretary of State shall promptly notify the DBFO Co of any such determination.

9.7.3 If the Docklands Roads Certificate is not issued on or prior to the DR Cut-Off Date, then the DBFO Co will not be required, nor will it have any right, to operate and maintain the Docklands Roads.

9.8 Docklands Roads: Conditions to Commencement

9.8.1 Not later than the DR Conditions Date, the DBFO Co shall provide to the Secretary of State:

9.8.1.1 confirmation that all conditions (other than conditions relating to the occurrence of the Actual DR Commencement Date) to the availability to the DBFO Co under the Funding Agreements of funds required in connection with the operation and maintenance of the Docklands Roads have been satisfied or waived;

9.8.1.2 confirmation that in relation to the Docklands Roads Liaison Procedures have been developed and agreed with each of the persons referred to in [paragraph 1 of Part 2 of Schedule 16](#) [Operations, Emergencies and Traffic Management];

9.8.1.3 confirmation that adequate procedures have been agreed between the DBFO Co and the current maintenance agent in respect of the Docklands Roads for the transfer of the operation and maintenance of the Docklands Roads with effect from the Actual DR Commencement Date and that the DBFO Co is ready to commence operation and maintenance of the Docklands Roads with effect from the Actual DR Commencement Date;

- 9.8.1.4 a warranty in the form, mutatis mutandis, set out in [Clause 6.1](#) in relation to the DR Site and the DR Adjacent Areas;
- 9.8.1.5 confirmation that all conditions precedent (other than conditions relating to the occurrence of the Actual DR Commencement Date) in the Project Documents in relation to the Docklands Roads have been satisfied or waived;
- 9.8.1.6 confirmation that the insurance required pursuant to [Clause 20](#) has been obtained and is in full force and effect; and
- 9.8.1.7 details of revisions to the Base Case and [Schedule 9](#) which it believes to be required and a revised version of the Base Case and [Schedule 9](#) reflecting the revisions,

accompanied in the cases of [Clauses 9.8.1.1 to 9.8.1.3](#) (inclusive), 9.8.1.5, 9.8.1.6 and 9.8.1.8 by such evidence thereof as may be reasonably required by the Secretary of State. The Secretary of State and the DBFO Co shall meet and use their respective reasonable endeavours to agree necessary revisions to the Base Case and [Schedule 9](#) as soon as possible and in any event before the Actual DR Commencement Date.

9.8.2 If the DBFO Co fails to satisfy the conditions set out in [Clause 9.8.1](#) prior to the DR Conditions Date or if the necessary revisions to the Base Case and [Schedule 9](#) have not been agreed before the Actual DR Commencement Date, then on or before the date specified in the Docklands Roads Certificate as being the Actual DR Commencement Date the Secretary of State may by notice withdraw the Docklands Roads Certificate and from the date of such notice the DBFO Co shall:

- 9.8.2.1 have no further right to operate and maintain the Docklands Roads; and
- 9.8.2.2 indemnify and hold indemnified the Secretary of State against all Claims or Losses incurred by the Secretary of State, whether arising directly or indirectly, from the failure to satisfy the conditions, including, without limitation, all costs of re-tendering the operation and maintenance of the Docklands Roads (or any part thereof) and any additional cost of procurement above that which would have been paid had the conditions been fulfilled within the relevant period.

9.9 Estimated Actual DR Commencement Date

Prior to the issue of the Docklands Roads Certificate, the Secretary of State shall keep the DBFO Co advised by notice of his estimate of the likely Actual DR Commencement Date, provided that such notice shall be for information and

planning purposes only and shall not be binding upon the Secretary of State or limit the right contained in [Clause 9.7.3](#).

9.10 Docklands Roads: Obligations of the DBFO Co

Subject to the Docklands Roads Certificate having been issued prior to or on the DR Cut-Off Date, from the Actual DR Commencement Date and thereafter throughout the Contract Period the DBFO Co shall be responsible for the operation and maintenance of the Docklands Roads which shall be carried out in accordance with the terms of this Agreement (including, without limitation, the O&M Requirements) and in such manner as to procure satisfaction of the Core O&M Requirements.

9.11 Bridge Replacement Works

9.11.1 In respect of each Part of the BRW New Road, the DBFO Co shall, at any time before the date (the "BRW Notice Date") which is 102 months prior to the expected Expiry Date, serve a notice on the Secretary of State requesting that the Secretary of State issues a BRW Commencement Certificate in respect of that Part of the BRW New Road.

9.11.2 The Secretary of State shall, within 35 days of the date of receipt of a notice given pursuant to Clause 9.11.1, issue a BRW Commencement Certificate in respect of the Part of the BRW New Road which is the subject of such notice. Such certificate shall specify the Actual BRW Commencement Date in respect of such Part of the BRW New Road, which shall be a date not earlier than 35 days nor later than 90 days from the date of issue of such BRW Commencement Certificate and which may, for the avoidance of doubt, be a date after the BRW Notice Date.

9.11.3 If, in relation to a Part of the BRW New Road, no notice has been served by the DBFO Co pursuant to Clause 9.11.1 by the BRW Notice Date, the Secretary of State may at any time thereafter issue a BRW Commencement Certificate in relation to that Part of the BRW New Road.

9.12 Bridge Replacement Works: Conditions to Commencement

9.12.1 Not later than the relevant BRW Conditions Date applicable to that Part of the BRW New Road the DBFO Co shall provide to the Secretary of State:

9.12.1.1 confirmation that all conditions (other than any condition relating to the occurrence of the Actual BRW Commencement Date) to the availability to the DBFO Co under the Funding Agreements of the funds required for the Bridge Replacement Works in respect of that Part of the New BRW New Road have been satisfied or waived;

9.12.1.2 confirmation that in relation to the Bridge Replacement Works for such Part of the BRW New Road, Liaison Procedures have

been developed and agreed with each of the persons referred to in [paragraph 1 of Part 2 of Schedule 16](#) [Operations, Emergencies and Traffic Management];

- 9.12.1.3 a warranty in the form, mutatis mutandis, set out in [Clause 6.1](#) [Site Inspection] in relation to the relevant part of the Bridge Replacement Works Site and the relevant BRW Temporary Adjacent Areas in respect of such Part of the New Road;
- 9.12.1.4 certified true copies of the BRW Construction Contract and the BRW Design Contract duly executed by the parties thereto and each in a form approved by the Secretary of State in his absolute discretion;
- 9.12.1.5 confirmation that all conditions precedent (other than conditions relating to the occurrence of the Actual BRW Commencement Date) in the Project Documents in relation to the Bridge Replacement Works for such Part of the BRW New Road have been satisfied or waived;
- 9.12.1.6 confirmation that any insurance required pursuant to [Clause 20](#) [Insurance] has been obtained and is in full force and effect;
- 9.12.1.7 a warranty in respect of the Project Documents in relation to the Bridge Replacement Works for such Part of the BRW New Road in the form, mutatis mutandis, set out in [Clause 38.1.14](#);
- 9.12.1.8 waivers of liability from the Contractor and the Designer appointed respectively pursuant to the relevant BRW Construction Contract and the relevant BRW Design Contract in respect of the Disclosed Data in the form referred to in the last sentence of [Clause 45.4.2](#); and
- 9.12.1.9 waivers of liability from the Contractor and the Designer appointed respectively pursuant to the relevant BRW Construction Contract and the relevant BRW Design Contract, in favour of the Secretary of State and the Department's Nominee in respect of the Losses and Claims referred to in [Clause 47.1.2](#).

accompanied in the cases of [Clauses 9.12.1.1, 9.12.1.2, 9.12.1.5 and 9.12.1.6](#) by such evidence thereof as may be reasonably required by the Secretary of State.

- 9.12.2 In relation to a Part of the BRW New Road, if the DBFO Co fails to satisfy the conditions set out in [Clause 9.12.1](#) prior to the BRW Conditions Date in relation to that Part of the BRW New Road then on or before the date specified in the BRW Commencement Certificate as being the Actual

BRW Commencement Date for that Part of the BRW New Road, the Secretary of State may by notice withdraw the relevant BRW Commencement Certificate and from the date of such notice:

- 9.12.2.1 the DBFO Co shall have no further right to carry out the Bridge Replacement Works in respect of such Part of the BRW New Road; and
 - 9.12.2.2 the DBFO Co shall indemnify and hold indemnified the Secretary of State against all Claims or Losses incurred by the Secretary of State, whether arising directly or indirectly, from the failure to satisfy the conditions, including, without limitation, all costs of re-tendering the Bridge Replacement Works (or any part thereof) in respect of such Part of the BRW New Road and all costs of procuring completion of such Bridge Replacement Works.
- 9.12.3 Following the issue of a notice pursuant to [Clause 9.12.2](#) the Secretary of State may, at his option, require any amount standing to the credit of the relevant BRW 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 the failure to satisfy the conditions referred to in [Clause 9.12.1](#). The DBFO Co and the Secretary of State shall pay to the Secretary of State out of the relevant BRW Retention Account such sum, or if the amount standing to the credit of the relevant BRW Retention Account is insufficient to pay such 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 such BRW Retention Account. Any remaining sums standing to the credit of the relevant BRW 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 such BRW Retention Account to the DBFO Co.
- 9.12.4 Without prejudice to any other right or remedy of the Secretary of State, if, following a notice given in respect of a Part of the BRW New Road pursuant to [Clause 9.12.2](#), the completion of the Bridge Replacement Works in respect of that Part of the BRW New Road is procured by the Secretary of State then the provisions of [Clause 34](#) [Change Procedure] and [Part 7 of Schedule 12](#) [Bridge Replacement Works] shall apply.

9.13. Bridge Replacement Works: DBFO Co's Obligation

Subject to the issue of a BRW Commencement Certificate in respect of a Part of the BRW New Road, the DBFO Co shall be responsible for the design, construction, completion, commissioning and testing of the Bridge Replacement Works in respect of such Part of the BRW New Road, which shall be carried out in strict accordance

with the Construction Requirements and the Communications Requirements (subject to any DBFO Co's Changes or Department's Changes) 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.

9.14 Bridge Replacement Cost

- 9.14.1 If, in relation to a Part of the BRW New Road, no BRW Completion Certificate has been issued in respect of such Part of the BRW New Road on or before the BRW Cost Date, then the DBFO Co shall, within 14 days of the BRW Cost Date, submit to the Department's Nominee its assessment of the reasonable cost (the "Bridge Replacement Cost") to the Secretary of State of procuring the completion of the Bridge Replacement Works in respect of that Part of the BRW New Road. The Bridge Replacement Cost in respect of a Part of the BRW New Road shall be determined on the assumption that the relevant Bridge Replacement Works will be commenced on the BRW Notice Date and carried out in accordance with the Construction Requirements, the Communication Requirements and Good Industry Practice by an independent contractor (not being the Contractor) appointed by the Secretary of State on an arm's length commercial basis.
- 9.14.2 The Department's Nominee may, within 60 days after receipt of the notice from the DBFO Co in accordance with Clause 9.14.1, by notice to the DBFO Co object to the proposals in respect of the Bridge Replacement Cost as set out in the DBFO Co's notice. The notice from the Department's Nominee shall give details of the grounds for such objection and shall give the Department's Nominee's estimate of the Bridge Replacement Cost.
- 9.14.3 If no agreement is reached between the DBFO Co and the Department's Nominee as to the Bridge Replacement Cost in relation to a Part of the BRW New Road within 60 days of receipt by the DBFO Co of a notice pursuant to Clause 9.14.2, then either Party may refer the matter for resolution under the Disputes Resolution Procedure.
- 9.14.4 If pursuant to Clause 9.14.1 the DBFO Co is required to serve a notice in respect of a Part of the BRW New Road and the DBFO Co has not submitted its assessment of the Bridge Replacement Cost in accordance with such Clause, then the Department's Nominee shall make an assessment of the Bridge Replacement Cost in respect of that Part of the BRW New Road, at the DBFO Co's expense, and shall notify such Bridge Replacement Cost to the DBFO Co. Such Bridge Replacement Cost assessed by the Department's Nominee shall be the Bridge Replacement Cost in respect of that Part of the BRW New Road for the purposes of Clause 9.15 or [Clause 9.16](#) (as the case may be).

9.15 River Lea Crossing Retention Account

- 9.15.1 Subject to [Clause 9.15.6](#) the Secretary of State and the DBFO Co shall procure that the River Lea Crossing Retention Account is established with a bank located in the United Kingdom not later than 120 months prior to the expected Expiry Date. The Secretary of State may (if he so chooses) by notice in writing to the DBFO Co, designate the River Lea Crossing Retention Account as a "Charged Retention Account" in which event the DBFO Co shall grant a charge to the Secretary of State over the River Lea Crossing Retention Account in the Agreed Form referred to in [Clause 2.3.1.12](#). Any interest accrued on any money standing to the credit of the River Lea Crossing Retention Account shall be credited to the River Lea Crossing Retention Account. Subject to [Clauses 9.12.3](#) and [9.17.3](#) all sums standing to the credit of the River Lea Crossing Retention Account from time to time, including without limitation any accrued interest, shall be dealt with only in accordance with the following provisions of this Clause 9.15 [River Lea Crossing Retention Account].
- 9.15.2 Subject to [Clauses 9.15.6](#) from the date which is 120 months prior to the expected Expiry Date, the Secretary of State shall withhold from any payment which would otherwise be due to the DBFO Co under this Agreement in respect of any DBFO Payment a sum equal to the River Lea Crossing Deduction. The Secretary of State shall procure that such sum is deposited into the River Lea Crossing Retention Account on the date on which payment of such sum would, absent the provisions of this Clause 9.15.2, be due to the DBFO Co.
- 9.15.3 When the amount standing to the credit of the River Lea Crossing 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 Bridge Replacement Cost in respect of the New River Lea Crossing the Secretary of State shall not be entitled to withhold any further sums in accordance with Clause 9.15.2.
- 9.15.4 If a BRW Completion Certificate is issued in respect of the New River Lea Crossing, then within 14 days of such BRW Completion Certificate being issued the Secretary of State and the DBFO Co shall pay to the DBFO Co all sums standing to the credit of the River Lea Crossing 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).
- 9.15.5 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 River Lea Crossing Retention Account be applied in payment of any amount due from the DBFO Co to the Secretary of State or becoming due as a consequence of such Event of Default or any termination of this Agreement (including, without limitation, any damages arising from such Event of Default). The DBFO Co and the Secretary of State shall pay to the Secretary of State out of the River Lea Crossing Retention Account such sum or, if the amount standing to the credit of the River Lea

Crossing 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 River Lea Crossing Retention Account upon termination of this Agreement. Any remaining sums standing to the credit of the River Lea Crossing 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 River Lea Crossing Retention Account to the DBFO Co.

9.15.6 [Clauses 9.15.1 to 9.15.5](#) (inclusive) shall not apply if:

9.15.6.1 not later than the date which is 120 months prior to the expected Expiry Date, the DBFO Co procures that a performance guarantee is provided to the Secretary of State in respect of the DBFO Co's obligations in respect of the New River Lea Crossing under [Clauses 9.11, 9.12, 9.13, 9.14](#) and [9.17](#) by a bank or other institution approved by the Secretary of State and in form and substance acceptable to him (in each case in his absolute discretion); or

9.15.6.2 on or before the date which is 120 months prior to the Expiry Date, a BRW Completion Certificate is issued in respect of the New River Lea Crossing.

9.16 Lodge Avenue Flyover Retention Account

9.16.1 Subject to [Clause 9.16.6](#), the Secretary of State and the DBFO Co shall procure that the Lodge Avenue Flyover Retention Account is established with a bank located in the United Kingdom not later than 120 months prior to the expected Expiry Date. The Secretary of State may (if he so chooses) by notice in writing to the DBFO Co, designate the Lodge Avenue Flyover Retention Account as a "Charged Retention Account" in which event the DBFO Co shall grant a charge to the Secretary of State over the Lodge Avenue Flyover Retention Account in the Agreed Form referred to in [Clause 2.3.1.12](#). Any interest accrued on any money standing to the credit of the Lodge Avenue Flyover Retention Account shall be credited to the Lodge Avenue Flyover Retention Account. Subject to [Clauses 9.12.3](#) and [9.17](#), all sums standing to the credit of the Lodge Avenue Flyover Retention Account from time to time, including without limitation any accrued interest, shall be dealt with only in accordance with the following provisions of this Clause 9.16 [Lodge Avenue Flyover Retention Account].

9.16.2 Subject to [Clause 9.16.6](#) from the date which is 120 months prior to the expected Expiry Date, the Secretary of State shall withhold from any payment which would otherwise be due to the DBFO Co under this Agreement in respect of any DBFO Payment a sum equal to the Lodge Avenue Flyover

Deduction. The Secretary of State shall procure that such sum is deposited into the Lodge Avenue Flyover Retention Account on the date on which payment of such sum would, absent the provisions of this Clause 9.16.2, be due to the DBFO Co.

9.16.3 When the amount standing to the credit of the Lodge Avenue Flyover 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 Bridge Replacement Cost in respect of the New Lodge Avenue Flyover the Secretary of State shall not be entitled to withhold any further sums in accordance with [Clause 9.16.2](#).

9.16.4 If a BRW Completion Certificate is issued in respect of the New Lodge Avenue Flyover, then within 14 days of such BRW Completion Certificate being issued the Secretary of State and the DBFO Co shall pay to the DBFO Co all sums standing to the credit of the Lodge Avenue Flyover 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).

9.16.5 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 Lodge Avenue Flyover Retention Account be applied in payment of any amount due from the DBFO Co to the Secretary of State or becoming due as a consequence of such Event of Default or any termination of this Agreement (including, without limitation, any damages arising from such Event of Default). The DBFO Co and the Secretary of State shall pay to the Secretary of State out of the Lodge Avenue Flyover Retention Account such sum or, if the amount standing to the credit of the Lodge Avenue Flyover 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 Lodge Avenue Flyover Retention Account upon termination of this Agreement. Any remaining sums standing to the credit of the Lodge Avenue Flyover 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 Lodge Avenue Flyover Retention Account to the DBFO Co.

9.16.6 [Clauses 9.16.1](#) to 9.16.5 (inclusive) shall not apply if:

9.16.6.1 not later than the date which is 120 months prior to the expected Expiry Date, the DBFO Co procures that a performance guarantee is provided to the Secretary of State in respect of the DBFO Co's obligations under [Clauses 9.11](#), [9.12](#), [9.13](#), [9.14](#) and [9.17](#) by a bank or other institution approved by the Secretary of State and in form and substance acceptable to him (in each case in his absolute discretion); or

9.16.6.2 on or before the date which is 120 months prior to the Expiry Date, a BRW Completion Certificate is issued in respect of the New Lodge Avenue Flyover.

9.17 Dates for Completion of the Bridge Replacement Works

9.17.1 The DBFO Co shall procure that the Bridge Replacement Works in respect of the New River Lea Crossing are completed to such standard as would require the issue of a BRW Completion Certificate in respect thereof by the RLC Completion Date.

9.17.2 If the DBFO Co shall fail to procure that the Bridge Replacement Works in respect of the New River Lea Crossing are completed to such standard as would require the issue of a BRW Completion Certificate in respect thereof by the RLC Completion Date, then (without prejudice to any of his other rights and remedies) the Secretary of State may by notice withdraw the BRW Commencement Certificate in respect of the New River Lea Crossing and from the date of such notice:

9.17.2.1 the DBFO Co shall have no further right to carry out Bridge Replacement Works in respect of the New River Lea Crossing;

9.17.2.2 the DBFO Co shall transfer to and there shall vest in the Secretary of State such part of such Bridge Replacement Works as shall have been carried out;

9.17.2.3 if in such notice the Secretary of State so elects the relevant BRW Design Contract and/or the BRW 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 intended to form part of the Bridge Replacement Works in respect of the New River Lea Crossing which is on the Site or adjacent thereto shall remain available to him for the purposes of completing such Bridge Replacement Works;

9.17.2.4 if in such notice the Secretary of State so elects, the Construction Plant that relates to the Bridge Replacement Works in respect of the New River Lea Crossing shall remain available to the Secretary of State for the purposes of completing such Bridge Replacement Works subject to payment therefor of a reasonable hire charge;

9.17.2.5 the DBFO Co shall deliver to the Secretary of State "as built drawings" of such of the Bridge Replacement Works in respect of the New River Lea Crossing as shall have been carried out;

- 9.17.2.6 the DBFO Co shall, as soon as practicable remove from the relevant parts of the Site and Adjacent Areas all Plant intended to form part of the Bridge Replacement Works in respect of the New River Lea Crossing and all Construction Plant which relates to such Bridge Replacement Works which is not required by the Secretary of State pursuant to [Clause 9.17.2.3](#) or hired by the Secretary of State pursuant to [Clause 9.17.2.4](#); and
- 9.17.2.7 the DBFO Co shall indemnify and hold indemnified the Secretary of State against all Claims or Losses incurred by the Secretary of State, whether arising directly or indirectly from the DBFO Co's failure to complete the Bridge Replacement Works in respect of the New River Lea Crossing, including without limitation all costs of re-tendering and procuring completion of such Bridge Replacement Works.
- 9.17.3 Following the issue of a notice pursuant to [Clause 9.17.2](#) the Secretary of State may, at his option, require any amount standing to the credit of the River Lea Crossing 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 the failure to procure that the Bridge Replacement Works in respect of the New River Lea Crossing are completed to such standard as would require the issue of a BRW Completion Certificate in respect thereof by the RLC Completion Date (including, without limitation, any damages arising from such failure and the costs of re-tendering and procuring completion of such Bridge Replacement Works). The DBFO Co and the Secretary of State shall pay to the Secretary of State out of the River Lea Crossing Retention Account such sum, or if the amount standing to the credit of the River Lea Crossing Retention Account is insufficient to pay such 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 River Lea Crossing Retention Account. Any remaining sums standing to the credit of the River Lea Crossing 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 River Lea Crossing Retention Account to the DBFO Co.
- 9.17.4 The DBFO Co shall procure that the Bridge Replacement Works in respect of the New Lodge Avenue Flyover are completed to such standard as would require the issue of a BRW Completion Certificate in respect thereof by the LAF Completion Date.
- 9.17.5 If the DBFO Co shall fail to procure that the Bridge Replacement Works in respect of the New Lodge Avenue Flyover are completed to such standard as would require the issue of a BRW Completion Certificate in respect thereof by the LAF Completion Date, then (without prejudice to any of his other rights

and remedies) the Secretary of State may by notice withdraw the BRW Commencement Certificate in respect of the New Lodge Avenue Flyover and from the date of such notice:

- 9.17.5.1 the DBFO Co shall have no further right to carry out Bridge Replacement Works in respect of the New Lodge Avenue Flyover;
- 9.17.5.2 the DBFO Co shall transfer to and there shall vest in the Secretary of State such part of such Bridge Replacement Works as shall have been carried out;
- 9.17.5.3 if in such notice the Secretary of State so elects, the relevant BRW Design Contract and/or the BRW 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 intended to form part of the Bridge Replacement Works in respect of the New Lodge Avenue Flyover which is on the Site or adjacent thereto shall remain available to him for the purposes of completing such Bridge Replacement Works;
- 9.17.5.4 if in such notice the Secretary of State so elects, the Construction Plant that relates to the Bridge Replacement Works in respect of the New Lodge Avenue Flyover shall remain available to the Secretary of State for the purposes of completing such Bridge Replacement Works subject to payment therefor of a reasonable hire charge;
- 9.17.5.5 the DBFO Co shall deliver to the Secretary of State "as built drawings" of such of the Bridge Replacement Works in respect of the New Lodge Avenue Flyover as shall have been carried out;
- 9.17.5.6 the DBFO Co shall, as soon as practicable remove from the relevant parts of the Site and Adjacent Areas all Plant intended to form part of the Bridge Replacement Works in respect of the New Lodge Avenue Flyover and all Construction Plant which relates to such Bridge Replacement Works which is not required by the Secretary of State pursuant to Clause 9.17.5.3 or hired by the Secretary of State pursuant to Clause 9.17.5.4; and
- 9.17.5.7 the DBFO Co shall indemnify and hold indemnified the Secretary of State against all Claims or Losses incurred by the Secretary of State, whether arising directly or indirectly from the DBFO Co's failure to complete the Bridge Replacement Works in respect of the New Lodge Avenue Flyover, including

without limitation all costs of re-tendering and procuring completion of such Bridge Replacement Works.

9.17.6 Following the issue of a notice pursuant to [Clause 9.17.5](#) the Secretary of State may, at his option, require any amount standing to the credit of the Lodge Avenue Flyover 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 the failure to procure that the Bridge Replacement Works in respect of the New Lodge Avenue Flyover are completed to such standard as would require the issue of a BRW Completion Certificate in respect thereof by the LAF Completion Date (including, without limitation, any damages arising from such failure and the costs of re-tendering and procuring completion of such Bridge Replacement Works). The DBFO Co and the Secretary of State shall pay to the Secretary of State out of the Lodge Avenue Flyover Retention Account such sum, or if the amount standing to the credit of the Lodge Avenue Flyover Retention Account is insufficient to pay such 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 Lodge Avenue Flyover Retention Account. Any remaining sums standing to the credit of the Lodge Avenue Flyover 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 Lodge Avenue Flyover Retention Account to the DBFO Co.

9.17.7 Without prejudice to any other right or remedy of the Secretary of State, if, following a notice given in respect of a Part of the BRW New Road pursuant to [Clause 9.17.2](#) or [19.7.5](#) (as the case may be) the completion of the Bridge Replacement Works in respect of that Part of the BRW New Road is procured by the Secretary of State then the provisions of [Clause 34](#) [Change Procedure] and [Part 7 of Schedule 12](#) [Bridge Replacement Works] will apply.

9.18 Bridge Replacement Works: Delay

9.18.1 Without prejudice to [Clauses 12.2](#) [Variations to Programme], [12.3](#) [Preparation of Works Programme] and [12.6](#) [Delay], if an event set out in [Clause 9.18.8](#) occurs (except and to the extent that the same shall arise out of any act, neglect or omission of the DBFO Co) which will cause a delay in achieving completion of the Bridge Replacement Works in respect of a Part of the BRW New Road to such standard as would require the issue of a BRW Completion Certificate in respect of such Part of the BRW New Road by the Relevant Completion Date then the following procedure set out in this Clause 9.18 shall apply.

9.18.2 The DBFO Co shall give notice to the Department's Agent as soon as it can foresee such an event occurring or, if the same is not foreseeable, as soon as it shall become aware of such event but in any case within 7 days of such event becoming apparent to the DBFO Co or, if earlier, of the date upon which the

same ought reasonably to have become apparent to the DBFO Co. Thereafter but in any event not later than 21 days after such notification the DBFO Co shall give further details to the Department's Agent, which shall include:

- 9.18.2.1 a statement of which event referred to in [Clause 9.18.8](#) the claim is based upon;
 - 9.18.2.2 details of the circumstances from which the delay arises;
 - 9.18.2.3 details of the contemporary records which the DBFO Co will maintain to substantiate its claim;
 - 9.18.2.4 details of the consequences, whether direct or indirect, which such delay may have on completion of the relevant part of the Bridge Replacement Works; and
 - 9.18.2.5 details of any measures which the DBFO Co proposes to adopt to mitigate the consequences of such delay.
- 9.18.3 The DBFO Co shall, following notification of any event pursuant to [Clause 9.18.2](#):
- 9.18.3.1 provide such further written information of which it becomes aware or as the Department's Agent may reasonably require regarding the nature and likely duration of such event;
 - 9.18.3.2 afford the Department's Agent reasonable facilities for investigating the effect of such event on the DBFO Co or the progress of the relevant Bridge Replacement Works, including on-site inspection; and
 - 9.18.3.3 take all steps necessary and consistent with Good Industry Practice to minimise the delay to completion of the relevant part of the Bridge Replacement Works.
- 9.18.4 If the DBFO Co has failed to comply with the requirements as to the giving of notice under [Clause 9.18.2](#), 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. 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 Relevant Completion Date in respect of the relevant event. 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 9.18.6](#).

9.18.5 The Department's Agent will be entitled, after receipt of written details under [Clause 9.18.2](#) or of further particulars under [Clause 9.18.3](#), by notice in writing to require the DBFO Co to provide such further supporting particulars as it may reasonably consider necessary.

9.18.6 Subject to:

9.18.6.1 the DBFO Co complying with the requirements of [Clause 9.18.2](#) or, if the Department's Agent has issued a request pursuant to [Clause 9.18.4](#), the sufficiency of the reasons for the default being accepted by the Secretary of State or under the Disputes Resolution Procedure; and

9.18.6.2 the DBFO Co putting forward proposals pursuant to [Clause 9.18.2.5](#) as to the measures which it intends to adopt in order to mitigate the consequences of any delay to completion of the Works by the Relevant Completion Date,

the Department's Agent shall, as soon as reasonably practicable, grant to the DBFO Co in writing (either prospectively or retrospectively) such extension of the Relevant Completion Date as may in the opinion of the Department's Agent (acting fairly and reasonably and having regard to the provisions of [Clause 9.18.7](#)) be justified (the period of such extension being the "Extension Period"). If the Department's Agent declines to grant an extension or the DBFO Co considers the Extension Period so determined to be insufficient, then the DBFO Co shall be entitled to refer the matter for resolution under the Disputes Resolution Procedure.

9.18.7 In determining the Extension Period there shall be taken into account, inter alia:

9.18.7.1 whether (and if so to what extent), as a consequence of the failure of the DBFO Co to conduct the Operations in accordance with this Agreement at all times prior to the occurrence of the event giving rise to the delay, the impact of the event on the timing of the completion of the relevant Bridge Replacement Works is greater than it would otherwise have been; and

9.18.7.2 (without prejudice to [Clause 9.18.3.3](#)) the extent to which the delay or impediment ought reasonably to be or to have been mitigated by the DBFO Co by the taking of reasonable steps after its occurrence.

9.18.8 The events referred to in [Clause 9.18.1](#) are as follows:

9.18.8.1 the occurrence of an event of Force Majeure;

- 9.18.8.2 a Department's Change;
- 9.18.8.3 an event within [Clause 26.5.3](#);
- 9.18.8.4 a Relevant Change in Law;
- 9.18.8.5 a breach by the Secretary of State of any of his obligations under this Agreement.

9.19 Handback

The provisions of [Clause 19](#) [Handback] shall not apply to a Part of the BRW New Road unless and until a BRW Completion Certificate has been issued in respect of such Part of the BRW New Road.

9.20 Road Segment 2

9.20.1 The Secretary of State may at any time issue the By-Pass Notice.

9.20.2 As of the date set out in the By-Pass Notice, the warranty set out in [Clause 6.1](#) shall be deemed to be repeated by the DBFO Co in respect of Road Segment 2.

10. **SECURITY OF THE SITE**

10.1 Responsibility for Protestors and Trespassers

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

10.1.2 The DBFO Co shall not be relieved by [Clause 8.5](#) [Off-Site Works] of any requirement to carry out Off-Site Works if the failure referred to in that Clause of the relevant highway authority (not being the Secretary of State) to give to the DBFO Co access to areas required to carry out the relevant Off-Site Works is the result of the presence on or around or entry onto or around the relevant areas of, or any other interference with or affecting the Site or Adjacent Areas or the vicinity of them or the Operations by or caused by, any Protestor or

Trespasser or any lawful or unlawful activities of any such person (in any such case whether before or during the Pre-Commencement Period or the Contract Period).

10.2 DBFO Co to Bear Loss

10.2.1 As between the Secretary of State and the DBFO Co, the DBFO Co shall bear, without recourse to the Secretary of State any Loss suffered by any person which is caused by any Protestor or Trespasser, including without limitation any damage to property, any personal injury or death, and any loss of income (including without limitation any reduction in DBFO Payments).

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

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

10.2.2.2 any right of the DBFO Co to make or recover any Claim against any Protestor or Trespasser for damage suffered by the DBFO Co, its agents, contractors or sub-contractors of any tier or any employees of any of them.

10.3 No Payments to Protestors

The DBFO Co shall not give 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. This Clause 10.3 shall not prevent the DBFO Co entering into bona fide compromises of claims or counterclaims brought against it by Protestors or Trespassers which provide for reasonable payments in satisfaction of such claim and counterclaims or agreeing any reasonable costs orders in any proceedings.

10.4 Measures to Deal with Protestors and Trespassers

The provisions of [Schedule 22](#) shall apply.

11. DESIGN AND CONSTRUCTION

11.1 Responsibility

Subject to [Clause 9.5](#) in respect of the Works in respect of the Contingent Scheme and subject to [Clause 9.13](#) in respect of the Bridge Replacement Works, the DBFO shall be responsible for the design, construction, completion, and, subject to [Schedule 17](#) in respect of the Communications Installations, the 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 11.4](#) [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.

11.2 Design and Certification Procedure

11.2.1 The DBFO Co shall procure that:

11.2.1.1 the Designer shall prepare or supervise the preparation of all Design Data in respect of the Works (including, without limitation, the Detailed Design) in accordance with the Construction Requirements and the Communications Requirements (subject to [Clause 11.4](#) [DBFO Co's Changes] and [Part 2 of Schedule 12](#) [Department's Change]) and shall comply with the Design and Certification Procedure;

11.2.1.2 without prejudice to Clause 11.2.1.1:

11.2.1.2.1 where, in accordance with [paragraph 4 of Part 3 of Schedule 4](#) [Design and Certification Procedure] Design Data is prepared by the Contractor, the Contractor shall prepare such Design Data in accordance with the Construction Requirements and the Communications Requirements (subject to [Clause 11.4](#) [DBFO Co's Changes] and [Part 2 of Schedule 12](#) [Department's Change]) and shall comply with the Design and Certification Procedure;

11.2.1.2.2 the Archaeologist shall prepare, in accordance with the Construction Requirements (subject to [Clause 11.4](#) [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;

11.2.1.2.3 the Landscape Architect shall prepare, in accordance with the Construction Requirements (subject to [Clause 11.4](#) [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

- 11.2.1.2.4 the Ecologist shall prepare, in accordance with the Construction Requirements (subject to [Clause 11.4](#) [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.
- 11.2.2 The DBFO Co shall procure that the certification procedures referred to in the Design and Certification Procedure are complied with by the appropriate persons referred to therein, including but not limited to the Design Team, the Designer and any independent team or engineer within the Designer, as the case may be, and that such persons are at all relevant times duly authorised to carry out such procedures and to sign the relevant Certificates.
- 11.2.3 The DBFO Co shall procure that the checking procedures referred to in the Design and Certification Procedure are complied with by the appropriate persons referred to therein, including but not limited to the Checking Team, the Checker, the Audit Team and any independent team or engineer within the Designer, as the case may be, and that such persons are at all relevant times duly appointed to carry out such procedures.
- 11.2.4 Without limitation to [Clause 51.3](#) [DBFO Co Responsibility], any failure by any person referred to in the Design and Certification Procedure, including but not limited to the Design Team, the Designer, the Checking Team, the Checker, the Audit Team, the Testing Control and Communications Testing Contractor, the Testing Contractor, the Traffic Signals 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.
- 11.2.5 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.

11.3 Review Procedure

- 11.3.1 Subject to [Clause 11.3.3](#) the DBFO Co shall not commence or permit the commencement of construction of any part of the Works until there has been no objection under the Review Procedure to all Design Data and all

relevant Certificates required in respect of such part of the Works. Relevant Certificates shall include, without limitation, Design Certificates, Archaeology Certificates, Ecology Certificates, Landscaping Certificates, Check Certificates, and Traffic Management Certificates as appropriate under the Design and Certification Procedure.

11.3.2 Subject to Clause 11.3.3. 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.

11.3.3 If pursuant to [paragraph 1.1 of Part 3 of Schedule 7](#) the Department's Nominee returns endorsed "comments" a submission by the DBFO Co accompanied by a proposed document or a statement of a proposed course of action, approval of which is required before the DBFO Co can commence construction of any part of the Works or any Temporary Works, and such comments are not raised on the ground that the proposed document or course of action would be:

(i) inconsistent with the Secretary of State's statutory duties; or

(ii) inconsistent with the provisions of this Agreement; or

(iii) in breach of any Legal Requirement or are not raised on the ground that the DBFO Co has not provided all the information required in respect of a submission or do not relate to matters referred to in [paragraphs 3.1, 3.5, 3.6, 3.8, 3.9, 3.11 and 3.17 of Part 3 of Schedule 7](#), the DBFO Co may notify the Department's Nominee that it disputes the comments on grounds permitted by the Agreement and wishes to proceed with such construction at its own risk pending resolution of such Dispute (whether or not under the Disputes Resolution Procedure). The Department's Nominee may in his absolute discretion within 7 Working Days after receipt of such notice, issue a stop notice notifying the DBFO Co that it may not so proceed. If a stop notice is issued the DBFO Co shall not proceed with such works. If it is agreed or determined pursuant to the Disputes Resolution Procedure that the Department's Nominee was justified in not endorsing the DBFO Co's submission "received", the DBFO Co shall take all necessary steps to remedy the submission so as to satisfy the concerns raised by the Department's Nominee in his "comments" endorsed on the returned submission and to implement the agreement or the decision of the Disputes Resolution Procedure, including (as necessary) removing and redoing the relevant Works.

11.4 DBFO Co's Changes

- 11.4.1 If the DBFO Co proposes to vary or amend the design, quality or quantity of the Works after the date hereof, including making additions, omissions, substitutions, alterations in design and/or variations in or to the Construction Requirements, or the Communications Requirements, such proposal, together with all supporting Design Data and an explanation of the reasons for the proposed change (including, if appropriate the Designer's comments), shall be submitted in accordance with the Review Procedure as a proposed DBFO Co's Change. The DBFO Co shall not proceed to implement a proposed DBFO Co's Change unless and until there has been no objection in accordance with the Review Procedure (on the grounds set out in [paragraph 3.4 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].
- 11.4.2 If the DBFO Co becomes aware that any element of the Construction Requirements does not comply with and satisfy the Core Construction Requirements, or that any element of the Communications Requirements does not comply with and satisfy the Core Communications Requirements, the DBFO Co shall so notify the Department's 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 11.4.1) a DBFO Co's Change to amend the Construction Requirements or the Communications Requirements (as the case may be) so that they comply with and satisfy the Core Construction Requirements or the Core Communications Requirements (as the case may be).

