

DATED 26 SEPTEMBER 2012

(1) THE ISLE OF WIGHT COUNCIL

- and -

(2) ISLAND ROADS SERVICES LIMITED

**CONTRACT**

relating to

the rehabilitation, maintenance, management  
and operation of the highway assets in the  
Project Area pursuant to the Government's  
Private Finance Initiative

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THIS CONTRACT is made on

26 September

2012

**BETWEEN**

- (1) **THE ISLE OF WIGHT COUNCIL** of County Hall, High Street, Newport, Isle of Wight ("Authority"); and
- (2) **ISLAND ROADS SERVICES LIMITED** (Company No. 8169805) whose registered office is at 1 Park Row, Leeds, United Kingdom, LS1 5AB ("Service Provider").

**BACKGROUND**

- A In accordance with the Government's Private Finance Initiative and pursuant to a notice published in the Official Journal of the European Union on 5 March 2010, the Authority invited expressions of interest pursuant to the competitive dialogue procedure under the Public Contracts Regulations 2006 from appropriately qualified undertakings for works and services relating to the rehabilitation, maintenance, management and operation of the Project Network.
- B By virtue of Section 1(2) of the Highways Act the Authority is the Highway Authority for the Project Network and by virtue of Section 121A of the Road Traffic Regulation Act the Authority is the Traffic Authority for the Project Network, and as such has the traffic management duties contained in the Traffic Management Act. Also, by virtue of Sections 17, 18 and 19 of the Public Health Act and Section 64 and 65 of the Town Police Clauses Act the Authority is the street naming and numbering authority for the Project Network.
- C The 2009 Order enables a Highway Authority to authorise another person or that person's employees to exercise certain functions in relation to the management, maintenance, improvement or other dealings with highways in respect of which it is the relevant authority.
- D The Authority is a Best Value Authority under the Local Government Act 1999 and the functions in respect of which the Authority wishes to procure services are functions to which the general duty set out at Section 3(1) of the Local Government Act 1999 applies.
- E The Service Provider has submitted proposals to the Authority setting out how it will meet the Authority's requirements relating to the rehabilitation, maintenance, management and operation of the Project Network.

- F The Authority has selected the Service Provider for the rehabilitation, maintenance, management and operation of the Project Network pursuant to this Contract.
- G By the Local Government Act 1972 Section 111, the Authority has the power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of its functions, including the entering into of this Contract.
- H The Parties intend this Contract to be a certified contract for the purposes of the Local Government (Contracts) Act 1997.

**IT IS AGREED**

**PART A - INTRODUCTORY**

**1. INTERPRETATION, CONSTRUCTION AND PRIORITY OF DOCUMENTS**

1.1 This Contract comprises:

- 1.1.1 the Main Body;
- 1.1.2 the schedules; and
- 1.1.3 the annexures.

1.2 Priority of Documents

This Contract shall be construed and interpreted as a whole provided that in the event of any conflict or inconsistency between the provisions of the Main Body, the schedules and the annexures, or between any of the schedules, then, save as expressly provided for by clause 1.3 (*The Direct Agreement*), the conflict or inconsistency shall be resolved according to the following descending order of priority:

- 1.2.1 the Main Body and schedule 1 (*Definitions*);
- 1.2.2 schedule 2 (*Output Specification*) and schedule 4 (*Payment Mechanism*);
- 1.2.3 the schedules and annexures (excluding schedule 1 (*Definitions*), the schedule 2 (*Output Specification*), schedule 3 (*Method Statements*), schedule 4 (*Payment Mechanism*) and schedule 21 (*Service Provider Programmes*));
- 1.2.4 schedule 3 (*Method Statements*) and schedule 21 (*Service Provider Programmes*);

### 1.3 The Direct Agreement

Notwithstanding the provisions of clause 1.2 (*Priority of Documents*), the provisions of the Direct Agreement shall prevail over Part P (Termination) and clauses 85 (Assignment and Sub-Contracting), 86 (Change in Ownership of the Service Provider and Holdco), 87 (Changes to Financing Agreements, Project Documents and Supplemental Documents) and 89 (Confidentiality) of this Contract and any other provision of this Contract which relates to:

- (a) the termination of this Contract; and/or
- (b) step-in by the Senior Lenders into this Contract

in the event of any conflict or inconsistency between the Direct Agreement and this Contract.

### 1.4 Project Documents

If there is any conflict or inconsistency between the terms of this Contract and another Project Document, other than the Direct Agreement, then in determining the rights and liabilities of the Parties, the provisions of this Contract shall prevail over and have effect in place of the relevant provisions of the relevant Project Documents.

### 1.5 Supplemental Documents

If there is any conflict or inconsistency between the terms of this Contract and any Supplemental Document, then in determining the rights and liabilities of the Parties, the provisions of this Contract shall prevail over and have effect in place of the relevant provisions of the relevant Supplemental Document.

### 1.6 Amendments to the Contract

All additions, amendments, modifications and/or waivers to this Contract (notwithstanding any provision to the contrary in this Contract) shall be binding only if made in writing and signed by the Authority Representative and the Service Provider Representative. All such additions, amendments and/or modifications shall be dated, numbered and attached or appended to this Contract.

### 1.7 Definitions

The provisions of schedule 1 (*Definitions*) shall apply and have effect in relation to the words and expressions used in this Contract and the interpretation and construction of this Contract.

## 1.8 Interpretation

In this Contract, except where the context otherwise requires:

- 1.8.1 the masculine includes the feminine and vice-versa;
- 1.8.2 the singular includes the plural and vice-versa;
- 1.8.3 a reference in this Contract to any clause, sub-clause, paragraph, schedule or annexure is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule or annexure of this Contract;
- 1.8.4 save where otherwise provided in this Contract, any reference to this Contract or to any other document shall include any permitted variation, amendment, or supplement to such document;
- 1.8.5 any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- 1.8.6 references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
- 1.8.7 where reference is given to consent given by the Authority, the Authority shall in its absolute discretion give or withhold consent, unless otherwise stated;
- 1.8.8 the ejusdem generis rule does not apply and the meaning of general words is not to be restricted by any particular examples preceding or following those general words;
- 1.8.9 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;

- 1.8.10 headings are for convenience of reference only;
- 1.8.11 all references to time of day shall be a reference to whatever time of day shall be in force in England and Wales;
- 1.8.12 without prejudice to clause 98.2 (*Sterling References*), all monetary amounts are expressed in pounds sterling;
- 1.8.13 the words "including" and "include" means "including without limitation" and "include without limitation" respectively;
- 1.8.14 an obligation not to do something includes an obligation not to wilfully allow it to be done;
- 1.8.15 reference in this Contract to any employed post within a Party shall include successors to such post and such alternative post as shall replace such post from time to time;
- 1.8.16 the Authority shall not be imputed with knowledge of any fact, matter or thing unless the fact, matter or thing is within the knowledge of those of its servants or agents (including the Authority Representative) who have responsibilities in connection with the conduct of the Service or the Project;
- 1.8.17 any reference to any Highways Standard (or any section, part or paragraph thereof) shall be construed as a reference to the Highways Standard (or any section, part or paragraph thereof), as amended, replaced or consolidated to the extent provided for in clause 54 (*Change in Highways Standards*); and
- 1.8.18 subject to the restrictions imposed by this Contract on sub-contracting, an obligation to do something includes an obligation to procure it to be done.