11.5 Breaches

- 11.5.1 In the event that the DBFO Co becomes aware of a breach of any of [Clauses 11.1](#) [Responsibility] to 11.4 [DBFO Co's Changes] (both inclusive), the DBFO Co shall:
- 11.5.1.1 forthwith notify the Department's Agent of the fact of such breach and the subject matter thereof; and
- 11.5.1.2 as soon as reasonably practicable make a submission in respect of such breach to the Review Procedure, including in such submission:
- 11.5.1.2.1 a full statement of the circumstances in which such breach took place together with a full explanation of the reasons for such breach and, if appropriate, for any delay in providing notification under Clause 11.5.1.1;

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

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

11.5.2 The Department's Agent shall deal with a submission pursuant to [Clause 11.5.1](#) above as soon as reasonably practicable (but without being subject to any specific time limit). The Department's 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, without limitation:

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

11.5.2.2 whether there has been culpable delay in making the relevant notification under [Clause 11.5.1.1](#) or submission under [Clause 11.5.1.2](#);

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

provided that in the circumstances set out in [Clause 11.5.1](#) the Department's 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.

11.6 Department's Design Data

Save as expressly provided in this Agreement, the DBFO Co shall not seek to recover from the Secretary of State, his servants or agents and shall indemnify the Secretary of State and his servants and agents against any Loss or Claim which may arise from the adoption, use or application by or on behalf of the DBFO Co, the Designer, the Checker, the Contractor, the Operator, the Traffic Control and Communications Testing Contractor, the Testing Contractor, the Traffic Signals Testing Contractor, the Carriageway Availability Monitoring 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.

11.7 Site Safety and Security

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

11.8 Health and Safety

11.8.1 In this Clause 11.8 [Health and Safety]:

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

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

11.8.2 Within 7 days of the date of execution of this Agreement the DBFO Co shall make and serve on the Executive a declaration pursuant to and in the form (if any) required by Regulation 4 that the DBFO Co will act as the client in relation to the Operations for all the purposes of the Regulations save on termination of this Agreement provided that on such termination the DBFO Co shall procure that a copy of the up to date health and safety file is handed over to the Department's Agent. 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, other than:

11.8.2.1 in relation to the Contingent Scheme in respect of which the CS Cut-Off Date has passed without the issue of a CS Commencement Certificate or where the CS Commencement Certificate for the Contingent Scheme was withdrawn pursuant to [Clause 9.3.2](#);

- 11.8.2.2 in relation to the Docklands Roads where the DR Cut-Off Date has passed without the issue of the Docklands Roads Certificate or where the Docklands Roads Certificate was withdrawn pursuant to [Clause 9.8.2.](#); or
 - 11.8.2.3 in relation to a Part of the BRW New Road where the BRW Commencement Certificate for that Part of the BRW New Road is withdrawn pursuant to [Clause 9.12.2](#) or [Clause 9.17](#).
- 11.8.3 The DBFO Co shall observe, perform and discharge and shall procure the observance, performance and discharge of:
- 11.8.3.1 all the obligations, requirements and duties arising under the Regulations in connection with the Operations; and
 - 11.8.3.2 any code of practice for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work etc. Act 1974 in connection with the Regulations.

11.9 Access and Facilities for Department's Agent

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

- 11.9.1 subject to complying with all relevant safety procedures, the Department's 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;
- 11.9.2 the Department's Agent shall have the right to attend monthly Site and other similar progress meetings; and
- 11.9.3 there are kept on Site one copy of all drawings for construction and of all specifications, and that the same shall, at all reasonable times, be available for inspection and use by the Department's Agent and by any other person authorised by the Department's Agent.

11.10 Licensing of Goods Vehicles

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

12. **PROGRAMME**

12.1 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.

12.2 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 or will 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:

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

The Department's Agent shall be entitled to raise comments in respect of the revised Programme only on the grounds set out in [paragraph 3.7 of Part 3 of Schedule 7](#) [Review Procedure].

12.3 Preparation of Works Programme

- 12.3.1 The DBFO Co shall procure the preparation of:
 - 12.3.1.1 an initial Works Programme in respect of the Firm Schemes, 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 within 28 days of the date of execution of this Agreement;
 - 12.3.1.2 an initial Works Programme in respect of the Contingent Scheme, 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 within 28 days of the Actual CS Commencement Date;
 - 12.3.1.3 an initial Works Programme in respect of the Bridge Replacement Works for each Part of the BRW New Road which shall be in all respects consistent with the Programme and shall submit to the Department's Nominee, in accordance with the Review Procedure, a copy of the same within 28 days

of the Actual BRW Commencement Date for that Part of the BRW New Road; and

- 12.3.1.4 a revised version of each Works Programme prepared in accordance with [Clauses 12.3.1.1](#), [12.3.1.2](#) and [12.3.1.3](#) in respect of each revised Programme submitted in accordance with [Clause 12.2](#) [Variations to Programme], which shall be in all respects consistent with such Programme, and shall submit to the Department's Agent, in accordance with the Review Procedure, a copy of each such revised Works Programme at the same time as the revised Programme is submitted in accordance with [Clause 12.2](#) [Variations to Programme].
- 12.3.2 Other than in the circumstances referred to in [Clause 12.3.1.4](#), if the DBFO Co wishes to make any amendment to any Works Programme or 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 or will not conform with the relevant 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:
 - 12.3.2.1 submit to the Department's Agent a report identifying the reasons for such amendment or non-conformity; and
 - 12.3.2.2 submit to the Department's Agent, in accordance with the Review Procedure, a revised version of each relevant Works Programme, each of which shall be in all respects consistent with the Programme.
- 12.3.3 The Department's Agent shall be entitled to raise comments in respect of each initial Works Programme or any revised Works Programme only on the grounds set out in [paragraph 3.7 of Part 3 of Schedule 7](#) [Review Procedure].
- 12.3.4 Subject to [Clause 12.4](#) [Works Programme], each 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 any Works Programme, the Programme shall (unless otherwise agreed by the Secretary of State) prevail.

12.4 Works Programme

Each initial Works Programme and any revised Works Programme submitted in accordance with [Clause 12.3](#) [Preparation of Works Programme] shall:

- 12.4.1 be in accordance with Good Industry Practice;

- 12.4.2 satisfy the requirements of [paragraph 3 of Appendix 1/13 to Annex 6 to Part 2 of Schedule 4](#) [Construction Requirements];
- 12.4.3 without prejudice to Clause 12.4.2, be in sufficient detail so as to enable the Department's Agent to resource itself appropriately; and
- 12.4.4 provide for the Works to be commenced and pursued in accordance with Clause 12.5.

12.5 Achievement of Completion

The DBFO Co shall commence the Works (other than the CS Works and the Bridge Replacement Works) promptly following the Commencement Date, and shall commence the CS Works promptly following the Actual CS Commencement Date, and shall commence the Bridge Replacement Works in respect of a Part of the BRW New Road promptly following the Actual BRW Commencement Date for that Part of the BRW New Road and in any such case shall thereafter diligently pursue the Works to procure that they are completed in accordance with the Programme to such standard as would require,

- 12.5.1 in relation to Firm Schemes, the issue of the Completion Certificate;
- 12.5.2 in relation to Contingent Scheme, the issue of the CS Completion Certificate;
- 12.5.3 in relation to the Bridge Replacement Works, the issue of the relevant BRW Completion Certificate.

12.6 Delay

12.6.1 Without prejudice to [Clauses 12.2](#) [Variations to Programme] and [12.3](#) [Preparation of Works Programme], the DBFO Co shall give notice to the Department's Agent as soon as it can foresee an event occurring which will cause material delay to or materially impede completion of the Works by the date set out in the Programme for such completion or, if the same is not foreseeable, as soon as it shall become aware of such event but in any case within 7 days of such event becoming apparent to the DBFO Co or, if earlier, of the date upon which the same ought reasonably to have become apparent to the DBFO Co. Thereafter but in any event not later than 21 days after such notification the DBFO Co shall give further written details to the Department's Agent, which shall include:

- 12.6.1.1 details of the circumstances from which the delay or impediment arises;
- 12.6.1.2 details of the contemporary records which the DBFO Co will maintain to substantiate such delay or impediment;

- 12.6.1.3 details of the consequences, whether direct or indirect, which such delay or impediment may have on completion of the Works; and
 - 12.6.1.4 details of any measures which the DBFO Co proposes to adopt to mitigate the consequences of such delay or impediment.
- 12.6.2 The DBFO Co shall, following notification of any event pursuant to [Clause 12.6.1](#):
- 12.6.2.1 provide such further written information of which it becomes aware or as the Department's Agent may reasonably require regarding the nature and likely duration of such event;
 - 12.6.2.2 afford the Department's Agent reasonable facilities for investigating the effect on the DBFO Co or the Programme of such event including on-site inspection; and
 - 12.6.2.3 take all steps necessary and consistent with Good Industry Practice to minimise the delay to completion of the Works or the Statutory Process.
- 12.6.3 If the DBFO Co has failed to comply with the requirements as to the giving of notice under [Clause 12.6.1](#), then the Department's 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. If the decision of the Disputes Resolution Procedure is that the failure is not excusable, then the period of such delay shall not at any time be taken into account if the DBFO Co is entitled to any additional payment in any of the circumstances referred to in [Clause 12.6.5](#).
- 12.6.4 The Department's Agent will be entitled, after receipt of written details under [Clause 12.6.1](#) or of further particulars under [Clause 12.6.2](#), by notice in writing to require the DBFO Co to provide such further supporting particulars as it may reasonably consider necessary.
- 12.6.5 Where the DBFO Co may have a claim for additional payment as a result of:
- 12.6.5.1 an event of Eligible Force Majeure, the provisions of [Clause 37.4](#) [Consequences of Force Majeure] shall have effect;
 - 12.6.5.2 a Department's Change, the provisions of [Part 2 of Schedule 12](#) [Department's Change] shall have effect;

12.6.5.3 a Compensation Event, the provisions of [Part 4 of Schedule 12](#) [Compensation Events] shall have effect; or

12.6.5.4 a CS Orders Change Event, the provisions of [Part 6 of Schedule 12](#) [Contingent Scheme] shall have effect.

For the avoidance of doubt, the DBFO Co shall have no claim against the Secretary of State for any additional payment as a result of any delay which is not an event referred to in [Clauses 12.6.5.1, 12.6.5.2, 12.6.5.3 and 12.6.5.4](#) above.

12.6.6 Where an event of Eligible Force Majeure, a Department's Change, CS Orders Change Event or a Compensation Event has occurred, then subject to:

12.6.6.1 the DBFO Co complying with the requirements of [Clause 12.6.1](#) in respect of any such notice;

12.6.6.2 the DBFO Co putting forward proposals pursuant to [Clause 12.6.1.4](#) as to the measures which it intends to adopt in order to mitigate the consequences of any delay to completion of the Works by the date set out in the Programme for such completion; and

12.6.6.3 such delay being material,

the Department's Agent shall, as soon as reasonably practicable, notify the DBFO Co (either prospectively or retrospectively) of his determination of the period of the delay (if any) to completion of the Works by the date set out in the Programme for such completion (the "Delay Period") which has arisen or will arise as a consequence of the relevant event of Eligible Force Majeure, Department's Change or Compensation Event or a CS Orders Change Event (as the case may be). If the Department's Agent determines that no Delay Period has arisen or will arise or the DBFO Co considers the Delay Period so determined to be insufficient, then the DBFO Co shall be entitled to refer the matter to the Disputes Resolution Procedure.

12.6.7 In determining the period of any delay for the purposes of any of [Clauses 12.6.5.1, 12.6.5.2, 12.6.5.3 and 12.6.5.4](#) there shall be taken into account, inter alia:

12.6.7.1 whether (and if so to what extent), as a consequence of the failure of the DBFO Co to conduct the Operations in accordance with this Agreement at all times prior to the occurrence of the event giving rise to the delay, the impact of the event on the timing of the completion of the Works is greater than it would otherwise have been; and

12.6.7.2 (without prejudice to [Clause 12.6.2.3](#)) the extent to which the delay or impediment ought reasonably to be or to have been mitigated by the DBFO Co by the taking of reasonable steps after its occurrence.

13. **INSPECTION AND COMPLETION**

13.1 **Permit to Use**

13.1.1 Not later than 28 days prior to the date upon which the DBFO Co expects the Works will be completed to such extent that the New Road or any Part of the New Road shall be suitable and safe for use by members of the public without traffic management restrictions, the DBFO Co shall issue to the Department's 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, within 15 Working Days of receipt of such confirmation, commence an inspection of the New Road or such Part of the New Road.

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

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

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

13.1.3 The Department's Agent may refuse to issue a Permit to Use if:

13.1.3.1 the New Road or the relevant Part of 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;

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

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

- 13.1.3.4 satisfactory evidence of compliance with [Clause 20.1.1.5.2](#) [Insurance Cover] has not been adduced;
 - 13.1.3.5 all noise barriers forming part of the relevant part of the Works have not been constructed in accordance with the Construction Requirements;
 - 13.1.3.6 the Orders and Notices referred to in [Part 7 of Schedule 4](#) have not been made or are not in force and such failure is wholly or partly due to the failure of the DBFO Co to comply with its obligations set out in [Part 7 of Schedule 4](#).
 - 13.1.3.7 the relevant requirements of [paragraph 2 of Annex 1 of Part 1 of Schedule 6](#) have not been met;
 - 13.1.3.8 [paragraph 18 of Section C of Part 1 of Schedule 17](#) or [paragraph 16 of Section D of Part 1 of Schedule 17](#) are applicable or if the requirements of [Annex 1 to Part 2 of Schedule 17](#) are not met;
 - 13.1.3.9 the requirements of [paragraphs 1.3, 1.8, 2.4.2, 5.1.2, 5.2.2, 5.3.2, 5.4.1, 5.4.2, 5.4.3, 5.5.2, 5.6.4 of Annex 1 to Part 1 of Schedule 4](#) have not been complied with in respect of the Permits to Use for the Firm Schemes referred to therein;
 - 13.1.3.10 the requirements of [paragraph 1.4 of Annex 8 to Part 2 of Schedule 4](#) has not been complied with in respect of the Permit to Use for the Firm Schemes referred to therein; or
 - 13.1.3.11 the Availability Monitoring Equipment in respect of the New Road or any Part of the New Road has not been designed, constructed, completed, commissioned and tested as required by [Clause 31.9.1.2](#).
- 13.1.4 In the event of service of a notice by the Department's Agent under [Clause 13.1.2.2](#) 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 a 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 within 5 Working Days of such notice and the provisions of [Clauses 13.1.2](#) and [13.1.3](#) and this Clause 13.1.4 shall thereafter apply to such notice mutatis mutandis.
- 13.1.5 The Department's Agent shall not refuse to issue a Permit to Use in the circumstances set out in [Clause 8.5.3](#).

13.2 Completion Certificates

- 13.2.1 Notwithstanding the issue of a Permit to Use in respect of the New Road or any Part of the New Road, the DBFO Co shall promptly complete all outstanding Works, if any, as soon as practicable.
- 13.2.2 Not later than 28 days prior to the date upon which the DBFO Co expects either the whole of the Works (other than any CS Works or any Bridge Replacement Works) or the whole of the CS Works or the Bridge Replacement Works in relation to a Part of the BRW New Road 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, within 15 Working Days of receipt of such confirmation, commence an inspection of the relevant Works.
- 13.2.3 The Department's Agent shall, within 10 Working Days of the commencement of such inspection, either:
- 13.2.3.1 issue the Completion Certificate in relation to the Firm Schemes, a CS Completion Certificate in relation to the Contingent Scheme or a BRW Completion Certificate in relation to the relevant Part of the BRW New Road (as appropriate); or
 - 13.2.3.2 notify the DBFO Co in writing of his decision not to issue a Completion Certificate, CS Completion Certificate or BRW Completion Certificate and state the reasons for such decision.
- 13.2.4 The Department's Agent may refuse to issue a Completion Certificate, CS Completion Certificate or BRW Completion Certificate if:
- 13.2.4.1 in relation to the Firm Schemes, the Works (other than the CS Works and the Bridge Replacement 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; or
 - 13.2.4.2 in relation to any Contingent Scheme, the CS Works have not been completed in all material respects in accordance with the Core Construction Requirements, the Core Communication Requirements, the Construction Requirements and the Communication Requirements; or
 - 13.2.4.3 in relation to a Part of the BRW New Road, the relevant Bridge Replacement 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 Communication Requirements; or

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

13.2.5 In the event of service of a notice by the Department's Agent under [Clause 13.2.3.2](#) 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, CS Completion Certificate or BRW 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 within 5 Working Days of such notice and the provisions of [Clauses 13.2.3](#) and [13.2.4](#) and this Clause 13.2.5 shall thereafter apply to such notice mutatis mutandis.

13.2.6 The issue of a Completion Certificate, CS Completion Certificate or BRW Completion Certificate shall be without prejudice to:

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

13.2.6.2 any warranties given by the DBFO Co under this Agreement; or

13.2.6.3 [Clause 13.3.5.3](#).

13.3 Local Facilities and De-Trunked Segments

13.3.1 Not later than 28 days prior to the date upon which the DBFO Co expects:

13.3.1.1 that part of the Works in respect of any Local Authority Road provided in connection with the Firm Schemes or the Contingent Scheme will be completed in all material respects in accordance with the Core Construction Requirements and the Construction Requirements and, without limitation thereto, completed to such extent that such Local Authority Road shall be suitable and safe for use by members of the public without traffic management restrictions; or

13.3.1.2 that part of the Works in respect of any other Local Facilities provided in connection with the Firm Schemes or the Contingent Scheme will be completed in accordance with the Core Construction Requirements, and the Construction Requirements; or

13.3.1.3 the Works on a section of the New Road, which will replace a De-Trunked Segment upon which no Works are required, will

be completed in accordance with the Core Construction Requirements, and the Construction Requirements;

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

- 13.3.2 The Department's Agent shall, within 10 Working Days of the commencement of such inspection, either:
- 13.3.2.1 issue a Taking Over Certificate; or
 - 13.3.2.2 notify the DBFO Co in writing of his decision not to issue a Taking Over Certificate and state the reasons for such decision.
- 13.3.3 Where notice is given pursuant to [Clause 13.3.1.1](#) or [13.3.1.2](#) the Department's Agent may refuse to issue a Taking Over Certificate in accordance with Clause 13.3.2.2 if:
- 13.3.3.1 in the case of a Local Authority Road, the Works in respect thereof have not been completed in all material respects in accordance with the Core Construction Requirements and the Construction Requirements or have not been completed to such extent that such Local Authority Road is suitable and safe for use by members of the public without traffic management restrictions;
 - 13.3.3.2 without limitation to Clause 13.3.3.1, in the case of a De-Trunked Segment, a Permit to Use has not been issued in respect of the New Road or Part of the New Road which will replace such De-Trunked Segment;
 - 13.3.3.3 in the case of any Local Facilities, other than a Local Authority Road, the Works in respect thereof have not been completed in all material respects in accordance with the Core Construction Requirements and the Construction Requirements; or
 - 13.3.3.4 in the case of the Works in respect of any Local Facilities, there has been and continues to be material non-compliance with the Design and Certification Procedure.
- 13.3.4 Where notice is given pursuant to [Clause 13.3.1.3](#) the Department's Agent may refuse to issue a Taking Over Certificate in accordance with Clause 13.3.2.2 if, in the case of a De-Trunked Segment, a Permit to Use has not

been issued in respect of the New Road or part of the New Road which will replace such De-Trunked Segment.

- 13.3.5 Upon the issue of a Taking Over Certificate in respect of any Local Facilities:
- 13.3.5.1 either the Secretary of State shall procure that the relevant Local Person assumes responsibility for the operation and maintenance (subject to Clause 13.3.5.3) of such Local Facilities or De-Trunked Segment or the Secretary of State shall himself assume responsibility for the operation and maintenance (subject to Clause 13.3.5.3) of such Local Facilities or De-Trunked Segment;
 - 13.3.5.2 those parts of the Works comprising such Local Facilities and those parts of the Existing Road comprising any De-Trunked Segment shall be excluded from the definition of "Off-Site Facilities" and "Existing Road", as the case may be, for all purposes of this Agreement (save for the purpose of giving effect to the provisions of this Clause 13.3 [Local Facilities and De-Trunked Segments]); and
 - 13.3.5.3 the DBFO Co shall execute all such work of amendment, reconstruction, and remedying of defects, shrinkages or other faults 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.
- 13.3.6 In the event of service of a notice by the Department's Agent under [Clause 13.3.2.2](#) and following completion by the DBFO Co of such further works or other measures necessary or appropriate to remedy or remove the cause of the refusal to issue a Taking Over Certificate, the DBFO Co may give notice to the Department's 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 relevant Local Person. The provisions of [Clauses 13.3.2](#) to 13.3.6 (inclusive) shall thereafter apply to such notice mutatis mutandis.
- 13.3.7 For the avoidance of doubt, all work referred to in Clause 13.3.5.3 shall be executed by the DBFO Co at its own cost.

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

13.4 Disputed Certificate

- 13.4.1 If there shall be any Dispute as to whether a Permit to Use, Completion Certificate, CS Completion Certificate, BRW Completion Certificate or Taking Over Certificate is required to be issued in accordance with the terms of [Clause 13.1](#) [Permit to Use], [Clause 13.2](#) [Completion Certificate] or [Clause 13.3](#) [Local Facilities and De-Trunked Segments] as appropriate, then either the Department's Agent or the DBFO Co may refer such Dispute for resolution under the Disputes Resolution Procedure.
- 13.4.2 The issues for resolution in any such referral to the Disputes Resolution Procedure shall be:
- 13.4.2.1 whether the Permit to Use, Completion Certificate, CS Completion Certificate, BRW Completion Certificate or Taking Over Certificate, as the case may be, was required to be issued in accordance with the terms of [Clause 13.1](#) [Permit to Use], [Clause 13.2](#) [Completion Certificate] or [Clause 13.3](#) [Local Facilities and De-Trunked Segments] as appropriate; and
- 13.4.2.2 if so, the date on which such Permit to Use, Completion Certificate, CS Completion Certificate, BRW Completion Certificate or Taking Over Certificate should have been issued.
- 13.4.3 The provisions of [Part 4 of Schedule 12](#) [Compensation Events] shall, if applicable, be given effect.

14. OPERATION AND MAINTENANCE

14.1 Operation and Maintenance

14.1.1 Subject to [Clause 1.4.2](#) and save to the extent that it is prohibited from so doing by reason of a breach by the Secretary of State of his obligations under [Clause 8.1](#) [Access for DBFO Co] and, in relation to the Docklands Roads, subject to [Clause 9.10](#) [Docklands Roads: Obligations of the DBFO Co], from the Commencement Date and in relation to Road Segment 2 from the date set out in the By-Pass Notice and thereafter throughout the Contract Period the DBFO Co shall operate and maintain the Project Facilities (other than the New Road (but excluding from the definition of New Road any Upgraded Section) and any Off-Site Facilities) in accordance with the terms of this Agreement (including, without limitation, the O&M Requirements) and in such manner as to procure satisfaction of the Core O&M Requirements.

14.1.2 Save to the extent that it is prohibited from so doing by reason of a breach by the Secretary of State of his obligations under [Clause 8.1](#) [Access for DBFO Co], from the date of issue of a Permit to Use in respect of the New Road or any Part of the New Road and thereafter throughout the Contract Period, the DBFO Co shall operate and maintain the New Road or such Part of the New Road in accordance with the terms of this Agreement (including, without limitation, the O&M Requirements) and in such manner as to procure satisfaction of the Core O&M Requirements.

14.1.3 Save to the extent that it is prohibited from so doing by reason of a breach by the Secretary of State of his obligations under [Clause 8.1](#) [Access for DBFO Co], from the date of issue of the Completion Certificate in respect of the Off-Site Facilities associated with the Firm Schemes and from the issue of the CS Completion Certificate in respect of the Off-Site Facilities associated with the Contingent Scheme and thereafter throughout the Contract Period, the DBFO Co shall operate and maintain such Off-Site Facilities in accordance with the terms of this Agreement (including, without limitation, the O&M Requirements) and in such manner as to procure satisfaction of the Core O&M Requirements.

14.2 O&M Requirements

14.2.1 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 as previously varied in accordance with this Clause 14.2 [O&M Requirements]) or any part thereof. If there shall be no objection to such proposed revision or substitution (on the grounds set out in [paragraph 3.8 of Part 3 of Schedule 7](#) [Review Procedure]), then the O&M Requirements as so varied shall be the O&M Requirements for the purposes of this Agreement, subject to any

further revision or substitution to which there has been no objection in accordance with the Review Procedure.

- 14.2.2 If the DBFO Co becomes aware that any element of the O&M Requirements does not comply with and satisfy the Core O&M Requirements, the DBFO Co shall so notify the Department's Representative 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 14.2.1](#)) a DBFO Co's Change to amend the O&M Requirements so that they comply with and satisfy the Core O&M Requirements.

14.3 Inspections

- 14.3.1 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.
- 14.3.2 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 14.3.1](#)) upon giving reasonable notice to the DBFO Co.

14.4 Access

- 14.4.1 The DBFO Co shall procure that:
- 14.4.1.1 the Department's Nominee and any designee of the Department's Nominee has unrestricted access to the Site and the Adjacent Areas at all reasonable times throughout the Contract Period in order to perform its functions under this Agreement; and
 - 14.4.1.2 the Secretary of State and any contractor or other designee of the Secretary of State has unrestricted access to the Site and the Adjacent Areas at all reasonable times throughout the Contract Period in order:
 - 14.4.1.2.1 to perform any obligations or exercise any rights of the Secretary of State under this Agreement including without limitation the operation and maintenance of the Communications Installations; or
 - 14.4.1.2.2 to fulfil any statutory functions of the Secretary of State; or

- 14.4.1.2.3 without limitation to [Clauses 14.4.1.2.1](#) and [14.4.1.2.2](#), to conduct any study or trial for purposes of research initiated by the Secretary of State, provided that any such study or trial shall be conducted in accordance with the provisions of [Clause 14.7](#) [Trials].
- 14.4.2 The DBFO Co shall procure that all Relevant Authorities have access to the Site and the Adjacent Areas throughout the Contract Period in order to carry out any work (including, without limitation, surveys and inspections) in accordance with any Legal Requirement or to exercise any right, power or duty of such Relevant Authority under any Law, subject, other than in the case of an emergency, to reasonable notice being given. 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.
- 14.4.3 The Secretary of State shall procure that the DBFO Co (or the Contractor or Operator) has access to the Connecting Roads at all reasonable times throughout the Contract Period to the extent necessary to enable the DBFO Co to perform its obligations under this Agreement, subject, other than in the case of emergency, to reasonable notice being given.

14.5 Emergencies and Liaison

- 14.5.1 The Parties shall develop Liaison Procedures in accordance with the provisions of [Parts 1 and 2 of Schedule 16](#):
- 14.5.1.1 as soon as practicable after the date hereof, (save in relation to the Contingent Scheme, the Docklands Roads and each Part of the BRW New Road) ;
- 14.5.1.2 without prejudice to [Clause 9.3.1.3](#), as soon as may be reasonable and practicable having regard to the likely or actual date of the Actual CS Commencement Date, in relation to the Contingent Scheme;
- 14.5.1.3 without prejudice to [Clause 9.8.1.2](#), as soon as may be reasonable and practicable having regard to the likely or actual date of the Actual DR Commencement Date, in relation to the Docklands Roads; and
- 14.5.1.4 without prejudice to [Clause 9.12.1.2](#) as soon as may be reasonable and practicable having regard to the likely or actual date of the Actual BRW Commencement Date, in relation to each Part of the BRW New Road.

14.5.2 Whenever the DBFO Co is required by this Agreement to take any action in accordance with the Liaison Procedures, it shall take such action in accordance with the procedures set out in or agreed in accordance with the provisions of [Schedule 16](#) [Liaison Procedures].

14.5.3 Notwithstanding any other provision of this Agreement, the DBFO Co shall and shall be entitled to take (at its own cost) such steps as necessary in an emergency for the protection of the public, but subject to the provisions of the Liaison Procedures.

14.6 Maintenance and Other Works

The provisions of [Clause 11](#) [Design and Construction] and [paragraphs 3.4, 3.7, 3.10, 3.15, 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:

14.6.1 the Works being deemed a reference to such works the subject of the Proposal;

14.6.2 the Department's Agent being deemed a reference to the Department's Representative;

14.6.3 a DBFO Co's Change being deemed a reference to an Alternative Proposal; and

14.6.4 a DBFO Co's Change Certificate being deemed a reference to an Alternative Proposal Certificate.

14.7 Trials

Any study or trial referred to in [Clause 14.4.1.2.3](#) shall be conducted in such manner as to minimise any adverse effect on traffic flows on the Project Road and no such study or trial shall, without the consent of the DBFO Co (such consent not to be unreasonably withheld or delayed), substantially affect the physical integrity of the Project Facilities.

14.8 DBFO Co's 5 Year Management Plan

The DBFO Co shall prepare a DBFO Co's 5 Year Management Plan annually in accordance with [Part 3 of Schedule 14](#) [DBFO Co's 5 Year Management Plan] and shall 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.

15. **TRAFFIC MANAGEMENT**

15.1 **Traffic Management**

15.1.1 Subject to Clause 15.2 [Liaison], general management of traffic on the Project Road shall be the responsibility of the DBFO Co.

15.1.2 Users shall be subject to the same Laws as those using the remainder of the public highway network, and the enforcement of those Laws shall be the responsibility of the police.

15.2 **Liaison**

The DBFO Co shall be responsible during the conduct of the Operations for ensuring compliance with the reasonable requirements of the Secretary of State in respect of then existing highways (other than the Project Road) for which he is the highway authority, of other highway authorities and of the police with regard to the management of traffic which may be affected by the carrying out of the Operations, all in accordance with the Liaison Procedures.

15.3 **Lane Closures**

15.3.1 Within 60 days after the date of execution of this Agreement the DBFO Co shall submit to the Department's 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.

15.3.2 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 15.3.1 showing proposed revisions to the periods of Lane Closure in respect of such Quarter. If there is no objection to any such revision in accordance with the Review Procedure, then it shall replace the annual Schedule of Lane Closures in respect of such Quarter.

15.3.3 The Department's 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 15.3.1 or Clause 15.3.2 in accordance with [paragraph 3.9 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 3.9.3 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 re-scheduled, on the basis that each such re-scheduled period shall be as close as reasonably practicable to the requested period of Lane Closure and of equal duration or, if the DBFO Co has indicated another period and/or duration that would be preferable to it and that is acceptable to the Department's 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.

- 15.3.4 The DBFO Co shall not effect any Lane Closures save:
- 15.3.4.1 in accordance with a Schedule of Lane Closures to which no objection has been made under the Review Procedure;
 - 15.3.4.2 in accordance with the procedures set out in Clause 15.3.6;
 - 15.3.4.3 in an emergency, in accordance with [Clause 15.3.7](#); or
 - 15.3.4.4 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.

- 15.3.5 Notwithstanding that there has been no objection to a Schedule of Lane Closures in accordance with the Review Procedure, the Department's Representative may upon 90 days prior written notice require the DBFO Co to re-schedule a period of Lane Closure if due to a change in any circumstances such re-scheduling is necessary to satisfy the standards set out in [paragraph 3.9.1](#) or [3.9.2 of Part 3 of Schedule 7](#) [Review Procedure], provided, however, that the Department's Representative may not require:
- 15.3.5.1 that such period of Lane Closure be brought forward by more than 60 days from the scheduled date of commencement of such period of Lane Closure; or
 - 15.3.5.2 that a period of Lane Closure be deferred by more than 60 days from the scheduled date of commencement of such period of Lane Closure.

- 15.3.6 If the need arises for unprogrammed maintenance or repair works (not being an emergency) requiring Lane Closures otherwise than in accordance with an approved Schedule of Lane Closures, the DBFO Co shall advise the Department's 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 3.9 of Part 3 of Schedule 7](#) [Review Procedure].

- 15.3.7 If as a result of an emergency the need arises for unprogrammed maintenance or repair works requiring Lane Closures otherwise than in accordance with an approved Schedule of Lane Closures, the DBFO Co shall effect such Lane Closures, provided that the DBFO Co shall as soon as reasonably practicable advise the Department's Representative of such closure and the reasons therefor and shall take all reasonable steps to minimise the duration of such Lane Closure.
- 15.3.8 In the event of an emergency occurring on a Connecting Road, at the request of the Department's 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.
- 15.3.9 The DBFO Co shall promptly remove traffic cones or other traffic management equipment which is no longer required.

15.4 Information Requirements

- 15.4.1 The DBFO Co shall provide to the Secretary of State such information (including without limitation details of proposed Lane Closures and information about its traffic safety and management measures on the Project Road) as may be required for purposes of any information service operated by or on behalf of the Secretary of State from time to time. Such information shall contain such details, be in such format and be sent to such address at such times as may be notified to the DBFO Co by the Secretary of State from time to time.
- 15.4.2 The DBFO Co shall, in accordance with [Clause 16.9](#) [Information for the Public], operate a telephone service connected to any telephone system and number nominated from time to time by the Secretary of State in relation to all or any part of the Trunk Road Network.

15.5. Secretary of State's Maintenance

- 15.5.1 Without prejudice to Clause 15.3.8, the Secretary of State shall use reasonable endeavours to co-ordinate his maintenance programme for the Connecting Roads with any Schedule of Lane Closures in respect of the Project Road to which there has been no objection under the Review Procedure, so as to minimise any disruption to the operation of the Project Road.

- 15.5.2 Within 90 days after the date of execution of this Agreement the Department's 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.
- 15.5.3 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 15.5.2.
- 15.5.4 The Schedule of Lane Closures provided to the DBFO Co pursuant to Clause 15.5.2 and any revisions thereto provided pursuant to Clause 15.5.3 shall be for information purposes only. The Secretary of State shall have no liability to the DBFO Co in respect of any variations of or departures from any such Schedule of Lane Closures.

16. **SIGNING AND COMMUNICATIONS**

16.1 Traffic Signs Provisions

The DBFO Co shall procure that all Traffic Signs on or near the Project Road shall be in accordance with the Traffic Signs Provisions and the Traffic Signs Manual, except:

- 16.1.1 to the extent required by any contrary provision in the Technical Requirements;
- 16.1.2 to the extent required by any Department's Change; or
- 16.1.3 for any Traffic Signs on the Project Road on the Commencement Date or, in relation to the Contingent Scheme, the relevant Actual CS Commencement Date, or in relation to the Docklands Roads, the Actual DR Commencement Date, or in relation to Road Segment 2, the date set out in the By-Pass Notice, provided that any such Traffic Signs which under the Traffic Signs Provisions are required by a specified time to be replaced by signs of a different design or removed shall be so replaced or removed.

16.2 New Signs

Save to the extent that any of the same are specified by the Technical Requirements or any Department's Change and notwithstanding and without prejudice to any obligation to obtain any necessary authorisations in accordance with the Traffic Signs Provisions in respect thereof, the DBFO Co shall submit the proposed layout, location, type, size, colour and content of all Traffic Signs or other signs (including without limitation the signs referred to in [Clause 16.5](#) [Notification Signs]) to be located on or near the Project Road to the Department's Nominee in accordance with the Review Procedure.

The Department's Nominee shall be entitled to raise comments on any such proposal only on the grounds set out in [paragraph 3.10 of Part 3 of Schedule 7](#) [Review Procedure].

16.3 Local Roads

Signing on roads for which the Secretary of State is not the highway authority shall be subject to agreement between the DBFO Co and the relevant local highway authority.

16.4 Directional Signs

Without prejudice to the DBFO Co's obligations to provide signs near the Project Road in accordance with the Technical Requirements the Secretary of State shall, at his own cost, install on motorways or trunk roads for which the Secretary of State is the highway authority (other than the Project Road) such further signs notifying motorists of the access to the Project Road as shall be necessary in accordance with the Secretary of State's duties as highway authority.

16.5 Notification Signs

The DBFO Co shall install on or near the Project Road at distances not further than 1 kilometre from each significant junction which is an access to or exit from the Project Road signs notifying the Users that the road is a road the operation of which is the responsibility of the DBFO Co and giving the telephone number for enquiries and complaints in respect of the Project Road required pursuant to [Clause 15.4](#) [Information Requirements] and in accordance with [Clause 16.9](#) [Information for the Public].

16.6 Additional Signs

For the avoidance of doubt, the Secretary of State may require the DBFO Co to place Traffic Signs (other than those required in accordance with the Technical Requirements or Clauses 16.4 [Directional Signs] and 16.5 [Notification Signs]) on or near the Project Road or to remove any such Traffic Signs. Where the Secretary of State does so require such requirement shall be treated as a Department's Change.

16.7 Removal of Signs

The DBFO Co shall, at its own cost, remove all signs referred to in Clause 16.5 [Notification Signs] within 30 days following termination of this Agreement.

16.8 Communications

16.8.1 The DBFO Co shall comply with the Communications Requirements.

16.8.2 The DBFO Co shall obtain in a timely manner and maintain in force any licence or consent required under the Telecommunications Act 1984 in order to perform its obligations under this Agreement.

16.9 Information for the Public

In relation to any provision of information to the public pursuant to this Agreement including, without limitation, pursuant to [Clauses 15.4](#) [Information Requirements] and 16.5 [Notification Signs] the DBFO Co shall comply with the requirements set out in [paragraph 2.7.2 of Part 2 of Section 2 of Schedule 6](#) [O&M Requirements].

17. **DEFECTS IN THE EXISTING ROAD**

17.1 Latent Defects

For the purposes of this Agreement, the term "Latent Defect" shall mean any defect in:

- 17.1.1 the Existing Road at the date hereof;
- 17.1.2 (subject to the issue of the Docklands Roads Certificate) the Docklands Roads at the Actual DR Commencement Date; and
- 17.1.3 Road Segment 2 at the date it becomes part of the Existing Road pursuant to the By-Pass Notice,

which (in any such case) could not reasonably have been ascertained by a competent person acting in accordance with Good Industry Practice during the inspection referred to in [Clause 6.1.1](#) or from an analysis of all relevant information available to the DBFO Co prior to the date of execution of this Agreement including, without limitation, the information referred to in [Clause 38.2.1](#).

17.2 Reporting of Defects

Without prejudice to [paragraph 2.8 of Part 2 of Schedule 14](#) [Reports]:-

- 17.2.1 in the event that a Latent Defect shall become apparent, the DBFO Co shall promptly give notice to the Secretary of State identifying such defect;
- 17.2.2 in the event that any Defective Work in relation to Road Segment 2 shall come to the attention of the DBFO Co, the DBFO Co shall promptly give notice to the Secretary of State identifying such defect.

17.3 Remedial Action

For the avoidance of doubt the DBFO Co shall be responsible for any remedial or other works required as a result of any defect in the Project Road, including, without limitation, any Defective Work in relation to Road Segment 2 or any Latent Defect.

17.4 Costs of Defects

17.4.1 All costs of and associated with any defect in the Project Road (including without limitation any Defective Work in relation to Road Segment 2 or any Latent Defect) and any remedial or other works in respect thereof shall be borne by the DBFO Co.

17.4.2 For the avoidance of doubt, except to the extent that the same are recoverable from the Secretary of State under Clause 17.5.4 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 Defective Work in relation to Road Segment 2 or any Latent Defect or any remedial or other works required as a result of any Defective Work in relation to Road Segment 2 or any Latent Defect.

17.5 Enforcement of Rights against Third Parties

17.5.1 If the DBFO Co suffers loss as a result of any Defective Work in relation to Road Segment 2 or 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 the Defective Work in relation to Road Segment 2 or any such Defective Work giving rise to such Latent Defect, then the DBFO Co may serve a notice on the Secretary of State asking him to exercise any right he may have to make a claim against the relevant Third Party Contractor (the "Third Party Contractor Claim Notice").

17.5.2 The Third Party Contractor Claim Notice shall:

17.5.2.1 describe such claim in a level of detail sufficient to enable the Secretary of State to understand the basis for such claim;

17.5.2.2 set out the DBFO Co's detailed estimate of the value of such claim; and

17.5.2.3 contain an undertaking on the part of the DBFO Co (in a form reasonably satisfactory to the Secretary of State) to meet all costs and/or liabilities incurred by the Secretary of State in pursuing such claim.

17.5.3 The Secretary of State shall be under no obligation to exercise any right in respect of any Defective Work against any Third Party Contractor if he considers, and either it is agreed by the DBFO Co or decided by an Expert appointed under the Disputes Resolution Procedure, that there is no reasonable prospect of making a successful and financially worthwhile claim in relation to such right.

17.5.4 Where the Secretary of State is successful in a claim against a Third Party Contractor in respect of Defective Work pursuant to a Third Party

Contractor Claim Notice he shall account to the DBFO Co for the Recovery Amount following the final conclusion of the relevant proceedings by the Secretary of State against the Third Party Contractor and the expiry of the time for any appeal.

17.5.5 Nothing in this Clause 17.5 [Enforcement of Rights against Third Parties] shall derogate from or relieve the DBFO Co of any of its obligations under this Agreement.

17.6 Third Party Contractor Access

Where a Third Party Contractor is entitled pursuant to his contractual arrangements with the Secretary of State entered into before the date of this Agreement to perform itself remedial or other work in relation to Road Segment 2, the DBFO Co shall grant reasonable access for such Third Party Contractor to the Project Facilities so as to enable the Third Party Contractor to carry out the remedial or other work. If the DBFO Co fails to grant such reasonable access it, rather than the Secretary of State, shall perform such remedial or other work itself and bear the costs of and associated therewith.

18. **FOSSILS AND ANTIQUITIES**

18.1 Archaeological Works

18.1.1 The DBFO Co shall procure that the Archaeologist has unrestricted access to the Site and the Adjacent Areas at all reasonable times and, without limitation to [Clause 18.3](#) [Disposal], shall give due regard to any recommendation of the Archaeologist in regard to any archaeological surveys or inspections of the Site or the Adjacent Areas or Temporary Adjacent Areas.

18.1.2 The DBFO Co shall carry out the Preliminary Archaeological Investigations and subject to [Clause 9.5](#) in respect of Archaeological Works in respect of the Contingent Scheme, the DBFO Co shall carry out the Archaeological Works.

18.1.3 In connection with Maintenance Works, the DBFO Co shall undertake such further archaeological surveys and consultations with English Heritage and the archaeologists of the relevant local authorities as is consistent with [Annex 14 to Part 2 of Schedule 4](#) [Archaeology] mutatis mutandis.

18.1.4 At all times when an Archaeologist is or is required to be appointed in accordance with this Agreement, the DBFO Co shall at all times ensure that he has expertise in the area of archaeology relevant to any Fossils and Antiquities discovered on the Site or Adjacent Areas or Temporary Adjacent Areas.

18.1.5 The DBFO Co shall comply with all the requirements of [Annex 14 to Part 2 of Schedule 4](#).

18.2 Ownership

As between the Secretary of State and the DBFO Co, all Fossils and Antiquities shall be the property of the Secretary of State.

18.3 Disposal

The DBFO Co shall take all reasonable precautions to prevent the removal of, or damage to, any 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. The DBFO Co shall take all steps necessary and consistent with Good Industry Practice to minimise any delay to completion of the Works as a result of carrying out such orders.

18.4 Costs

If 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 18.3 [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 18.3 [Disposal].

19. **HANDBACK**

19.1 **Handback Requirements**

Upon the Expiry Date, each element of the Project Facilities shall comply with the Handback Requirements, save that if a BRW Completion Certificate has not been issued in respect of a Part of the BRW New Road, the Handback Requirements shall not apply to such Part of the BRW New Road.

19.2 **Initial Inspection**

19.2.1 Not less than 57 months nor more than 63 months prior to the expected Expiry Date, the DBFO Co and the Department's 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.

19.2.2 Such inspection shall comply with the requirements set out in [paragraph 2 of Part 4 of Schedule 4](#) [Handback Requirements].

19.3 **Renewal Programme**

19.3.1 Within 90 days after the completion of the Initial Inspection, the DBFO Co shall provide to the Department's Representative a report on the condition of the pavement of the Project Road and the Structures referred to in Clause 19.2.1 and a notice setting out:

19.3.1.1 the DBFO Co's proposals as to the Renewal Works;

19.3.1.2 the DBFO Co's proposals as to the Renewal Programme; and

19.3.1.3 the DBFO Co's estimate of the Renewal Amount.

19.3.2 The proposals referred to in Clause 19.3.1.1 shall be made, inter alia:

19.3.2.1 on the basis of an assessment of the Residual Life of the relevant element of the Project Facilities in accordance with the provisions of [paragraph 2 of Part 4 of Schedule 4](#) [Handback Requirements]; and

19.3.2.2 on the assumption that the Project Facilities will be maintained in accordance with the O&M Requirements for the remainder of the Contract Period.

- 19.3.3 The Department's Representative may, within 90 days after receipt of the notice from the DBFO Co in accordance with [Clause 19.3.1](#), by notice to the DBFO Co object to the proposals in respect of any or all of the Renewal Works, the Renewal Programme and the Renewal Amount as set out in the DBFO Co's notice. The notice from the Department's 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.
- 19.3.4 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 19.3.3](#) 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:
- 19.3.4.1 in the case of an objection in respect of the Renewal Works, whether or not the objection is justified and whether any alternative proposals by the Department's 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 19.3.2](#));
- 19.3.4.2 in the case of an objection in respect of the Renewal Programme, what programme would be reasonable for the implementation of the Renewal Works; and
- 19.3.4.3 in the case of an objection in respect of the Renewal Amount, what amount would represent the reasonable cost of carrying out the Renewal Works, on the assumption that such Renewal Works will be carried out in accordance with Good Industry Practice.
- 19.3.5 Upon agreement or determination in accordance with the Disputes Resolution Procedure of the Renewal Works and the Renewal Programme, the DBFO Co shall procure that the Renewal Works are carried out in accordance with the Renewal Programme. For the avoidance of doubt, the DBFO Co shall procure at its own cost that the Renewal Works are carried out notwithstanding that the actual cost of the Renewal Works may be higher than the Renewal Amount.
- 19.3.6 For the avoidance of doubt, neither the agreement of the Department's Representative to any Renewal Works, Renewal Programme or Renewal Amount, nor the participation of the Department's Representative in any inspection under this [Clause 19 \[Handback\]](#), nor the complete or partial

carrying out of the Renewal Works shall relieve or absolve the DBFO Co from:

- 19.3.6.1 its obligation under [Clause 19.1](#) [Handback Requirements]; or
- 19.3.6.2 any obligation to conduct any other inspection or perform any other works in accordance with the O&M Requirements.

19.4 Second Inspection

- 19.4.1 Not less than 15 months nor more than 18 months prior to the expected Expiry Date, the DBFO Co and the Department's Representative shall conduct a joint inspection (the "Second Inspection") of all elements of the Project Facilities, including without limitation the pavement and the Structures referred to in [Clause 19.2.1](#) (whether or not the Renewal Works in respect of the pavement and such Structures have been carried out).
- 19.4.2 Such inspection shall comply with the requirements set out in [paragraph 2 of Part 4 of Schedule 4](#) [Handback Requirements] as applicable to each element of the Project Facilities.

19.5 Revised Renewal Programme

- 19.5.1 Within 60 days after the completion of the Second Inspection, the DBFO Co shall provide to the Department's Representative a report on the condition of the Project Facilities and a notice setting out:
 - 19.5.1.1 the DBFO Co's proposals as to any revisions or additions to the Renewal Works (including without limitation those referred to in [Clause 19.5.6](#)) required in order to procure that all elements of the Project Facilities will, on the Expiry Date, satisfy the Handback Requirements;
 - 19.5.1.2 the DBFO Co's proposals as to any revisions to the Renewal Programme as a consequence of such revisions or additions to the Renewal Works; and
 - 19.5.1.3 the DBFO Co's estimate of any changes in the Renewal Amount as a consequence of such revisions or additions to the Renewal Works.
- 19.5.2 The proposals referred to in [Clause 19.5.1.1](#) shall be made, inter alia, on the basis set out in [Clause 19.3.2](#).
- 19.5.3 The Department's Representative may, within 28 days after receipt of the notice from the DBFO Co in accordance with [Clause 19.5.1](#), by notice to the DBFO Co object to any proposed revisions or additions to any or all of the Renewal Works, the Renewal Programme and the Renewal Amount as

set out in the DBFO Co's notice. The notice from the Department's Representative shall give details of the grounds for such objection and shall give the Department's Representative's proposals in respect of such matters.

19.5.4 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 19.5.3](#) 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:

19.5.4.1 in the case of an objection in respect of any revisions or additions to the Renewal Works, whether or not the objection is justified and whether any alternative proposals by the Department's 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 19.3.2](#));

19.5.4.2 in the case of an objection in respect of any revisions to the Renewal Programme, what programme would be reasonable for the implementation of the Renewal Works (as revised or added to in accordance with the provisions of this Clause 19.5 [Revised Renewal Programme]); and

19.5.4.3 in the case of an objection in respect of any change in the Renewal Amount, what amount would represent the reasonable cost of carrying out the Renewal Works (as revised or added to in accordance with the provisions of this Clause 19.5 [Revised Renewal Programme]).

19.5.5 Upon agreement or determination in accordance with the Disputes Resolution Procedure of any revision or addition to the Renewal Works or the Renewal Programme, the DBFO Co shall procure that the Renewal Works (as so revised or added to) are carried out in accordance with the Renewal Programme (as so revised). For the avoidance of doubt, the DBFO Co shall procure, at its own cost, that the Renewal Works (as so revised or added to) are carried out notwithstanding that the actual cost of the Renewal Works may be higher than the Renewal Amount (as changed in accordance with this Clause 19.5 [Revised Renewal Programme]).

19.5.6 The Renewal Works proposed pursuant to [Clause 19.5.1.1](#) shall include, inter alia, the following:

19.5.6.1 the renewal of all reflecting road studs on the Project Facilities within the last 6 months of the Contract Period, provided that

metal housings having a Residual Life of at least 5 years at the Expiry Date need not be renewed; and

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

19.6 Handback Inspection

19.6.1 Not later than 28 days after the Expiry Date, the DBFO Co and the Department's 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.

19.6.2 Within 90 days after the completion of the Handback Inspection, the Department's Representative shall either:

19.6.2.1 issue to the DBFO Co a Handback Certificate; or

19.6.2.2 notify the DBFO Co in writing of his decision not to issue the Handback Certificate and state the reason for such decision.

19.6.3 The Department's Representative may refuse to issue the Handback Certificate if:

19.6.3.1 the DBFO Co shall have failed to complete all of the Renewal Works; or

19.6.3.2 the Project Facilities for any other reason do not comply with the Handback Requirements in all respects.

19.6.4 Any notice given by the Department's Representative in accordance with Clause 19.6.2.2 shall set out each respect in which the Renewal Works have not been completed or the Project Facilities do not comply with the Handback Requirements and shall state the Department's 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.

19.6.5 The DBFO Co may, within 28 days after receipt of a notice given in accordance with Clause 19.6.2.2, by notice to the Department's 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.

19.6.6 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 19.6.5](#) 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:

19.6.6.1 whether the Renewal Works have been completed;

19.6.6.2 whether the Project Facilities comply in all respects with the Handback Requirements; and

19.6.6.3 of the estimated cost of procuring that such Renewal Works are completed and that the Project Facilities comply in all respects with the Handback Requirements.

19.6.7 If it is agreed or determined in accordance with the Disputes Resolution Procedure that the DBFO Co has not completed the Renewal Works or that the Project Facilities do not comply in all respects with the Handback Requirements, then without prejudice to any other right or remedy of the Secretary of State the DBFO Co shall pay to the Secretary of State an amount equal to the estimated cost of completing such Renewal Works or procuring that the Project Facilities comply in all respects with the Handback Requirements, as agreed or determined in accordance with [Clause 19.6.6](#) (the "Handback Amount"). Such payment shall be made not later than 14 days after such estimated cost has been agreed or determined in accordance with this Clause 19.6 [Handback Inspection].

19.7 Retention Account

19.7.1 The Secretary of State and the DBFO Co shall procure that the Retention Account is established with a bank located in the United Kingdom not later than the date which is 5 years prior to the expected Expiry Date. The Secretary of State may (if he so chooses) by notice in writing to the DBFO Co, designate the Retention Account as a "Charged Retention Account" in which event the DBFO Co shall grant a charge to the Secretary of State over the Retention Account referred to in [Clause 2.3.1.12](#). Any interest accrued on any money standing to the credit of the Retention Account shall be credited to the Retention Account. All sums standing to the credit of the Retention Account from time to time, including without limitation any accrued interest, shall be dealt with only in accordance with the following provisions of this Clause 19 [Handback].

19.7.2 Subject to [Clause 19.7.3](#), from the date which is 5 years prior to the expected Expiry Date, the Secretary of State shall withhold from any payment which would otherwise be due to the DBFO Co under this Agreement in respect of any Availability Payment, Monthly Usage Payment or any DBFO Payment, DR Availability Payment, or DR Usage Payment a sum equal to 40% of such payment. The Secretary of State shall procure that such sum is deposited into the Retention Account on the

date on which payment of such sum would, absent the provisions of this Clause 19.7.2, be due to the DBFO Co.

- 19.7.3 When the amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law to be made from such account) is equal to the Retention Sum, then subject to Clause 19.7.5.1 the Secretary of State shall not be entitled to withhold any further sums in accordance with [Clause 19.7.2](#) and the DBFO Co shall be entitled to receive directly the full amount of any sum due to it under any other provision of this Agreement.
- 19.7.4 If, following the Initial Inspection, it is agreed or determined in accordance with [Clause 19.3](#) [Renewal Programme] that no Renewal Works are required, then within 14 days of such agreement or determination the Secretary of State and the DBFO Co shall pay to the DBFO Co all sums standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law to be made from such account), but without prejudice to the provisions of Clause 19.7.5.
- 19.7.5 If, as a result of the Second Inspection:
- 19.7.5.1 the Renewal Amount is increased, then the provisions of [Clause 19.7.2](#) shall apply, or shall again apply, until the amount held in the Retention Account equals the increased Retention Sum;
- 19.7.5.2 there is a decrease in the Renewal Amount, such that the total amount held in the Retention Account (including accrued interest but less any bank charges and less any deductions required by any Law to be made from such account) exceeds the revised Retention Sum, then the Secretary of State and the DBFO Co shall, within 14 days of the agreement or determination of the revised Renewal Amount in accordance with the provisions of [Clause 19.5](#) [Revised Renewal Programme], pay the amount of such excess out of the Retention Account to the DBFO Co.
- 19.7.6 Within 14 days after the issue of a Handback Certificate in accordance with [Clause 19.6.2.1](#), the Secretary of State and the DBFO Co shall pay the monies standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law to be made from such account) to the DBFO Co.
- 19.7.7 If the Department's Representative gives a notice in accordance with [Clause 19.6.2.2](#), then pending the agreement or determination in accordance with the Disputes Resolution Procedure of all matters referred to in that notice, the Secretary of State and the DBFO Co shall retain in the Retention Account whichever is the lesser of:

19.7.7.1 the amount standing to the credit of the Retention Account (including accrued interest); and

19.7.7.2 the amount stated by the Department's Representative in the notice given in accordance with [Clause 19.6.2.2](#) as his estimate of the cost of completing the Renewal Works and/or of procuring that the Project Facilities comply in all respects with the Handback Requirements,

and the balance (if any) of any amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law to be made from such account) shall be paid to the DBFO Co in accordance with [Clause 19.7.6](#).

19.7.8 If any sum is retained in the Retention Account in accordance with [Clause 19.7.7](#), then the Secretary of State and the DBFO Co shall continue to hold such sum in the Retention Account pending the agreement or determination under the Disputes Resolution Procedure of all matters raised in the notice given by the Department's Representative in accordance with [Clause 19.6.2.2](#).

19.7.9 Within 14 days after the agreement or determination in accordance with the Disputes Resolution Procedure of the Handback Amount, the Secretary of State and the DBFO Co shall pay out of the Retention Account to the Secretary of State an amount equal to the Handback Amount or, if the amount standing to the credit of the Retention Account is insufficient to pay the Handback Amount in full, the entire amount (including accrued interest but less any bank charges and less any deductions required by any Law to be made from such account) standing to the credit of the Retention Account. Any remaining sums standing to the credit of the Retention Account (after deducting the amount payable to the Secretary of State and any bank charges and any deductions required by any Law to be made from such account) shall be paid by the Secretary of State and the DBFO Co out of the Retention Account to the DBFO Co.

19.7.10 If the amount standing to the credit of the Retention Account is less than the Handback Amount, then the payment of any sum to the Secretary of State in accordance with [Clause 19.7.9](#) in or towards satisfaction of the Handback Amount shall not in any way prejudice or affect any other rights or remedies of the Secretary of State for the purpose of recovering the remainder of the Handback Amount.

19.7.11 Upon the occurrence of an Event of Default, the Secretary of State may, at his option and without prejudice to any of his other rights or remedies, require that any amount standing to the credit of the Retention Account be applied in payment of any amount due from the DBFO Co to the Secretary of State or becoming due as a consequence of such Event of Default or any

termination of this Agreement (including, without limitation, any damages arising from such Event of Default). The DBFO Co and the Secretary of State shall pay to the Secretary of State out of the Retention Account such sum or, if the amount standing to the credit of the Retention Account is insufficient to pay such amount in full, the entire amount (including accrued interest but less bank charges and less any deductions required by any Law to be made from such account) standing to the credit of the Retention Account upon termination of this Agreement. Any remaining sums standing to the credit of the Retention Account (after deducting the amount payable to the Secretary of State and any bank charges and any deductions required by any Law to be made from such account) shall be paid by the Secretary of State and the DBFO Co out of the Retention Account to the DBFO Co.

- 19.7.12 The foregoing provisions of this Clause 19.7 [Retention Account] shall not apply if, not later than the date which is 5 years prior to the expected Expiry Date, the DBFO Co procures that a performance guarantee is provided to the Secretary of State in respect of the DBFO Co's obligations under this Clause 19 [Handback] (other than this Clause 19.7 [Retention Account]) by a bank or other institution approved by the Secretary of State and in form and substance acceptable to him (in each case in his absolute discretion).

20. **INSURANCE**

20.1 **Insurance Cover**

- 20.1.1 The DBFO Co shall take out and maintain in force the insurances specified in [Schedule 10](#) [Insurance] ("the insurances") throughout the relevant stages of the Contract Period as follows:

20.1.1.1 the DBFO Co shall procure that the insurances identified in [paragraphs 1.1, 1.3, 1.4 and 1.6 of Schedule 10](#) [Insurance] are taken out prior to and maintained in force at all times during the undertaking of any Investigation referred to in [Clause 6.2](#) [Investigations and Surveys], any other preparatory works referred to in [Clause 6.3](#) [Other Preparatory Works], or any works by Relevant Authorities pursuant to [Clause 6.4](#) [Works by Relevant Authorities] or any works pursuant to [Clause 6.5](#) [Works Prior to the Actual CS Commencement Date];

20.1.1.2 in relation to the Firm Schemes the DBFO Co shall procure that the insurances identified in [paragraph 1 of Schedule 10](#) [Insurance] are taken out prior to the commencement of the Works (other than the CS Works and the Bridge Replacement Works) and are maintained in force until the issue of the Completion Certificate (or such later date identified in [Schedule 10](#));

- 20.1.1.3 in relation to the Contingent Scheme the DBFO Co shall procure that the insurances identified in [paragraph 1 of Schedule 10](#) [Insurance] are taken out prior to the commencement of the CS Works and are maintained in force until the issue of the CS Completion Certificate (or such later date identified in [Schedule 10](#) [Insurance]);
- 20.1.1.4 in relation to the Bridge Replacement Works in respect of a Part of the BRW New Road the DBFO Co shall procure that the insurances identified in [paragraph 1 of Schedule 10](#) [Insurance] are taken out prior to the commencement of the Bridge Replacement Works in respect of such Part of the BRW New Road and are maintained in force until the issue of the relevant BRW Completion Certificate (or such later date identified in [Schedule 10](#) [Insurance]); and
- 20.1.1.5 the DBFO Co shall procure that the insurances identified in [paragraph 2 of Schedule 10](#) [Insurance] are taken out:
 - 20.1.1.5.1 in respect of the Existing Road, prior to the commencement of any activities in respect of the operation and maintenance of the Existing Road;
 - 20.1.1.5.2 in respect of the New Road or any Part of the New Road, prior to the issue of the relevant Permit to Use; and
 - 20.1.1.5.3 in respect of the Docklands Roads, after the issue of the Docklands Roads Certificate but prior to the commencement of any activities in respect of the operation and maintenance of the Docklands Roads,

and are maintained in force throughout the Contract Period or, in respect of any De-Trunked Segment, until the date of the relevant Taking Over Certificate.

- 20.1.2 The DBFO Co shall procure that, save in respect of the policies referred to in [paragraphs 1.2 and 2.2 of Schedule 10](#), the Secretary of State is named as sole loss payee on all the policies referred to in [Schedule 10](#) and that the interest of the Secretary of State is noted on such insurance policies. For the avoidance of doubt, it is accepted and understood that in respect of those third party, employer's and public liability and professional indemnity policies referred to in [Schedule 10](#) where the party claiming to have suffered the loss or damage in respect of which a claim under any policy is made ("the Third Party Claimant") is someone other than:

- 20.1.2.1 the Secretary of State; or

20.1.2.2 a sub-contractor or another named insured under the policy,

the Secretary of State will expressly waive his right to receive the insurance proceeds provided that, in the case of employer's liability insurance, the employee in respect of whom a claim is made will be deemed to be a Third Party Claimant, notwithstanding the fact that he will be part of a named insured. (For ease of reference hereinafter this exception will be referred to as the "Clause 20.1.2 Proviso").

20.1.3 Prior to taking out, replacing, or changing any such insurances, or requesting or permitting the amendment, waiver, deletion, or addition to any of the provisions of the policies of insurance or any endorsements or attachments thereto, 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:

20.1.3.1 the identity of the insurer; and

20.1.3.2 the terms and conditions of the insurances (including without limitation, policy limits, sub-limits, attachments and endorsements) or any revision to such terms and conditions; and

20.1.3.3 details of any warranties contained in the insurances (which expression hereinafter in this Clause 20 shall include any pre-emption warranties which form the basis of the contract of insurance).

20.1.4 No insurances shall be taken out and no insurances which have been taken out in accordance with the terms of this Agreement shall be assigned or changed or replaced and no amendment, waiver, deletion, or addition to any of the provisions of the policies of insurance or of any endorsements or attachments thereto shall be permitted and no rights of the DBFO Co under the insurances or to the proceeds thereof shall be assigned unless the Secretary of State in his absolute discretion agrees the insurances or any assignment, change, replacement, amendment, waiver, deletion or addition thereto and until there shall have been no objection in accordance with the Review Procedure:

20.1.4.1 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);

20.1.4.2 to the terms, conditions and warranties of such insurances on the grounds set out in [paragraph 3.11 of Part 3 of Schedule 7](#) [Review Procedure]; or

20.1.4.3 to the proposed assignment.

The DBFO Co shall procure that (save in respect of the policies referred to in [paragraphs 1.2 and 2.2 of Schedule 10](#)) any assignment is expressed to be subject to the Secretary of State's rights as sole loss payee.

20.1.5 The DBFO Co shall procure that the policy of insurance actually taken out (or any policy taken out in substitution therefor or as a supplement thereto) conforms in every respect with the terms, conditions and warranties agreed by the Secretary of State pursuant to the Review Procedure.

20.1.6 The DBFO Co shall not take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any of the insurances.

20.2 Policies and Copies

The DBFO Co shall:

20.2.1 if requested by the Secretary of State, provide copies of all information given to underwriters, either at the time of placing the policies or during the currency thereof, and procure and take all steps necessary to ensure that this information (and any held by third parties acting on the DBFO Co's behalf) is retained for a period of not less than 10 years after the termination of the Agreement;

20.2.2 furnish all insurance policies, placing slips, cover notes, and endorsements or attachments, and amendments and replacements of the same 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;

20.2.3 shall provide and/or shall take all steps and will give all necessary instructions to procure the provision of the said policies and the other documents referred to in this Clause 20.2 and such additional evidence of compliance with this Clause 20 [Insurance] as may reasonably be requested by the Department's Nominee;

20.2.4 procure that the said original policies and the original of the documents referred to in this Clause 20.2 (with the exception of the policies referred to in [paragraph 1.2 and 2.2 of Schedule 10](#)) are held to the order of the Secretary of State whose prior written consent is required for their release.

20.3 Rights of Subrogation, Non-Vitiation, Changes to Policy Provisions, Waiver of Disclosure Obligation and Notice of Cancellation

20.3.1 All policies of insurance taken out shall contain clauses to the effect that insurers agree:

20.3.1.1 that (with the exception of the policies referred to in paragraphs 1.2 and 2.2 of Schedule 10 and claims where the Clause 20.1.2 Proviso applies) all monies payable in respect of the policy shall be paid to the Secretary of State as sole loss payee under the policy;

20.3.1.2 to waive their rights to receive from the Secretary of State disclosure of material information;

20.3.1.3 a non-vitiation/severability clause to the effect that all the provisions of the policies (except the sums insured/limits of liability) shall operate as if there were a separate policy for each named insured and that the non-compliance with any policy, term, condition or warranties or the non-disclosure and/or misrepresentation of material information by the DBFO Co or any other co-assured will not affect the rights and/or interests of the Secretary of State under the policies;

20.3.1.4 to waive all rights of subrogation against the Secretary of State and his servants and agents;

20.3.1.5 (without prejudice to Clause 20.1.4), that no reduction in limits or coverage or increases in deductibles, exclusions or exceptions shall be made to the policy without the prior written consent of the Secretary of State, not to be unreasonably withheld or delayed;

20.3.1.6 (without prejudice to the right and power of the Secretary of State to adduce additional information to insurers), that the DBFO Co shall have the obligation to provide all information required by insurers, including, without limitation, evidence or proof of loss in connection with any claim;

20.3.1.7 that no claims under the policy for amounts in excess of £20,000 (in October 1998 prices) may be settled with insurers without the prior written consent of the Secretary of State, not to be unreasonably withheld or delayed; and

- 20.3.1.8 that all monies payable in respect of the policy shall be paid without deduction or set-off (howsoever and whensoever arising).
- 20.3.2 All such policies of insurance shall provide for 30 days written notice to be given to the Secretary of State prior to any cancellation, non-renewal or modification of any such policy.
- 20.3.3 In this Clause 20.3 "Unavailable" means in relation only to a clause referred to in [Clause 20.3.1.2](#) that the clause is not unavailable for inclusion in an insurance policy required by this Agreement by reasons of the actions of the DBFO Co, the Contractor, the Operator, the Designer or any other employee, contractor or sub-contractor or agent for whose actions or omissions the DBFO Co is, under the terms of this Agreement, responsible and that clause is not available in the worldwide insurance market in respect of that risk. A clause referred to in [Clause 20.3.1.2](#) will be deemed not to be available in the worldwide insurance market if either:
- 20.3.3.1 the DBFO Co has demonstrated to the satisfaction of the Secretary of State that such a clause is not offered by any insurer who would be considered a good security by any of the top 5 insurance brokers in the UK (determined by their average annual brokerage income over the preceding 3 years); or
- 20.3.3.2 the DBFO Co has demonstrated to the satisfaction of the Secretary of State that the additional premiums charged for the inclusion of such a clause are so high that none of the top 5 insurance brokers in the UK (determined as aforesaid) are recommending that the same or substantially similar businesses take out policies which include such clauses.
- 20.3.4 If the DBFO Co believes that a clause required by [Clause 20.3.1.2](#) has become unavailable then the DBFO Co shall promptly notify the Secretary of State.
- 20.3.5 If the DBFO Co and the Secretary of State agree, or it is determined pursuant to the Disputes Resolution Procedure that the clause is Unavailable, the parties shall meet to discuss the means by which the risk should be managed, but until such agreement is reached or if agreement cannot be reached the DBFO Co shall not be relieved of its obligations under this Agreement, save for its obligation to include such a clause for a period of one year from the date when the agreement was reached or the determination made that the clause was Unavailable, the DBFO Co shall be relieved of its obligation to include such a clause for a further year, and thereafter the determination shall be made on a yearly basis as to whether the clause is Unavailable.

20.4 Renewal Certificates

Renewal certificates in relation to the 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) and a summary of any proposed modification, amendment or variation to the insurances in accordance with [Clause 20.1.3](#) and [20.1.4](#) above shall be forwarded to the Department's Nominee as soon as possible and in any event at least 30 days before the renewal date.

20.5 Secretary of State's Right to Insure

If the DBFO Co fails or refuses to obtain or maintain in force any insurance required to be effected by it under the provisions of this Clause 20 [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 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.

20.6 Claims and Application of Proceeds

20.6.1 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 20 [Insurance] and shall allow the Department's Nominee to inspect such register at any time.

20.6.2 Without prejudice to the right and power (which is hereby agreed and confirmed) of the Secretary of State to adduce additional information to insurers, the DBFO Co shall have the obligation to provide all information required by the insurer including, without limitation, evidence or proof of loss in connection with any claim.

20.6.3 The DBFO Co shall inform the Secretary of State in writing as soon as reasonably practicable after it becomes aware of the occurrence of any event that may give rise to a claim under a policy of insurance required by this Clause 20 [Insurance] and will ensure that the Secretary of State is kept fully informed of subsequent action and developments concerning the claim provided that such written information shall not be required in relation to any claim of less than £20,000 (in October 1998 prices). The DBFO Co hereby undertakes that it will not settle any insurance claim with insurers for amounts in excess of £20,000 (in October 1998 prices), without the prior written agreement of the Secretary of State (such agreement not to be unreasonably withheld or delayed).

20.6.4 The DBFO Co shall:-

- 20.6.4.1 procure and take all steps as are necessary and appropriate for the opening and maintenance of:
 - 20.6.4.1.1 an insurance proceeds account in the joint names of the Secretary of State and the DBFO Co (the "SoS Insurance Account"), (and that any interest accrued on any money standing to the credit of the SoS Insurance Account shall be added to the SoS Insurance Account); and
 - 20.6.4.1.2. a separate insurance account in the name of the DBFO Co into which the proceeds or any payment from insurers of the policies referred to at [paragraphs 1.2 and 2.2 of Schedule 10](#) (the "Business Interruption Account"), (and that any interest accrued on any money standing to the credit of the Business Interruption Account shall be added to the Business Interruption Account);
- 20.6.4.2 procure that where the [Clause 20.1.2 Proviso](#) applies, the insurers undertake to make all payments under the policies of insurance direct to the Third Party Claimant;
- 20.6.4.3 procure that any proceeds paid by insurers in respect of the insurances referred to in [paragraph 1.2 and 2.2 of Schedule 10](#) are paid into the Business Interruption Account;
- 20.6.4.4 procure and shall take all necessary steps to facilitate, the payment of all other proceeds received from insurers of the policies required by this Clause 20 [Insurance] into the SoS Insurance Account;
- 20.6.4.5 forthwith on the request of the Department's Nominee grant a first charge over its interest in the SoS Insurance Account, in the Agreed Form referred to in [Clause 2.3.1.10](#); and
- 20.6.4.6 forthwith on the request of the Department's Nominee execute such documents and do such things as the Secretary of State may require in accordance with [Clause 45.6](#).
- 20.6.5 Other than the SoS Insurance Account First Charge referred to in [Clause 2.3.1.10](#), the DBFO Co shall not, except as provided in [Clause 45.6](#), grant any Encumbrance over or in respect of the SoS Insurance Account or any sums standing to the credit thereof from time to time.
- 20.6.6 The DBFO Co shall procure that the broker who has arranged the policies specified in [Schedule 10](#) [Insurance] "the Broker":

- 20.6.6.1 accepts that as from the date of this Agreement he will act both for the Secretary of State as well as for the DBFO Co and will owe to the Secretary of State the duties and give the undertakings and warranties specified in the Letter of Undertaking at [Schedule 10A](#);
 - 20.6.6.2 warrants to the Secretary of State that the levels of cover under the policies of insurance are sufficient to meet the requirements of [Schedule 10](#);
 - 20.6.6.3 undertakes to procure and take all steps necessary to ensure that save in respect of those policies referred to in [paragraphs 1.2 and 2.2 of Schedule 10](#) and save where the [Clause 20.1.2 Proviso](#) applies, all proceeds due from insurers shall be paid to the Secretary of State as sole loss payee subject to [Clause 20.6.7](#) and that the only valid receipt insurers may accept in discharge of their obligations is that of the Secretary of State or the Third Party Claimant where the [Clause 20.1.2 Proviso](#) applies;
 - 20.6.6.4 enters into a direct agreement with the Secretary of State in the form of the Letter of Undertaking set out at [Schedule 10A](#); and
 - 20.6.6.5 that any Broker(s) appointed during the currency of this Agreement in substitution for the Broker referred to in [Clause 20.6.6](#) above shall owe the Secretary of State the like obligations and give the like warranties as are set out in [Schedule 10A](#) and in this [Clause 20.6.6](#) and shall enter into a similar agreement to that set out in [Schedule 10A](#).
- 20.6.7 The Secretary of State agrees that unless the sums received from insurers are in respect of claims made by the Secretary of State himself or are claims in respect of which the Secretary of State is entitled to an indemnity under the policy, all sums will be paid immediately, and in any event, within seven days of their receipt, into the SoS Insurance Account. The DBFO Co hereby accepts and shall procure that the sums in the SoS Insurance Account are applied to repair, reinstate or replace those elements of the Project in respect of which proceeds of insurance were required or are applied to reimburse the party who has already undertaken the repair, reinstatement or replacement.
- 20.6.8 Where sums in the SoS Insurance Account are to be applied to repair, reinstate or replace elements of the Project, the DBFO Co shall deliver as soon as practicable and in any event within 28 days after making the claim under its insurance, a plan prepared by the DBFO Co for the carrying out of the works necessary ("the Reinstatement Works") to repair, reinstate or replace ("the Reinstatement Plan") those elements of the Project which are the subject of the claim in accordance with [Clause 20.6.12](#) below.

- 20.6.9 The Reinstatement Plan shall set out:
- 20.6.9.1 the identity of the persons proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Secretary of State; and
 - 20.6.9.2 the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Secretary of State.
- 20.6.10 Provided that the Secretary of State is satisfied that the Reinstatement Plan will enable the DBFO Co to comply with Clause 20.6.12 below within a reasonable timescale:
- 20.6.10.1 the Reinstatement Plan will be adopted;
 - 20.6.10.2 the DBFO Co shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the approved Reinstatement Plan approved by the Secretary of State;
 - 20.6.10.3 the Secretary of State shall consent to sums being withdrawn from the SoS Insurance Account (together with any interest accrued) to enable the DBFO Co to make payments in accordance with the terms of the contractual arrangements referred to in Clause 20.6.9.2, and to meet any other costs and expenses of the Contractor for the sole purposes of funding the Reinstatement Works.
- 20.6.11 After the Reinstatement Plan has been implemented to the reasonable satisfaction of the Secretary of State and in accordance with Clause 20.6.12 the Secretary of State shall permit the withdrawal by the DBFO Co of excess sums in the SoS Insurance Account that are not required to be paid for the Reinstatement Works.
- 20.6.12 Where insurance proceeds are to be used to repair, reinstate or replace any elements of the Project, the DBFO Co shall carry out the work in accordance with the Construction Requirements so that on completion of the work, the provisions of this Agreement are complied with.