#### 1.9 Housing Grants Act

This Contract is entered into under the PFI. This Contract is excluded from Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of paragraph 4 of the Construction Contracts (England and Wales) Exclusion Order 1998. The Service Provider acknowledges that the operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Project Document shall not affect the Parties' rights or obligations under this Contract.

## 2. DURATION OF CONTRACT

### 2.1 Execution and Delivery of Documents

On or prior to the date of this Contract:

- 2.1.1 the Service Provider shall deliver to the Authority the documents set out in part 1 of schedule 31 (*Execution Documents*) (unless the requirement to deliver any such documents is waived by the Authority by written notice to the Service Provider); and
- 2.1.2 the Authority shall deliver to the Service Provider the documents set out in part 2 of schedule 31 (*Execution Documents*) (unless the requirement to deliver any such documents is waived by the Service Provider by written notice to the Authority).

### 2.2 Term of this Contract

This Contract and the rights and obligations of the Parties to this Contract shall take effect on the date of this Contract and, except as expressly provided for in clause 93 (*Continuing Obligations*), shall cease on the earlier of:

- 2.2.1 the Expiry Date; and
- 2.2.2 the Termination Date

(the "**Term**").

### 2.3 Service Period

The Service Period will commence on the Service Commencement Date and terminate on the earlier of:

- 2.3.1 the Expiry Date; and
- 2.3.2 the Termination Date.

### **3. LOCAL GOVERNMENT (CONTRACTS) ACT 1997**

#### **3.1 Contract to be a Certified Contract**

- 3.1.1 The Service Provider hereby consents to the issue by the Authority of a certificate under Section 3 of the Local Government (Contracts) Act 1997 in respect of the Contract.
- 3.1.2 The Parties agree and acknowledge that they have consented to the Contract being a certified contract within the meaning of Section 2 of the Local Government (Contracts) Act 1997.
- 3.1.3 The Authority shall satisfy the certification requirements (within the meaning of Section 3 of the Local Government (Contracts) Act 1997 within six (6) weeks of the date of Financial Close.

#### **3.2 Relevant Discharge Terms**

The relevant discharge terms within the meaning of Section 6 of the Local Government (Contracts) Act 1997 are set out in clause 80.6 (*Relevant Discharge Terms*).

## **PART B - STATUTORY POWERS**

### **4. STATUTORY CAPACITY**

- 4.1 Without prejudice to the Service Provider's rights and contractual remedies in respect of a risk, liability or obligation expressly provided as a risk, liability or obligation of the Authority in this Contract, nothing contained or implied in this Contract or any Project Document or Supplemental Document shall prejudice, affect, restrict or fetter the Authority's rights, powers, duties and obligations in the exercise of its functions in any statutory capacity (including as Highway Authority, Street Authority, Bridge Authority, Responsible Authority, Transport Authority, Traffic Authority, Waste Regulation Authority and Waste Disposal Authority or otherwise).
- 4.2 The exercise by the Authority whether acting by any officer, agent, or employee or other representative of the Authority or otherwise of

its rights, powers, duties and obligations as referred to in clause 4.1 other than in its capacity as a contracting counterparty shall not be deemed, for the purposes of this Contract, to be an act or omission of the Authority or any Authority Party.

## 5. DELEGATION OF STATUTORY FUNCTIONS

### 5.1 General Delegation

5.1.1 Subject to the provisions of this clause 5 (*Delegation of Statutory Functions*) and the limitations set out in schedule 23 (*Statutory Functions*) the Service Provider is hereby authorised by the Authority as Highway Authority, Street Authority, Bridge Authority, Responsible Authority, Transport Authority, Traffic Authority, Waste Regulation Authority and Waste Disposal Authority for the Term to exercise the Authorised Functions for the purposes of the provision of the Services in the Project Area. The Service Provider in consultation with the Authority shall take such actions as are necessary to effect the efficient exercise of any such Authorised Functions in accordance with this Contract.

5.1.2 Where the Service Provider requires a Service Provider Party to exercise any of the Authorised Functions then the Service Provider shall apply to the Authority setting out:

5.1.2.1 the name of the Service Provider Party; and

5.1.2.2 the Authorised Functions which the Service Provider Party is to perform and any limitations on such authorisation,

and the Service Provider shall also provide such further additional information in respect of the Service Provider Party and the Authorised Functions to be delegated as the Authority may reasonably require to determine the approval of such authorisation. The Authority shall review such application and determine, at the Authority's sole discretion, whether such authorisation is approved. Where such delegation is approved the Authority shall confirm such delegation to the Service Provider stating the scope and extent of such authorisation and clause 5.1.1 shall apply mutatis mutandis to the Service Provider Party but only to the extent of such authorised delegation. A Service

Provider Party who is so approved and authorised pursuant to this clause 5.1.2 shall be termed an "**Authorised Service Provider Party**". Where such delegation is not approved, the Authority shall provide an explanation of its reasons for not approving the delegation to the Service Provider.

## 5.2 Date Authorisation Takes Effect

5.2.1 The authorisation obtained by the Service Provider and/or any Service Provider Party pursuant to this clause 5 (Delegation of Statutory Functions) shall be effective from:

5.2.1.1 the Service Commencement Date; or

5.2.1.2 if later, in the case of any Authorised Service Provider Party the date of authorisation by the Authority pursuant to clause 5.1.2.

## 5.3 Scope of authorisation

5.3.1 Any authorisation provided pursuant to this clause 5 (Delegation of Statutory Functions) in respect of each and every Authorised Function is made on the following terms:

5.3.1.1 it shall be non-assignable;

5.3.1.2 the Service Provider and any Authorised Service Provider Party shall not be entitled to sub-contract the exercise of any such Authorised Function to Service Provider Parties save where the authorisation of such Authorised Function to the relevant Service Provider Party has been approved in accordance with clause 5.1.2; and

5.3.1.3 in accordance with the provisions of the Local Government (Contracts) Act 1997, it shall be for a term commencing in accordance with Clause 5.2 (*Date Authorisation Takes Effect*) above and continuing until the earlier of either:

(a) the Termination Date; or

(b) the Expiry Date,

(the "**Authorisation Term**") provided that the Authorisation Term shall not exceed a period of forty (40) years.