20.7 Risks that become Uninsurable

- 20.7.1 In this Clause 20, "Uninsurable" means, in relation to a risk, that the risk is not uninsurable by reason of the actions of the DBFO Co, the Contractor, the Operator, the Designer, or any other employee, contractor or sub-contractor or agent for whose actions or omissions the DBFO Co is under the terms of this Agreement responsible, and that insurance is not available in the worldwide insurance market in respect of that risk. A risk shall be deemed to be not available in the worldwide insurance market if:
- 20.7.1.1 either cover is not offered by any insurer who would be considered a good security by any of the top 5 insurance brokers in the UK (determined by their average annual brokerage income over the preceding 3 years);
 - 20.7.1.2 or the DBFO has demonstrated to the satisfaction of the Secretary of State that the premiums charged for such cover are so high that none of the top 5 insurance brokers in the UK (determined as aforesaid) are recommending that the same or substantially similar businesses take out policies to cover such risk.
- 20.7.2 If the DBFO Co believes that a risk covered by insurance required by [Clause 20.1](#) has become Uninsurable then the DBFO Co shall promptly notify the Secretary of State.
- 20.7.3 If the DBFO Co and the Secretary of State agree, or it is determined pursuant to the Disputes Resolution Procedure that the risk is Uninsurable then the parties shall meet to discuss the means by which the risk should be managed, but until such agreement is reached or if agreement cannot be reached the DBFO Co shall not be relieved of its obligations under this Agreement, save for its obligation to insure such risk for a period of one year from the date when the agreement was reached or the determination made that the risk was Uninsurable. If at the end of such one year period it is agreed or determined that the risk remains Uninsurable, the DBFO Co shall be relieved of its obligation to insure such risk for a further year, and thereafter the determination shall be made on a yearly basis as to whether the risk is Uninsurable.
- 20.7.4 On the occurrence of an event, the risk of which is Uninsurable but which would otherwise have given rise to a loss in respect of which a recovery could have been made from insurers, the Secretary of State shall in his sole discretion:
- 20.7.4.1 either notify the DBFO Co that it intends to treat the event as if it were an Eligible Force Majeure event, and to exercise his right to terminate pursuant to the second sentence of [Clause 42.2.1](#);

20.7.4.2 or pay to the DBFO Co an amount equal to the insurance proceeds that would have been payable had the relevant insurance continued to be available, and the Contract will continue.

20.7.5 From the date on which a risk becomes Uninsurable the Monthly Payments made to the DBFO Co pursuant to [Clause 32.2](#) shall be reduced by one twelfth of the annual premium which was, immediately prior to such risk becoming Uninsurable, payable to insure such risk.

20.8 Savings

20.8.1 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.

20.8.2 The supply to the Department's Nominee of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 20 [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.

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

21.1 Connecting Roads

Without prejudice to [Clause 39.1.16](#), the Secretary of State shall repair and maintain the Connecting Roads throughout the Contract Period having regard to the character of the highway and the traffic which is reasonably to be expected to use it and to the standard of maintenance appropriate for a highway of that character and used by such traffic.

21.2 Information

The Secretary of State shall provide to the DBFO Co such information within his possession or control with respect to the Project as the DBFO Co may reasonably request to enable it to perform its obligations under this Agreement, provided that the Secretary of State shall have no obligation to provide any information with respect to which he is subject to an obligation of confidentiality (whether under any Law or contract or otherwise).

PART III
RELATIONSHIPS AND MONITORING

22. REPRESENTATIVES

22.1 The Department's Agent and Department's Representative

- 22.1.1 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 (other than the CS Works and the Bridge Replacement Works) and, prior to the issue of the Completion Certificate, the maintenance of the New Road (other than the New CS Road and the BRW 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.
- 22.1.2 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 22.1.1. 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. In discharging his functions relating to the CS Works and the Bridge Replacement Works, the Department's Representative will, insofar as they are applicable thereto, perform those functions which are performed by the Department's Agent in relation to the remainder of the Works and references in this Agreement to the Department's Agent, shall insofar as they relate to that part of the Works comprised by the CS Works and the Bridge Replacement Works be construed as if they were references to the Department's Representative.
- 22.1.3 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.
- 22.1.4 Notwithstanding the provisions of Clause 22.1.2, the Secretary of State may nominate, in relation to the Contingent Scheme or in relation to the Bridge Replacement Works in respect of a Part of the BRW New Road, a Department's Agent to act as his agent in connection with the design, construction, completion, commissioning and testing of the CS Works or Bridge Replacement Works (as the case may be) and, prior to the issue of the CS Completion Certificate or BRW Completion Certificate, the maintenance of the New CS Road or such Part of the BRW New Road, such Department's Agent shall carry out 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. In the absence of such nomination the Department's Representative shall carry out the relevant functions.

22.1.5 The provisions of Clauses 22.1.6, 22.1.7 and 22.1.8 shall apply if and so long as there is more than one Department's Agent, in accordance with the definition of that term.

22.1.6 In respect of any function to be carried out by a Department's Agent:

22.1.6.1 which relates wholly to one Part of the New Road, or the performance of which in relation to one Part of the New Road does not affect the Operations in relation to any other Part of the New Road, such function shall be carried out by whichever Department's Agent is, in accordance with the definition of that term, responsible for the Part of the New Road to which such function relates;

22.1.6.2 which wholly or partly relates to, or affects the Operations in relation to, more than one Part of the New Road and involves a submission or notification to be made by the DBFO Co, then the DBFO Co shall request the Secretary of State to nominate one only of the Department's Agents who shall be responsible for responding to that submission or notification, which nomination shall be made and communicated to the DBFO Co in writing within 5 Working Days of the request for such nomination by the DBFO Co. The DBFO Co shall only be obliged to communicate with and satisfy the requirements of the Department's Agent nominated in respect of the particular submission or notification in order to have fulfilled its obligations to communicate with and satisfy the Department's Agent with respect to such submission or notification; or

22.1.6.3 which wholly or partly relates to, or affects the Operations in relation to, more than one Part of the New Road and is not covered by Clause 22.1.6.2 above, then the Secretary of State may, or at the DBFO Co's request shall, nominate only one of the Department's Agents who shall be responsible for that function, which nomination in the latter case shall be made and communicated to the DBFO Co in writing within 5 Working Days of the request for such nomination by the DBFO Co, provided that if the Secretary of State is of the opinion that it is necessary or desirable for more than one of the Department's Agents to carry out such function, he may nominate more than one of the Department's Agents. In the event of any conflict between the instructions or actions of the Department's Agents in relation to the same matter, the matter shall be referred to the Secretary of State, who shall resolve such conflict and the

DBFO Co shall not be obliged to follow any such conflicting instructions until the conflict has been resolved by the Secretary of State.

- 22.1.7 Where the Secretary of State has nominated one only of the Department's Agents pursuant to [Clause 22.1.6.3](#), the DBFO Co shall only be obliged to communicate with and satisfy the requirements of the Department's Agent nominated in respect of the particular function in order to have fulfilled its obligations to communicate with and satisfy the Department's Agent with respect to such function.
- 22.1.8 The Secretary of State may at any time, by notice to the DBFO Co, change the Department's Agent which is at that time nominated in accordance with [Clause 22.1.6.2](#) or [Clause 22.1.6.3](#) to fulfil any particular function.
- 22.1.9 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.
- 22.1.10 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.
- 22.1.11 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.
- 22.1.12 Any decision by any Department's Nominee is specific to the circumstances to which it relates, and shall not be construed as binding on, or limiting any other decision to be made by, that or any other Department's Nominee, whether in the same or similar circumstances or otherwise.
- 22.1.13 For the avoidance of doubt the Department's Nominee shall be entitled to consult anyone he considers appropriate in connection with the discharge of his duties in relation to this Agreement.

22.2 DBFO Co's Representative and Contractor's Representative

- 22.2.1 The DBFO Co shall appoint a competent and qualified person to act as its agent in connection with this agreement. Such appointment shall be subject to the approval of the Secretary of State, such approval not to be unreasonably withheld or delayed.

22.2.2 The DBFO Co's Representative shall have full authority to act on behalf of the DBFO Co for all purposes of this Agreement. The Secretary of State, 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.

22.2.3 Until the date specified in Clause 22.3, the Secretary of State, the Department's Agent and the Department's Representative shall be entitled to treat any act of the Contractor's Representative in connection with this Agreement as being expressly authorised by the Contractor and to treat the Contractor's Representative as their sole point of contact with the Contractor and as the person authorised to accept on behalf of the Contractor service or delivery of all notices or information 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.

22.3 Change of Representatives

22.3.1 The Secretary of State may, at any time and from time to time by notice to the DBFO Co, terminate the appointment of any Department's Agent or Department's Representative or appoint one or more substitute Department's Agents or Department's Representatives. Any such notice shall specify the date on which such termination or substitution shall have effect, which date shall, other than in the case of an emergency, be such as will not cause serious inconvenience to the DBFO Co in the execution of its obligations hereunder.

22.3.2 Save in the case of death or serious illness, the appointment of the DBFO Co's Representative shall not be terminated 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.

22.3.3 If the Contractor proposes to change the Contractor's Representative, the DBFO Co shall procure that at least 28 days prior notice is given to the Secretary of State, Department's Agent and Department's Representative of the date on which such change will be effective and such notice will include the name and contact details of the proposed new Contractor's Representative.

23. QUALITY MANAGEMENT

23.1 Quality Management Systems and Documentation

- 23.1.1 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 23 [Quality Management].
- 23.1.2 The Quality Management Systems referred to in Clause 23.1.1 shall comply with:
- 23.1.2.1 the relevant part of the BS EN ISO 9000 series;
 - 23.1.2.2 the Technical Requirements (other than the requirement set out in Clause 23.1.2.1); and
 - 23.1.2.3 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].
- 23.1.3 Without limitation to the generality of Clause 23.1.2, there shall be:
- 23.1.3.1 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");
 - 23.1.3.2 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");
 - 23.1.3.3 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");
 - 23.1.3.4 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

- 23.1.3.5 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].
- 23.1.4 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 3.12 of Part 3 of Schedule 7](#) [Review Procedure]).
- 23.1.5 Without prejudice to Clause 23.1.8, it shall not be necessary to submit to the Review Procedure in accordance with the provisions of Clause 23.1.4 the Quality Documentation (or parts thereof) included in [Part 2 of Schedule 5](#) [Quality Documentation].
- 23.1.6 The DBFO Co shall comply with the DBFO Co's Quality Documentation and shall procure that:
- 23.1.6.1 the Designer complies with the Designer's Quality Documentation;
 - 23.1.6.2 the Contractor complies with the Contractor's Quality Documentation;
 - 23.1.6.3 the Operator complies with the Operator's Quality Documentation; and
 - 23.1.6.4 any other party contracting with the DBFO Co complies with that party's Quality Documentation.
- 23.1.7 Where any aspect of the Operations is performed by more than one contractor or sub-contractor, then the provisions of this Clause 23 [Quality Management] shall apply in respect of each of such contractors or sub-contractors, and references in this Clause 23 [Quality Management] to the Designer, Contractor and Operator or any other party shall be construed accordingly.
- 23.1.8 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 3.12 of Part 3 of Schedule 7](#) [Review Procedure]).

- 23.1.9 Without limitation to the generality of [Clause 23.1.8](#), 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 23.1.2](#). The Department's Nominee may object to any such proposed change only on the grounds set out in [paragraph 3.12 of Part 3 of Schedule 7](#) [Review Procedure].
- 23.1.10 If the DBFO Co fails to propose any change required pursuant to Clause 23.1.9, 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.
- 23.1.11 If there is no objection under the Review Procedure to a part of the Quality Documentation referred to in [Clause 23.1.4](#) or a change, addition or revision proposed pursuant to [Clause 23.1.8](#), Clause 23.1.9 or Clause 23.1.10, then the Quality Documentation shall be amended to incorporate such part, change, addition or revision.

23.2 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 23.1.2](#).

23.3 Additional Information

Notwithstanding any other provision of this Clause 23 [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 23 [Quality Management] and the provisions of [Part 1 of Schedule 5](#) [Principles for Quality Documentation].

23.4 Trials and Testing

- 23.4.1 Where the DBFO Co is required by Table NG 1/1 in the Notes for Guidance to carry out any calibration, sample, trial or test, such calibration,

sample, trial or test shall be carried out by the Testing Contractor in accordance with the following provisions of this Clause 23.4 [Testing].

- 23.4.2 Save as referred to in Clause 23.4.3, all on-site and off-site calibrations, samples, trials and tests shall be carried out by laboratories accredited by the United Kingdom Accreditation Service ("UKAS") for such calibrations, samples, trials and tests. Accreditation shall be Category 0 for an off-site laboratory and Category II for an on-site laboratory.
- 23.4.3 In respect of any calibration, sample, trial or test to be carried out at an on-site laboratory during an initial period not exceeding 30 days from the first calibration, sample, trial or test to be carried out at that laboratory:
- 23.4.3.1 the DBFO Co shall take two samples for calibration, sampling, trial or testing, one of which shall be calibrated, sampled, tried and tested at the on-site laboratory; and
- 23.4.3.2 if the on-site laboratory does not obtain a Category II UKAS accreditation within such initial period, then the calibration, sample, trial or test referred to in Clause 23.4.3.1 shall not constitute a valid calibration, sample, trial or test in accordance with this Agreement and the second set of samples shall be taken to and calibrated, sampled, tried or tested at an off-site laboratory which is Category 0 UKAS accredited.
- 23.4.4 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, trial or test required in accordance with this Agreement or as a result of any laboratory not being accredited as required by this Agreement.

23.5 DBFO Co Quality Director

The DBFO Co shall at all times, employ a DBFO Co Quality Director, who shall, irrespective of his other responsibilities, have defined authority for ensuring the establishment and maintenance of the DBFO Co's Quality Management System and reporting on the performance of the DBFO Co's Quality Management System. The identity of the DBFO Co Quality Director (and any replacement) and his job specification and responsibilities shall be subject to the approval of the Secretary of State (such approval not to be unreasonably withheld or delayed). Without limitation to the foregoing, the job specification and responsibilities of the DBFO Co Quality Director shall include:

- 23.5.1 ensuring the effective operation of the DBFO Co's Quality Management System;
- 23.5.2 auditing the DBFO Co's Quality Management System and the other Quality Management Systems referred to in [Clause 23.1.1](#) at regular

intervals and reporting the findings of such audits to the Department's Nominee;

- 23.5.3 reviewing all Quality Management Systems referred to in [Clause 23.1.1](#) at intervals agreed with the Department's Nominee to ensure their continued suitability and effectiveness;
- 23.5.4 liaising with the Department's Nominee on all matters relating to quality management; and
- 23.5.5 ensuring that relevant quality records are retained for the retention periods required by [Clause 25](#) [Records].

23.6 Quality Monitoring

Without limitation to [Clause 26](#) [Monitoring of Performance], the Department's Nominee may carry out audits of the Quality Management Systems referred to in [Clause 23.1.1](#) (including without limitation 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.

24. **REPORTS AND INFORMATION**

24.1 Required Reports

The DBFO Co shall submit to the Department's Nominee the reports specified in [Part 2 of Schedule 14](#) [Reports], in such numbers as provided therein, which reports shall, at the Department's Nominee's request, be accompanied by a copy of such report or any part thereof on computer diskette or other electronic storage device in such form and compatible with such software as the Department's Nominee shall reasonably require.

24.2 Form

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

24.3 Further Information

The DBFO Co shall at any time and from time to time at its own cost provide to the Department's Agent or the Department's Representative such information (including any copy correspondence) with respect to the Project as the Department's Agent or the Department's Representative may reasonably require.

24.4 Objections to Reports

- 24.4.1 If the Department's Nominee considers that any Report either has not been compiled in accordance with the provisions of this Agreement or has been

based on erroneous information or data, then it may serve a notice to that effect on the DBFO Co within 28 days of receipt of such Report objecting to such Report.

24.4.2 If any such objection has not been resolved by agreement between the Department's Nominee and the DBFO Co within 14 days after the service of such notice, then either of them may refer the matter to the Disputes Resolution Procedure.

24.5 Revisions to Reports

If either:

24.5.1 the resolution (whether by agreement or determination under the Disputes Resolution Procedure) of any objection made pursuant to [Clause 24.4.1](#); or

24.5.2 the correction of any calculation pursuant to [Clause 31.7](#) [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.

24.6 TUPE Information

24.6.1 Where notified in writing by the Secretary of State to do so, the DBFO Co shall provide TUPE Information to the Secretary of State within 14 days of such notice.

24.6.2 The Secretary of State may disclose TUPE Information to any Prospective Tenderer and, if requested by the DBFO Co to do so, shall ensure that prior to such disclosure the prospective tenderer undertakes not to disclose (unless required by law to do so) the information to any other person other than a person who:

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

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

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

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

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

24.6.3.3 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.

24.6.4 Subject to [Clause 24.6.2](#) above and unless required by law to do so, the Secretary of State shall not disclose TUPE Information (or any part of that information) to any other person.

24.6.5 For the purposes of this Clause 24.6 [TUPE Information], "TUPE Information" means written details of:

24.6.5.1 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;

24.6.5.2 in relation to each employee who falls within the scope of Clause 24.6.5.1 above:

24.6.5.2.1 the employee's date of birth and gender and the terms of any pension scheme of which the employee is a member (so that appropriate pension entitlements can be calculated and provided for); and

24.6.5.2.2 the employee's salary, normal working hours, length of service, contractual period of notice, any pay settlement covering future dates which has already been agreed by the DBFO Co and any redundancy entitlement;

24.6.5.3 information relating to or connected with the employment of employees falling within the scope of Clause 24.6.5.1 above, including details of:

24.6.5.3.1 terms and conditions of employment including terms incorporated from any collective agreement;

24.6.5.3.2 any outstanding or potential liability for past breaches of such contracts;

- 24.6.5.3.3 any employee who is on sick, maternity or other statutory or contractual leave (other than normal holiday leave) whether paid or unpaid;
 - 24.6.5.3.4 any outstanding or potential statutory liability (for example, any claim for unfair dismissal or under non-discrimination legislation); and
 - 24.6.5.3.5 any other outstanding or potential liability to be met by the Prospective Tenderer if its tender is accepted; and
- 24.6.5.4 such other information as the Secretary of State may reasonably require in relation to the DBFO Co's employees or the employees of its contractors (other than the name or other details which enable any employee to be identified unless both the DBFO Co and that employee have consented in writing to the provision of such details).
- 24.6.6 For the purposes of this Clause 24.6 [TUPE Information], "Prospective Tenderer" means a person who has been or is to be invited to submit a tender in relation to the provision of works or services of a similar type to any of those provided by the DBFO Co.

24.7 Changes to the Workforce

- 24.7.1 During the 12 month period preceding the expiry of this Agreement or at any time after either Party has given notice to terminate this Agreement, the DBFO Co shall not without the prior written agreement of the Secretary of State (which consent shall not be unreasonably withheld or delayed):
- 24.7.1.1 materially amend or offer, promise or agree for the future materially to amend the terms and conditions of employment of any employee falling within the scope of [Clause 24.6.5.1](#); or
 - 24.7.1.2 materially increase or make offers of employment so as materially to increase the number of employees whose work (or any part of it) is work undertaken for the purposes of this Agreement.
- 24.7.2 In Clause 24.7.1 above, what is material:
- 24.7.2.1 for the purposes of the phrase "materially amend" shall be determined by considering the individual contract of employment as a whole; or

24.7.2.2 for the purposes of the phrase "materially increase" shall be determined by considering this Agreement as a whole.

24.8 Parliamentary Questions and Issues

- 24.8.1 Without prejudice to [Clause 24.3](#), the DBFO Co shall, at its own cost and within the timescale from time to time prescribed by the Secretary of State to ensure compliance with all relevant procedures, provide any information within the possession of the DBFO Co or any company which is at the relevant time an Associated Company of the DBFO Co or any of their respective directors, officers, employees, servants or agents which is requested by the Secretary of State in relation to his statements to or responses to questions or issues raised by or on behalf of the United Kingdom Parliament, or any member thereof.
- 24.8.2 Notwithstanding the provisions of [Clause 50](#) [Confidentiality], the Secretary of State shall be entitled to disclose in the course of carrying out his public functions any information to which Clause 24.8.1 applies to the extent that he deems necessary or appropriate and shall not be obliged to keep any such information confidential.

24.9 Development Control

Without prejudice to [Clause 24.3](#), the DBFO Co shall, upon 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 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:

- 24.9.1 review the development proposals (including any planning application and related papers);
- 24.9.2 submit to the Secretary of State preliminary, reasoned advice describing in detail the safety and traffic implications (if any) that such proposals might have in relation to the Project Facilities;
- 24.9.3 advise the Secretary of State whether it considers that any further action (including the commissioning of any further investigations or studies) is required or desirable in the circumstances as a consequence of such proposals;
- 24.9.4 keep the Secretary of State informed of the progress of the development proposals including the progress of any planning application,

provided that such further action as referred to in [Clause 24.9.3](#) (other than further review or advice by the DBFO Co) that the Secretary of State determines is necessary shall be commissioned by the Secretary of State at his own expense.

24.10 Effects of Docklands Tunnel Surface Development

In relation to possible developments on the Docklands Roads or the surface above the East India Dock Link Tunnel the DBFO Co shall in addition to the services referred to in [Clause 24.9](#) advise upon request by the Secretary of State on the effect of such development on the structural integrity of the East India Dock Link Tunnel.

25. **RECORDS**

25.1 Required Records

25.1.1 The DBFO Co shall maintain and update those records relating to the Project set out in [Part 1 of Schedule 14](#) [Records].

25.1.2 The Secretary of State shall be entitled at his own cost within 180 days after the Commencement Date (or in the case of Road Segment 2 the date set out in the By-Pass Notice if later) to deliver up to the DBFO Co the existing records of the Secretary of State (or copies thereof) in respect of the Project Facilities (or any part thereof). In such event, the DBFO Co shall retain such records in safe storage at its own cost and such records shall thereafter be treated for all purposes as though they were part of the records referred to in Clause 25.1.1.

25.1.3 The Secretary of State shall be entitled at his own cost within 180 days of the Actual CS Commencement Date to deliver up to the DBFO Co all records in relation to the Contingent Scheme (or copies thereof). In such event, the DBFO Co shall retain such records at its own cost and such records shall thereafter be treated for all purposes as though they were part of the records referred to in Clause 25.1.1.

25.1.4 The Secretary of State shall be entitled at his own cost within 180 days of the Actual DR Commencement Date to deliver up to the DBFO Co the existing records of the Secretary of State (or copies thereof) in respect of the Docklands Roads (or any part thereof). In such event, the DBFO Co shall retain such records in safe storage at its own cost and such records shall thereafter be treated for all purposes as though they were part of the records referred to in Clause 25.1.1.

25.2 Audit

The records referred to in Clause 25.1 [Required Records] shall be kept in good order and in such form as to be capable of audit (including by electronic means) by the Department's Nominee. The DBFO Co shall make such records available for

inspection by or on behalf of the Secretary of State, the Department's Agent and the Department's Representative at all reasonable times.

25.3 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.

25.4 Retention of Records

25.4.1 Without prejudice to any Legal Requirement, all records referred to in [Clause 25.1](#) [Required Records] shall be retained for no less than the period specified in respect of such records in [Part 1 of Schedule 14](#) [Records] or, if no such period is specified, a period of 7 years after the end of the Contract Year to which such records relate.

25.4.2 Where the period for the retention of any records (as set out against the relevant class of records in [Part 1 of Schedule 14](#) [Records]) has expired, then the DBFO Co shall notify the Secretary of State as to what it intends to do with such records. If it intends to dispose of them or subsequently decides to dispose of them, the DBFO Co shall notify the Secretary of State, and if the Secretary of State shall within 40 days of such notice elect to receive those records or any part of them the DBFO Co, at its own cost, shall deliver up such records to the Secretary of State in the manner and at such location as the Secretary of State shall reasonably specify.

25.4.3 Upon the termination, for whatever reason, of this Agreement, the DBFO Co shall, at its own cost, deliver up to the Secretary of State, in the manner and at such location as the Secretary of State shall reasonably specify, all such records as are referred to in [Clause 25.1](#) [Required Records] which were in existence at the Termination Date (or, where those records are required by 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 25.4.3, subject to reasonable notice.

25.4.4 The DBFO Co shall retain in safe storage for a period of not less than 15 years following the Termination Date all such records as are referred to in Clause 25.4.3 which the Secretary of State does not require to be delivered up to him. The costs of retaining those records in safe storage shall be borne:

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

- 25.4.4.2 by the Secretary of State where the termination arises as a result of a DBFO Co Termination Event; and
- 25.4.4.3 in cases of termination other than those governed by [Clauses 25.4.4.1](#) and 25.4.4.2 by the DBFO Co and the Secretary of State in equal proportions.

25.5 Computer Records

To the extent that the records of the DBFO Co are to be created or maintained on a computer or other electronic storage device, then the DBFO Co shall agree with the Department's Nominee a procedure for back-up and off-site storage for copies of such records and shall adhere to such agreed procedure and shall cause the Contractor, the Designer, the Operator and its or their sub-contractors to implement and adhere to such agreed procedure.

26. MONITORING OF PERFORMANCE

26.1 Breach of this Agreement

26.1.1 The DBFO Co shall notify the Department's Nominee of the occurrence of any matter specified in [Schedule 18](#) [Penalty Points] and any other breach of its obligations under this Agreement as soon as practicable after it becomes aware of such matter but in any case within 7 days of such matter becoming apparent to the DBFO Co or, if earlier, of the date upon which the same ought reasonably to have become apparent to the DBFO Co.

26.1.2 If at any time the Department's Nominee is of the opinion that the DBFO Co has failed to perform any of its obligations under this Agreement (whether or not such failure has been notified under Clause 26.1.1) and such failure is capable of remedy, then the Department's Nominee will, unless such matter relates to safety or constitutes an emergency or unless a notice under this clause has been served in respect of the same kind of failure within the preceding one year or where the matter to which the failure relates occurs annually only, then within the preceding two years, 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 (which shall be at least 14 days) (the "Remedial Period") and for the avoidance of doubt a failure to perform shall include a failure to remedy as required by this Clause 26.1.2.

26.2 Penalty Points

26.2.1 If at any time:

- 26.2.1.1 any Report indicates or the Department's Nominee is notified or otherwise becomes aware that the DBFO Co has failed to

perform any of its obligations under this Agreement which obligation is incapable of remedy; or

26.2.1.2 the Department's Nominee serves a notice under [Clause 26.1.2](#) and the DBFO Co fails to remedy the failure within the Remedial Period,

then the 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].

26.2.2 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.

26.2.3 The DBFO Co may, within 28 days of receipt of any notice pursuant to [Clause 26.2.1](#), object to the award of any such Penalty Points or, where Penalty Points have been awarded in respect of a matter which is not set out in [Schedule 18](#) [Penalty Points], to the number of such Penalty Points. If the Department's Nominee and the DBFO Co are unable to reach agreement on any such matter within 14 days of such objection by the DBFO Co, either may refer the Dispute for resolution under the Disputes Resolution Procedure. In respect of any Dispute as to the number of Penalty Points to be awarded pursuant to Clause 26.2.2, the issue for decision shall be 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.

26.3 Warning Notices

Without prejudice to any other right or remedy available to the Secretary of State, if at any time the DBFO Co has committed any material breach of its obligations under this Agreement or has been awarded a total of 100 or more Penalty Points in any 3 year period, then the Department's Nominee may give written notice (herein called a "Warning Notice") to the DBFO Co setting out in general terms the matter or matters giving rise to such notice and containing a reminder to the DBFO Co of the implications of such notice. Any such notice shall state on its face that it is a "Warning Notice" and shall be signed by or on behalf of the Secretary of State.

26.4 Increased Monitoring

In the event of the DBFO Co either:

26.4.1 being awarded a total of 50 or more Penalty Points in any 1 year period; or

26.4.2 receiving one or more Warning Notices,

the Department's Nominee may (without prejudice to any other right or remedy available to the Secretary of State) by notice to the DBFO Co increase the level of its monitoring of the DBFO Co until such time as the DBFO Co shall have demonstrated to the reasonable satisfaction of the Department's Nominee that it will perform and is capable of performing its obligations under this Agreement. The notice to the DBFO Co shall specify the additional measures to be taken by the Department's Nominee in monitoring the DBFO Co in response to the matters which led to such Penalty Points being awarded or Warning Notice sent. The DBFO Co shall compensate the Secretary of State for all costs incurred by him as a result of such increased level of monitoring (including, without limitation, the relevant administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads).

26.5 Step-In Rights

26.5.1 Without prejudice to Clause 26.5.2, if at any time the Department's Nominee serves a notice under [Clause 26.1.2](#) and the DBFO Co fails to remedy the failure within the Remedial Period, then the Secretary of State may (without prejudice to any other right or remedy available to him) himself take such steps as necessary to remedy such failure or engage others to take such steps, and the provisions of [Clauses 26.5.3](#) and [26.5.4](#) shall apply.

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

26.5.2.1 in the event that the Secretary of State considers that a breach by the DBFO Co of an obligation under this Agreement may create an immediate and serious threat to public safety;

26.5.2.2 in the event of an emergency; or

26.5.2.3 where it appears to the Secretary of State necessary or expedient in the interests of road safety;

26.5.2.4 where it appears to the Secretary of State necessary in order to secure the carrying out of any statutory function; or

26.5.2.5 where it appears to the Secretary of State whether as a result of information received from the Traffic Director for London or

otherwise that the DBFO Co has failed to comply with its obligations to maintain red route traffic signs and road markings in accordance with the requirements of [Paragraph 4 of Annex 1 of Part 1 of Schedule 6](#),

the Secretary of State may give notice requiring the DBFO Co forthwith to take such steps as he considers necessary or expedient to mitigate or preclude such state of affairs. In the event that the DBFO Co shall fail to take such steps as the Secretary of State may think necessary and within such time as the Secretary of State shall think fit, then the Secretary of State may take such steps himself or engage others to take such steps, and the provisions of Clauses 26.5.3 and 26.5.4 shall apply.

26.5.3 To the extent that the Parties shall agree, or it shall be determined under the Disputes Resolution Procedure, that the DBFO Co had not failed to perform its obligations under this Agreement (in the case of any action taken pursuant to [Clause 26.5.1](#)) or the Secretary of State was not reasonable in requiring the DBFO Co to take such steps as are referred to in [Clause 26.5.2](#) or, in the case of [Clause 26.5.2.1](#), that no such breach had occurred or, in the case of [Clause 26.5.2.4](#), such steps were not necessary in order to secure the carrying out of any statutory function (any such determination to be made on the basis of the facts available to the Secretary of State at the time he took or required such action to be taken), then the provisions of [Part 4 of Schedule 12](#) [Compensation Events] shall apply.

26.5.4 Except in the circumstances referred to in Clause 26.5.3, the DBFO Co shall reimburse the Secretary of State for all costs incurred by him in taking the steps or engaging others to take the steps referred to in [Clause 26.5.1](#) or [Clause 26.5.2](#) (including, without limitation, the relevant administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads).

26.6 Removal of Personnel

The Department's Nominee may require the DBFO Co to remove forthwith from the Site and Adjacent Areas any person who, in the opinion of the Department's Nominee, misconducts himself or is incompetent or negligent in the proper performance of his duties, or whose presence on the Site or Adjacent Areas is otherwise considered by the Department's Nominee to be undesirable, and such person shall not be again allowed upon the Site or the Adjacent Areas without the consent of the Department's Nominee.

27. **STATUTORY POWERS**

27.1 Application

Whenever the exercise by the Secretary of State of any statutory power is essential to enable the DBFO Co to perform any obligation under this Agreement, the provisions

of this Clause 27 [Statutory Powers] shall apply, save where the provisions of [Schedule 22](#), [Clause 28.4.4](#) and/or [Clause 29.3.4](#) apply.

27.2 Procedure

27.2.1 If the DBFO Co believes that the exercise by the Secretary of State of any statutory power is essential to enable the DBFO Co to perform any obligation under this Agreement, the DBFO Co shall give notice to that effect to the Secretary of State.

27.2.2 Any notice given by the DBFO Co in accordance with Clause 27.2.1 shall:

27.2.2.1 clearly specify the action requested of the Secretary of State, the duty of the DBFO Co under this Agreement in respect of which such action is requested and the reasons why such action by the Secretary of State is required;

27.2.2.2 indicate the time by which the requested action is required; and

27.2.2.3 set out any recommendation by the DBFO Co in respect of the requested action.

27.2.3 Within 21 days after receipt of a notice given in accordance with Clause 27.2.1, the Secretary of State shall acknowledge receipt of such notice and shall give his good faith estimate of the date on which he will respond on the merits of the request, provided that no such estimate shall be binding on the Secretary of State.

27.2.4 The Secretary of State shall respond to the merits of the request contained in the notice given in accordance with Clause 27.2.1 as soon as reasonably practicable in the circumstances, taking into consideration, inter alia, any requirement for consultation with the public or other interested parties in connection with such request.

27.3 No Fetter on Discretion

The Secretary of State shall consider on its merits in accordance with his statutory duties any request for action contained in a notice given in accordance with Clause 27.2.1. Without in any way limiting the discretion of the Secretary of State in responding to any such request, the Secretary of State shall, in reaching any such decision, give consideration, inter alia, to the matters set out in Clause 27.4 [Relevant Considerations]. The decision of the Secretary of State on the merits of the request shall not be subject to review under the Disputes Resolution Procedure.

27.4 Relevant Considerations

The considerations referred to in Clause 27.3 [No Fetter on Discretion] are the following:

- 27.4.1 whether the Secretary of State has the statutory power to take the action requested;
- 27.4.2 whether there is any alternative course available to the DBFO Co (and the cost of such alternative course) which would not require action by the Secretary of State;
- 27.4.3 the effect the requested action would have on the interests of any third parties;
- 27.4.4 whether the timing and substance of the request is such as to enable the Secretary of State to consider the merits of the request in accordance with the principles of procedural fairness (taking into account, where appropriate, the necessity or desirability of consultation with other interested parties); and
- 27.4.5 whether the action requested would have any implications for safety, either of Users or of any other third parties.

27.5 Refusal of Request

- 27.5.1 Subject to Clause 27.5.2, 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 27.2.1](#).
- 27.5.2 The DBFO Co shall be relieved of its liability in accordance with Clause 27.5.1 only if it has taken all steps necessary to mitigate the effects of the refusal of the Secretary of State to take the requested action.
- 27.5.3 If the failure to take any action requested in a notice given in accordance with [Clause 27.2.1](#) renders impossible (and not merely more expensive) the DBFO Co's performance of this Agreement (as a whole) or has a fundamental effect on the rights or obligations of the DBFO Co under this Agreement, then following:
 - 27.5.3.1 consultation for a period of not less than 120 days from the date of the Secretary of State's response under [Clause 27.2.4](#) to reach a solution acceptable to both Parties; and
 - 27.5.3.2 (if applicable) such period as is reasonably necessary for the implementation of such solution,the DBFO Co shall be entitled to terminate this Agreement in accordance with [Clause 42.4](#) [Termination under Clause 27].

27.6 Traffic Regulation Orders

- 27.6.1 Whether or not [Clause 27.1](#) [Application] applies, the DBFO Co (at its own cost) shall be responsible for, and shall provide to the Secretary of State, all data gathering, document preparation, administrative and other support and liaison (including preparation of plans, publication of notices, administrative steps required to serve notices and serving notices) in such manner and at such times as to enable the Secretary of State to make any traffic regulation order in respect of the Project Road.
- 27.6.2 Without prejudice to the generality of Clause 27.6.1 the DBFO Co shall propose and progress draft traffic regulation orders and any ancillary documents in relation to the imposition of speed limits on the Project Road as the Secretary of State may specify from time to time.

28. **STATUTORY UNDERTAKERS**

28.1 Definitions

For the purpose of this Clause 28 [Statutory Undertakers]:

- 28.1.1 "Apparatus" means all apparatus (including apparatus as defined in the 1991 Act) located in, on, under, over, across, along or adjacent to the Site or Adjacent Areas;
- 28.1.2 "Authorised Functions" means each of the functions conferred on the Secretary of State by the 1991 Act which the DBFO Co is authorised by the Secretary of State from time to time to exercise pursuant to [Clause 28.4.1](#) or [28.4.5](#), as the case may be;
- 28.1.3 "Authorisation Period" means either the Contract Period or the period commencing on the Commencement Date and expiring 10 years therefrom, whichever is shorter;
- 28.1.4 "Bridge Authority" has the meaning given in Section 88 (1)(b) of the 1991 Act;
- 28.1.5 "Codes of Practice" means the codes of practice issued from time to time pursuant to Part III of the 1991 Act;
- 28.1.6 "Diversionary Works" means works involving the diversion, change in level, protection or removal of Apparatus or other works in relation to Apparatus which are necessary to facilitate the execution of the Operations;
- 28.1.7 "Highway Authority" has the same meaning as ascribed in the Highways Act;
- 28.1.8 "Major Highway Works" means both major highway works as defined in Section 86(3) of the 1991 Act and major bridge works as defined in Section 88 (2) of the 1991 Act;
- 28.1.9 "the Regulations" means regulations issued pursuant to Part III of the 1991 Act;
- 28.1.10 "Renewed Authorisation Period" has the meaning given in [Clause 28.4.5.2](#);
- 28.1.11 "Street Authority" has the meaning given in Section 49(1) of the 1991 Act;
- 28.1.12 "Street Works Licences" has the meaning given in Section 50(1) of the 1991 Act;

- 28.1.13 "Sample Inspections" has the meaning given to it in the Code of Practice entitled Code of Practice for Inspections;
- 28.1.14 "Traffic Authority" has the meaning given in Section 121A of the Road Traffic Regulation Act 1984;
- 28.1.15 "Works for Road Purposes" has the meaning given in Section 86(2) of the 1991 Act;
- 28.1.16 "1991 Act" means the New Roads and Street Works Act 1991;
- 28.1.17 "1995 Order" means the Contracting Out (Highway Functions) Order 1995 (SI 1995/1986);
- 28.1.18 "affected" or "affecting" shall be regarded as including the meaning given to "affected" in Section 105(4) of the 1991 Act; and
- 28.1.19 "Street Works Register" means the register referred to in Section 53(1) of the 1991 Act.

28.2 Primary Duty of Co-ordination

- 28.2.1 The DBFO Co covenants with the Secretary of State to use its best endeavours to co-ordinate the execution of works of all kinds affecting the Project Facilities and the surrounding highway network:
 - 28.2.1.1 in the interests of safety;
 - 28.2.1.2 so as to minimise the inconvenience to persons using the Project Facilities having regard in particular to the needs of people with disabilities; and
 - 28.2.1.3 so as to protect the structure of the Project Facilities and the integrity of Apparatus,and in accordance with all relevant Codes of Practice.
- 28.2.2 The DBFO Co shall comply with such directions as to the co-ordination of works of all kinds, including the co-ordination of works on streets other than the Project Road, as the Secretary of State may give from time to time consistent with Good Industry Practice.

28.3 The 1991 Act

- 28.3.1 In constructing and operating the Project Facilities and otherwise performing the Operations, the DBFO Co shall comply with the 1991 Act, the Regulations, the Codes of Practice and any requirements of Statutory

Undertakers notified to the DBFO Co or the Secretary of State pursuant to the 1991 Act.

- 28.3.2 The DBFO Co shall notify the Secretary of State of all proposed Major Highway Works, Diversionary Works and Works for Road Purposes necessary in connection with the Operations and shall contract, commit or compromise in respect of such works with Statutory Undertakers and carry out any such works in accordance with the 1991 Act, the Regulations, the Codes of Practice and the provisions of this Clause 28 [Statutory Undertakers].
- 28.3.3 The DBFO Co will be responsible for all costs of, and shall make all payments due to, Statutory Undertakers in connection with any Diversionary Works.
- 28.3.4 Subject to Clauses 28.3.5 and [28.6.2](#) the Secretary of State will pay to the DBFO Co within 28 days of receipt any monies actually received by him from any Statutory Undertaker in respect of the Project Facilities pursuant to any provision of the 1991 Act, the Regulations or the Codes of Practice, other than fees relating to Sample Inspections.
- 28.3.5 If a contribution is made to the Secretary of State pursuant to Section 78 of the 1991 Act then payment will only be made to the DBFO Co if the contribution relates to costs actually incurred or likely to be incurred by the DBFO Co during the 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.
- 28.3.6 At the request of the DBFO Co, and subject to an indemnity for all costs including administrative costs, general staff costs and overheads, the Secretary of State will use his reasonable endeavours to recover all damages, losses, charges, fees, contributions and costs due to the Secretary of State as Street Authority in respect of the Project Facilities pursuant to the 1991 Act, the Regulations or Codes of Practice.
- 28.3.7 Other than where the DBFO Co keeps the Street Works Register pursuant to [Clause 28.4](#) [Contracting Out of Functions] the DBFO Co shall provide to the keeper of the Street Works Register such information as may be prescribed pursuant to Sections 53 and 54 of the 1991 Act and such other information of which it becomes aware as is eligible for registration and shall make any payment or payments to such party as the Secretary of State may require pursuant to Section 53(5) of the 1991 Act, and the DBFO Co shall maintain, at all times, a terminal linked to the Street Works Register for the purposes of giving and receiving notices and information affecting the Project Road and the surrounding road network.
- 28.3.8 Subject to the provisions of Section 50 and Schedule 3 of the 1991 Act, the Secretary of State will, as soon as is reasonably practicable after receiving

a request from the DBFO Co, grant a Street Works Licence to the DBFO Co in respect of any specified part of the Project Road on the following terms:

- 28.3.8.1 it shall be non-assignable;
 - 28.3.8.2 it shall not inure beyond the shorter of the Contract Period and the period during which the Secretary of State is Street Authority in respect of the Project Road; and
 - 28.3.8.3 it shall only be exercisable after consultation with any affected Relevant Authority or person owning Apparatus.
- 28.3.9 The DBFO Co shall refer to the relevant Street Works Register to determine designation of the Project Road in connection with streets subject to special controls pursuant to Section 61 to 64 of the 1991 Act.
- 28.3.10 The DBFO Co shall notify the Secretary of State of any possible offence committed or likely to be committed by a Statutory Undertaker under the 1991 Act of which the DBFO Co is or should reasonably be aware and shall provide such information relating to such offence as may be specified by the Secretary of State.
- 28.3.11 The DBFO Co will, at all times, assist and facilitate the Secretary of State in carrying out, and shall take all steps necessary to ensure that the Secretary of State is able to comply with, his duties under the 1991 Act, the Regulations and the Codes of Practice.
- 28.3.12 The DBFO Co shall take such actions as are appropriate to inform all interested parties of its role on behalf of the Secretary of State pursuant to Clauses 28.4 [Contracting Out of Functions] and 28.5 [Management of Operations affecting Apparatus].

28.4 Contracting Out of Functions

- 28.4.1 Subject to the provisions of this Clause 28.4 [Contracting Out of Functions] and pursuant to the 1995 Order, the DBFO Co is hereby authorised by the Secretary of State as Street Authority, Highway Authority, Bridge Authority and Traffic Authority (as the case may be) for the Authorisation Period to exercise in respect of the Project Facilities each of the functions of the Secretary of State listed in [Part 1 of Schedule 19](#) [Authorised Functions]. The DBFO Co shall take such actions as are necessary for the efficient transfer of any such function to the DBFO Co.
- 28.4.2 The DBFO Co shall exercise properly and fully each of the Authorised Functions in respect of the Project Facilities for as long as any authorisation made under this Clause 28.4 [Contracting Out of Functions]

is effective. For the avoidance of doubt any authorisation under this Clause 28.4 shall be effective from:

- 28.4.2.1 in relation to the Existing Road and the Firm Schemes, the Commencement Date but in the case of Road Segment 2 from the date set out in the By-Pass Notice if later;
- 28.4.2.2 in relation to the Contingent Scheme, the Actual CS Commencement Date for the Contingent Scheme;
- 28.4.2.3 in relation to the Docklands Roads, the Actual DR Commencement Date;
- 28.4.2.4 in relation to a Part of the BRW New Road, the Actual BRW Commencement Date for that Part of the BRW New Road.

provided that at such date an Authorisation Period or Renewed Authorisation Period is effective. Notwithstanding that in accordance with this Clause 28.4 an authorisation in respect of the Road Segment 2 or the Docklands Roads or the Contingent Scheme or a Part of the BRW New Road becomes effective from a date other than the commencement of an Authorisation Period or a Renewed Authorisation Period, such authorisation shall only continue until the end of such Authorisation Period or Renewed Authorisation Period (unless renewed or further renewed in accordance with Clause 28.4.5).

28.4.3 The authorisation made under this Clause 28.4 [Contracting Out of Functions] in respect of an Authorised Function is made on the following terms:

28.4.3.1 it shall be non assignable; and

28.4.3.2 the DBFO Co shall not delegate any such Authorised Function.

28.4.4 On or before the expiry of the Authorisation Period (or any Renewed Authorisation Period) in respect of an Authorised Function the DBFO Co may request the Secretary of State to renew the authorisation for any period not exceeding 10 years from the date of renewal. The decision whether or not to renew the authorisation in whole or in part shall be in the absolute discretion of the Secretary of State. The decision of the Secretary of State shall not be subject to review under the Disputes Resolution Procedure.

28.4.5 If, following a request under Clause 28.4.4, the Secretary of State decides to renew the authorisation, he shall confirm the same by notice in writing to the DBFO Co. Such notice shall specify:

28.4.5.1 the function of the Secretary of State which the DBFO Co is authorised to exercise in respect of the Project Facilities; and

- 28.4.5.2 the authorisation period, which shall not exceed the shorter of the Contract Period and 10 years from the date of the renewal (the "Renewed Authorisation Period").
- 28.4.6 If the 1995 Order or any replacement order made under Sections 69 and 77 of the Deregulation and Contracting Out Act 1994 shall cease for whatever reason to be in effect, the DBFO Co may request the Secretary of State to take such action as necessary to bring into effect a further order in respect of part or all of the functions the subject of the original order. The provisions of [Clauses 27.2](#) [Procedure], [27.3](#) [No Fetter on Discretion] and [27.4](#) [Relevant Considerations] (but for the avoidance of doubt not [Clause 27.5](#) [Refusal of Request]) shall apply mutatis mutandis to any such request.
- 28.4.7 In exercising the Authorised Functions the DBFO Co shall act in accordance with the principles of administrative law which govern the conduct of the Secretary of State and, without prejudice to the generality of the foregoing, shall:
- 28.4.7.1 obey all relevant Legal Requirements, and administrative and procedural requirements;
- 28.4.7.2 not take any decisions or actions which may be considered perverse and liable to be quashed; and
- 28.4.7.3 obey the rules of natural justice.
- 28.4.8 For so long as any authorisation under this Clause 28.4 [Contracting Out of Functions] is effective the DBFO Co shall include in the Monthly Report details of all actions taken by the DBFO Co pursuant to the Authorised Functions, including without limitation details of:
- 28.4.8.1 all notices given and received;
- 28.4.8.2 all directions and consents given to Statutory Undertakers;
- 28.4.8.3 all agreements, commitments or compromises reached with Statutory Undertakers with regard to Diversionary Works; and
- 28.4.8.4 any arbitration proceedings commenced or proposed.
- 28.4.9 Without prejudice to the generality of Clause 28.4.8, the DBFO Co shall provide the Department's Nominee with copies of all consents and directions given by the DBFO Co and all notices given and received by the DBFO Co pursuant to the 1991 Act.

- 28.4.10 If the DBFO Co fails to exercise any Authorised Function in the manner set out in [Clause 28.4.7](#) then the Secretary of State may withdraw or suspend the authorisation in respect of such Authorised Function. Such suspension or withdrawal shall not be treated by the DBFO Co as a repudiation by the Secretary of State.
- 28.4.11 If an authorisation under this Clause 28.4 [Contracting Out of Functions] is revoked by the Secretary of State, other than in accordance with Clause 28.4.10, then for the purposes of Section 73 of the Deregulation and Contracting Out Act 1994 "relevant contract" shall mean this Clause 28.4 [Contracting Out of Functions] and no other provision of this Agreement.
- 28.4.12 On the expiry or revocation of an authorisation under this Clause 28.4 [Contracting Out of Functions], the DBFO Co shall take such actions as are necessary for the efficient transfer of any such function to such person as the Secretary of State may designate.

28.5 Management of Operations Affecting Apparatus

- 28.5.1 If, at any time an authorisation under [Clause 28.4](#) [Contracting Out of Functions] is revoked or expires (and is not renewed) the DBFO Co shall be released from exercising and shall not exercise the relevant Authorised Function. Subject to Clause 28.5.3, the DBFO Co shall instead perform those services set out in [Part 2 of Schedule 19](#) [Services in Relation to the Secretary of State's Functions] (if any) which relate to the same function of the Secretary of State as the Authorised Function which has been revoked or has expired.
- 28.5.2 In addition to its obligations under [Clause 28.4](#) [Contracting Out of Functions] or Clause 28.5.1 (as the case may be) but subject to Clause 28.5.3, the DBFO Co shall throughout the Contract Period perform the services set out in [Part 3 of Schedule 19](#) [Other Services].
- 28.5.3 In carrying out its services pursuant to this Clause 28.5 [Management of Operations Affecting Apparatus], the DBFO Co shall not contract with, enter into binding commitments with, compromise with, give a notice of intention to proceed to, impose obligations upon, issue Street Works Licences to or seek to recover costs from Statutory Undertakers or carry out works affecting Statutory Undertakers without the prior written approval of the Secretary of State.
- 28.5.4 For the purposes of Clause 28.5.3, the approval of the Secretary of State may be given from time to time either in terms relating to a particular contract, commitment, compromise or works or upon terms relating to particular classes of contracts, commitments, compromises or works.
- 28.5.5 Actions taken by the DBFO Co pursuant to this Clause 28.5 and [Part 2](#) or [Part 3 of Schedule 19](#) shall not in any way limit or fetter the discretion of

the Secretary of State in the discharge or exercise of his duties or powers. The decision of the Secretary of State on the merits of any recommendation made by the DBFO Co pursuant to this Clause 28.5 and [Part 2](#) or [Part 3 of Schedule 19](#) shall not be subject to review under the Disputes Resolution Procedure.

28.6 The Secretary of State's Responsibility

- 28.6.1 Without prejudice to the DBFO Co's obligations pursuant to [Clause 28.3.12](#) the Secretary of State shall:
- 28.6.1.1 from time to time, at the request of the DBFO Co, notify Statutory Undertakers that, subject to the terms and conditions set out in this Clause 28 [Statutory Undertakers], the DBFO Co will be exercising the Authorised Functions or will be performing the services set out in [Clause 28.5](#) [Management of Operations affecting Apparatus] (as the case may be); and
 - 28.6.1.2 notify the DBFO Co promptly of any Statutory Undertaker's requirements or notices or any notices from Street Authorities for streets other than the Project Road (but which affect the Project Road) which he receives pursuant to the 1991 Act, the Regulations or the Codes of Practice.
- 28.6.2 If works are necessary as a consequence of an event described in Section 82(2) of the 1991 Act then those works shall be considered as a Department's Change and any sums received by the Secretary of State from any Statutory Undertaker shall not be subject to [Clause 28.3.4](#).

29. **OTHER FUNCTIONS OF THE SECRETARY OF STATE**

29.1 **Definitions**

For the purpose of this Clause 29 [Other Functions of the Secretary of State]:

- 29.1.1 "Highway Authority" has the same meaning as ascribed in the Highways Act;
- 29.1.2 "Statutory Provisions" means the provisions of the statutes and regulations set out in [Schedule 20](#) [Contracted Out Functions of the Secretary of State] and (subject to [Clause 29.3.7.3](#)) the provisions of any statute or regulation which the Secretary of State has authorised the DBFO Co to exercise pursuant to [Clause 29.3.7](#);
- 29.1.3 "Third Party" means any third party (but excluding any Statutory Undertaker to the extent that the provisions of [Clause 28](#) [Statutory Undertakers] apply in relation to such Statutory Undertaker in any particular case);
- 29.1.4 "Third Party Authorised Functions" means each of the functions conferred on the Secretary of State by the Statutory Provisions, which the DBFO Co is authorised by the Secretary of State from time to time to exercise pursuant to [Clause 29.3.1](#), [Clause 29.3.5](#) or (subject to [Clause 29.3.7.3](#)) [Clause 29.3.7](#);
- 29.1.5 "Third Party Authorisation Period" means, in the case of an authorisation pursuant to [Clause 29.3.1](#) and subject to [Clause 29.3.2](#), either the Contract Period or the period commencing on the Commencement Date and expiring 10 years therefrom, whichever is shorter, or, in the case of an authorisation pursuant to [Clause 29.3.7.3](#), the period specified in the notice given by the Secretary of State pursuant to [Clause 29.3.7.2.2](#);
- 29.1.6 "Third Party Renewed Authorisation Period" has the meaning given in [Clause 29.3.5.2](#); and
- 29.1.7 "1995 Order" means the Contracting Out (Highway Functions) Order 1995 (SI 1995/1986).

29.2 **General**

- 29.2.1 Without limitation to [Clause 3.4](#) [Standard of Performance], the DBFO Co will, at all times, assist and facilitate the Secretary of State in carrying out, and shall take all steps necessary to ensure that the Secretary of State is able to comply with, his duties under the Statutory Provisions.
- 29.2.2 The DBFO Co shall take such actions as are appropriate to inform all interested parties of its role on behalf of the Secretary of State pursuant to

Clauses 29.3 [Contracting Out of Functions] and 29.4 [Management of Operations].

29.3 Contracting Out of Functions

29.3.1 Subject to the provisions of this Clause 29.3 [Contracting Out of Functions] and pursuant to the 1995 Order, the DBFO Co is hereby authorised by the Secretary of State as Highway Authority and as Minister under the Parish Councils Act 1957 (as the case may be) for the Third Party Authorisation Period to exercise in respect of the Project Facilities each of the functions of the Secretary of State listed in [Schedule 20](#) [Contracted Out Functions of the Secretary of State]. The DBFO Co shall take such actions as are necessary for the efficient transfer of any such function to the DBFO Co.

29.3.2 The DBFO Co shall exercise properly and fully each of the Third Party Authorised Functions in respect of the Project Facilities for as long as any authorisation made under this Clause 29.3 [Management of Operations] is effective. For the avoidance of doubt any authorisation under this Clause 29.3 shall be effective from:

29.3.2.1 in relation to the Existing Road and the Firm Schemes, the Commencement Date but in the case of Road Segment 3 from the date set out in the By-Pass Notice if later;

29.3.2.2 in relation to the Contingent Scheme, the Actual CS Commencement Date for the Contingent Scheme;

29.3.2.3 in relation to the Docklands Roads, the Actual DR Commencement Date; and

29.3.2.4 in relation to a Part of the BRW New Road, the Actual BRW Commencement Date for that Part of the BRW New Road.

provided that at such date an Authorisation Period or Renewed Authorisation Period is effective. Notwithstanding that in accordance with this Clause 29.3.2 an authorisation in respect of the Road Segment 2 or the Docklands Roads or Contingent Scheme or a Part of the BRW New Road becomes effective from a date other than the commencement of an Authorisation Period or a Renewed Authorisation Period, such authorisation shall only continue until the end of such Authorisation Period or Renewed Authorisation Period (unless renewed or further renewed in accordance with [Clause 29.3.5](#)).

29.3.3 The authorisation made under this Clause 29.3 [Contracting Out of Functions] in respect of a Third Party Authorised Function is made on the following terms:

- 29.3.3.1 it shall be non assignable; and
- 29.3.3.2 the DBFO Co shall not delegate any such Third Party Authorised Function.
- 29.3.4 On or before the expiry of the Third Party Authorisation Period (or any Third Party Renewed Authorisation Period) in respect of a Third Party Authorised Function the DBFO Co may request the Secretary of State to renew the authorisation for any period not exceeding 10 years from the date of renewal. The decision whether or not to renew the authorisation in whole or in part shall be in the absolute discretion of the Secretary of State. The decision of the Secretary of State shall not be subject to review under the Disputes Resolution Procedure.
- 29.3.5 If, following a request under Clause 29.3.4, the Secretary of State decides to renew the authorisation, he shall confirm the same by notice in writing to the DBFO Co. Such notice shall specify:
 - 29.3.5.1 the function of the Secretary of State which the DBFO Co is authorised to exercise in respect of the Project Facilities; and
 - 29.3.5.2 the authorisation period, which shall not exceed the shorter of the Contract Period and 10 years from the date of the renewal (the "Third Party Renewed Authorisation Period").
- 29.3.6 If the 1995 Order or any replacement order made under Sections 69 and 77 of the Deregulation and Contracting Out Act 1994 shall cease for whatever reason to be in effect, the DBFO Co may request the Secretary of State to take such action as necessary to bring into effect a further order in respect of part or all of the functions the subject of the original order. The provisions of [Clauses 27.2 \[Procedure\]](#), [27.3 \[No Fetter on Discretion\]](#) and [27.4 \[Relevant Considerations\]](#) (but for the avoidance of doubt not [Clause 27.5 \[Refusal of Request\]](#)) shall apply mutatis mutandis to any such request.
- 29.3.7 The DBFO Co may at any time and from time to time request the Secretary of State to authorise it to exercise any one or more of the functions conferred on the Secretary of State by the provisions of any of the statutes or regulations set out in any of the schedules to the 1995 Order (other than those functions authorised pursuant to [Clause 29.3.1](#) and [Clause 28.4.1](#)) and the following provisions shall apply to any such request by the DBFO Co:
 - 29.3.7.1 the provisions of [Clauses 27.2 \[Procedure\]](#), [27.3 \[No Fetter on Discretion\]](#) and [27.4 \[Relevant Considerations\]](#) (but for the avoidance of doubt not [Clause 27.5 \[Refusal of Request\]](#)) shall apply mutatis mutandis in relation to any such request pursuant to this Clause 29.3.7;

29.3.7.2 if the Secretary of State decides to make any such authorisation, he shall confirm the same by a notice in writing to the DBFO Co. Such notice shall specify:

29.3.7.2.1 the function(s) of the Secretary of State which the DBFO Co is authorised to exercise in respect of the Project Facilities; and

29.3.7.2.2 the authorisation period, which shall not exceed the shorter of the Contract Period and 10 years from the date of the grant of the authorisation; and

29.3.7.3 each of the statutes or regulations setting out one of the functions so authorised shall be deemed to be a Statutory Provision from the date of the authorisation and the provisions of this Clause 29 [Other Functions of the Secretary of State] applicable to Third Party Authorised Functions (other than this Clause 29.3.7) shall apply mutatis mutandis in respect of such function from such date.

The decision of the Secretary of State whether or not to accede to any request of the DBFO Co pursuant to this Clause 29.3.7 in whole or in part shall not be subject to review under the Disputes Resolution Procedure.

29.3.8 In exercising the Third Party Authorised Functions the DBFO Co will act in accordance with the principles of administrative law which govern the conduct of the Secretary of State and, without prejudice to the generality of the foregoing, will:

29.3.8.1 obey all relevant Legal Requirements, and administrative and procedural requirements;

29.3.8.2 not take any decisions or actions which may be considered perverse and liable to be quashed in a court of law; and

29.3.8.3 obey the rules of natural justice.

29.3.9 For so long as any authorisation under this Clause 29.3 [Contracting Out of Functions] is effective the DBFO Co shall include in the Monthly Report details of all actions taken by the DBFO Co or which the DBFO Co is aware of relating to the Third Party Authorised Functions, including without limitation details of:

29.3.9.1 all notices given and received;

- 29.3.9.2 all directions, permissions and consents given to Third Parties in the exercise of any Third Party Authorised Functions;
 - 29.3.9.3 all agreements, commitments or compromises reached with Third Parties in the exercise of any Third Party Authorised Functions; and
 - 29.3.9.4 any legal proceedings (including without limitation any appeals) commenced or proposed or threatened to be commenced in relation to any Statutory Provision or the exercise of any Third Party Authorised Function.
- 29.3.10 Without prejudice to the generality of [Clause 29.3.9](#), the DBFO Co shall provide the Department's Nominee with copies of all permissions, consents, directions and proceedings issued by the DBFO Co and all notices given and received by the DBFO Co and all proceedings (including without limitation any appeals) commenced against the DBFO Co in respect of any Statutory Provision or the exercise of any Third Party Authorised Function.
- 29.3.11 If the DBFO Co fails to exercise any Third Party Authorised Function in the manner referred to in [Clause 29.3.8](#) then the Secretary of State may withdraw or suspend the authorisation in respect of such Third Party Authorised Function. Such suspension or withdrawal shall not be treated by the DBFO Co as a repudiation by the Secretary of State.
- 29.3.12 If an authorisation under this Clause 29.3 [Contracting Out of Functions] is revoked by the Secretary of State, other than in accordance with Clause 29.3.11, then for the purposes of Section 73 of the Deregulation and Contracting Out Act 1994 "relevant contract" shall mean this Clause 29.3 [Contracting Out of Functions] and no other provision of this Agreement.
- 29.3.13 On the expiry or revocation of an authorisation under this Clause 29.3 [Contracting Out of Functions], the DBFO Co shall take such actions as are necessary for the efficient transfer of any such function to such person as the Secretary of State may designate.

29.4 Management of Operations

- 29.4.1 If at any time and from time to time:
- 29.4.1.1 an authorisation under [Clause 29.3](#) [Contracting Out of Functions] is revoked or expires (and is not renewed) the DBFO Co shall be released from exercising and shall not exercise the relevant Third Party Authorised Function and, subject to [Clause 29.4.5](#) and unless otherwise directed by the Secretary of State, the DBFO Co shall instead perform those services set out in [Clause 29.4.2](#) insofar as they apply to the

same function of the Secretary of State as the Third Party Authorised Function which has been revoked or has expired;

29.4.1.2 a Third Party requests the DBFO Co or the Secretary of State (and the Secretary of State notifies the DBFO Co of such request) to exercise in relation to the Project Facilities or the Operations any function of the Secretary of State as Highway Authority under any statute or regulation (other than a Third Party Authorised Function) (an "Other Function"), then, subject to [Clause 29.4.5](#) and unless otherwise directed by the Secretary of State, the DBFO Co shall perform those services set out in [Clause 29.4.2](#) insofar as they apply to the Other Function.

29.4.2 In the circumstances referred to in [Clauses 29.4.1.1](#) and [29.4.1.2](#), in relation to:

29.4.2.1 any application for a permission, consent, authorisation or other form of approval relating to the Project Facilities or the execution of the Operations the grant of which is required by Law to be made by or on behalf of the Secretary of State (an "Application"), the DBFO Co shall assemble all requisite documentation to support and explain the relevant Application and shall prepare a recommendation in respect of (i) any terms and conditions to be attached to any consent to the Application (if relevant) and (ii) the merits of the relevant Application, and submit the same to the Secretary of State. Upon the Secretary of State granting or refusing any Application, the DBFO Co shall upon notice from the Secretary of State take all necessary steps to give effect to any such grant or refusal and comply with the terms thereof;

29.4.2.2 any proceedings commenced by a Third Party relating to any decision made or condition imposed on an Application ("Appeal"), the DBFO Co shall assemble all requisite documentation and evidence to defend the Appeal and shall prepare a recommendation in respect of the merits of the relevant Appeal and submit the same to the Secretary of State;

29.4.2.3 any power to carry out any works on the Project Road by or on behalf of the Secretary of State and to recover the expenses from any Third Party, the DBFO Co shall assemble all relevant documentation and evidence necessary to explain why the said works should be carried out and prepare a recommendation as to how the said expenses should be recovered;

29.4.2.4 any requirement for a notice or a direction to a Third Party which is required by Law to be made by or on behalf of the Secretary of State (a "Direction"), the DBFO Co shall assemble

all requisite documentation to support and explain the Direction and prepare a recommendation as to whether the Direction should be made and the terms thereof. Upon the Secretary of State making a Direction the DBFO Co shall serve the Direction on the relevant Third Party on behalf of the Secretary of State;

- 29.4.2.5 any power to manage, maintain or provide facilities on any part of the Project Facilities by or on behalf of the Secretary of State, the DBFO Co shall prepare recommendations to the Secretary of State as and when required by the Secretary of State in respect of the exercise of the aforementioned powers in relation to the Project Facilities; and
- 29.4.2.6 any right of the Secretary of State as Highway Authority in relation to the Project Facilities to object to a proposed course of action by a Third Party ("Objection"), the DBFO Co shall assemble all requisite documentation and evidence in relation to the Objection and prepare a recommendation in relation to the Objection and submit the same to the Secretary of State.
- 29.4.3 As part of the Liaison Procedures the DBFO Co shall establish with the Department's Representative a procedure for the communication of the matters referred to in [Clause 29.4.2](#) to the Secretary of State.
- 29.4.4 Without limitation to [Clause 3.4](#) [Standard of Performance], the DBFO Co shall deal with all matters relating to its obligations pursuant to [Clause 29.4.2](#) in a timely and expeditious manner so as to ensure that the Secretary of State is able to discharge or exercise any relevant duty, power or discretion within the time required by Law.
- 29.4.5 In carrying out its services pursuant to this Clause 29.4 [Management of Operations], the DBFO Co shall not contract with, enter into binding commitments with, compromise with, give a notice of intention to proceed to, impose obligations upon, respond to any Application from or Appeal by, issue any Direction to or seek to recover costs from any Third Party or carry out works affecting any Third Party without the prior written approval of the Secretary of State.
- 29.4.6 For the purposes of Clause 29.4.5, the approval of the Secretary of State may be given from time to time either in terms relating to a particular matter relating to the relevant Statutory Provision or upon terms relating to particular classes of such matters.
- 29.4.7 Actions taken by the DBFO Co pursuant to this Clause 29.4 [Management of Operations] shall not in any way limit or fetter the discretion of the Secretary of State in the discharge or exercise of his duties or powers. The decision of the Secretary of State on the merits of any recommendation

made by the DBFO Co pursuant to [Clause 29.4.2](#) shall not be subject to review under the Disputes Resolution Procedure.

29.5 The Secretary of State's Responsibility

Without prejudice to the DBFO Co's obligations pursuant to [Clause 29.2.2](#), the Secretary of State shall:

- 29.5.1 from time to time, at the request of DBFO Co, notify Third Parties that, subject to the terms and conditions set out in this Clause 29 [Other Functions of the Secretary of State], the DBFO Co will be exercising the Third Party Authorised Functions or will be performing the services set out in [Clause 29.4](#) [Management of Operations] (as the case may be); and
- 29.5.2 notify the DBFO Co promptly of any Third Party's requirements, notices or details of legal proceedings which he receives relating to the Statutory Provisions.

30. **OTHER THIRD PARTIES**

30.1 Third Party Claims

- 30.1.1 The DBFO Co shall deal with any complaints received (whether received orally or in writing, and whether from a User or others) in a prompt, courteous and efficient manner.
- 30.1.2 If the DBFO Co receives any Claim from a third party:
 - 30.1.2.1 in the case of the Firm Schemes relating wholly to any period prior to the date of execution of this Agreement;
 - 30.1.2.2 in the case of the Contingent Scheme and subject always to [Clause 39.1.13](#) relating wholly to any period prior to the issue of the CS Commencement Certificate;
 - 30.1.2.3 in the case of the Docklands Roads, relating wholly to the period prior to the issue of the Docklands Roads Certificate,it shall promptly forward such Claim to the Secretary of State. All other Claims from third parties shall be dealt with in accordance with the provisions of [Clause 39](#) [Indemnities].

30.2 Claims Against Third Parties

- 30.2.1 Subject to [Clause 39.4](#) and 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 including, without limitation, any damage to property, any personal injury or death, and any loss of income (including without limitation any reduction in DBFO Payments).

30.2.2 For the avoidance of doubt, nothing in [Clause 30.2.1](#) shall affect:

30.2.2.1 any right of the Secretary of State to make or recover any Claim against any person referred to in [Clause 30.2.1](#) for damage suffered by the Secretary of State, its agents or contractors (other than the DBFO Co) or sub-contractors of any tier or the employees of any of them; or

30.2.2.2 any right of the DBFO Co to make or recover any Claim against any person referred to in [Clause 30.2.1](#) for damage suffered by the DBFO Co, its agents, contractors or sub-contractors of any tier, or the employees of any of them.

30.3 Conduct of Claims Against Third Parties

30.3.1 Subject to the prior consent of the Secretary of State (such consent not to be unreasonably withheld or delayed and to be on such terms as the Secretary of State may reasonably require), the DBFO Co may if necessary bring any action against a person referred to in [Clause 30.2.1](#) in the name of the Secretary of State, provided that the DBFO Co shall indemnify and keep indemnified the Secretary of State against all costs and expenses of and Losses and Claims arising out of any such action.

30.3.2 With respect to any action brought under [Clause 30.3.1](#) and without prejudice to any terms which the Secretary of State may reasonably require in accordance with such [Clause 30.3.1](#):

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

30.3.2.2 the DBFO Co shall consult with the Secretary of State about the conduct of any such action and shall take account of the reasonable requirements of the Secretary of State in the conduct of such action; and

30.3.2.3 the DBFO Co shall not settle any such action without the consent of the Secretary of State, 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 October 1998 prices).

30.4 Police

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

30.5 Interested Parties

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

30.5.2 Without limitation to Clause 30.5.1, the DBFO Co shall be responsible for discharging any requirements of any Relevant Authorities of which the DBFO Co has notice or ought reasonably to be aware from time to time.

30.6 Abnormal Indivisible Loads

30.6.1 Without prejudice to Clause 30.6.2, the DBFO Co will receive and process notifications for the movement of Abnormal Indivisible Loads, required by the Motor Vehicle (Authorisation of Special Types) General Order 1979. On request, the DBFO Co will, without charge, supply relevant information to third parties regarding the routing of abnormal loads. The DBFO Co will additionally co-ordinate, obtain (in such form as may be specified from time to time by the Secretary of State), complete, index and hold indemnities from hauliers.

30.6.2 The Secretary of State shall promptly advise the DBFO Co of any notice it receives of any Abnormal 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.

30.6.3 For the avoidance of doubt, the provisions of [Clause 30.2.1](#) shall apply in respect of any Claim or Loss arising directly or indirectly as a result of any such Abnormal Indivisible Load.

30.7 Litter Authority

30.7.1 If and so long as required by the Secretary of State to do so, the DBFO Co shall discharge in respect of the Project Road (or any part thereof specified by the Secretary of State) the duties of the Secretary of State under Sections 89(1) and 89(2) of the Environmental Protection Act 1990. In discharging those duties, the DBFO Co shall have regard to any codes of practice in force under Section 89(7) of such Act from time to time.

30.7.2 For the avoidance of doubt, in respect of any period during which, or any part of the Project Road in respect of which, the Secretary of State has not given a notice pursuant to Clause 30.7.1, the DBFO Co shall procure access for the Relevant Authority in accordance with [Clause 14.4.2](#) to discharge the duties under Sections 89(1) and 89(2) of the Environmental Protection Act 1990.

30.8 Shared Facilities

- 30.8.1 The DBFO Co shall be fully responsible, at its own expense, for the operation and maintenance of any facilities which form part of the Project Facilities (including, without limitation, those facilities set out in [Part 4 of Schedule 3](#) [Shared Facilities]) whose use is shared with any person. The DBFO Co may agree such cost sharing arrangements as it deems appropriate with any such person, provided always that in no circumstances shall such agreement adversely affect the Secretary of State.
- 30.8.2 Without prejudice to Clause 30.8.1, if any electrical power supply, lighting, pumping station, drainage or other apparatus serving the Project Facilities also serves any facilities (other than the Project Facilities) for which the Secretary of State is the highway authority, then:
- 30.8.2.1 the DBFO Co shall use all reasonable endeavours to procure, at the earliest date practicable, the installation of equipment measuring the cost of that service in respect of the Project Facilities and shall make payment for such supply directly to the provider of such service; and
- 30.8.2.2 in respect of any period during which there is no such separate measurement equipment installed, the Secretary of State shall in the first instance meet the cost of such supply and he shall be reimbursed by the DBFO Co a proportion of such cost equal, in the case of an electricity supply, to the ratio of the power rating of the DBFO Co's equipment which is connected to that supply to the power rating of all equipment which is connected to that supply and in the case of other services an equitable amount taking account of each Party's relative usage and reliance upon the service.
- 30.8.3 If any electrical power supply, lighting, pumping station, drainage or other apparatus serving the Project Facilities also serves any facilities (other than the Project Facilities) for which any highway authority other than the Secretary of State is the highway authority, then:
- 30.8.3.1 the DBFO Co shall make arrangements with the relevant highway authority in relation to the payment for such service and, as between the Secretary of State and the DBFO Co, the DBFO Co shall be responsible for any such payment; and
- 30.8.3.2 the DBFO Co shall, if any works are to be carried out affecting such service, use all reasonable endeavours to agree with the relevant highway authority that separate equipment shall be installed measuring the cost of that service in respect of the Project Facilities.

PART IV
PAYMENTS

31. **MEASUREMENT OF TRAFFIC AND DETERMINATION OF AVAILABILITY**

31.1 Measurement Method

At all times from and after the date of issue of the Completion Certificate, the traffic using the Project Road shall be continuously Measured by the DBFO Co at each Measurement Point using the Measuring Equipment.

31.2 Measurement Points

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

31.2.1.1 each of the points so designated on the Carriageway and Usage Payment details drawings in Folio 22, provided that the points so designated on the Carriageway and Usage Payment details drawings in Folio 22 shall only comprise Measurement Points if a Permit to Use has been issued in respect of the Contingent Scheme and the points shown on the sub-sections shaded yellow and cross-hatched on the Carriageway and Usage Payment details in Folio 22 shall only become Measurement Points upon the Actual DR Commencement Date; and

31.2.1.2 if, as a result of any Subsequent Scheme or Additional Works, the Measurement Points specified in Clause 31.2.1.1 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;

31.2.1.3 if, as a result of developing the Detailed Design in relation to the Contingent Scheme, the proposed location of the Measurement Point needs to be changed, such other point or points as are necessary to Measure traffic.

31.2.2 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 31.2.1.2 or 31.2.1.3 or as to any amendment required to the Road Lengths described in [Annex 2 to Part 1 of Schedule 9](#) and the drawings annexed thereto 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 the Secretary of State.

- 31.2.3 The Secretary of State shall bear the cost of any additional Measurement Point required pursuant to [Clause 31.2.1.2](#) as a result of any Additional Works. The DBFO Co shall bear the cost of any other Measurement Point required pursuant to [Clause 31.2.1.2](#) as a result of any Subsequent Scheme or [Clause 31.2.1.3](#) as a result of the Contingent Scheme.

31.3 Measuring Equipment

- 31.3.1 The DBFO Co shall provide and install (at its own cost, save as provided in [Clause 31.2.3](#)) the following equipment (the "Measuring Equipment") at each Measurement Point:

31.3.1.1 two sets of vehicle detection equipment meeting the specification set out in [Section A of Part 1](#) and [Section A of Part 2 of Schedule 17](#) [Core Communications and Traffic Signals Requirements] ;

31.3.1.2 all other measuring and verification equipment (together with necessary housings, appliances and buildings) required to Measure the traffic passing the Measurement Point; and

31.3.1.3 such cables or other means of electronic data transmission as necessary to connect the equipment referred to in Clauses 31.3.1.1 and 31.3.1.2 to the public service telephone network and so as to enable the Secretary of State directly to interrogate the Measuring Equipment.

- 31.3.2 The Measuring Equipment shall be capable of classifying each vehicle passing the Measurement Point into one of the following categories:

31.3.2.1 Long Vehicles; and

31.3.2.2 Other Vehicles.

- 31.3.3 Not used.

- 31.3.4 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.

- 31.3.5 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.

- 31.3.6 Without limitation to any other provision of this Clause 31.3, 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](#) [Core Communications and Traffic Signals Requirements] and with Good Industry Practice.
- 31.3.7 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:
- 31.3.7.1 measuring equipment to check the Measurement of the traffic at such Measurement Point; and/or
- 31.3.7.2 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.
- 31.3.8 Any equipment installed by the Secretary of State pursuant to Clause 31.3.7 shall be compatible with and shall not interfere with the use or operation of the Measuring Equipment.