5.3.2 Not used

5.4 Limits on Authorisation

Where, in paragraph 1 of part 1 section A of schedule 23 (*Statutory Functions*) or in any authorisation given pursuant to clause 5.1.2, the exercise of a function is to be subject to the approval of the Authority, the Service Provider shall apply to the Authority Representative for such approval which shall only be deemed to be granted when confirmed by the Authority Representative in writing.

5.5 Duty

The Service Provider shall and shall ensure that any Authorised Service Provider Party shall exercise properly, fully and in accordance with Legislation each of the Authorised Functions in respect of the provision of the Services on the Project Network for as long as the authorisation made under this clause 5 (*Delegation of Statutory Functions*) is effective.

5.6 Amendment, Revocation, Suspension or Withdrawal of Authorisation by the Authority

5.6.1 Without prejudice to Part K of the Contract (Change), if at any time, for any reason, the Authority considers it necessary to revoke, suspend, amend or withdraw any authorisation granted to either the Service Provider or any Authorised Service Provider Party under this clause 5 (*Delegation of Statutory Functions*) it shall notify the Service Provider Representative of such intention and the Authority shall notify the Highways PFI Board of the reasons for such proposed revocation so that the Parties may assess the implications of the Authority's proposals and attempt to agree, avoid or minimise the effects of such action.

5.6.2 Following any deliberation of the Highways PFI Board, or if the Highways PFI Board did not or could not meet within twenty (20) Business Days of notification pursuant to clause 5.6.1, the final decision in respect of any amendment, revocation, suspension or withdrawal of such authorisation shall be in the absolute discretion of the Authority.

5.6.3 The Parties agree and acknowledge that any decision of the Authority in respect of any of the Authorised Functions under this clause 5.6 (*Amendment, Revocation, Suspension or Withdrawal of Authorisation by the Authority*) shall not be subject to review under the Dispute Resolution Procedure.

#### 5.7 Effect of Revocation

Subject to clause 5.9 (*Partial cessation of Orders*) below, if at any time the authorisation under this clause 5 (*Delegation of Statutory Functions*) is revoked by the Authority in respect of any Authorised Function whether pursuant to clause 5.6 (*Amendment, Revocation, Suspension or Withdrawal of Authorisation by the Authority*) or otherwise, the Service Provider and any Authorised Service Provider Party shall be released from exercising and shall not be entitled to exercise the relevant Authorised Function. The revocation of an Authorised Function by the Authority shall constitute an Authority Change and the Authority shall issue an Authority Change Notice in respect of such revocation within fifteen (15) Business Days (or such longer period as the Parties, acting reasonably, may agree) of such revocation (and the revocation shall only be effective following issue of such notice) and the Authority shall not be entitled to withdraw such Authority Change Notice.

##### 5.7.1 1994 Act

5.7.1.1 If the delegation of an Authorised Function under this clause 5 (*Delegation of Statutory Functions*) is revoked by the Authority, or that part of the relevant order that enables the Authority to delegate such Authorised Function is revoked under the 1994 Act without an equivalent replacement order being made, then in respect of each Authorised Function revoked (each being a "**Revoked Function**"), the "relevant contract" for the purposes of section 73 of the 1994 Act shall mean the relevant parts of this clause 5 (*Delegation of Statutory Functions*) and schedule 23 (*Statutory Functions*) but solely to the extent that they relate to the Revoked Function and provided that such provisions shall remain effective in respect of any Authorised Function which is not a Revoked Function.

5.7.1.2 For the purposes of clause 5.7.1.1, revocation shall not include any temporary suspension or any amendment or revocation

arising from the Service Provider or an Authorised Service Provider Party having failed to perform the Authorised Function in accordance with this Contract.

#### 5.8 Total cessation of Orders

5.8.1 If the 2009 Order or any replacement order made under Section 77 of the 1994 Act shall cease for whatever reason to be effective, the Service Provider may request the Authority to take such action as is necessary to bring into effect a further authorisation in respect of part or all of the functions which were the subject of the original order and the provisions of clause 5.1 (*General Delegation*) (but for the avoidance of doubt not clause 5.7 (*Effect of Revocation*)) shall apply mutatis mutandis to any such request.

5.8.2 Where the 2009 Order or any replacement order made under Section 77 of the 1994 Act ceases to be effective and the Authority does not obtain (or there is not otherwise granted by replacement order or other Legislation) a further authorisation in respect of those parts of the functions the subject of the original order requested by the Service Provider pursuant to clause 5.8.1 ("**Order Failure**") then such Order Failure shall constitute an Authority Change and the Authority shall issue an Authority Change Notice in respect of such Order Failure within fifteen (15) Business Days (or such longer period as may be reasonable), of the occurrence of such Order Failure and the Authority shall not be entitled to withdraw any such Authority Change Notice.

#### 5.9 Partial cessation of Orders

Subject to clause 53 (*Change in Law*), if the 2009 Order or any replacement order made under Section 77 of the 1994 Act shall cease to be effective in respect of one (1) or more of the Authorised Functions then to the extent that the Authority does not obtain a further authorisation in respect of such functions the Service Provider shall perform the corresponding service in respect of such previously Authorised Function set out in part 3 of schedule 23 (*Statutory Functions*) and such cessation shall constitute an Authority Change.

#### 5.10 Termination

Any authorisation under this clause 5 (*Delegation of Statutory Functions*) shall cease automatically on the Termination Date.

#### 5.11 Transfer on Expiry/Revocation

On the expiry or revocation of an authorisation under this clause 5 (*Delegation of Statutory Functions*), the Service Provider shall and shall ensure that any Authorised Service Provider Party shall take such actions as are reasonably necessary for the efficient transfer of the performance of any such expired or revoked Authorised Function to the Authority or any such persons as the Authority may designate.

#### 5.12 Further Authorised Functions

In the event that any further order under Section 77 of the 1994 Act provides for the exercise of further functions of a Highway Authority, Street Authority, Bridge Authority, Responsible Authority, Transport Authority and/or Traffic Authority additional to those listed in schedule 23 (*Statutory Functions*) including functions under the Traffic Management Act 2004 and Legislation amended by the Traffic Management Act 2004 then:

- 5.12.1 the Authority may give notice authorising the Service Provider and/or any Authorised Service Provider Party to exercise any or all such further functions for the purposes of the provision of the Services on the Project Network; and
- 5.12.2 the Service Provider and the Authority shall take such actions as are necessary to effect the efficient exercise of any such further functions by the Service Provider and/or any Authorised Service Provider Party; and
- 5.12.3 the provisions of this clause 5 (*Delegation of Statutory Functions*) shall apply as if such further functions were Authorised Functions, provided however, if the effect of such further authorisation is to materially increase or reduce the costs incurred by the Service Provider in performing the Services the Authority shall instruct an Authority Change and schedule 17 (*Change Protocol*) shall apply.