31.4 Verification

- 31.4.1 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](#) [Core Communications and Traffic Signals Requirements] or [paragraph 2.5 of Section E of Part 2 of Schedule 17](#) [Core Communications and Traffic Signals Requirements]. 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 and Traffic Signals Requirements] or [paragraph 4 of Section E of Part 1 of Schedule 17](#) (as applicable) [Core Communications and Traffic Signals 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.
- 31.4.2 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 31.7.1](#) 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 and Traffic Signals Requirements] (the "Measurement Limits of Accuracy").

31.4.3 The DBFO Co shall give to the Department's Representative reasonable notice of the date and time of any Verification pursuant to [Clause 31.4.2](#) 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 or the Traffic Census Equipment at any other time.

31.4.4 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.

31.5 Collection of Data

31.5.1 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.

31.5.2 Subject to [Clause 31.7.2](#), 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.

31.6 Inspection and Auditing

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

31.6.1 any Measuring Equipment; and

31.6.2 any charts or other measurement or test data relating to the Measuring Equipment and upon request to receive copies thereof free of charge.

31.7 Correction of Defects

31.7.1 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.

- 31.7.2 If the Measuring Equipment referred to in [Clause 31.7.1](#) (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 31.5.2](#) shall be retrospectively corrected by the DBFO Co, 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.
- 31.7.3 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 31.5.2](#) shall be retrospectively corrected by the DBFO Co 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.
- 31.7.4 Calculations shall be corrected for purposes of [Clause 31.7.3](#) by the DBFO Co by applying the methods set out below in the order in which they appear:
- 31.7.4.1 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
- 31.7.4.2 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
- 31.7.4.3 by using readings recorded at the Measurement Point where the Defective Equipment is located such readings to be taken both before and after the period that such Measuring Equipment was defective and at adjacent Measuring Points before during and after the period that such Measuring Equipment was defective such periods to be determined in accordance with [Paragraph 4](#)

of Part 2 of Schedule 17. If such Measuring Equipment at adjacent Measurement Points was not operating accurately during such period or if there are no such readings then

- 31.7.4.4 by estimating the number and classification of vehicles by reference to Measurements made under similar circumstances when the Defective Equipment was registering accurately. If there is any Dispute between the DBFO Co and the Department's Representative on any such estimate, then such Dispute shall, at the request of either, be submitted to the Disputes Resolution Procedure.

31.8 Monitoring Points

- 31.8.1 Each of the following shall be a Monitoring Point for the purposes of this Agreement:

- 31.8.1.1 each of the points so designated on drawings referred to in [Annex 7 to Part 2 of Schedule 9](#) in the case of the Main Section of the Project Road (including, without limitation, any Firm Schemes and the Contingent Scheme) and on drawings referred to in [Annex 6 to Part 4 of Schedule 9](#) in the case of the Docklands Roads provided that the points so designated on drawings numbers:

- 31.8.1.1.1 C/TG/PAY/001 shall only become Monitoring Points if a Permit to Use has been issued in respect of the Contingent Scheme; and

- 31.8.1.1.2 C/TG/PAY/001 shall only become Monitoring Points upon the Actual DR Commencement Date;

- 31.8.1.2 if, as a result of any Subsequent Scheme or Additional Works, the Monitoring Points specified in Clause 31.8.1.1 shall be insufficient or inadequate to monitor all vehicular and pedestrian traffic using the Project Road to a level of accuracy equivalent to that achieved prior to the Subsequent Scheme or Additional Works, such other point or points as necessary to monitor all traffic using the Project Road to such degree of accuracy; and

- 31.8.1.3 if, as a result of developing the Detailed Design in relation to a Firm Scheme or the Contingent Scheme, the proposed location of the Monitoring Point needs to be changed, such other point or points as are necessary to monitor all traffic using the Project Road to such degree of accuracy.

- 31.8.2 If there is any Dispute between the DBFO Co and the Department's Nominee as to the need for or location of any Monitoring Point referred to in [Clause 31.8.1.2](#) or [31.8.1.3](#) as a consequence of the addition, deletion or change of location of a Monitoring Point, such Dispute shall, at the request of either, be submitted to the Disputes Resolution Procedure. In no case shall the addition, deletion or change of location of a Monitoring Point have an adverse financial effect upon the Secretary of State.
- 31.8.3 The Secretary of State shall bear the cost of any additional Monitoring Point required pursuant to 31.8.1.2 as a result of any Additional Works. The DBFO Co shall bear the cost of any other Monitoring Point required pursuant to [Clause 31.8.1.2](#) as a result of any Subsequent Scheme or [Clause 31.8.1.3](#) as a result of any Firm Scheme or the Contingent Scheme.

31.9 Availability Monitoring Equipment

- 31.9.1 The DBFO Co shall, (at its own cost, save as provided in Clause 31.8.3) design, construct, complete, commission and test Availability Monitoring Equipment for each Monitoring Point in accordance with the following timetable:
- 31.9.1.1 in the case of any such equipment to be established to monitor the Main Section of the Project Road (except those parts thereof described in Clause 31.9.1.2), no later than the second anniversary of the date of issue of the Commencement Certificate;
 - 31.9.1.2 in the case of any such equipment to be established to monitor those parts of the Main Section of the Project Road to be constructed as a Firm Scheme or the Contingent Scheme, no later than the date of service by the DBFO Co of the notice which it is to serve pursuant to [Clause 13.1.1](#) in respect of the relevant Firm Scheme or the Contingent Scheme; and
 - 31.9.1.3 in the case of the Docklands Roads, the later of the date specified in Clause 31.9.1.1 and the first anniversary of the issue of the DR Commencement Certificate.
- 31.9.2 The Availability Monitoring Equipment shall, at all times, meet the requirements and characteristics set out or referred to in the definition of the expression "Availability Monitoring Equipment" including, without limitation the requirements as to reliability, accuracy and format of output respectively specified in [Section E of Part 1](#) and [Section E of Part 2 of Schedule 17](#) [Core Communications and Traffic Signals Requirements].
- 31.9.3 The DBFO Co shall provide such alternative monitoring facilities, that have been previously approved by the Department's Representative, as are reasonably required to ensure that failure or withdrawal for maintenance or

adjustment of any individual component does not materially affect the monitoring of all of the Project Road and all traffic using it.

31.9.4 Prior to the installation or replacement of any component of the Availability Monitoring Equipment, which may materially affect the accuracy of such Availability Monitoring 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.

31.9.5 Without limitation to any other applicable provision of this Agreement, the DBFO Co shall design, supply, install, test, commission, maintain, repair, replace and operate all Availability Monitoring Equipment, in accordance with the provisions of this Agreement and with Good Industry Practice.

31.9.6 The Secretary of State shall be entitled, at any time and from time to time, to install, operate and maintain (at his own expense and risk) at any Monitoring Point:

31.9.6.1 monitoring equipment to monitor the Project Road and vehicular and pedestrian traffic using it at such Monitoring Point; and/or

31.9.6.2 equipment linked directly to the Availability Monitoring Equipment,

to provide at the Secretary of State's premises independent confirmation and/or direct monitoring of the Project Road and traffic using it at such Monitoring Point.

31.9.7 Any equipment installed by the Secretary of State pursuant to Clause 31.9.6 shall be compatible with and shall not interfere with the use or operation of the Availability Monitoring Equipment and the DBFO Co shall provide the Secretary of State with such information as is reasonably required to ascertain the compatibility of such equipment and the likelihood of any interference with the use or operation of the Availability Monitoring Equipment.

31.10 Inspection of the Availability Monitoring Equipment

The Department's Representative shall be entitled, at all reasonable times, to inspect any Availability Monitoring Equipment.

31.11 Correction of Defects to any Availability Monitoring Equipment

If, at any time, any Availability Monitoring Equipment is found to be defective or failing to comply with [Clause 31.9](#) the DBFO Co shall, as soon as practicable, repair such equipment so that it operates within and complies with such requirements or (if that is not possible) shall replace it with serviceable equipment.

31.12 Monitoring of certain parts of the Project Road before installation of the Availability Monitoring Equipment

31.12.1 Until the relevant Availability Monitoring Equipment has been provided, installed and commissioned on:

31.12.1.1 the Main Section of the Project Road (other than those sections referred to in [Clause 31.9.1.2](#)) in accordance with the requirements of this Agreement then, without prejudice to [Clause 31.9.1.1](#), the DBFO Co shall implement, with effect from the Commencement Date, an interim system of monitoring whether each lane forming part of the Main Section of the Project Road (other than those sections referred to in [Clause 31.9.1.2](#)) is to be treated as available for the purposes of [paragraph 3.1 of Part 2 of Schedule 9](#);

31.12.1.2 the Docklands Roads in accordance with the requirements of this Agreement then, without prejudice to [Clause 31.9.1.3](#), the DBFO Co shall implement with effect from the Actual DR Commencement Date an interim system of monitoring whether each lane forming part of the Docklands Roads is to be treated as available for the purposes of [paragraph 3.1 of Part 4 of Schedule 9](#).

31.12.2 The interim system of monitoring to be adopted by the DBFO Co to comply with the requirements of Clause 31.12.1 shall be as set out in [Section E of part 2 of Schedule 17](#) [Core Communications and Traffic Signals Requirements].

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32.3 Annual Reconciliation

32.3.1 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:

32.3.1.1 the actual DBFO Payment in respect of such Contract Year, determined in accordance with [Clause 32.1.1](#);

32.3.1.2 the total of the Monthly Usage Payments, the Availability Payments, and any DR Availability Payments paid in respect of such Contract Year;

32.3.1.3 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 32.3.1.1 exceeds the amount in Clause 32.3.1.2 (as adjusted to reflect any Safety Performance Adjustment), 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 32.3.1.2 exceeds the

- amount in [Clause 32.3.1.1](#) (as adjusted to reflect any Safety Performance Adjustment);
- 32.3.1.4 any VAT payable on the amount payable pursuant to [Clause 32.3.1.3](#) or, where the amount is payable to the Secretary of State, the amount of VAT overpaid by the Secretary of State;
 - 32.3.1.5 any other adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);
 - 32.3.1.6 any other amount due and payable from one Party to the other under this Agreement;
 - 32.3.1.7 any interest payable in respect of any amounts owed; and
 - 32.3.1.8 the net amount owing by the Secretary of State to the DBFO Co or by the DBFO Co to the Secretary of State.
- 32.3.2 The notice given pursuant to [Clause 32.3.1](#) (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:
- 32.3.2.1 the DBFO Payment (following the formula specified in [Clause 32.1.1](#)) and showing separately the calculation of the Usage Payment in accordance with [Part 1 of Schedule 9](#) [Usage Payment], and the aggregate for that Contract Year of each of the Carriageway Availability Payments calculated in accordance with [Part 2 of Schedule 9](#) [Carriageway Availability Payment], the FC Availability Payments calculated in accordance, [Part 3 of Schedule 9](#) [FC Availability Payment], any DR Availability Payments calculated in accordance with [Part 4 of Schedule 9](#) [DR Carriageway Availability Payment] any DRFC Availability Payments in accordance with [Part 5 of Schedule 9](#) (DRFC Availability Payment] and the Safety Performance Adjustment which may be a positive or a negative figure in accordance with [Part 6 of Schedule 9](#) [Safety Performance Adjustment];
 - 32.3.2.2 any adjustments to reflect previous over-payments and/or under-payments;
 - 32.3.2.3 any other amount due and payable from one Party to the other under this Agreement; and
 - 32.3.2.4 if the Annual Reconciliation Notice reflects any amounts due and owing on which interest is payable, the amount of interest.

33. INVOICING AND PAYMENT

33.1 Monthly Invoices

- 33.1.1 The Availability Payment and if applicable the DR Availability Payment for the relevant month and the Monthly Usage Payment shall be payable by the Secretary of State to the DBFO Co monthly in arrears.
- 33.1.2 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:
- 33.1.2.1 the Availability Payment and if applicable the DR Availability Payment for the relevant month and the Monthly Usage Payment for the relevant month;
 - 33.1.2.2 any VAT payable for the relevant month;
 - 33.1.2.3 any adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);
 - 33.1.2.4 any other amount due and payable from one Party to the other under this Agreement;
 - 33.1.2.5 any interest payable in respect of any amounts owed; and
 - 33.1.2.6 the net amount owing by the Secretary of State to the DBFO Co or by the DBFO Co to the Secretary of State.
- 33.1.3 The report delivered pursuant to Clause 33.1.2 shall be accompanied by work papers clearly setting forth the derivation of the Availability Payment and if applicable the DR Availability Payment for the relevant month and the Monthly Usage Payment, all other charges and any adjustments. The work papers shall illustrate, inter alia, the calculation of:
- 33.1.3.1 the Availability Payment and if applicable the DR Availability Payment for the relevant month and the Monthly Usage Payment;
 - 33.1.3.2 any adjustments to the invoice to reflect previous over-payments or under-payments;
 - 33.1.3.3 any other amount due and payable from one Party to the other under this Agreement; and
 - 33.1.3.4 if the invoice reflects any amounts due and owing on which interest is being charged, the amount of interest.

33.1.4 If the report delivered pursuant to [Clause 33.1.2](#) 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).

33.2 Annual Invoices

33.2.1 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).

33.2.2 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).

33.3 Secretary of State's Invoices

If the DBFO Co fails to issue any report or invoice within the time period required pursuant to [Clause 33.1](#) [Monthly Invoices] or [Clause 33.2](#) [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.

33.4 Due Date for Payments

33.4.1 Without prejudice to [Clause 33.6](#) [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 33.1.4](#) not later than the later of:

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

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

33.4.2 Without prejudice to [Clause 33.6](#) [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 33.1.4](#) not later than the later of:

- 33.4.2.1 the last day of the month following the month to which the debit note relates; or
 - 33.4.2.2 the twentieth day after the DBFO Co has received the said debit note.
- 33.4.3 Without prejudice to Clause 33.6 [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 33.2.2](#) not later than the later of:
 - 33.4.2.1 30 days after receipt of such invoice; or
 - 33.4.2.2 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.
- 33.4.4 Without prejudice to Clause 33.6 [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 33.2.1](#) not later than 20 days after receipt of such debit note.
- 33.4.5 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.

33.5 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.

33.6 Disputed Amounts

- 33.6.1 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.
- 33.6.2 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.
- 33.6.3 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.

33.7 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.

33.8 Satisfaction of Obligation

If the calculation of any amounts payable by the Secretary of State under this Agreement would (otherwise than for this Clause 33.8 [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.

33.9 Set-Off

33.9.1 Where either party ("the First Party") is owed by the other party ("the Second Party") a sum of money under this Agreement, the First Party may deduct an amount equal to such sum from any amount which the First Party then owes or which in future it will owe to the Second Party under this Agreement.

33.9.2 If the First Party wishes to exercise his rights of set-off as envisaged by Clause 33.9.1 he shall give the Second Party written notice ("the Section 33.9 Notice") to that effect and such notice shall state, in reasonable detail, the grounds upon which the First Party relies as entitling him to exercise such rights. The Second Party may, not later than 3 Working Days after service of the Section 33.9 Notice, give the First Party written notice ("the Section 33.9 Counternotice") that either:

33.9.2.1 it disputes that circumstances exist which entitle the First Party to exercise such rights; or

33.9.2.2 the amount which the First Party proposes to deduct from any payments in exercise of such right is excessive.

Where no Section 33.9 Counternotice is served in accordance with the provisions of this Clause 33.9.2, the First Party shall be entitled to exercise his rights of set-off as envisaged by Clause 33.9.1 in accordance with the terms of the Section 33.9 Notice.

33.9.3 Any Section 33.9 Counternotice shall state, in reasonable detail, the Second Party's grounds for disputing, as the case may be, the First Party's entitlement to exercise such rights of set off or the amount of the proposed deduction and if the dispute relates to the amount to be set off, the Second Party's proposal as to the correct amount to be deducted from payments to be made by the First Party. If a Section 33.9 Counternotice is served, the First Party shall not be entitled to exercise his rights of set off in respect of any disputed amount until such dispute has either been resolved between the parties or by a single expert ("the Clause 33.9 Expert") appointed in accordance with Clause 33.9.4 or if no Clause 33.9 Expert is appointed, the Disputes Resolution Procedure. The issue to be determined by the Clause 33.9 Expert are as follows:

33.9.3.1 if the Second Party disputes the First Party's entitlement to exercise his rights of set off on the grounds set out in [Clause 33.9.2.1](#), whether the Second Party is disputing such entitlement in good faith and has reasonable grounds for doing so; or

33.9.3.2 if the Second Party disputes the First Party's entitlement to exercise his rights of set off on the grounds set out in [Clause 33.9.2.2](#), whether the amount proposed to be deducted is reasonable in all the circumstances and if it is not, the amount, if any, which it is reasonable for the First Party to deduct pending a resolution under the Disputes Resolution Procedure of the dispute ("the Underlying Dispute") concerning any of the circumstances giving rise to the alleged right of set off or the amount to be set off.

33.9.4 If a Section 33.9 Counternotice is served the First Party may immediately apply to the Chairman of the Bar Council requesting him to appoint a Clause 33.9 Expert to determine the issues in dispute specified in Sub-Clauses 33.9.3.1 and 33.9.3.2 and for the purposes of such application and determination the provisions of [Schedule 15](#) shall apply with the following variations:

33.9.4.1 Paragraphs 1, 2, 3.1, 3.2, 6.1.7, 6.1.8 and 7 shall be deleted;

33.9.4.2 Paragraph 3.3 shall be amended so that it reads:

‘The Chairman of the Bar Council shall be requested to make the appointment of the Expert within 28 days and in so doing shall take such independent advice as he thinks fit’;

33.9.4.3 In Paragraphs 3.4, 3.5 and 3.6 the references to ‘14 days’ shall be replaced by references to ‘7 days’;

- 33.9.4.4 Paragraph 4.1 shall be amended so that it reads :
- ‘The Expert shall be a Barrister or Solicitor having at least 10 years post-qualification experience of advising upon commercial contracts’;
- 33.9.4.5 In Paragraphs 6.1.2, 6.1.3, and 6.1.4 references to ‘21 days’ shall be replaced by references to ‘5 days’;
- 33.9.4.6 Paragraph 6.2 shall be amended by replacing the reference to ‘42 days’ in the second line thereof by a reference to ‘21 days’;
- 33.9.4.7 Paragraph 7 shall be replaced by the following:
- ‘7. The decision of the Expert shall, for the purposes of determining the ability of the First Party to exercise his rights of set off pending a resolution of the Underlying Dispute (as defined in [Clause 33.9.3.2](#)), be final and binding upon the parties but shall not prejudice either Party’s right to pursue the Underlying Dispute; and
- 33.9.4.8 References to the “Expert” shall be construed as if they were references to the “Clause 33.9 Expert”.
- 33.9.5 If the Clause 33.9 Expert determines that:
- 33.9.5.1 the Second Party is disputing, in good faith, that circumstances exist which entitle the First Party to exercise his rights of set off and has reasonable grounds for so disputing, then the First Party shall not be entitled to exercise such rights of set off as a result of those alleged circumstances unless and until the Underlying Dispute is determined in a manner which entitles the First Party to exercise such rights; or
- 33.9.5.2 the amount which the First Party proposes to deduct by way of set off from any payments in exercise of such right is excessive then the First Party shall not be entitled to deduct any greater amount in respect of the relevant circumstances than that, if any, which the Clause 33.9 Expert determines or the Second Party agrees it would be reasonable for him to deduct unless and until the Underlying Dispute is determined in a manner which entitles the First Party to exercise such rights in respect of a greater amount.
- 33.9.6 The decision of such Expert in relation to the ability of the First Party to exercise the relevant rights of set-off shall remain in full force and effect until there has been a resolution of the Underlying Dispute by agreement between the Parties or in accordance with the Dispute Resolution

Procedure. Once the Underlying Dispute has been resolved (whether or not such decision is to be subjected to appeal) the relevant right of set off shall, thereupon, be governed by the terms of such resolution and to the extent that it is inconsistent therewith, the decision of the Clause 33.9 Expert shall cease to have effect.

33.9.7 The decision of the Clause 33.9 Expert shall not be admissible as evidence in the process for the determination of the Underlying Dispute.

33.9.8 If, as a result of the determination of the Clause 33.9 Expert, the First Party is entitled to exercise rights of set off for all or part of the amount he is claiming, but a subsequent final resolution of the Underlying Dispute determines that he was not entitled to exercise such rights or was only entitled to exercise them for a lesser amount the First Party shall not, thereby be treated as having been in breach of [Clauses 40.1.11](#) or [41.1.6](#) (as the case may be) but he shall nevertheless be obliged, within seven days of such final resolution, to repay the Second Party the difference between (i) the amount which he deducted in accordance with the determination of the Clause 33.9 Expert or in accordance with any agreement between the Parties and (ii) the amount, if any, which it was finally determined he was entitled to deduct together with Interest on the amount to be paid to the Second Party in respect of the period from the date such amount should have been paid until the date of its actual payment.

33.10 Examination of Records

Without limitation to [Clause 25.2](#) [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:

33.10.1 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;

33.10.2 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

33.10.3 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

34. **CHANGE PROCEDURE**

If at any time after the date of this Agreement an Eligible Change occurs, except and to the extent that the same arises out of a breach by the DBFO Co (or any person for whom it is responsible) of any obligations under this Agreement or the Project Documents, or User Paid Tolls are introduced, withdrawn or changed, the provisions of [Schedule 12](#) [Change] shall apply.

35. **CHANGE IN LAW**

35.1 **Relevant Change in Law**

35.1.1 If the DBFO Co believes that a Relevant Change in Law has occurred which is a Compensation Event, the DBFO Co may give a notice pursuant to [paragraph 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].

35.1.2 Where, after the date of this Agreement, any Relevant Change in Law is repealed or modified or any Law is enacted or modified the effect of which is to neutralise or reduce the discriminatory effect of a Relevant Change in Law, then the Secretary of State may give a notice to that effect to the DBFO Co and the provisions of [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 35.1.2. For the avoidance of doubt, the Secretary of State shall be the "Proponent" and the DBFO Co shall be the "Other Party" for the purposes of the General Change Procedure.

35.1.3 For the avoidance of doubt Legislation establishing or relating to the establishment of the proposed Greater London Authority or Transport for London shall not be treated as a Relevant Change in Law.

35.2 **Deemed Department's Change**

35.2.1 Where the DBFO Co believes that a Change in Law constitutes a Deemed Department's Change, it may, within 120 days of the relevant Change of Law coming into effect, serve a notice (a "Deemed Department's Change Notice") to that effect on the Department's Nominee.

35.2.2 The Deemed Department's Change Notice shall:

- 35.2.2.1 identify the relevant Change in Law;
 - 35.2.2.2 give details of the variation to the Works and/or the Operations which has become necessary as a result of the relevant Change in Law; and
 - 35.2.2.3 set out the basis of its belief that the same should have been effected by means of a Department's Change.
- 35.2.3 Within 60 days of receipt of the Deemed Department's Change Notice, the Department's Nominee shall notify the DBFO Co that either:
- 35.2.3.1 it agrees that a Deemed Department's Change has occurred; or
 - 35.2.3.2 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.
- 35.2.4 Where the Department's Nominee fails to respond to a Deemed Department's Change Notice within such 60 day period, a Deemed Department's Change shall be deemed to have occurred and the DBFO Co may serve a notice on the Department's Nominee requiring him to issue a Department's Change and the provisions of [Part 2 of Schedule 12](#) [Department's Change] shall apply.
- 35.2.5 Where the Department's Nominee gives a notice under Clause 35.2.3.2, the Parties shall negotiate for a period of 60 days in an attempt to agree:
- 35.2.5.1 whether a Deemed Department's Change has occurred; and
 - 35.2.5.2 where a Deemed Department's Change has occurred, the effect, if any, it has on the Works and/or the Operations.
- 35.2.6 If the Parties fail to agree any matter referred to in Clause 35.2.5 within such 60 day period, then either Party may refer the Dispute to the Disputes Resolution Procedure.
- 35.2.7 Where the Department's Nominee agrees, or it is determined in accordance with the Disputes Resolution Procedure, that there has been a Deemed Department's Change, the Department's Nominee shall issue a Department's Change and the provisions of [Part 2 of Schedule 12](#) [Department's Change] shall apply.
- 35.2.8 Legislation establishing or relating to the establishment of the proposed Greater London Authority and Transport for London shall not be treated as a Change in Law constituting a Deemed Department's Change.

36. **ADDITIONAL WORKS AND SUBSEQUENT SCHEMES**

36.1 Additional Works Services

Where the Secretary of State requires the DBFO Co to carry out any Additional Works Services, the DBFO Co shall procure that such Additional Works Services are carried out in accordance with the provisions of [Part 1 of Schedule 13](#) [Procedure for Additional Works].

36.2 Compensation

36.2.1 The DBFO Co shall be entitled to compensation from the Secretary of State in respect of Additional Works Services, calculated in accordance with the provisions of [Part 2 of Schedule 13](#) [Payment for Additional Works Services].

36.2.2 The provisions of [Part 3 of Schedule 12](#) [Additional Works] shall apply with respect to any Change in Costs, Change in Usage Payments or Change in Availability Payments of the DBFO Co consequential upon the carrying out of any Additional Works.

36.3 Subsequent Schemes

Where the DBFO Co desires a Subsequent Scheme to be carried out, the provisions of [Part 3 of Schedule 13](#) [Subsequent Schemes] shall apply.

36.4 Improvements

Where the DBFO Co desires to make any Improvement to the Project Facilities, the provisions of [Part 4 of Schedule 13](#) [Improvements] shall apply.

37. **FORCE MAJEURE**

37.1 Relief from Liability

The Parties shall be relieved from liability under this Agreement to the extent that by reason of Force Majeure they are not able to perform their obligations under this Agreement.

37.2 Notice

Relief under Clause 37.1 [Relief from Liability] shall not be given unless the Party intending to claim relief has, by notice to the other Party within 10 days of becoming aware of the event of Force Majeure or, if later, of the failure to perform, informed the other Party that it intends to claim relief. Such notice shall contain such relevant information relating to such failure as is available, including (without limitation) the actions being taken to remedy such failure to perform and an estimate of the period of time required to remedy such failure.

37.3 Obligation to Remedy

As soon as practicable after the occurrence of an event of Force Majeure the Party affected shall take all necessary steps to remedy the failure to perform and relief under this Clause 37 [Force Majeure] shall cease to be available to a Party if it fails so to take all necessary steps to remedy the failure.

37.4 Consequences of Force Majeure

If the Parties agree or it is determined through the Disputes Resolution Procedure that Eligible Force Majeure:

37.4.1 has, in relation to Firm Schemes, prior to the issue of the Completion Certificate, delayed the DBFO Co in completing the Works (other than the CS Works) then the Contract Period shall be extended by a period equal to the period of such delay, provided that the cumulative aggregate of all such extensions pursuant to Clauses 37.4.1 and 37.4.2 shall not, in any event, exceed 180 days;

37.4.2 has, in relation to the Contingent Scheme prior to the issue of the CS Completion Certificate, delayed the DBFO Co in completing the CS Works then, the Contract Period shall be extended by a period equal to the period of such delay, provided that the cumulative aggregate of all such extensions pursuant to Clauses 37.4.1 and 37.4.2 shall not in any event exceed 180 days;

37.4.3 has, in relation to the Firm Schemes prior to the issue of the Completion Certificate caused damage to the Works (other than the CS Works or the Bridge Replacement Works), or has, in relation to the Contingent Scheme prior to the issue of the CS Completion Certificate, caused damage to the CS Works or has, prior to the issue of the relevant BRW Completion Certificate, caused damage to the Bridge Replacement Works then:

37.4.3.1 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;

37.4.3.2 the Parties shall enter into discussions concerning the event of Eligible Force Majeure and the damage with the intent that, as soon as possible after the cessation of the event of Eligible Force Majeure, rectification work can be commenced;

37.4.3.3 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:

37.4.3.3.1 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

37.4.3.3.2 for purposes of determining the Revised Values in accordance with [paragraph 7 of Part 1 of Schedule 12](#) [General Change Procedure], no Change in Traffic or Change in Availability Payments shall be taken into account;

37.4.4 occurring after the issue of the Completion Certificate, has substantially affected the Long Vehicle flow on the Project Road, or Carriageway Availability or DR Carriageway Availability on the Project Road then the Contract Period shall be extended by a period equal to the period during which the Long Vehicle flow or Carriageway Availability or DR Carriageway Availability on the Project Road has been so affected, provided that:

37.4.4.1 there shall be excluded from such period of extension the first 7 days of each occurrence of an Eligible Force Majeure event so affecting the Long Vehicle flow or Carriageway Availability or DR Carriageway Availability, and

37.4.4.2 the aggregate extension of the Contract Period pursuant to this Clause 37.4.4 shall not in any event exceed 180 days;

37.4.5 has, at any time caused damage to either the Existing Road (other than any Upgraded Section) or the equipment and facilities identified in [Annex 6/2 to Part 2 of Schedule 6](#); or has after the issue of the Completion Certificate caused damage to either the New Road (other than the New CS Road or the BRW New Road) or the Off-Site Facilities located on Main Site Adjacent Areas; or has, after the issue of the CS Completion Certificate caused damage to the New CS Road or the Off-Site Facilities located on CS Adjacent Areas; or has, after the issue of the Docklands Roads Certificate (provided the same is not withdrawn pursuant to [Clause 9.8.2](#)) caused damage to the Docklands Roads or has, after the issue of a BRW Completion Certificate in respect of a Part of the BRW New Road, caused damage to such Part of the BRW New Road then, and subject always to [Clause 37.6](#):

37.4.5.1 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;

- 37.4.5.2 the Parties shall enter into discussions concerning the event of Eligible Force Majeure and the damage with the intent that, as soon as possible after the cessation of the event of Eligible Force Majeure, rectification work can be commenced;
- 37.4.5.3 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 7 of Part 1 of Schedule 12](#) [General Change Procedure] no Change in Traffic [or Change in Availability Payments] shall be taken into account;

37.5 Right to Terminate - Eligible Force Majeure

Where an occurrence of Eligible Force Majeure:

37.5.1 occurring prior to the later of:

37.5.1.1 the issue of the Completion Certificate; and

37.5.1.2 the CS Construction End Date

has rendered financially or practicably impossible the performance of this Agreement for a period of time so as to have a fundamental effect on the rights or obligations of either of the Parties; or

37.5.2 has a material effect on the performance by either Party of this Agreement for a period longer than 180 days; or

37.5.3 has a fundamental effect on the performance by either Party 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 to reach a solution acceptable to both Parties, terminate this Agreement in accordance with [Clause 42.2](#) [Termination for Force Majeure].

37.6 Termination – Force Majeure

Where an occurrence of an event of Force Majeure that is not an event of Eligible Force Majeure has a material effect on traffic flow on the Project Road for a period longer than 270 days, or is the direct cause of a delay in the achievement of the Completion Certificate for a period of 270 days, either party may terminate this Agreement without compensation by 14 Working Days notice to the other party, provided that where such termination is proposed by the Secretary of State, the DBFO Co may by notice to the Secretary of State within such 14 Working Days period elect to continue this Agreement on the basis that:

37.6.1 the Secretary of State shall not compensate the DBFO Co for any rectification works which the DBFO carries out which arise after the date of the notice served by the Secretary of State;

37.6.2 there shall be no further extension of the Contract Period to compensate for any period after the date of the notice served by the Secretary of State;

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

37.7 Limit on Liability

For the avoidance of doubt, save as expressly set out in this Clause 37 [Force Majeure] (other than this Clause 37.7 [Limit on Liability]) none of the Secretary of State, his servants or agents shall have any liability to the DBFO Co in relation to any Loss or Claim which the DBFO Co suffers or incurs as a result of any event of Force Majeure and, accordingly, as between the Parties any such Loss or Claim shall be borne by the DBFO Co.

38. **WARRANTIES UNDERTAKINGS AND DISCLAIMERS**

38.1 Warranties and Undertakings by the DBFO Co

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

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

38.1.2 the design of the Works and of any other works the subject of a Proposal will in all respects meet the Technical Requirements and all other requirements of this Agreement;

38.1.3 the Works and any other works the subject of a Proposal will comprise only materials and goods which will be of sound and satisfactory quality and have been manufactured or prepared in accordance with the Technical Requirements and with the quality assurance procedures established

pursuant to [Clause 23](#) [Quality Management] and all workmanship shall be in accordance with sound construction practice applicable at the time of construction;

- 38.1.4 the DBFO Co will, at all times, comply with the requirements of the Department's Nominee as permitted under this Agreement and the Requirements of Interested Parties and any Legal Requirement;
- 38.1.5 the Works and any other works the subject of a Proposal, when constructed, will comply, in all respects, with the Core Construction Requirements, the Construction Requirements, the Core Communications Requirements, the Communications Requirements, the design as received in accordance with [Clause 11](#) [Design and Construction] or [Clause 14.6](#) [Maintenance and Other Works] (as the case may be) and the Design and Certification Procedure;
- 38.1.6 the Construction Requirements, the Communications Requirements and the O&M Requirements will comply with and satisfy the Core Construction Requirements, the Core Communications Requirements and the Core O&M Requirements respectively;
- 38.1.7 subject to the terms of the Design and Certification Procedure, the design of the Works and of any other works the subject of a Proposal will be carried out by or under the supervision of the Designer and the persons carrying out any design and/or supervision are suitably qualified and experienced so to do and in particular have adequate previous experience of the part of the design they are carrying out or supervising;
- 38.1.8 all information, representations and other matters of fact communicated in writing to the Secretary of State or his agents or employees in connection with the DBFO Co's response to the invitation to tender in respect of the Project or in the course of the subsequent negotiations in respect of this Agreement are true, complete and accurate in all respects;
- 38.1.9 it is a limited liability company, duly incorporated and validly existing under the laws of England and Wales;
- 38.1.10 it has full power and authority to enter into this Agreement and to carry out the Operations;
- 38.1.11 the entry into and performance by it of this Agreement do not and will not conflict with:
 - 38.1.11.1 its constitutional documents; or
 - 38.1.11.2 any document which is binding upon it or any of its assets to the extent that such conflict would be reasonably likely to have

a material adverse effect on the ability of the DBFO Co to perform its obligations under this Agreement;

- 38.1.12 there has been no material adverse change in the financial condition of the DBFO Co since its incorporation in the financial condition of the Sponsors since the accounts dated 31 December 1999;
- 38.1.13 the Financial Terms are the basis on which the DBFO Co will finance the Project;
- 38.1.14 each of the Project Documents other than those referred to in [Clause 9.3.1.2](#), [9.3.1.4](#), [9.8.1.4](#) and [9.12.1.3](#) 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
- 38.1.15 any items referred to in [Clauses 49.1.1](#) and [49.1.2](#) will be original and will not infringe any third party's copyright, moral rights, design rights, trade mark or any other intellectual property rights.

38.2 Disclaimer

- 38.2.1 The Secretary of State has made available to the DBFO Co, prior to the date hereof, certain materials, documents and data related to the design or construction of the Works, the operation and maintenance of the Project Facilities, the Site (including without limitation Road Segment 2), the CS Site, the DR Site, the Adjacent Areas, the CS Adjacent Areas, the DR Adjacent Areas, traffic records and forecasts and other matters which are or may be relevant to the Project and the obligations undertaken by the DBFO Co under this Agreement (the "Disclosed Data"). The Disclosed Data includes, without limitation, all such materials, documents and data which were provided to the DBFO Co in connection with the invitation to tender in respect of the Project (including all such contained on the CD-ROM or in the Data Room).
- 38.2.2 The Secretary of State shall not be liable to the DBFO Co (whether in contract, tort, by statute or otherwise howsoever and whether or not arising out of any negligence on the part of the Secretary of State or any agent, servant or contractor of his) in respect of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy of any kind whatsoever in the Disclosed Data.
- 38.2.3 The Secretary of State gives no warranty or undertaking that the Disclosed Data represents all of the information in his possession or power (either

during the tender for the Project or at the execution of this Agreement) relevant or material to the Project or the obligations undertaken by the DBFO Co under this Agreement. The Secretary of State shall not be liable to the DBFO Co in respect of any failure to disclose or make available (whether before or after the execution of this Agreement) to the DBFO Co any information, documents or data, nor to keep the Disclosed Data up to date, nor to inform the DBFO Co (whether before or after execution of this Agreement) of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy in the Disclosed Data.

38.2.4 The DBFO Co acknowledges and confirms that:

38.2.4.1 it has conducted its own analysis and review of the Disclosed Data and has before the execution of this Agreement satisfied itself as to the accuracy, completeness and fitness for purpose of all such Disclosed Data upon which it places reliance; and

38.2.4.2 it shall not be entitled to make any claim against the Secretary of State whether in damages or for extensions of time or additional payments under this Agreement on the grounds of any misunderstanding or misapprehension in respect of the Disclosed Data or the matters referred to in [Clause 6.1](#) [Site Inspection] or Clause 38.2.4.1 or on the grounds that incorrect or insufficient information relating thereto or to the Site or Adjacent Areas was given to it by any person, whether or not in the employ of the Secretary of State. Nor shall the DBFO Co be relieved from any risks or obligations imposed on or undertaken by it under this Agreement on any such ground.

38.2.5 The Secretary of State shall not give any warranty or undertaking or 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, omission, unfitness for purpose, defect or inadequacy of any kind in connection with and material of a similar nature to the Disclosed Data provided to the DBFO Co in relation to the Contingent Scheme or a Part of the BWR New Road after the date hereof.

38.3 Savings

The warranty by the DBFO Co under any provision of this Agreement shall be without limitation to any warranty by the DBFO Co under any other provision of this Agreement.

38.4 Secretary of State's Warranty

The Secretary of State warrants to the DBFO Co that (at the date of this Agreement) the Orders listed in [Paragraph 1 of Part 6 of Schedule 3](#) [Scheme Orders] have been properly made and are in full force and effect.

39. **INDEMNITIES**

39.1 DBFO Co's Indemnities

Save to the extent that the DBFO Co is entitled to an indemnity from the Secretary of State under [Clause 39.4](#) [Secretary of State's Indemnities], the DBFO Co shall indemnify and keep indemnified the Secretary of State, his servants and agents in respect of any Claims or Losses of any person (including, for the avoidance of doubt, the DBFO Co and the Secretary of State) which may arise out of, or in the course of or in connection with, the Operations or the performance of or failure to perform any obligation under this Agreement and, without limitation to the generality of the foregoing, in respect of:

- 39.1.1 any criminal penalties or fines arising out of or resulting from the breach by the DBFO Co of any of its obligations under this Agreement;
- 39.1.2 any damages or compensation payable to any workman or other person in the employment of the DBFO Co or any contractor or sub-contractor of any tier of the DBFO Co;
- 39.1.3 any loss or damage to the Works or the Project Facilities or any materials or Plant to be used in the construction of the Works or the Project Facilities from any cause (other than as provided in [Clause 37](#) [Force Majeure]);
- 39.1.4 any Loss or Claim caused by any defect (including without limitation any Defective Work in relation to Road Segment 2 or any Latent Defect) in the Existing Road or (subject to the issue of the Docklands Roads Certificate and from the Actual DR Commencement Date) the Docklands Roads, including without limitation all costs of any remedial action taken in respect of any such defect and any loss of income as a consequence of any such defect or any such remedial action;
- 39.1.5 any Claim for damage suffered by any user of the Project Facilities or any other third party which arises out of the execution of the Works or the operation, maintenance or improvement of the Project Facilities (including without limitation any Claims in respect of environmental mitigation measures);
- 39.1.6 any Claim made by any person in respect of any works of accommodation which the DBFO Co has performed or agreed to perform whether pursuant to any requirement of this Agreement or otherwise;

- 39.1.7 any Loss or Claim arising whether directly or indirectly out of or in connection with:
- 39.1.7.1 a breach of the provisions of [Clause 28](#) [Statutory Undertakers]; or
 - 39.1.7.2 any Diversionary Works (as defined in [Clause 28.1.6](#)); or
 - 39.1.7.3 the DBFO Co's exercise, purported exercise or failure to exercise any Authorised Functions (as defined in [Clause 28.1.2](#)); or
 - 39.1.7.4 the Secretary of State performing or engaging others to perform any Authorised Function (as defined in [Clause 28](#) [Statutory Undertakers]) as a result of the Secretary of State withdrawing or suspending any such Authorised Function in accordance with [Clause 28.4.10](#);
- 39.1.8 any Loss or Claim arising whether directly or indirectly out of or in connection with:
- 39.1.8.1 a breach by the DBFO Co of the provisions of [Clause 29](#) [Other Functions of the Secretary of State]; or
 - 39.1.8.2 the DBFO Co's exercise, purported exercise or failure to exercise any Third Party Authorised Function (as defined in [Clause 29.1.4](#)); or
 - 39.1.8.3 the Secretary of State performing or engaging others to perform any Third Party Authorised Function (as defined in [Clause 29](#) [Other Functions of the Secretary of State]) as a result of the Secretary of State withdrawing or suspending any such Third Party Authorised Function in accordance with [Clause 29.3.11](#);
- 39.1.9 any Loss or Claim which is to be borne by the DBFO Co in accordance with [Clause 10](#) [Security of the Site] or which arises out of or in connection with any measures taken or not taken by the DBFO Co against or in connection with Protestors or Trespassers;
- 39.1.10 any Loss which is to be borne by the DBFO Co in accordance with [Clause 30.2](#) [Claims Against Third Parties];
- 39.1.11 any Loss or Claims which may arise out of or in connection with any breach of the warranties and undertakings set out in [Clause 6.1](#) [Site Inspection], [Clause 9.3.1.4](#) [Contingent Scheme Conditions to Commencement] [Clause 9.8.1.4](#) [Docklands Roads: Conditions to Commencement], [Clause 9.12.1.3](#) [Bridge Replacement Works:

Conditions to Commencement], [Clause 9.20.2](#) [Road Segment 2] or [Clause 38.1](#) [Warranties and Undertakings by the DBFO Co];

- 39.1.12 any Loss or Claim arising out of the carrying out of any Investigation and any Loss or Claim arising whether directly or indirectly out of the carrying on of works pursuant to [Clause 6.4](#) [Works by Relevant Authorities];
- 39.1.13 any Loss or Claim arising whether directly or indirectly out of the carrying out of works pursuant to [Clause 6.5](#) [Works Prior to the Actual CS Commencement Date] whether or not a CS Commencement Certificate is issued;
- 39.1.14 any costs, charges, Losses or Claims to be borne by the DBFO Co in accordance with [Clause 8.4](#) [Additional Access];
- 39.1.15 any Loss or Claim arising whether directly or indirectly out of any act or omission of the DBFO Co which directly or indirectly causes any breach by the Secretary of State of any of his statutory duties;
- 39.1.16 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;
- 39.1.17 any Loss or Claim arising out of or in connection with any breach of the Regulations referred to in [Clause 11.8](#) [Health and Safety] (whether in relation to obligations, requirements and duties of the client (as defined in [Clause 11.8.1.2](#)) or otherwise);
- 39.1.18 any Loss or Claim referred to in [Clause 47.1.2](#);
- 39.1.19 any Loss or Claim which may arise out of, or in the course of or in connection with, any excavation, extraction, disposal, exploitation of or other dealing with any Site Materials or any breach by the DBFO Co of the provisions of [Clause 8.10](#) [Disposal of Materials Won on Site];
- 39.1.20 any Loss or Claim made or brought by any person for or on account of infringement of any Intellectual Property (other than any Intellectual Property provided by the Secretary of State to the DBFO Co) used in connection with the Works or Operations which may arise on or in connection with the use of any plant, machines or equipment in connection with the Works or Operations;
- 39.1.21 any Loss or Claim made or brought by any person arising in respect of or as a result of the Transfer of Undertakings (Protection of Employment) Regulations 1981;
- 39.1.22 any Loss or Claim suffered by the Secretary of State which may arise out of or in the course of or in connection with the taking of any measures

authorised by the Secretary of State pursuant to [Schedule 22](#) [Security Measures] including without limitation the taking of any legal proceedings, enforcement of any Court order or enforcement of legal rights without a Court order or the doing of anything whatsoever taken, enforced or done or purported to be taken, enforced or done in the name of or on behalf of the Secretary of State;

- 39.1.23 any Loss or Claim arising from any inaccuracy, error, omission, unfitness for purpose, defect or inaccuracy of any kind whatsoever in the Disclosed Data or material as referred to in [Clause 38.2](#) (whether or not arising from any negligence on the part of the Secretary of State or any servant, agent or contractor of his) except to the extent such Loss or Claim arises from the use by a third party of the Disclosed Data for a purpose unconnected with the Project;
- 39.1.24 any Loss or Claim arising as a consequence of the DBFO Co's failure to satisfy the conditions in [Clause 9.3.1](#) [Contingent Scheme: Conditions to Commencement];
- 39.1.25 100% of any Loss or Claim relating to severance or injurious affection up to and including £2 million in aggregate and 50% of the aggregate of Losses or Claims relating to severance or injurious affection, to the extent such aggregate of Losses or Claims exceeds £2 million and is less than £5 million;
- 39.1.26 any Loss or Claim arising as a consequence of the DBFO Co's failure to satisfy the conditions in [Clause 9.8.1](#) [Docklands Roads: Conditions to Commencement];
- 39.1.27 any Loss or Claim arising as a consequence of the DBFO Co's failure to satisfy the conditions in [Clause 9.12](#) [Bridge Replacement Works - Conditions to Commencement] in respect of a Part of the BRW New Road;

and in the case of [Clauses 39.1.1](#) to 39.1.27 whether arising out of the act, neglect or omission of the DBFO Co, its Funders, agents, contractors or sub-contractors of any tier or its or their employees.

39.2 Savings

- 39.2.1 The DBFO Co's liability to the Secretary of State arising under any indemnity in this Agreement shall be without prejudice to any other right or remedy available to the Secretary of State and in particular shall not prejudice in any way the ability of the Secretary of State to enforce any guarantee given pursuant to [Clause 4](#) [Guarantees] at any time and in any manner whatsoever.

- 39.2.2 The indemnity by the DBFO Co under any provision of this Agreement shall be without limitation to any indemnity by the DBFO Co under any other provision of this Agreement.
- 39.2.3 Notwithstanding any other provision of this Agreement, where the DBFO Co does anything or fails to do anything in breach of a provision of this Agreement and such act or omission could result in (i) a lane not being treated as available under [paragraph 3.4 of Part 2 of Schedule 9](#) and (ii) the Secretary of State being entitled to make a deduction to the Availability Payment that would otherwise be payable, and if the Secretary of State elects to make such deduction or having made such deduction shall not first refund such deduction to the DBFO Co, the Secretary of State shall not, in respect of such lane unavailability arising from such breach, also seek to recover by way of indemnification or make any other monetary claim under this Agreement. The provisions of this Clause 39.2.3 shall be without prejudice to the Secretary of State's other remedies under this Agreement in respect of any other consequences of such breach.

39.3 Conduct of Claims Subject to DBFO Co's Indemnities

- 39.3.1 If the Secretary of State receives any notice, demand, letter or other document concerning any Claim from which it appears that the Secretary of State is or may become entitled to indemnification under this Agreement, the Secretary of State shall give notice in writing to the DBFO Co as soon as reasonably practicable.
- 39.3.2 Subject to Clauses 39.3.3, [39.3.4](#), [39.3.5](#) and [39.3.6](#) and the provisions of [Clause 8.11](#) [Claims for Injurious Affection], on the giving of a notice pursuant to Clause 39.3.1 the DBFO Co shall be entitled to and shall resist the Claim in the name of the Secretary of State at its own expense and shall have the conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations, and the Secretary of State will give the DBFO Co all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim.
- 39.3.3 With respect to any Claim subject to Clause 39.3.2:
- 39.3.3.1 the DBFO Co shall keep the Secretary of State fully informed and consult with him about the conduct of the Claim;
- 39.3.3.2 to the extent that the Secretary of State is not entitled to be indemnified by the DBFO Co for all of the liability arising out of the act or omission which is the subject of the Claim, no action shall be taken pursuant to Clause 39.3.2 which shall increase the amount of any payment to be made by the Secretary of State in respect of that part of the Claim which is not covered by the indemnity from the DBFO Co; and

- 39.3.3.3 the DBFO Co shall not pay or settle such Claim without the consent of the Secretary of State, such consent not to be unreasonably withheld or delayed; provided that such consent shall not be required to the payment or settlement of a Claim subject to the indemnity in [Clause 39.1.6](#) if the Claim is paid or settled in full and the amount of such payment or settlement does not exceed £10,000 (in October 1998 prices).
- 39.3.4 The Secretary of State shall be free to pay or settle any Claim on such terms as he may, in his absolute discretion, think fit and without prejudice to his rights and remedies under this Agreement if:
- 39.3.4.1 within 28 days of the notice from the Secretary of State under [Clause 39.3.1](#) the DBFO Co fails to notify the Secretary of State of its intention to dispute the Claim; or
- 39.3.4.2 the DBFO Co fails to comply in any material respect with the provisions of [Clause 39.3.3](#).
- 39.3.5 The Secretary of State shall be free at any time to give notice to the DBFO Co that he is taking over the conduct of any defence, dispute, compromise or appeal of any Claim subject to [Clause 39.3.2](#) or of any incidental negotiations. Upon receipt of such notice the DBFO Co shall promptly take all steps necessary to transfer the conduct of such Claim to the Secretary of State and shall provide to the Secretary of State all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim. If the Secretary of State gives any notice pursuant to this [Clause 39.3.5](#), then the DBFO Co shall be released from its indemnity in respect of such Claim save where such notice was given as a consequence of the failure of the DBFO Co to deal properly with any such Claim.
- 39.3.6 The DBFO Co shall have no rights under [Clause 39.3.2](#) to conduct or resist any Claim which is the subject of the indemnity in [Clause 39.1.25](#) and the provisions of [Clauses 39.3.3](#), [39.3.4](#) and [39.3.5](#) shall not apply in relation to such a Claim.
- 39.4 Secretary of State's Indemnities

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

- 39.4.1 any Loss or Claim to the extent resulting from any negligent act or omission of the Secretary of State, his agents, employees or other contractors (not being employed by the DBFO Co) save in respect of:

- 39.4.1.1 the matters referred to in [Clauses 17.5](#) [Enforcement of Rights against Third Parties], [39.1.4](#), [39.1.9](#), [39.1.21](#), [39.1.23](#) and [39.1.25](#);
- 39.4.1.2 acts or omissions occurring prior to the date of this Agreement; and
- 38.4.1.3 acts or omissions in relation to the Docklands Roads occurring prior to the Actual DR Commencement Date;
- 39.4.2 in respect of Firm Schemes and the Contingent Scheme, 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];
- 39.4.3 any Claims made by any person in respect of any works of accommodation, other than any works of accommodation which the DBFO Co has performed or agreed to perform whether pursuant to any requirement of this Agreement or otherwise;
- 39.4.4 any Loss to be borne by the Secretary of State in accordance with [Clause 17.5](#) [Enforcement of Rights against Third Parties];
- 39.4.5 any Loss which is to be borne by the Secretary of State in accordance with [Clause 37](#) [Force Majeure]; and
- 39.4.6 Fifty per cent of Losses or Claims relating to severance or injurious affection to the extent that such Losses or Claims exceed £2 million and are less than £5 million in aggregate, and 100% of Losses or Claims relating to severance or injurious affection in excess of £5 million in aggregate.

39.5 Disclaimer

Save as expressly provided in [Clause 39.4](#) [Secretary of State's Indemnities], the Secretary of State shall not under any circumstances be liable to the DBFO Co whether in contract, tort, by statute or otherwise and whether or not arising from any negligence on the part of the Secretary of State or any of his agents or employees, for any Claims or Losses of any person arising out of, or in the course of or in connection with, the Operations. This [Clause 39.5](#) [Disclaimer] shall not apply in relation to:

- 39.5.1 any failure by the Secretary of State to make proper payment to the DBFO Co in accordance with the terms of this Agreement;
- 39.5.2 any negligent act or omission of the Secretary of State or any of his agents or employees giving rise to death or personal injury; and
- 39.5.3 any liability of the Secretary of State for any breach of his obligations under this Agreement, save where (and to the extent that) the DBFO Co

has an express remedy under this Agreement in respect of such breach, which remedy shall be exhaustive of its rights in respect of such breach.

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

- 39.6.1 If the DBFO Co receives any notice, demand, letter or other document concerning any Claim from which it appears that the DBFO Co is or may become entitled to indemnification under this Agreement, the DBFO Co shall give notice in writing to the Secretary of State as soon as reasonably practicable.
- 39.6.2 Subject to Clauses 39.6.3 and 39.6.4, on the giving of a notice pursuant to Clause 39.6.1 the Secretary of State shall be entitled to resist the Claim in the name of the DBFO Co at his own expense and to have the conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations, and the DBFO Co will give the Secretary of State all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim.
- 39.6.3 With respect to any Claim subject to Clause 39.6.2:
- 39.6.3.1 the Secretary of State shall keep the DBFO Co fully informed and consult with it about the conduct of the Claim;
- 39.6.3.2 to the extent that the DBFO Co is not entitled to be indemnified by the Secretary of State for all of the liability arising out of the act or omission which is the subject of the Claim, no action shall be taken pursuant to Clause 39.6.2 which shall increase the amount of any payment to be made by the DBFO Co in respect of that part of the Claim which is not covered by the indemnity from the Secretary of State; and
- 39.6.3.3 the Secretary of State shall not pay or settle such Claim without the consent of the DBFO Co, such consent not to be unreasonably withheld or delayed.
- 39.6.4 The DBFO Co shall be free to pay or settle the Claim on such terms as it may in its absolute discretion think fit and without prejudice to its rights and remedies under this Agreement if:
- 39.6.4.1 within 28 days of the notice from the DBFO Co under Clause 39.6.1 the Secretary of State fails to notify the DBFO Co of its intention to dispute the Claim; or
- 39.6.4.2 the Secretary of State fails to comply in any material respect with the provisions of Clause 39.6.3.

40. DEFAULT

40.1 Events of Default

The following shall be Events of Default:

40.1.1 the occurrence of any act of insolvency in respect of the DBFO Co or any Contracting Associate or any Sponsor, including:

40.1.1.1 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;

40.1.1.2 a supervisor, receiver, administrator, administrative receiver or 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 part of the assets of the person in question;

40.1.1.3 the person in question ceasing or threatening to cease to carry on business, or being or becoming unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986 (without the need to prove any fact or matter to the satisfaction of the court);

40.1.1.4 a petition being presented (and, other than in the case of an administration petition, not being dismissed within seven days of presentation thereof) or circumstances existing for 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; or

40.1.1.5 if the person in question shall suffer any event analogous to any of the foregoing in any jurisdiction in which it is incorporated or resident,

but in the case of any of the foregoing affecting a Contracting Associate or Sponsor, only if the occurrence will have a material effect on the ability of the DBFO Co to perform its obligations under this Agreement;

40.1.2 the occurrence of any change in control as referred to in [Clause 45.3](#) [Change in Control];

40.1.3 the DBFO Co or 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 45.2.2](#)) 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;

- 40.1.4 the failure of the conditions referred to in [Clause 7.1](#) [Conditions to Commencement] (other than [Clause 7.1.6](#)) to be satisfied by the date referred to in [Clause 7.2](#) [Satisfaction of Conditions];
- 40.1.5 the repudiation of this Agreement by the DBFO Co;
- 40.1.6 the DBFO Co commits a serious breach of its obligations under this Agreement, including, without limitation, the DBFO Co otherwise than as a consequence of a breach by the Secretary of State of his obligations under this Agreement:
 - 40.1.6.1 abandoning the Works; or
 - 40.1.6.2 ceasing to maintain or operate the Project Facilities or any, or any material part of any, of them;
- 40.1.7 the DBFO Co neglecting persistently to comply with any of its obligations under this Agreement (other than (but without prejudice to, or limitation of, the Secretary of State's rights under [Clause 40.1.8](#)) its obligations for which Penalty Points may be or are awarded under [Clause 26.2](#) or a Warning Notice may be or is awarded under [Clause 26.3](#));
- 40.1.8 without limitation to the generality of [Clause 40.1.7](#):
 - 40.1.8.1 the DBFO Co receiving a total number of two or more Warning Notices in any 3 year period;
 - 40.1.8.2 the DBFO Co being awarded a total of 100 or more Penalty Points in any 1 year period;
- 40.1.9 any of the warranties in or referred to in [Clause 6.1](#) [Site Inspection], [Clause 9.3.1](#), [9.12.1](#), [9.20.2](#) or [Clause 38.1](#) [Warranties and Undertakings by the DBFO Co] shall prove to be materially untrue or incorrect;
- 40.1.10 any of the Project Documents:
 - 40.1.10.1 or this Agreement, where appropriate, 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

40.1.10.2 is materially amended, varied or departed from (other than in accordance with [Clause 2.3.2](#)),

and, in any such case where the DBFO Co is not a party to such Project Document, 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 and provided further that where such Project Document is an agreement listed in [Clause 2.3.1.3](#) the Secretary of State shall, prior to taking any action under this Agreement in reliance on any event referred to in [Clause 40.1.10.2](#) which is incapable of remedy notify the DBFO Co stating the reasons why he considers that any such event will have a material adverse effect upon the ability of the DBFO Co to perform its obligations under this Agreement and the DBFO shall within 28 days of receipt of such notice be entitled to demonstrate to the reasonable satisfaction of the Secretary of State that no such effect will occur, in which case the Secretary of State shall not take any such action. The Secretary of State shall at any time be entitled to raise the same or further reasons subject always to the DBFO Co's entitlement to demonstrate that no material adverse effect will occur as set out above;

40.1.11 the DBFO Co fails to pay any sum due to the Secretary of State hereunder (which sum is not in dispute) and such failure continues for 90 days; or

40.1.12 any breach by the DBFO Co of [Clause 10.3](#) [No Payments to Protestors].

40.2 Notification of Events of Default

The DBFO Co undertakes that it shall notify the Secretary of State of the occurrence and details of any Event of Default and of any event or circumstance which would, with the passage of time or otherwise, constitute or give rise to an Event of Default, in either case promptly upon the DBFO Co becoming aware of the occurrence thereof.

40.3 Remedies

Upon the occurrence of an Event of Default, the Secretary of State may at his option and without prejudice to any of his other rights or remedies and to any rights of action which shall accrue or shall have already accrued to the Secretary of State do any or all of the following:

40.3.1 suspend payment of the DBFO Payment and any other payments otherwise due hereunder or retain any amount due from the Secretary of State to the DBFO Co howsoever arising;

- 40.3.2 apply any sums standing to the credit of the Retention Account in accordance with [Clause 19.7.11](#), the New River Lea Crossing Retention Account in accordance with [Clause 9.15.5](#), and the Lodge Avenue Flyover Retention Account in accordance with [Clause 9.16.5](#);
- 40.3.3 without determining this Agreement, by notice in writing having immediate effect suspend performance by the DBFO Co of part only of the functions to be performed by it under this Agreement until such time as the DBFO Co shall have demonstrated to the reasonable satisfaction of the Secretary of State that it will perform and is capable of performing its obligations under this Agreement and thereafter himself perform or procure a third party to perform such part of the functions for such period;
- 40.3.4 in the case of the Events of Default referred to in [Clauses 40.1.1 to 40.1.5](#) (inclusive), [40.1.8](#), [40.1.11](#) and [40.1.12](#) and any other Event of Default which is incapable of remedy, terminate the Agreement in its entirety by notice in writing having immediate effect;
- 40.3.5 in the case of any Event of Default other than those referred to in [Clause 40.3.4](#), serve notice of default on the DBFO Co requiring the DBFO Co at the DBFO Co's option either:
- 40.3.5.1 to remedy the breach or breaches referred to in such notice of default within 28 days of such notice (or such longer period as may be agreed by the Secretary of State in his absolute discretion); or
- 40.3.5.2 to put forward within 14 days of such notice a reasonable programme for the remedying of the breach or breaches, such programme to specify in reasonable detail the manner in which such breach or breaches is or are proposed to be remedied and the latest date by which it is proposed that such breach or all such breaches shall be remedied, and the provisions of [Clause 40.5](#) [Termination in Full] shall apply.

40.4 Partial Suspension

In the case of a partial suspension of the performance by the DBFO Co under this Agreement in accordance with [Clause 40.3.3](#), the DBFO Co shall reimburse the Secretary of State for all costs incurred by him in performing or engaging others to perform the functions of the DBFO Co which are suspended (including, without limitation, the relevant administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads).

40.5 Termination in Full

40.5.1 Where the DBFO Co puts forward a programme in accordance with [Clause 40.3.5.2](#) the Secretary of State shall have 28 days within which to notify the DBFO Co that it 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 it does not accept such programme as being reasonable, the parties shall endeavour within the following 7 days to agree any necessary amendments to the programme put forward. In the absence of agreement within such 7 day period, the question of whether or not the programme (as the same may have been amended by agreement) is reasonable may be referred by either Party to the Disputes Resolution Procedure.

40.5.2 If:

40.5.2.1 the breach or breaches notified in a notice of default served under [Clause 40.3.5](#) is or are not remedied:

40.5.2.1.1 before the expiry of the period referred to in [Clause 40.3.5.1](#) (if applicable); or

40.5.2.1.2 where the DBFO Co puts forward a programme pursuant to [Clause 40.3.5.2](#) which has been accepted by the Secretary of State or determined by the Disputes Resolution Procedure as being reasonable, in accordance with such programme; or

40.5.2.2 such programme as is put forward by the DBFO Co pursuant to [Clause 40.3.5.2](#) is rejected by the Secretary of State as not being reasonable, and the Disputes Resolution Procedure does not find against that rejection,

the Secretary of State may terminate this Agreement in its entirety by notice in writing having immediate effect.

40.6 Savings

The rights of the Secretary of State under this Clause 40 [Default] are in addition and without prejudice to any other right the Secretary of State may have to claim the amount of any loss or damage suffered by the Secretary of State on account of the acts or omissions of the DBFO Co, whether pursuant to any bond or guarantee given in accordance with the requirements of this Agreement or otherwise.

41. **TERMINATION BY THE DBFO CO**

41.1 DBFO Co Termination Events

The following are DBFO Co Termination Events:

- 41.1.1 the Government or any person acting pursuant to powers delegated by 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 or otherwise than as a result of any default by the DBFO Co;
- 41.1.2 the Secretary of State shall fail to issue the Commencement Certificate on or before the date which is 1 year after the date determined in accordance with [Clause 7.3.1](#);
- 41.1.3 the Secretary of State shall be in material breach of its obligations under [Clause 8.1](#) [Access for DBFO Co] and such breach shall materially adversely affect the ability of the DBFO Co to perform its obligations under this Agreement for a period of not less than 180 days;
- 41.1.4 the Secretary of State or any successor of the Secretary of State under this Agreement shall cease to be the highway authority in respect of the Project Road or any material part of the Project Road (but excluding by way of any temporary or permanent delegation of the whole or any part of his statutory functions as highway authority and excluding the Docklands Roads);
- 41.1.5 the obligations of the Secretary of State under this Agreement shall (without the prior consent of the DBFO Co, such consent not to be unreasonably withheld or delayed) be novated or otherwise transferred (whether by virtue of any Law or any scheme pursuant to any Law or otherwise) to another person other than:
 - 41.1.5.1 any department, office, instrumentality or agency of the Government; or
 - 41.1.5.2 any person whose obligations under this Agreement are guaranteed by the Government or any department, office, instrumentality or agency of the Government; or
 - 41.1.5.3 Transport for London, a body corporate to be established in connection with the Greater London Authority Act, and for the avoidance of doubt upon transfer to Transport for London the Secretary of State shall have no liability to the DBFO Co under the terms hereof save in respect of any antecedent breach of his obligations hereunder;
- 41.1.6 the Secretary of State shall fail to pay any sum due to the DBFO Co hereunder (which sum is not in dispute), and such failure continues for 90 days.

41.2 Termination Procedure

- 41.2.1 Upon the occurrence of a DBFO Co Termination Event and so long as such DBFO Co Termination Event is subsisting, the DBFO Co may, at its option, serve notice on the Secretary of State of the occurrence of such DBFO Co Termination Event. If the relevant matter or circumstance has not been rectified or remedied by the Secretary of State or otherwise within 60 days of such notice, the DBFO Co may serve a further notice on the Secretary of State terminating this Agreement with immediate effect.
- 41.2.2 Upon a termination of this Agreement pursuant to Clause 41.2.1, the DBFO Co shall be entitled to compensation in accordance with [Clause 44](#) [Compensation on Termination].
- 41.2.3 The DBFO Co may give notice to the Secretary of State terminating this Agreement only in accordance with the provisions of this Clause 41.2 [Termination Procedure], [Clause 42.2.1](#), [Clause 42.3.1](#) or [Clause 42.4.1](#).

41.3 Transfer by Transport for London

In the event that the obligations of the Secretary of State hereunder having been transferred to Transport for London, such obligations are thereafter to be novated or otherwise transferred (whether by virtue of any Law or any scheme pursuant to any Law or otherwise) to another person ("Transferee") it shall not be alleged that the DBFO Co has nor shall DBFO Co be found to have unreasonably withheld or delayed its consent to such novation or transfer if it can demonstrate that the Transferee does not have legal capacity or sufficient financial standing and resources to perform the obligations under this Agreement of Transport for London (or other person who has succeeded its rights and obligations under this Agreement).

42. **NON-DEFAULT TERMINATION**

42.1 Expiry of Term

This Agreement shall terminate automatically upon the Expiry Date unless it shall have previously been terminated in accordance with the provisions of this Agreement.

42.2 Termination for Force Majeure

42.2.1 In the circumstances referred to in [Clause 37.5](#) [Right to Terminate] and so long as such circumstances continue, either the Secretary of State or the DBFO Co may terminate this Agreement by notice to the other having immediate effect. In the circumstances referred to in [Clause 20.7.1.1](#) the Secretary of State may terminate this Agreement by notice to the DBFO Co having immediate effect.

42.2.2 In the event of any termination pursuant to Clause 42.2.1, the Secretary of State shall pay to the DBFO Co the amounts determined in accordance with [Clause 44.2](#) [Pre-Commencement Termination] or [Clause 44.3](#) [Post-Commencement Termination], as the case may be.

42.3 Termination on Change in Law

42.3.1 If a 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 following consultation to reach a solution acceptable to both parties of not less than 90 days may terminate this Agreement by notice to the other.

42.3.2 In the event of any termination pursuant to Clause 42.3.1, the Secretary of State shall pay to the DBFO Co the amounts determined in accordance with [Clause 44.2](#) [Pre-Commencement Termination] or [Clause 44.3](#) [Post-Commencement Termination] (as the case may be) and [Clause 44.5](#) [Additional Compensation].

42.4 Termination under Clause 27

42.4.1 If the entitlement of the DBFO Co to terminate this Agreement under [Clause 27.5.3](#) arises, then the DBFO Co may terminate this Agreement by notice to the Secretary of State having immediate effect.

42.4.2 The DBFO Co shall be entitled to compensation as a consequence of any termination pursuant to Clause 42.4.1 in accordance with [Clause 44](#).

43. EFFECT OF TERMINATION

43.1 Step-in Rights

43.1.1 Without prejudice to [Clause 26.5](#) [Step-In Rights], in the event that the Secretary of State has given notice of default or notice of termination under [Clause 40.3](#) [Remedies], [Clause 40.5](#) [Termination in Full], [Clause 42.2](#) [Termination for Force Majeure], [Clause 42.3](#) [Termination on Relevant Change in Law] or [Clause 42.4](#) [Termination under [Clause 27](#)] or the DBFO Co has given notice of termination under [Clause 41.2](#) [Termination Procedure], [Clause 42.2](#) [Termination for Force Majeure], [Clause 42.3](#) [Termination on Relevant Change in Law] or [Clause 42.4](#) [Termination under [Clause 27](#)] and, in any such case, members of the public shall be unable to use the Project Facilities either safely, without undue delay or at all, then:

43.1.1.1 the Secretary of State may by 7 days notice to the DBFO Co expel the DBFO Co from the Site and the Adjacent Areas without thereby avoiding this Agreement or releasing the DBFO Co from any of its obligations or liabilities under this Agreement except to the extent such liabilities are the result of the negligence of the Secretary of State or his agents; and

43.1.1.2 whether or not he exercises the right under [Clause 43.1.1.1](#), the Secretary of State may take, or employ others to take, such steps in relation to the operation and maintenance of the Project Facilities as he may think fit to protect the position of such members of the public, and the Secretary of State may recover all costs of so doing (including, without limitation, the relevant administrative expenses of the Secretary of State, including an appropriate sum in respect of general staff costs and overheads) from the DBFO Co provided that, where DBFO Co has validly served a notice of termination under [Clause 41.2](#), [42.2](#), [42.3](#) or [42.4](#), the Secretary of State shall not be entitled to recover such costs.

43.1.2 For the avoidance of doubt, subject to the exercise by the Secretary of State of any right under [Clause 43.1.1](#), the Parties shall continue to perform their obligations under this Agreement notwithstanding the giving of any notice of default or notice of termination until the termination of this Agreement becomes final in accordance with the provisions of this [Clause 43](#) [Effect of Termination].

43.2 Disputed Termination

43.2.1 Notwithstanding the provisions of [Clauses 40.3](#) [Remedies], [40.5](#) [Termination in Full], [41.2](#) [Termination Procedure], [42.2](#) [Termination for Force Majeure], [42.3](#) [Termination on Relevant Change in Law], and

Clause 42.4 [Termination under Clause 27], where either Party has given notice of termination of this Agreement and the other Party has within 14 days of receipt of such notice referred the question of whether or not the purported termination is wrongful to the Disputes Resolution Procedure, termination of this Agreement shall not take effect pursuant to such notice of termination unless and until it is agreed by the Parties or finally determined in accordance with the Disputes Resolution Procedure that such termination is not wrongful.

43.2.2 If at any time a notice of termination has been received and a reference to the Disputes Resolution Procedure has not been made pursuant to Clause 43.2.1, then either Party may (within the 14 day period referred to in Clause 43.2.1) apply to the Court for injunctive or declaratory relief (whichever shall be appropriate) in respect of such purported termination and/or refer to the Court the question whether this Agreement has been wrongfully terminated and, if so, the damages accruing therefrom, in which event such matter shall be dealt with by the Court and not pursuant to the Disputes Resolution Procedure. Termination of this Agreement shall not take effect until it has been finally determined by the Court whether or not injunctive or declaratory relief is to be granted. Any Court proceedings shall be conducted by both Parties with due expedition.

43.2.3 If the Secretary of State has given notice of termination of this Agreement to the DBFO Co and has exercised the right referred to in Clause 43.1.1.1, then such termination shall be final notwithstanding a determination under the Disputes Resolution Procedure that such termination was wrongful and the DBFO Co shall not be entitled to access to any part of the Site or Adjacent Areas.

43.3 Savings

43.3.1 Save as otherwise expressly provided in this Agreement:

43.3.1.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including without limitation the right of the Secretary of State to recover damages from the DBFO Co where the termination has arisen as a result of an Event of Default); and

43.3.1.2 termination of this Agreement shall not affect the continuing rights and obligations of the DBFO Co and the Secretary of State under Clauses 8.6.2, 16.7 [Removal of Signs], 20 [Insurance], 24 [Reports and Information], 25 [Records], 30.2 [Claims Against Third Parties], 32 [Calculation of Payments], 33 [Invoicing and Payment], 39 [Indemnities], 42.2 [Termination for Force Majeure], 42.3 [Termination on Relevant Change in Law], 44 [Compensation on Termination],

48 [Taxes], 49 [Intellectual Property] and 50 [Confidentiality], 52 [Disputes Resolution Procedure], 57 [Governing Law and Jurisdiction], Schedules 14 [Records and Reports] and 15 [Disputes Resolution Procedure] and this Clause 43 [Effect of Termination] or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

Save as provided in this Clause 43.3 [Savings], all rights and obligations of the Secretary of State and the DBFO Co under this Agreement shall cease and be of no further force and effect upon termination of this Agreement.

43.3.2 Notwithstanding any breach of this Agreement by either Party and without prejudice to any other rights which the other Party may have in relation thereto, the other Party may elect to continue to treat this Agreement as in full force and effect and to enforce its rights hereunder, and failure of either Party to exercise any right hereunder including any right to terminate this Agreement and any right to claim damages shall not be deemed a waiver of such right for any continuing or subsequent breach.

43.4 Transfer of Assets, etc

On the termination of this Agreement (or, in the case of Clause 43.4.5 and where the Secretary of State has exercised his step-in rights under Clause 43.1.1, on and for the duration of the exercise by the Secretary of State of such step-in rights):

43.4.1 the rights of access under Clause 8.1 [Access for DBFO Co] shall automatically terminate;

43.4.2 if, prior to the issue of the later of the Completion Certificate and the CS Construction End Date, the DBFO Co shall transfer to and there shall vest in the Secretary of State such part of the Works as shall have been carried out, and if the Secretary of State so elects:

43.4.2.1 the Design Contract and/or the Construction Contract and the Completion Guarantee referred to in Clause 2.3.1.5(b) shall be novated to the Secretary of State (and upon such election the DBFO Co shall take all necessary steps as soon as reasonably practicable to procure such novation to the Secretary of State) and all Plant and all materials on the Site or adjacent thereto shall remain available to him for the purposes of completing the Works; and

43.4.2.2 the Construction Plant shall remain available to the Secretary of State for the purposes of completing the Works subject to payment therefor of a reasonable hire charge;

- 43.4.3 if, following the Actual BRW Commencement Date in respect of a Part of the BRW New Road, but prior to the issue of the BRW Completion Certificate in respect of such Part of the BRW New Road, the DBFO Co shall transfer to and there shall vest in the Secretary of State such part of the Bridge Replacement Works as shall have been carried out, and if the Secretary of State so elects:
- 43.4.3.1 the relevant BRW Design Contract and/or the BRW 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 intended to form part of such Bridge Replacement Works which is on the Site or adjacent thereto shall remain available to him for the purposes of completing the Bridge Replacement Works; and
 - 43.4.3.2 the Construction Plant shall remain available to the Secretary of State for the purposes of completing the Bridge Replacement Works subject to payment therefor of a reasonable hire charge;
- 43.4.4 the DBFO Co shall hand over to and there shall vest in the Secretary of State any interest of the DBFO Co in the Project Facilities, which in the case of the termination of this Agreement in accordance with [Clause 42.1](#) [Expiry of Term], shall be in the state required in accordance with [Clause 19](#) [Handback];
- 43.4.5 if the Secretary of State so elects, the contracts of engagement between the DBFO Co and those persons listed in [Clause 45.4.1](#) in so far as they relate to Operation & Maintenance; the Operating and Maintenance Support Agreement between the DBFO Co and the Sponsors; and the Operating and Maintenance Support Agreement Guarantee between the DBFO Co and the Sponsors shall be novated to him;
- 43.4.6 the Secretary of State shall have an option to purchase or (where the Secretary of State has exercised his step-in rights under [Clause 43.1.1](#)) hire from the DBFO Co or any of its Associated Companies at a fair market value (as between willing counterparties, with any disputes as to such fair market value being determined by the Expert) and free from any security interest all or any part of the stocks of material, road vehicles, spare parts and other moveable property owned by the DBFO Co or any of its Associated Companies and reasonably required in connection with the operation and maintenance of the Project Facilities;
- 43.4.7 the DBFO Co shall deliver to the Secretary of State or his designee "as built drawings" showing all alterations made since the commencement of operation for the Project Facilities;

- 43.4.8 the DBFO Co shall deliver to the Secretary of State operation and maintenance manuals for the Project Facilities, including without limitation in respect of communications, signalling and other systems in service at the Termination Date;
- 43.4.9 the DBFO Co shall procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical equipment included in the Project Facilities is assigned to the Secretary of State;
- 43.4.10 the DBFO Co shall deliver to the Secretary of State or his designee the records referred to in [Clause 25.4.3](#);

43.5 Handover

On the termination of this Agreement for any reason:

- 43.5.1 the DBFO Co shall cooperate fully with the Secretary of State and any successor operator of the Project Facilities in order to achieve a smooth transfer of the operation of the Project Facilities, so as to protect the safety of and avoid undue delay or inconvenience to the members of the public;
- 43.5.2 the DBFO Co shall, as soon as practicable, remove from the Site, the Adjacent Areas, all Plant, materials, Construction Plant, temporary buildings, road vehicles, spare parts and other property not required by the Secretary of State pursuant to [Clause 43.4.2](#), [43.4.3](#) or acquired or hired by the Secretary of State pursuant to [Clause 43.4.6](#), and if it has not done so within 28 days after any notice from the Secretary of State requiring it to do so the Secretary of State may (without being responsible for any Loss) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of the DBFO Co;
- 43.5.3 the DBFO Co shall, within 1 week of the Termination Date, deliver to the Department's Representative:
 - 43.5.3.1 keys to all traffic sign housings; and
 - 43.5.3.2 lifting keys for all types of chamber covers.
- 43.5.4 the DBFO Co shall as soon as practicable vacate the Site and the Adjacent Areas and shall leave the Site and the Adjacent Areas in a clean and orderly condition.