#### 5.13 Public Law Principles

In exercising the Authorised Functions, the Service Provider shall and shall ensure that any Authorised Service Provider Party shall at all times act in accordance with the

principles of administrative law which govern the conduct of the Authority and, without prejudice to the generality of the foregoing:

- 5.13.1 obey all Legal Requirements and administrative and procedural requirements;
- 5.13.2 not take any decisions or actions which may be considered perverse or unreasonable or disproportionate and liable to be quashed;
- 5.13.3 obey the rules of natural justice;
- 5.13.4 take such reasonable actions as are appropriate to minimise the risk of Judicial Review; and
- 5.13.5 comply with schedule 34 (*Fair and Equitable Operations Protocol*).

#### 5.14 Consents, Directions and Notices

- 5.14.1 The Service Provider shall provide the Authority Representative with copies of all consents and directions given by the Service Provider and any Authorised Service Provider Party and all notices given and received by the Service Provider and any Authorised Service Provider pursuant to the Highways Act or NRSWA.
- 5.14.2 The Service Provider shall maintain all information relating to the performance of the Authorised Functions under NRSWA on the Street Works Register in accordance with Performance Requirement 10.

#### 5.15 TMA

Provided always that the Authority's remedy in respect of any breach in respect of this clause 5 shall be provided by the operation of Schedule 4 (*Payment Mechanism*), the Service Provider shall carry out the TMA Services in accordance with paragraph 9.2.4 of PS9 of schedule 2 (*Output Specification*) and schedule 34 (*Fair and Equitable Operations Protocol*):

- 5.15.1 with a view to securing (as far as may reasonably be practicable) the expeditious movement of traffic on the Project Network and in order to achieve such objective, and the Service Provider shall take such action which it considers will contribute to securing:

- 5.15.1.1 the more efficient use of the Project Network;
- 5.15.1.2 the avoidance, elimination or reduction of road congestion or other disruption to the movement of traffic on the Project Network or a road network for which another authority is the Traffic Authority; and
- 5.15.1.3 the exercise of any power including an Authorised Function to regulate or co-ordinate the use of any Project Network Part.

5.15.2 in compliance at all times with the network management duty of the Authority pursuant to Part 2 of the Traffic Management Act, and any Guidance relating thereto. The Parties agree and acknowledge that parity is a fundamental principle in respect of the Authority's network management duty, and the Service Provider shall ensure that it applies identical standards and approaches in respect of its own activities on the Project Network.

## 5.16 NRSWA

### 5.16.1 Regulatory Compliance

5.16.1.1 In providing the Services on the Project Network, the Service Provider shall comply with NRSWA, the Regulations, the Codes of Practice, schedule 34 (*Fair and Equitable Operations Protocol*) and any requirements of Statutory Undertakers notified to the Service Provider or the Authority pursuant to NRSWA.

5.16.1.2 The Parties agree and acknowledge that all works undertaken by the Service Provider in connection with the carrying out of the Services shall be Works for Road Purposes.

### 5.16.2 Payment for Diversionary Works

The Service Provider will be responsible for all costs of, and shall make all payments due to, Statutory Undertakers in connection with any Diversionary Works.

### 5.16.3 Financial Provisions

5.16.3.1 Part 4 (*NRSWA fees, Costs and Charges*) of schedule 23 (*Statutory Functions*) sets out the statutory basis on which fees, costs, charges, contributions, compensation and indemnities are payable to the Authority under NRSWA and regulations made under NRSWA, all of which financial payments are collectively termed "**NRSWA Payments**".

5.16.3.2 Where part 4 of schedule 23 (*Statutory Functions*) identifies that the beneficiary of a category NRSWA Payment is the Service Provider then:

- (a) the Service Provider shall be entitled to retain any such NRSWA Payment;
- (b) the Authority shall pay to the Service Provider any such NRSWA Payment it receives from a Statutory Undertaker in accordance with the provisions of clause 56 (*Payment and Financial Matters*);
- (c) the Service Provider shall be entitled to commence proceedings in the name of the Authority to recover any such NRSWA Payment from the Statutory Undertaker and the Authority shall provide reasonable assistance comprising attendance at meetings reasonably requested by the Service Provider to confirm the position that the Service Provider is acting with the Authority's consent together with any statement document or information reasonably required by the Service Provider in connection with any such proceedings provided that the Service Provider shall reimburse the Authority for its reasonable costs of such provision;

- (d) provided also that where the statutory basis is section 85 of NRSWA then the Service Provider shall pay such allowable costs as are due to the Statutory Undertaker and/or the Authority.

5.16.3.3 Where part 4 of schedule 23 (*Statutory Functions*) identifies that the beneficiary of any category of NRSWA Payment is the Authority then:

- (a) the Authority shall be entitled to retain any such NRSWA Payment;
- (b) the Service Provider shall pay to the Authority any such NRSWA Payment it receives from a Statutory Undertaker in accordance with the provisions of clause 56 (*Payment and Financial Matters*);
- (c) the Service Provider shall ensure that the Authority receives in full all NRSWA Payments from which the Authority is the beneficiary pursuant to part 4 of schedule 23 (*Statutory Functions*), provided that the Service Provider shall be relieved from this obligation in respect of a Statutory Undertaker where within one (1) Month of the NRSWA Payment becoming due such Statutory Undertaker shall have sustained an insolvency event within limbs (c) to (f) (inclusive) of the definition of Service Provider Default which shall be construed in this context only as if the Statutory Undertaker was the Service Provider;
- (d) the Service Provider shall provide the Authority on demand with full particulars of all records and accounts of any NRSWA Payments that are due to the Authority pursuant to part 4 of schedule 23 (*Statutory Functions*) but have not been paid ("NRSWA Shortfall"); and
- (e) the Authority may deduct the NRSWA Shortfall from any monies due to the Service Provider under this

Contract in accordance with the provisions of clause 56  
(*Payment and Financial Matters*).

5.16.4 The Service Provider shall:

5.16.4.1 make any payment or payments to such party as may be required pursuant to section 53(5) NRSWA; and

5.16.4.2 share the information on the Street Works Register with a person appointed to keep a central register which discharges the duty of the Authority as a Street Authority in accordance with section 53(5A) NRSWA.

5.16.5 Street Works Licence

5.16.5.1 Subject to the provisions of clause 5.17 (*Authority's Notice to Statutory Undertakers of Delegation*), section 50 and schedule 3 of NRSWA and part 2 of schedule 23 (*Statutory Functions*), the Authority may (after reasonable and proper consideration), as soon as is reasonably practicable after receiving a request from the Service Provider, grant a Street Works Licence to the Service Provider and the relevant Service Provider Parties in respect of any specified part of the Project Network on the following terms:

5.16.5.2 it shall be non-assignable;

5.16.5.3 it shall not inure beyond the shorter of the Term and the period during which the Authority is Street Authority in respect of the Project Area; and

5.16.5.4 it shall only be exercisable after consultation with any affected Relevant Authority or person owning Apparatus.

5.16.6 Assistance by Service Provider

5.16.6.1 Subject to clause 5.16.6.2, the Service Provider shall at all times take all reasonable steps to ensure that the Authority is able to comply with its duties under NRSWA, the Regulations and the Codes of Practice and assist the Authority in carrying out such duties;

5.16.6.2 If at any time a statutory duty under NRWSA or a regulation under the Regulations (in both cases termed the "**Reserved Function**") has not been delegated to the Service Provider, then the Service Provider shall at all times take such reasonable steps as may be necessary to ensure that the Authority is able to comply with its duties under the Reserved Function and the Codes of Practice and assist the Authority in carrying out the Reserved Function.

#### 5.16.7 Fixed Penalty Notices

5.16.7.1 The Service Provider may by notice to the Authority request the Authority to issue a fixed penalty notice under schedule 4B of NRSWA where the Service Provider is satisfied that a fixed penalty notice offence has been committed by a Statutory Undertaker under part 3 and schedule 4A of NRSWA and the Service Provider shall include in its notice the following information all in sufficient detail so that the Authority may issue a fixed penalty notice to the Statutory Undertaker:

- (a) the name and address of the Statutory Undertaker that has committed the offence;
- (b) the offence code;
- (c) the location of the relevant works;
- (d) the date of the offence; and
- (e) the details of the offence,

such information to be provided to the Authority within one (1) Month of the date of the offence to which it relates. The Service Provider shall also promptly provide to the Authority such additional clarification information as may reasonably be requested by the Authority, such information to be provided within ten (10) Business Days of a written request from the Authority.

5.16.7.2 The Authority shall determine whether it will issue a fixed penalty notice provided that:

- (a) if it declines to do so it shall set out its reasons to the Service Provider within one (1) Month of the issue of the Service Provider's notice under clause 5.16.7.1 (*Fixed Penalty Notices*); and
- (b) if it decides to issue a fixed penalty notice then it shall send a copy of the fixed penalty notice to the Service Provider within five (5) Business Days of its issue.

5.16.7.3 The Service Provider shall provide the Authority with assistance in:

- (a) responding to any representations received from the Statutory Undertaker concerning the fixed penalty notice;
- (b) attending any meeting that the Authority arranges with the Statutory Undertaker; and
- (c) prosecuting the Statutory Undertaker (including providing witness statements and the attendance at court by witnesses for the purpose of giving evidence but excluding the provision of legal advice and representation) if the Statutory Undertaker fails to pay the penalty.

5.16.7.4 The Authority shall be responsible for determining whether:

- (a) the period for paying the penalty is to be extended;
- (b) the Statutory Undertaker in receipt of the fixed penalty notice who does not make payment is to be prosecuted; and
- (c) to withdraw a fixed penalty notice provided that where the Authority determines to withdraw the fixed penalty notice it shall set out its reasons to the Service Provider within one (1) Month of the withdrawal of the fixed penalty notice.

5.16.7.5 Any penalty paid by the Statutory Undertaker following the issue of a fixed penalty notice shall be due to the Authority and the Service Provider shall forward any penalty it receives from the Statutory Undertaker to the Authority without deduction in accordance with the provisions of clause 56 (*Payment and Financial Matters*).

5.16.7.6 If in any case the Authority is obliged to withdraw the fixed penalty notice or is unable to recover the penalty on account of any act or omission of the Service Provider or a Service Provider Party then the Service Provider shall pay the Authority an equivalent sum to the discounted amount of the penalty in order to compensate the Authority for its abortive costs in accordance with the provisions of clause 56 (*Payment and Financial Matters*).

5.16.7.7 Where the Authority receives payment of a penalty from the Statutory Undertaker in respect of a fixed penalty notice and no formal appeal has been made to the Authority for consideration by such Statutory Undertaker, the Authority shall pay the Service

Provider its reasonable costs incurred in issuing the fixed penalty notice pursuant to clause 5.16.7.1 (*Fixed Penalty Notices*) in accordance with the provisions of clause 56 (*Payment and Financial Matters*).

5.16.8 Without prejudice to the other provisions of this clause 5.16 (*NRSWA*), the Service Provider shall perform the services set out in part 2 of schedule 23 (*Statutory Functions*) relating to functions of the Authority pursuant to *NRSWA*.

5.16.9 The decision of the Authority on the merits of any recommendation made by the Service Provider in performance of its services pursuant to this clause 5.16 (*NRSWA*) shall not be subject to review under the Dispute Resolution Procedure.

5.16.10 The Service Provider shall take such actions as are appropriate to inform all Interested Parties of its role on behalf of the Authority pursuant to this clause 5.16 (*NRSWA*).

#### 5.17 Authority's Notice to Statutory Undertakers of Delegation

The Authority shall:

5.17.1 where reasonably requested by the Service Provider, notify Statutory Undertakers that, subject to the terms and conditions set out in this clause 5 (*Delegation of Statutory Functions*), the Service Provider will be performing the Authorised Functions in section B of part 1 of schedule 23 (*Statutory Functions*); and

5.17.2 notify the Service Provider promptly of any Statutory Undertaker's requirements or notices or any notices from Street Authorities for streets outside the Project Network (but which affect the Project Network) which it receives pursuant to *NRSWA*, the Regulations or the Codes of Practice.

#### 5.18 Specified Licences

5.18.1 The Service Provider shall not grant or issue in respect of a Project Network Part any of the licences within the classes of licence specified in part 3 of paragraph 9.3.1.2 of PS9 of schedule 2 (*Output Specification*).

5.18.2 The Service Provider shall, upon receipt of an application for a Specified Licence from the Authority, advise and assist the Authority in connection with the granting of such Specified Licences, which shall include:

5.18.2.1 preparing the draft Specified Licence for issue by the Authority (such Specified Licence to be in the applicable agreed form as set out in part 5 of schedule 23 (*Statutory Functions*) and not to inure beyond the Term); and

5.18.2.2 a written recommendation as to whether or not the Authority should grant the Specified Licence together with all information required to support and justify such recommendation including the consequences anticipated by the Service Provider should the Authority choose to grant a Specified Licence which has not been recommended by the Service Provider.