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45. **ASSIGNMENT, SUB-CONTRACTING, CHANGE IN CONTROL AND ENCUMBRANCES**

45.1 Binding on Successors and Assigns

This Agreement shall be binding on and shall enure to the benefit of the DBFO Co and the Secretary of State and their respective successors and permitted assigns.

45.2 Assignment

45.2.1 Subject to Clause 45.2.2 and [Clause 45.6](#) the DBFO Co shall not, and shall procure that no Contracting Associate shall, in any such case without the prior consent of the Secretary of State, assign, novate, transfer or create or allow to subsist any Encumbrance, trust or interest in 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 any part thereof or any benefit or interest therein or thereunder.

45.2.2 The provisions of Clause 45.2.1 do not apply:

45.2.2.1 in relation to the assignment of the benefit of any of the agreements referred to in [Clause 45.2.1.1](#) by way of security in accordance with the Funding Agreements, provided that in the case of an assignment of the benefit of this Agreement or any part thereof or any benefit or interest therein or thereunder any assignee shall have entered into the Direct Agreement or such other similar agreement in relation to the exercise of its rights as the Secretary of State shall require; or

45.2.2.2 to the novation of this Agreement to a Proposed Substitute on one occasion only in accordance with the provisions of the Direct Agreement.

45.2.3 Without prejudice to [Clauses 45.4.1](#), [45.4.2](#) and [45.4.3](#), the DBFO Co shall procure that:

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

45.2.3.2 the Contractor shall not be permitted to assign the Construction Contract, the BRW Construction Contract or any part thereof or any benefit or interest therein or thereunder,

without the DBFO Co having obtained the prior consent of the Secretary of State.

45.2.4 Without prejudice to [Clauses 45.4.1](#), [45.4.2](#) and [45.4.4](#), the DBFO Co shall procure that the Operator shall not be permitted to assign the 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.

45.3 Change in Control

45.3.1 Subject to [Clause 45.3.4](#), there is a change in control of the DBFO Co for the purposes of [Clause 40.1.2](#) whenever:

45.3.1.1 any person has control of the DBFO Co who did not have control of the DBFO Co when this Agreement was executed; or

45.3.1.2 any person ceases to have control of the DBFO Co,

and in either case (but subject to [Clause 45.3.2](#)) the change in control shall have taken place without the prior consent of the Secretary of State.

45.3.2 The Secretary of State shall not unreasonably withhold or delay his consent to a change in control in the following circumstances:

45.3.2.1 in the case of a reorganisation for bona fide fiscal purposes where the ultimate control of the DBFO Co does not change;

45.3.2.2 in respect of a change in control proposed at any time after the later of:

45.3.2.2.1 the date of issue of the Completion Certificate;

45.3.2.2.2 the CS Construction End Date;

45.3.2.3 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 and which is not an entity to which the Secretary of State had previously refused to give his consent pursuant to this [Clause 45.3](#) [[Change in Control](#)].

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

45.3.3 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 45.3 [Change in Control], a person has or had control of the DBFO Co, with the following modifications:

45.3.3.1 for the words "the greater part" wherever they occur in the said subsection (2) there shall be substituted the words ["one third or more"]; and

45.3.3.2 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.

45.3.4 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 40.1.2](#).

45.3.5 The DBFO Co confirms that it has not and undertakes that it will not directly or indirectly by way of formal or informal arrangement appoint any Contracting Associate as its agent or sub-contractor to act on behalf of the DBFO Co in the Disputes Resolution Procedure or act on behalf of the DBFO Co in its dealings with the persons listed in Clause 45.4.1.3 to 45.4.1.13, and any such purported agency, sub-contracting arrangement proposed document or proposed course of action shall be sufficient grounds upon which the Secretary of State may object to any document relating to the Project which is submitted to the Review Procedure.

45.4 Sub-Contracting

45.4.1 Neither the engagement nor employment of the following persons shall be terminated 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:

45.4.1.1 the Contractor;

45.4.1.2 the Designer;

45.4.1.3 any Checker;

45.4.1.4 the Operator;

- 45.4.1.5 the Archaeologist;
- 45.4.1.6 the DBFO Co Quality Director;
- 45.4.1.7 the Landscape Architect;
- 45.4.1.8 the Landscape Manager;
- 45.4.1.9 the Ecologist;
- 45.4.1.10 the Traffic Control and Communications Testing Contractor;
- 45.4.1.11 the Testing Contractor;
- 45.4.1.12 the Traffic Signals Testing Contractor;
- 45.4.1.13 the Carriageway Availability Monitoring Contractor,

provided that in the case of the appointment of the persons referred to in Clauses 45.4.1.10 to 45.4.1.13 inclusive the Secretary of State shall not withhold consent if such person is included on the Agreed Form List.

- 45.4.2 If any of the persons referred to in [Clause 45.4.1](#) 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, Landscape Manager 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).
- 45.4.3 Without prejudice to any obligation under [Clause 23](#) [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.
- 45.4.4 Without prejudice to any obligation under [Clause 23](#) [Quality Management] the operation and maintenance of the Project Facilities may be sub-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.
- 45.4.5 No additional sub-contractor shall carry out any Operation until:

- 45.4.5.1 the Secretary of State has approved the appointment (such approval not to be unreasonably withheld or delayed) both as to the person concerned and to the terms of engagement or employment; and
- 45.4.5.2 the DBFO Co has provided to the Secretary of State a waiver of liability in relation to the Disclosed Data in a form satisfactory to him (acting reasonably).

45.5 Consents

Save as provided in [Clauses 45.3.1](#), [45.4.1](#) and [45.4.2](#), any consent to be given by the Secretary of State under this Clause 45 [Assignment, Sub-Contracting and Change in Control and Encumbrances] shall be in his absolute discretion and upon such terms as he may in his absolute discretion determine.

45.6 Encumbrances over Retention Accounts and SoS Insurance Accounts

The DBFO Co shall not be entitled to grant any Encumbrance over or in respect of any of the SoS Insurance Account, the Retention Account, the River Lea Crossing Retention Account, the Lodge Avenue Flyover Retention Account or the Secretary of State Insurance Account (together, "**the Accounts**") or any sums standing to the credit thereof from time to time other than in favour of the Secretary of State provided that the DBFO Co shall be entitled to grant a security interest to the Credit Providers (or the Security Trustee on their behalf) as defined in the Direct Agreement in and to the "Accounts" in the form of the RMS Debenture referred to in [Clause 2.3.1.3 \(l\)](#) (on terms that at all times such security interest:

- 45.6.1 is subject to and ranks at all times behind:
 - 45.6.1.1 any Encumbrance in favour of the Secretary of State whether created before or after any such security interest in favour of the Credit Providers (or the Security Trustee on their behalf) as defined in the Direct Agreement over or in respect of any of the Accounts, all sums from time to time standing to the credit of such Account (including without limitation any accrued interest); and
 - 45.6.1.2 any and all other rights of the Secretary of State in and to the Accounts, all sums from time to time standing to the credit of the Accounts and all accrued interest;
- 45.6.2 is subject to the provisions of this Agreement; and
- 45.6.3 shall not in any way interfere with, prejudice or otherwise affect any of the rights and obligations of the Parties under this Agreement (in particular, but without limitation, this Clause 45.6) or in respect of the Accounts,

and otherwise upon such terms as the Secretary of State shall approve in writing in advance. The DBFO Co shall (if so required by the Secretary of State) execute such documents and do such things as the Secretary of State may reasonably require to give effect to the ranking of any security interest contemplated by this Clause 45.6.

46. **NOTICES**

46.1 **Requirement for Writing**

Wherever in this Agreement provision is made for the giving or issuing of any notice, endorsement, consent, approval, certificate or determination by any person (a "Notice"), unless otherwise specified such Notice shall be in writing and the words "notify", "endorsed", "consent", "approval", "certify" or "determined" shall be construed accordingly.

46.2 **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

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DBFO Co

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Department's Agent

[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

Department's Representative

[REDACTED]

[REDACTED]

46.3 Changes

Either Party may change its address for notice to another address in England and Wales by prior notice to the other Party with a copy to the Department's 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.

46.4 Receipt

Any Notice shall be deemed to have been received:

46.4.1 if sent by hand or recorded delivery post, when delivered;

46.4.2 if sent by facsimile, upon sending, subject to:

46.4.2.1 confirmation of uninterrupted transmission by a transmission report; and

46.4.2.2 there having been no telephonic communication by the recipient to the sender (any such telephonic communication to be confirmed in writing) that the facsimile has not been received in legible form:

46.4.2.2.1 within 3 hours after sending, if sent on a Working Day and between the hours of 9.00 a.m. and 4.00 p.m.; or

46.4.2.2.2 by noon on the next following Working Day if sent after 4.00 p.m. on a Working Day but

[REDACTED]

[REDACTED]

before 9.00 a.m. on the next following Working Day,

provided that any Notice (other than a routine Notice) given by fax shall be confirmed by letter sent by hand or post, but without prejudice to the original fax Notice if received in accordance with this Clause 46.4.2.

47. **CONSENTS AND APPROVALS**

47.1 **Review Procedure**

47.1.1 Any proposed document (including without limitation any Design Data) or proposed course of action on the part of the DBFO Co which, under the terms of this Agreement, is required to be submitted to the Review Procedure shall be dealt with in accordance with the provisions of [Part 3 of Schedule 7](#) [Review Procedure].

47.1.2 Without limitation to Clause 47.3 [Effect of Consents, Approvals and Inspections], notwithstanding the application of the Review Procedure, the DBFO Co shall not be entitled to recover from the Secretary of State any Losses or Claims which may arise out of or in connection with any inadequacy, error or failure of any matter which has been subject to the Review Procedure and any comments made by the Department's Nominee in the course thereof. The DBFO Co shall obtain from the Designer, Contractor, Operator, Checker, Archaeologist, Landscape Architect, Landscape Manager, Traffic Control and Communications Testing Contractor, Traffic Signals Testing Contractor, Testing Contractor, the Carriageway Availability Monitoring Contractor and Ecologist, prior to any such party carrying out any part of the Operations, waivers of liability in favour of the Secretary of State and the Department's Nominee in respect of any such Losses and Claims. No comments or absence of comments on any matter in the course of the Review Procedure shall relieve the DBFO Co of any of its obligations under this agreement in connection with the Operations.

47.2 **Reasonableness**

Unless otherwise specified, where any agreement, certificate, consent, permission, expression of satisfaction or other approval (an "Approval") falls to be given by the Secretary of State or any person on his behalf under the terms of this Agreement, the same shall not be unreasonably withheld or delayed.

47.3 **Effect of Consents, Approvals and Inspections**

47.3.1 Neither the giving of any Approval, knowledge of the terms of any agreement or document (including without limitation the Project Documents), nor the review of any document or course of action pursuant

to the Review Procedure by or on behalf of the Secretary of State, 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.

- 47.3.2 Without limitation to [Clause 47.3.1](#), 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.
- 47.3.3 Without limitation to [Clause 47.3.1](#), 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.
- 47.3.4 Any Approval shall be final, subject to being opened up, reviewed or revised:
- 47.3.4.1 if errors or further relevant facts are revealed after the Approval has been given; or
- 47.3.4.2 in accordance with [paragraph 7.3 of Schedule 15](#) [Disputes Resolution Procedure].
- 47.3.5 Without prejudice to [Clause 47.3.4](#), any endorsement, decision, opinion, instruction, notice, statement of objection, finding, determination, requirement or certificate of the Department's 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.

48. **TAXES**

48.1 **VAT**

- 48.1.1 All amounts stated to be payable by either Party under this Agreement shall be exclusive of any VAT properly chargeable thereon.

- 48.1.2 Each Party shall pay to the other Party any VAT properly chargeable to it in respect of any supply made to it under this Agreement provided that it shall first have received from the other Party a valid tax invoice in respect of that supply which complies with the requirements of Part III of the Value Added Tax Regulations 1995.
- 48.1.3 If either Party (in this Clause 48 [Taxes] the "First Party") shall consider that any VAT which the other Party (in this Clause 48 [Taxes] the "Second Party") claims to be properly chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain a ruling from the Commissioners of Customs and Excise (or, if relevant, such other body as is charged at the time with the collection and management of VAT) (in this Clause 48 [Taxes] the "Commissioners") as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Commissioners for such a ruling.
- 48.1.4 The following further provisions shall apply in respect of the application for a ruling in accordance with Clause 48.1.3:
- 48.1.4.1 prior to submitting its request for such a ruling and any further communication to the Commissioners in connection with the obtaining of the ruling, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;
- 48.1.4.2 the Second Party shall provide to the First Party copies of all communications received from the Commissioners in connection with the application for a ruling as soon as practicable after receipt; and
- 48.1.4.3 the Second Party shall use all reasonable efforts (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a ruling as soon as reasonably practicable following the initial request.
- 48.1.5 If a ruling is required by the First Party under Clause 48.1.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a ruling is received from the Commissioners which states that a sum of VAT is properly so chargeable. In the event of the receipt of a ruling which states that a sum of VAT (the "VAT Sum") is properly so chargeable, then subject to [Clause 48.1.6](#) and [48.1.7](#) and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III of the Value Added Tax Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum to the Second Party.

- 48.1.6 In the event that the First Party disagrees with any ruling obtained pursuant to [Clause 48.1.3](#) by the Second Party from the Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such ruling or otherwise to resist or avoid the imposition of VAT on the relevant supply.
- 48.1.7 The following further provisions shall apply in the event that the First Party shall exercise its rights under Clause 48.1.6:
- 48.1.7.1 the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of the Commissioners before any VAT tribunal or court of competent jurisdiction and appealing any judgment or decision of any such tribunal or court;
- 48.1.7.2 in the event that the Second Party shall be required to pay to or deposit with the Commissioners a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to the Commissioners on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with the Commissioners the First Party shall pay such sum to the Second Party;
- 48.1.7.3 save as specifically provided in Clause 48.1.7.2, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and
- 48.1.7.4 the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with the Commissioners in accordance with Clause 48.1.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

48.2 Deductions from payments

Save as otherwise provided in this Agreement and save only as may be required by law all sums payable by either Party to the other under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation.

48.3 Construction Industry Tax Deduction Scheme

48.3.1 In this Clause 48.3 [Construction Industry Tax Deduction Scheme]:

48.3.1.1 "the Act" means the Income and Corporation Taxes Act 1988;

48.3.1.2 "the Regulations" means the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993 (SI 1993/743);

48.3.1.3 "contractor" means a person who is a contractor for the purposes of the Act and the Regulations;

48.3.1.4 "evidence" means such evidence as is required by the Regulations to be produced to a contractor for the verification of a sub-contractor's tax certificate;

48.3.1.5 "statutory deduction" means the deduction referred to in Section 559(4) of the Act or such other deduction as may be in force at the relevant time;

48.3.1.6 "sub-contractor" means a person who is a sub-contractor for the purposes of the Act and the Regulations; and

48.3.1.7 "tax certificate" is a certificate issuable under Section 561 of the Act.

48.3.2 The provisions of this Clause 48.3 [Construction Industry Tax Deduction Scheme] shall apply throughout the term of this Agreement save for any period during such term in respect of which the 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 48.3.11](#) shall apply).

48.3.3 Not later than 21 days before the first payment under this Agreement is due to be made to the DBFO Co or after this Clause 48.3 [Construction Industry Tax Deduction Scheme] applies for the first time and on each occasion when this Clause 48.3 [Construction Industry Tax Deduction Scheme] applies following a period when it has not so applied the DBFO Co shall either:

48.3.3.1 provide the Secretary of State with the evidence that the DBFO Co is entitled to be paid without the statutory deduction;
or

- 48.3.3.2 inform the Secretary of State in writing that it is not entitled to be paid without the statutory deduction.
- 48.3.4 If the Secretary of State is not satisfied with the validity of the evidence submitted in accordance with [Clause 48.3.3.1](#), 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.
- 48.3.5 Where [Clause 48.3.3.2](#) applies, the DBFO Co shall immediately inform the Secretary of State if it obtains a tax certificate, and thereupon [Clause 48.3.3.1](#) shall apply.
- 48.3.6 If the period for which the tax certificate has been issued to the DBFO Co expires before the final payment is made to the DBFO Co under this Agreement and provided that this [Clause 48.3](#) [Construction Industry Tax Deduction Scheme] applies at that time, the DBFO Co shall not later than 28 days before the date of expiry either:
- 48.3.6.1 provide the Secretary of State with evidence that the DBFO Co from the said date of expiry is entitled to be paid for a further period without the statutory deduction, in which case the provisions of [Clause 48.3.4](#) shall apply if the Secretary of State is not satisfied with the evidence; or
- 48.3.6.2 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.
- 48.3.7 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.
- 48.3.8 The Secretary of State shall, as a "contractor" in accordance with the Regulations, send promptly to the Inland Revenue any voucher which, in compliance with the obligations of the DBFO Co as a "sub-contractor" under the Regulations, the DBFO Co gives to the Secretary of State.
- 48.3.9 If the DBFO Co does not produce a valid tax certificate sufficient to absolve the Secretary of State from its obligations to deduct tax from such payment, the Secretary of State shall be entitled to make a deduction at the rate specified in [Section 559\(4\)](#) of the Act or at such other rate as may be in force from time to time from the whole of any payment to DBFO Co (and not just that part of such payment which does not represent the direct cost to the DBFO Co or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment the Secretary of State shall have received written confirmation from the Inland Revenue in a form

which is reasonably satisfactory to the Secretary of State directing the Secretary of State to make the deduction against only a specified amount or proportion of any such payment to the DBFO Co.

- 48.3.10 Where any error or omission has occurred in calculating or making the statutory deduction then:
- 48.3.10.1 in the case of an over-deduction, the Secretary of State shall correct that error by payment to the DBFO Co of the sum over-deducted; and
- 48.3.10.2 in the case of an under-deduction, the DBFO Co shall correct that error or omission by payment to the Secretary of State of the sum which should have been but was not deducted.
- 48.3.11 The DBFO Co shall at the request of the Secretary of State produce to the Secretary of State the original of any current tax certificate which it holds and shall permit the Secretary of State to make a copy of such tax certificate and/or to record such details in respect of such tax certificate as the Secretary of State may consider appropriate.
- 48.3.12 If compliance with this Clause 48.3 [Construction Industry Tax Deduction Scheme] involves the Secretary of State or the DBFO Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause 48.3 [Construction Industry Tax Deduction Scheme] shall prevail.
- 48.3.13 Any Dispute arising out of the application of this Clause 48.3 [Construction Industry Tax Deduction Scheme] shall be resolved in accordance with the Disputes Resolution Procedure.

49. **INTELLECTUAL PROPERTY**

49.1 Design and Other Data

The DBFO Co shall make available to the Secretary of State without charge in paper based or machine readable form as required by the Secretary of State:

- 49.1.1 all materials, documents and data of any nature (including without limitation all Design Data) acquired or brought into existence in any manner whatsoever by the DBFO Co (and/or any of the DBFO Co's agents, employees, contractors or sub-contractors of any tier) for the purposes of the design or construction of the Works, the operation, maintenance or improvement of the Project Facilities or the conduct of the other Operations and which might reasonably be required by the Secretary of State whether during or after the Contract Period for the purposes of exercising his rights or carrying out his duties under this Agreement or carrying out any other functions; and

49.1.2 all other such materials, documents and data acquired or brought into existence by third parties as may reasonably be required for the purposes referred to in [Clause 49.1.1](#).

49.2 Licences

49.2.1 The DBFO Co:

49.2.1.1 hereby grants to the Secretary of State a perpetual, transferable, non-exclusive, royalty-free licence (carrying the right to grant sub-licences) to use for any purpose (whether during or after the Contract Period) relating to the design, construction, completion, commissioning or testing of the Works, or of the Contingent Scheme the completion of which is procured by the Secretary of State following the giving of a notice pursuant to [Clause 9.3.2](#) (a "Clause 9.3.2 Scheme"), or of the Bridge Replacement Works in respect of a Part of the BRW New Road, the completion of which is procured by the Secretary of State following the giving of a notice pursuant to [Clause 9.12.2](#) or [9.17](#) (a "BRW Scheme") the operation, maintenance or improvement of the Project Facilities or a Clause 9.3.2 Scheme, or the conduct of any other Operations or the carrying out by the Secretary of State of any functions in respect of the Project Facilities, a Clause 9.3.2 Scheme or a BRW Scheme all and any Intellectual Property which is or becomes vested in the DBFO Co (and/or any of the DBFO Co's agents, employees, contractors or sub-contractors of any tier) and to make any alterations, adaptations or additions to the Design Data and the Traffic Data which is or becomes vested in the DBFO Co; and

49.2.1.2 where any Intellectual Property is vested in any other third party, shall procure the grant of a like licence with effect (subject to [Clause 49.2.3](#)) from the date hereof (having immediate effect from the grant thereof) to the Secretary of State for any purpose (whether during or after the Contract Period) relating to the design, construction, completion, commissioning or testing of the Works, a Clause 9.3.2 Scheme or a BRW Scheme, the operation, maintenance or improvement of the Project Facilities or a Clause 9.3.2 Scheme, the conduct of any other Operations or the carrying out by the Secretary of State of any functions in respect of the Project Facilities, a Clause 9.3.2 Scheme or a BRW Scheme.

49.2.2 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) to use (during the Contract Period only) all and any Intellectual Property which is or becomes vested in the Secretary of State for any purpose relating to the design, construction, completion, commissioning or testing

of the Works, the operation, maintenance or improvement of the Project Facilities or the conduct of any other Operations.

- 49.2.3 With respect to Intellectual Property arising during the Contract Period, the licence granted pursuant to [Clause 49.2.1](#) or [Clause 49.2.2](#) shall take effect immediately upon the coming into existence of such Intellectual Property.

49.3 Access to Data

- 49.3.1 To the extent that any of the data, materials and documents referred to in [Clause 49](#) [Intellectual Property] including, without limitation, all Design Data and Traffic Data are generated by or maintained on a computer or other equipment or otherwise in any machine readable format, the DBFO Co shall procure for the benefit of the Secretary of State at no charge the grant of a licence or sub-licence for and supply of any relevant software or database to enable the Secretary of State or any person authorised by him to access and otherwise use such data (including, without limitation, online access and use, as applicable) for the purposes set out in this Agreement or whether during or after the termination of this Agreement as otherwise permitted under this Agreement or following its termination, for the purposes of the design, construction, completion, commissioning or testing of the Works, any [Clause 9.3.2](#) Scheme or any BRW Scheme, the operation, maintenance or improvement of the Project Facilities or a [Clause 9.3.2](#) Scheme or the carrying out by or on behalf of the Secretary of State of any function.

- 49.3.2 Within 28 days after the execution of this Agreement the DBFO Co shall submit to the Department's 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 49.1](#) [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.

49.4 Further Assurances

The DBFO Co and the Secretary of State each undertakes at the request of the other to execute all documents and do all acts which may be necessary to bring into effect or confirm the terms of any licence contained or referred to in [Clause 49.2](#) [Licences].

49.5 Traffic Data

49.5.1 The Secretary of State shall be entitled without further consent from the DBFO Co:

49.5.1.1 to use the Traffic Data for the purposes of exercising his rights or carrying out his duties under this Agreement or carrying out any other function; and

49.5.1.2 to incorporate the Traffic Data in any traffic or other statistics prepared by or on behalf of the Secretary of State and to publish such statistics or the Traffic Data either generally or to a limited category of persons or otherwise to exploit such statistics or the Traffic Data and whether or not in return for any fee.

49.5.2 The DBFO Co shall not be entitled without prior written consent from the Secretary of State (which consent he may withhold in his absolute discretion) to use the Traffic Data except for the purposes of exercising its rights or carrying out its duties under this Agreement;

49.6 Termination

This Clause 49 [Intellectual Property] shall survive the termination of this Agreement irrespective of the reason for termination.

50. **CONFIDENTIALITY/**

50.1 Confidential Information

Each Party agrees, for itself and its respective directors, officers, employees, servants and agents, to keep confidential and not to disclose to any person (save as hereinafter provided) any of the terms of this Agreement contained in the Confidential Schedules or any confidential or proprietary information provided to or arising or acquired by it pursuant to the terms or performance of this Agreement (including without limitation any such documents or information supplied in the course of proceedings under the Disputes Resolution Procedure) (together the "Confidential Information").

50.2 Exceptions

Notwithstanding Clause 50.1 [Confidential Information], a Party shall be entitled to disclose the whole or any part of the Confidential Information:

50.2.1 to its directors, officers, employees, servants, sub-contractors, agents, or professional advisers to the extent necessary to enable it to perform (or to cause to be performed) or to enforce any of its rights or obligations under this Agreement including, for the avoidance of doubt any credit rating agency appointed by or on behalf of a Party; or

- 50.2.2 when required to do so by law or by or pursuant to the rules or any order having the force of law of any court, association or agency of competent jurisdiction or any governmental agency; or
- 50.2.3 in the case of the DBFO Co, to any bank or financial institution from whom it is seeking or obtaining finance; or
- 50.2.4 to the extent that the Confidential Information has, except as a result of breach of confidentiality, become publicly available or generally known to the public at the time of such disclosure; or
- 50.2.5 to the extent that the Confidential Information is already lawfully in the possession of the recipient or lawfully known to him prior to such disclosure; or
- 50.2.6 to the extent that it has acquired the Confidential Information from a third party who is not in breach of any obligation as to confidentiality to the other Party; or
- 50.2.7 to the extent permitted by [Clause 24.8.2](#) [Parliamentary Questions] [Clause 49.2](#) [Licence] and [Clause 49.5](#) [Traffic Data]; or
- 50.2.8 in the case of the Secretary of State:
 - 50.2.8.1 to the extent required for the purpose of the design, construction, completion, commissioning and testing of the Works or the operation, maintenance or improvement of the Project Facilities in the event of termination of this Agreement;
 - 50.2.8.2 (without limitation to [Clause 50.2.2](#)) in relation to the outcome of the procurement process for the Project as may be required to be published in the Official Journal of the European Union or elsewhere; or
 - 50.2.8.3 to any other department, office or agency of the Crown (including for the avoidance of doubt the National Audit Office) where required for parliamentary, governmental, statutory or judicial purposes;
 - 50.2.8.4 in the case of the terms of this Agreement contained in the Confidential Schedules, after the expiry of seven years from the date of this Agreement.
- 50.2.9 to the extent required as part of the Statutory Process,

and, in the cases of [Clauses 50.2.1](#) and [50.2.3](#) above, upon obtaining from such person or entity to whom the disclosure is to be made an undertaking of strict confidentiality in relation to the Confidential Information in question and provided that [Clauses](#)

50.2.2 to 50.2.7 shall not apply in respect of any police report STATS 19 (or any replacement or substitute for such report).

50.3 Return of Confidential Information

On the Termination Date each party shall return to the other such Confidential Information within its possession or control as may belong to the other Party, save that this Clause 50.3 [Return of Confidential Information] shall not apply to:

50.3.1 Confidential Information belonging to the DBFO Co necessary for the design, construction, completion, commissioning and testing of the Works or the operation, maintenance or improvement of the Project Facilities, which Confidential Information may be so used or applied in the design, construction, completion, commissioning and testing of the Works or the operation, maintenance or improvement of the Project Facilities; or

50.3.2 Traffic Data.

50.4 Continuation of Confidentiality Obligations

The obligations of the parties under this Clause 50 [Confidentiality] shall, subject to [Clause 50.2](#), continue for a period of 5 years following the Termination Date notwithstanding such termination.

50.5 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 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.

50.6 Remedies

Without prejudice to any other rights and remedies that the other Party would have, each of the Parties agrees that damages would not be an adequate remedy for any breach of this Clause 50 [Confidentiality] and that the other Party shall be entitled to the remedies of injunction, specific performance and/or other equitable relief for any threatened or actual breach of this Clause 50 [Confidentiality].

51. AGENCY

51.1 No Delegation

For the avoidance of doubt, no provision of this Agreement shall be construed as a delegation by the Secretary of State of any of his statutory authority to the DBFO Co

save as specifically provided by [Clause 28.4](#) [Contracting Out of Functions] and [Clause 29.3](#) [Contracting Out of Functions].

51.2 No Agency, Crown Immunity

Save as otherwise provided in this Agreement, the DBFO Co shall not be or be deemed to be an agent of the Secretary of State and the DBFO Co shall not hold itself out as having authority or power to bind the Secretary of State in any way. For the avoidance of doubt the DBFO Co shall not have the benefit of any Crown immunity and, unless otherwise agreed by the Secretary of State, shall apply for and obtain all consents, licences and permissions which the DBFO Co would otherwise be obliged to obtain under any Law on the basis that the DBFO Co does not have the benefit of any Crown immunity.

51.3 DBFO Co Responsibility

As between the Parties, the DBFO Co shall be responsible for the acts, defaults, omissions and neglect of the Designer, Checker, Contractor, Operator, Archaeologist, Landscape Architect, Landscape Manager, Ecologist, Testing Contractor, Project Quality Director, the Carriageway Availability Monitoring Contractor and any other contractor or sub-contractor of the DBFO Co of any tier and the agents, employees or workmen of any of them as fully as if they were the acts, defaults, omissions or neglect of the DBFO Co, its agents, employees or workmen.

51.4 DBFO Co Knowledge

Without limitation to its actual knowledge, the DBFO Co shall, for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project and the Operations as is held (or as ought reasonably to be held) by the Designer, Checker, Contractor, Operator, Archaeologist, Landscape Architect, Landscape Manager, Ecologist, Testing Contractor, DBFO Co Quality Director, the Carriageway Availability Monitoring Contractor in the relevant circumstances.

52. **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].

53. **WHOLE AGREEMENT**

This Agreement (including the Schedules) and the Custody Agreement and the Direct 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.

54. **WAIVER**

Failure by the Secretary of State at any time to enforce any provision of this Agreement or to require performance by the DBFO Co of any of the provisions of this Agreement shall not be construed as a waiver of any such provision and shall not affect the validity of this Agreement or any part thereof or the right of the Secretary of State to enforce any provision in accordance with its terms.

55. **AMENDMENTS**

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Secretary of State and the DBFO Co.

56. **CONFLICTS OF INTEREST**

The DBFO Co shall ensure that no conflict of interest arises between its performance of the Operations and any other matter in which it may be interested whether directly or indirectly.

57. **GOVERNING LAW AND JURISDICTION**

57.1 Law

This Agreement shall be governed by and construed in all respects in accordance with English law.

57.2 Jurisdiction

Subject to the provisions of [Clause 52](#) [Disputes Resolution Procedure], the Parties agree to submit to the non-exclusive jurisdiction of the English Courts as regards any claim or matter arising in relation to this Agreement.

58. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT**

A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

59. **COMPETITION ACT**

59.1 In the event that either Party reasonably considers that this Agreement infringes or may infringe the Chapter I Prohibition contained in the Competition Act 1998 and/or Article 81(1) of the EC Treaty, then each Party will co-operate with the other using its respective reasonable endeavours and each bearing its own costs and expenses to persuade and satisfy the Relevant Regulatory Authority of the legality and enforceability of this Agreement in its original form and for such purposes shall jointly undertake all such filings, notifications, discussions, negotiations or settlements with the Relevant Regulatory Authority as the parties agree shall be necessary or desirable. In particular, without prejudice to the generality of the foregoing, the Parties shall consider together whether a joint application shall be made to the Relevant Regulatory Authority for negative clearance or exemption under Regulation 17/62 in relation to Article 81 of the EC Treaty or under Sections 12 to 14 of the Competition Act 1998 in respect of the Chapter 1 prohibition. The parties shall jointly make any necessary written or oral submissions to the Relevant Regulatory Authority unless requested by the Relevant Regulatory Authority to respond individually.

59.2 If any provision of this Agreement is deemed unenforceable by operation of Article 81(1) of the EC Treaty or Chapter I of the Competition Act 1998 then the Parties shall in good faith consult with each other to agree an alternative provision which achieves a result as similar as possible to the result which would have been achieved by the provision deemed unenforceable.

[REDACTED]

[REDACTED]

[REDACTED]

**AMENDING DEED TO A13 THAMES GATEWAY
DBFO CONTRACT**

Dated 25 February 2002

Transport for London
(Successor to the Secretary of State in connection with the A13
Project under the Private Finance Initiative)

Road Management Services (A13) plc



DENTON WILDE SAPTE

LONDON

This Amending Deed is made on the

25

February 2002
day of ~~November 2001~~

Dated

Between


- (1) **Transport for London** of Windsor House, 42-50 Victoria Street, London SW1H 0NL (TfL); and
- (2) **Road Management Services (A13) plc**, a company organised and existing under the laws of England registered under Number 03917644 and having its registered office at Sandiway House, Hertford, Northwich, Cheshire CW8 2YA (the **DBFO Co**)

Recitals

- A On 12 April 2000 the Secretary of State for the Environment, Transport and the Regions (the **Secretary of State**) and the DBFO Co entered into a DBFO contract (the **DBFO Contract**) relating to the design, building, finance and operating of a roads project known as the A13 Thames Gateway DBFO (A13 Project).
- B On 3 July 2000 pursuant to the Greater London Authority Act 1999 all rights, duties, obligations and powers that relate to the A13 Project that existed on 22 May were transferred to TfL from the Secretary of State.
- C The DBFO Contract provided that the Secretary of State could at any time prior to 36 months after the commencement of the A13 Project issue to DBFO Co a Docklands Roads Certificate, requiring it to undertake the operation and maintenance of the Docklands Roads.
- D At the time of entering into the DBFO Contract and as part of the A13 Project it was contemplated by the Secretary of State and DBFO Co that at the time of the issue of the Docklands Roads Certificate a drawdown on a variation bond used by the DBFO Co to finance the A13 Project would also occur.
- E On 16 February 2001, TfL issued the Docklands Roads Certificate and on 26 March 2001 the Variation Bond was sold with an assumed drawdown date of 31 March 2001.
- F The Financial Model prepared by the financial advisers to the Secretary of State and the DBFO Co at financial close in April 2000 made certain assumptions about the date when the Docklands Roads Certificate would be issued and the variation bond drawn down. It was necessary to rerun the Financial Model at the actual date of issue and draw down to reflect interest rates prevailing at that time.
- G In order to reflect the circumstances referred to in Recital F above in the payment mechanism in the DBFO Contract, and in particular in Schedule 9 thereof, TfL and the DBFO Co have agreed that certain variations should be made to the DR Usage Payment Tolls as set out in Schedule 9 Part 1 Annex 1 Appendix 4; Schedule 9 Part 1 Annex 1 Appendix 7; Schedule 9 Part 1 Annex 1 Appendix 15 of the DBFO Contract.
- H Clause 32.2.2 of the DBFO Contract provides a formula for calculating provisional usage payments to the DBFO Co in the Contract Year in which the Completion Certificate is issued. Clause 32.2.4 of the DBFO Contract provides a formula to supplement that in Clause 32.2.2 for use in calculating additional provisional usage payments to the DBFO Co in the Contract Year in which the Completion Certificate is issued if the Actual DR Commencement Date also occurs in that year. These formulae requires the use of an amount in pounds sterling which is

referred to as "Base Case Item 1" in Clause 32.2.2 and "Base Case Item 2" in Clause 32.2.4. When the DBFO Contract was entered into in April 2000, the figure for Base Case Item 1 and Base Case Item 2 was not known. The figure is contained in the Financial Model, and for ease of reference the parties have agreed that the amounts should be specified in this Deed.

It is agreed:

1. Terms defined in the DBFO Contract shall bear the same meaning in this Deed unless the context otherwise requires.
2. Schedule 1 to this Deed contains the Revised DR Usage Payment Tolls and Bands which the parties agree shall with effect from 1 April 2001 be substituted for the DR Usage Payments and Bands contained in Schedule 9 Part 1 Annex 1 Appendix 4 of the DBFO Contract. Schedule 2 to this Deed contains the Revised DR Usage Payment Tolls and Bands which the parties agree shall with effect from 1 April 2001 be substituted for the DR Usage Payments and Bands contained in Schedule 9 Part 1 Annex 1 Appendix 7. Schedule 3 to this Deed contains the Revised DR Usage Payment Tolls and Bands which the parties agree shall with effect from 1 April 2001 be substituted for the DR Usage Payments and Bands contained in Schedule 9 Part 1 Annex 1 Appendix 15.
3. The parties acknowledge and agree that by reason of the fact that the Docklands Roads Certificate was issued within 12 months after the Commencement Date of the DBFO Contract, Appendices 5 and 6, 8 and 9, and 16, 17, and 21 and 22 of Schedule 9 Part 1 Annex 1 are of no further force and effect.
4. 

In witness whereof the parties have hereto have executed this agreement as a deed

The Official Seal of)
TRANSPORT FOR LONDON)
hereunto affixed is authenticated by)

Executed as a Deed by)
ROAD MANAGEMENT SERVICES)
(A13) PLC)
acting by:)