5.18.2.3 agreeing with the Authority the fee to be charged in relation to the issue of a Specified Licence together with any additional charge as may be payable ("**Additional Charge**") as set out in clause 5.18.6 and then assist the Authority in recovering from the licensee the amount of such fee and any Additional Charge as may be payable provided that:

(a) the fee shall be retained by the Authority in respect of any Specified Licence granted under PS9.3.2.1, PS9.3.2.3, PS9.3.2.4, PS9.3.1.3 and PS9.3.2.6;

- (b) the fee shall be retained by the Service Provider in respect of any Specified Licence granted under PS9.3.2.2, PS9.3.1.1, PS9.3.1.2, PS9.3.2.5 and PS9.3.2.7;
- (c) the Additional Charges payable in respect of any Specified Licence shall be retained by the Service Provider; and
- (d) the Service Provider may agree with the Authority that the fee and any Additional Charge may be increased for a particular class of Specified Licence from the start of each Contract Year provided that it shall not exceed the fee or Additional Charge for the immediately preceding Contract Year as Indexed.

5.18.3 The Service Provider shall comply with clause 5.18.2 within such time as is necessary in order to ensure that the Authority will be able to meet any time periods within which a Specified Licence is to be granted.

5.18.4 The Service Provider shall allow the Authority a minimum of ten (10) Business Days following receipt of the information required under clause 5.18.2 in which to determine whether to grant a Specified Licence.

5.18.5 The Service Provider shall notify the Authority by telephone as soon as reasonably practicable and in any event within two (2) hours of the time (and shall provide written notice as soon as reasonably practicable thereafter) at which the Service Provider becomes aware of any breach of the terms of a Specified Licence by the relevant Specified Licensee.

5.18.6 The Additional Charges referred to in clause 5.18.2.3 are:

<b>Statutory Provision</b>	<b>Section Heading</b>	<b>Scope of Additional Charge</b>
Section 140A of the Highways Act	Builders' skips: charge for occupation of highway for unreasonable period	charge for the period for which the skip remains in the highway exceeds:  (a) such period as may be prescribed; and

Statutory Provision	Section Heading	Scope of Additional Charge
		(b) a reasonable period.
Section 140B of the Highways Act	Builders' skips: charges determined by reference to duration of occupation of highways	charge determined by reference to period for which the highway is occupied by the skip.
Section 171A of the Highways Act	scaffolding, building materials and excavations: charge for occupation of highway for unreasonable period	charge payable for the period for which:  (a) a relevant structure is on or over the highway;  (b) things are deposited in the highway, or (as the case may be)
		(c) there is an excavation in the highway,  exceeds both the prescribed period and a reasonable period.
Section 171B of the Highways Act	scaffolding, building materials and excavations: charge determined by reference to duration of occupation of highway	charge determined by reference to the period for which:  (a) a relevant structure is on or over the highway;  (b) things are deposited in the highway, or (as the case may be);  (c) there is an excavation in the highway.

5.19 Where the Service Provider rectifies any damage to the Project Network which has been caused by a Third Party, the Service

Provider shall be entitled to recover and retain the cost of so doing from such third party.

## 6. AUTHORITY STATUTORY POWERS

### 6.1 Exercise of statutory powers

Where the Service Provider would be unable to perform any obligation under this Contract without the exercise by the Authority of any statutory power, the Service Provider may give notice to that effect to the Authority, requesting the Authority to exercise such power.

### 6.2 Matters to be covered in the request

Any notice given by the Service Provider in accordance with clause 6.1 (*Exercise of statutory powers*) shall clearly specify:

- 6.2.1 the action requested of the Authority and the duty of the Service Provider under this Contract in respect of which such action is requested;
- 6.2.2 the reasons why such action by the Authority is required and why it would be impossible for it to perform its duties under the Contract without such action, and/or the action requested by the Service Provider would constitute the taking of reasonable steps by the Authority so as to minimise and mitigate the likely losses to be incurred by the Service Provider were the Authority not to exercise the action requested;
- 6.2.3 the time by which the requested action is required;
- 6.2.4 any recommendation by the Service Provider in respect of the requested action;
- 6.2.5 the likely effect upon the performance of the Services if the action requested of the Authority is not agreed to by the Authority; and
- 6.2.6 the grounds for the Service Provider's belief that the action requested would constitute the taking of reasonable steps including relevant supporting evidence.

### 6.3 Authority's response to request

Within ten (10) Business Days following receipt of a notice given in accordance with clause 6.1 (*Exercise of statutory powers*), the Authority shall (acting reasonably) give an estimate of the date on which it will respond on the merits of the request, provided that no such estimate shall be binding on the Authority.

6.4 The Authority shall respond to the merits of the request contained in the notice given in accordance with clause 6.1 (*Exercise of statutory powers*), 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.

6.5 The Authority shall consider, acting reasonably and in accordance with its statutory duties and/or powers, any request for action contained in a notice given in accordance with clause 6.1 (*Exercise of statutory powers*). The Parties agree and acknowledge that the decision of the Authority on the merits of the request shall not be subject to review under the Dispute Resolution Procedure.

6.6 Refusal or delay by Authority to take requested action

If:

6.6.1 in the exercise of its discretion, the Authority refuses to take the action requested; or

6.6.2 the Authority unreasonably delays in taking the action requested (unreasonableness being assessed in the context of the processes which the Authority must properly go through in order to arrive at its decision, including any mandatory or proper discretionary consultation periods and the like; and the burden of proof shall be upon the Service Provider to prove in any dispute under the Dispute Resolution Procedure that delay has been unreasonable for this purpose);

then such refusal or unreasonable delay shall constitute an Excusing Cause to the extent that by reason of such refusal or delay the Service Provider is not able to perform the obligations identified in the request contained in the notice given in accordance with clause 6.1 (*Exercise of statutory powers*).

6.7 Where a decision by the Secretary of State or Court is required

6.7.1 If any consent, confirmation or order of the Secretaries of State (or any of them) or any order of the Court is required for the exercise by the Authority of any statutory power requested to be exercised pursuant to this clause 6 (*Authority Statutory Powers*), and the Authority, in the exercise of its discretion, decides that it wishes to seek to exercise such statutory power, then the Authority shall as soon as reasonably practicable in the circumstances apply for such consent, confirmation or order. For the avoidance of doubt, the decision of the Secretaries of State (or any of them) or the Court shall not be subject to review under the Dispute Resolution Procedure and the Authority shall not be obliged to exercise any right of appeal of such decision.

6.7.2 If the Secretaries of State (or any of them) or the Court refuse to give or make any consent, confirmation or order referred to in clause 6.7.1, then the provision of clause 6.6 (*Refusal or delay by Authority to take requested action*) shall apply (*mutatis mutandis*).

6.8 Exceptions

6.8.1 The Parties agree and acknowledge that clause 6 (*Authority Statutory Powers*) shall not apply to:

6.8.1.1 the exercise of any statutory function of the Authority as a planning authority under the Town and Country Planning Act 1990; and

6.8.1.2 the securing of any acquisition of land by compulsory purchase powers or voluntary agreement,

6.9 For the avoidance of doubt if the failure of the Authority to exercise any statutory power (which is not an authorised delegated function) would directly result in the Service Provider being in breach of any Legislation and such breach is not the result of any other act or omission of the Service Provider and the exercise of such statutory power by the Authority would result in the Service Provider no longer being in breach of any such Legislation, then the exercise by the Authority of such statutory power shall be treated as being essential to enable the Service Provider to

perform the relevant obligation under this Contract and in the event that the Authority does not exercise such statutory power, the Service Provider shall refrain from performing such relevant obligations and the provisions of clause 6.6 shall apply.

## **PART C - MOBILISATION**

### **7. TRANSFER OF STOCK, ISLE OF WIGHT TRAFFIC MODEL, STAKEHOLDER MANAGEMENT TOOL AND LAND**

#### **Isle of Wight Traffic Model and Stakeholder Management Tool**

7.1 From the date of this Contract, the Authority shall grant to the Service Provider a non-exclusive, non-transferable, royalty free licence for the Term to use and copy the Isle of Wight Traffic Model and the Stakeholder Management Tool on the terms (including the right to sub-license) set out in clause 84.9 (*Licence to use Trade Marks and Data*).

7.2 On the Service Commencement Date, the Authority shall transfer to the Service Provider all rights, title and interest that the Authority has in the Stock. As soon as reasonably practicable, but in any event no later than fifteen (15) Business Days following the Service Commencement Date, the Parties (each acting reasonably) shall carry out a stock take to agree upon the fair value ("**Value**") of the Stock.

7.3 The Value shall be taken into account in the calculation of the next Monthly Payment following agreement of the Value and such calculation shall be set out in the relevant Draft Monthly Payment Report and the Actual Monthly Payment Report.

#### **Land**

##### **7.4 Grant of Depot Leases**

7.4.1 Not Used

7.4.2 Not Used

7.4.3 Not Used

7.5 Each Depot Lease shall be granted subject to but, where applicable, with the benefit (to the extent the Authority is capable of transferring the same) of all Land Rights including without limitation:

7.5.1 all existing rights privileges easements liabilities (and in particular but without prejudice to the generality of the foregoing) drainage or other service rights or easements and quasi or reputed easements affecting the relevant Depot;

7.5.2 all local land charges (whether registered or not before the date hereof) and all matters capable of registration as local land charges (whether or not actually registered as such) affecting or relating to the relevant Depot or any part thereof or any building or other structure thereon whether general or specific;

7.5.3 all notices orders proposals or requirements whatsoever (whether registered or not before the date hereof) affecting or relating to the relevant Depot or any part thereof given or made by any government department or by any statutory undertaker or by any public local authority or other competent authority;

7.5.4 all actual or proposed charges orders proposals restrictions agreements notices or other matters whatsoever (whether registered or not before the date hereof) affecting or relating to the relevant Depot or any part thereof or any building or other structure thereon or any part thereof under the TC 1990; and

7.5.5 the matters mentioned or referred to in the registers to the freehold or leasehold titles to the relevant Depot as at the date of this Contract,

and the Service Provider shall be deemed to take the relevant Depot Lease with full knowledge thereof and shall raise no requisition thereon or objection thereto.

7.6 Neither the Service Provider nor any Party shall be entitled to any compensation on the expiry or earlier determination of any Depot Lease save as set out in this Contract.

7.7 Exclusion of Security of Tenure - Stag Lane Depot

7.7.1 The Authority and the Service Provider have agreed that the provisions of sections 24 to 28 (inclusive) of the 1954 Act be excluded in relation to the tenancy of the Stag Lane Depot.

7.7.2 A notice as required by section 38A(3) of the 1954 Act (as amended) has been served on the Service Provider and the Service Provider or a person authorised by them has made the statutory declaration as required by schedule 2 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 in relation to the tenancy of the Stag Lane Depot.

#### 7.8 Exclusion of Security of Tenure - Smallbrook Depot

7.8.1 The Authority and the Service Provider have agreed that the provisions of sections 24 to 28 (inclusive) of the 1954 Act be excluded in relation to the tenancy of the Smallbrook Depot.

7.8.2 A notice as required by section 38A(3) of the 1954 Act (as amended) has been served on the Service Provider and the Service Provider or a person authorised by them has made the statutory declaration as required by schedule 2 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 in relation to the tenancy of the Smallbrook Depot.

7.9 Not used

7.10 Compliance with Leases

Each party shall comply with its respective obligations under each Depot Lease.

#### 7.11 Necessary Consents

7.11.1 Subject to clause 17.9, insofar as any Necessary Consents are required for the operation and/or use of each Depot the Service Provider will at its own expense in all respects procure that such Necessary Consents are obtained and will supply copies of any Necessary Consents to the Authority.

7.11.2 The Service Provider shall comply with the terms of and observe all conditions attaching to any and all Necessary Consents and any and all planning agreements insofar as they may apply to the Depots from time to time.

7.12 Title

Title to the Authority's Depots having been deduced to the Service Provider prior to the date of this Contract the Service Provider shall take the Depot Leases with full knowledge thereof and shall raise no requisition thereon or objection thereto.

#### 7.13 Early Termination

If this Contract is terminated for any reason prior to the Expiry Date:

- 7.13.1 the Depot Leases granted to the Service Provider or any Service Provider Party shall automatically cease and determine with effect from the date of termination of this Contract (or, if not granted at the time, the obligation to grant the Depot Leases);
- 7.13.2 the Service Provider shall forthwith deliver to the Authority the Depot Leases together with relevant title deeds, releases from any charge and a direction to the Chief Land Registrar to cancel the registered titles relating to the Leases; and
- 7.13.3 the Service Provider shall take all steps as may be proper and reasonable to cancel or assist in the cancellation of all entries at HM Land Registry and the Land Charges Registry in relation to the Depot Leases.

### 8. MOBILISATION

8.1 The Service Provider shall notify the Authority and shall provide such supplementary evidence and/or demonstrations to satisfy the Authority (acting reasonably) that the Mobilisation Requirements and the Mobilisation Plan are being met during the Mobilisation Period.

8.2 During the Mobilisation Period, the Service Provider shall:

- 8.2.1 provide the Authority with fortnightly updates on its progress in satisfying the Mobilisation Requirements and the Mobilisation Plan, and the Service Provider shall promptly respond to any queries or comments that the Authority may raise; and
- 8.2.2 permit the Authority access to any information or premises of the Service Provider or any Service Provider Party provided that any such information or premises have been or could be generated or used for the purposes of the

Project to make such inspections as it may reasonably require upon reasonable notice in order to determine the Service Provider's progress in satisfying the Mobilisation Requirements and the Mobilisation Plan.

8.3 No later than ten (10) Business Days prior to the Planned Service Commencement Date, the Service Provider shall either:

8.3.1 notify the Authority that it will be able to commence the Services on the Planned Service Commencement Date together with such evidence and/or demonstrations to satisfy the Authority (acting reasonably) that the Mobilisation Requirements and the Mobilisation Plan have been met ("**Notice of Service Commencement**"); or

8.3.2 notify the Authority that it will not be able to commence the Services on the Planned Service Commencement Date, and provide the Authority with a revised date on which it will be able to commence the Services.

8.3A The Authority shall provide the Service Provider and Service Provider Parties with such access to the Project Network, the Stag Lane Depot, the Smallbrook Depot and Transferring Employees as may reasonably be required, but in the case of the Stag Lane Depot such date as shall be agreed with the Authority which shall be no later than five (5) months before the Planned Service Commencement Date ("**Stag Lane Access Date**") and in the case of the Smallbrook Depot such date as shall be agreed with the Authority which shall be no later than two (2) months before the Planned Service Commencement Date ("**Smallbrook Access Date**"), for it to carry out its obligations under this clause 8 (*Mobilisation*) and the Mobilisation Plan, having due regard to the performance by the Authority and/or Transferring Employees of their existing functions prior to the Planned Service Commencement Date and taking account of any practical working arrangements agreed by the Highways PFI Board.

8.3B The Authority hereby grants a licence to the Service Provider and Service Provider Parties at all times with effect from the Smallbrook Access Date until the date of commencement of the term of the Smallbrook Depot Lease to enter into and upon and to remain in and upon the Smallbrook Depot for the purposes of undertaking the Mobilisation Requirements in accordance with the

Mobilisation Plan or otherwise to comply with its obligations under this Contract (the “**Smallbrook Depot Licence**”).

8.3C The Authority hereby grants a licence to the Service Provider and Service Provider Parties at all times with effect from the Stag Lane Access Date until the date of commencement of the term of the Stag Lane Depot Lease to enter into and upon and to remain in and upon the Stag Lane Depot for the purposes of undertaking the Mobilisation Requirements in accordance with the Mobilisation Plan or otherwise to comply with its obligations under this Contract (the “**Stag Lane Depot Licence**”).

8.3D Subject to and without prejudice to the Authority's obligations under clause 17.9, in the exercise of the Smallbrook Depot Licence and/or the Stag Lane Depot Licence, the Service Provider and any Service Provider Party shall obtain all Necessary Consents to the extent that such Necessary Consents can be obtained by the Service Provider as a matter of law.

8.3E The Smallbrook Depot Licence is not a lease of the Smallbrook Depot and the Stag Lane Depot Licence is not a lease of the Stag Lane Depot. The Parties do not intend the Smallbrook Depot Licence or the Stag Lane Depot Licence to transfer any real property from the Authority to the Service Provider or any Service Provider Party or grant to the Service Provider or any Service Provider Party any interest in the Smallbrook Depot or the Stag Lane Depot.

8.4 In relation to the evidence and/or demonstrations required by the Authority pursuant to clause 8.3.1 above:

8.4.1 the Authority shall be entitled to attend at any Work Sites in order to verify that such evidence exists or is correct and to attend at any demonstrations provided by the Service Provider as appropriate; and

8.4.2 the Authority shall have the right to dispute that such evidence exists or is correct or that such demonstrations effectively demonstrate that the Mobilisation Requirements and the Mobilisation Plan have been achieved.

8.5 Following receipt of the Notice of Service Commencement, the Authority shall:

- 8.5.1 agree that such evidence and/or demonstrations provided by the Service Provider pursuant to clause 8.3.1 indicate that the Service Provider is ready to commence the Services ("**Acknowledgment of Service Commencement**") and following receipt of such Acknowledgement of Service Commencement, the Service Provider may commence the Services; or
- 8.5.2 dispute that such evidence and/or demonstrations provided by the Service Provider indicate that the Service Provider is ready to commence the Services and decline to issue an Acknowledgment of Service Commencement; or
- 8.5.3 indicate, at the Authority's absolute discretion, that notwithstanding that the Authority dispute the evidence and/or demonstrations provided by the Service Provider, pursuant to clause 8.3.1, the Service Provider may commence the Services on the condition that it provides the Authority with a written undertaking that it will complete all outstanding work in respect of the Mobilisation Requirement(s) that remain outstanding within a period of time as agreed between the Parties (acting reasonably).

8.6 If the Authority declines to issue the Acknowledgment of Service Commencement pursuant to clause 8.6.2 , the Parties shall endeavour to work together through the Highways PFI Board in order to ensure that the Authority is provided with evidence and/or demonstrations which they consider (acting reasonably) are satisfactory and in the event that such evidence and/or demonstrations are considered by the Authority (acting reasonably) to be unsatisfactory, the Service Provider shall take all steps necessary to meet the Mobilisation Requirements and the Mobilisation Plan and shall afford the Authority access to information or premises for the purpose of monitoring progress.

8.7 The Parties agree and acknowledge that the provisions of clause 8.6 shall continue to apply until such time as the Service Provider serves a notice confirming a revised Intended Service Commencement Date on which it will be able to commence the Services together with such evidence and/or demonstrations to satisfy the Authority (acting reasonably) that the Mobilisation Requirements and the Mobilisation Plan have been met and the

Authority shall serve an Acknowledgement of Service Commencement pursuant to clause 8.6.1 or indicate that the Service Provider may commence the Services pursuant to clause 8.6.3 (as the case may be), provided that the Intended Service Commencement Date shall not be later than the Long Stop Date (except as expressly consented to by the Authority in its absolute discretion).

**9. COMMENCEMENT, THE INDEPENDENT CERTIFIER AND THE TECHNICAL APPROVAL AUTHORITY**

From the Service Commencement Date:

- 9.1 the Service Provider shall commence delivery of the Services in accordance with the terms of this Contract;
- 9.2 the Authority and the Service Provider shall procure that the Independent Certifier appointed on or about the date of this Contract on substantially the terms of appointment set out in annexure 5 (*Form of Appointment of Independent Certifier*) shall carry out the duties throughout the Contract Period as set out in the Independent Certifier's Appointment.
- 9.3 the Service Provider shall engage the Technical Approval Authority to undertake the duties and responsibilities as set out in annexure 14 (*Technical Approval Authority Scope of Duties and Responsibilities*)

**PART D - CONDITION OF THE PROJECT NETWORK**

**10. CONDITION OF THE PROJECT NETWORK**

The Service Provider confirms that it has satisfied itself as to:

- 10.1 the condition and extent of the Project Network Parts as at the Pre-Commencement Survey Date, including the volume and type of Project Roads, Structures, Apparatus, Furniture, Vegetation and Off-Street Car Parks; and