



Our ref:

Jo Dowling
Lead Member of the Examining Authority
National Infrastructure Planning
Temple Quay House
2 The Square Bristol
BS1 6PN

Via E-Mail to:

lutonairport@planninginspectorate.gov.uk

Kelly Milburn
Spatial Planning Manager
Operations (East)
National Highways
Woodlands
Manton Lane
Bedford
MK41 7LW

5 February 2024

Dear Ms Dowling,

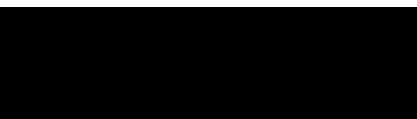
LONDON LUTON AIRPORT EXPANSION – DEADLINE 10 SUBMISSION

Further to the Rule 17 letter published on 31 January 2024 and particularly, the reference to the Applicant's s127/138 position on serious detriment, we understand that the Applicant's position is that as no land or rights are being acquired from National Highways, the relevant statutory provisions are not engaged and as such the Applicant does not propose to make submissions in respect of the detriment caused to National Highways.

It is National Highways' position that notwithstanding the fact that no land or rights are proposed to be acquired (and therefore the provisions of s127/138 are not engaged), the substantive issues between the parties does cause serious detriment to the strategic road network and consequently we will be making submissions at Deadline 11.

As we understand that the Applicant has not submitted our form of preferred wording in the final draft DCO to be submitted at Deadline 10, we attach the National Highways preferred version of the protective provisions to this letter.

Yours sincerely,



Kelly Milburn
Spatial Planning Manager

PART 5

FOR THE PROTECTION OF NATIONAL HIGHWAYS LIMITED

Application, etc.

1.—(1) The provisions of this Part of this Schedule apply for the protection of National Highways of Bridge House, 1 Walnut Tree Close, Guildford, Surrey, GU1 4LZ (company registration number 09346363) and all successors in title and have effect unless otherwise agreed in writing between the undertaker and National Highways.

(2) An agreement for the purpose of sub-paragraph (1) includes, but is not limited to, an agreement made under article 17 of this Order, or under the 1980 Act provided that the agreement expressly refers to this paragraph 1 of this schedule.

(3) Nothing in this Order affects or prejudices the operation of the powers and duties of National Highways or the Secretary of State under the 1980 Act, the 1984 Act, the 1991 Act, the Transport Act 2000⁽¹⁾, or Town and Country Planning (General Permitted Development) (England) Order 2015⁽²⁾ which shall continue to apply in respect of the exercise of all National Highways' statutory functions.

Interpretation

2.—(1) Where the terms defined in article 2 (interpretation) of this Order are inconsistent with subparagraph (2) the latter prevail.

(2) In this Part of this Schedule—

“as built information” means one electronic copy of the following information—

- (a) as constructed drawings in both PDF and AutoCAD DWG formats for anything designed by the undertaker; in compliance with Interim Advice Note 184 or any successor document;
- (b) list of suppliers and materials used, as well as any relevant test results and CCTV surveys (if required to comply with DMRB standards);
- (c) product data sheets and technical specifications for all materials used;
- (d) as constructed information for any utilities discovered or moved during the works;
- (e) method statements for the works carried out;
- (f) in relation to road lighting, signs, and traffic signals any information required by Series 1300 and 1400 of the Specification for Highway Works or any replacement or modification of it;
- (g) organisation and methods manuals for all products used;
- (h) as constructed programme;
- (i) test results and records as required by the detailed design information and during construction phase of the project;
- (j) a stage 3 road safety audit subject to any exceptions to the road safety audit standard as agreed by the undertaker and National Highways;
- (k) the health and safety file; and

such other information as is reasonably required by National Highways to be used to update all relevant databases and to ensure compliance with National Highway's Asset Data Management Manual as is in operation at the relevant time;

⁽¹⁾ 2000 c. 38.

⁽²⁾ S.I. 2015/596.

“the bond sum” means the sum equal to 200% of the cost of carrying out the specified works (to include all costs plus any commuted sum) or such other sum agreed between the undertaker and National Highways;

“the cash surety” means the sum agreed between the undertaker and National Highways;

“commuted sum” means such sum calculated as provided for in paragraph 48 of this Part of this Schedule to be used to fund the future cost of maintaining the specified works;

“condition survey” means a survey of the condition of National Highways structures and assets within the Order limits that may be affected by the specified works;

“contractor” means any contractor or subcontractor appointed by the undertaker to carry out the specified works;

“defects period” means the period from the date of the provisional certificate to the date of the final certificate which shall be no less than 12 months from the date of the provisional certificate;

“detailed design information” means such of the following drawings specifications and calculations as are relevant to the development—

- (a) site clearance details;
- (b) boundary, environmental and mitigation fencing;
- (c) road restraints systems and supporting road restraint risk appraisal process assessment;
- (d) drainage and ducting as required by DMRB CD 535 Drainage asset data and risk management and DMRB CS551 Drainage surveys – standards for Highways
- (e) earthworks including supporting geotechnical assessments required by DMRB CD622 Managing geotechnical risk and any required strengthened earthworks appraisal form certification;
- (f) pavement, pavement foundations, kerbs, footways and paved areas;
- (g) traffic signs and road markings;
- (h) traffic signal equipment and associated signal phasing and timing detail;
- (i) road lighting (including columns and brackets);
- (j) regime of California Bearing Ratio testing;
- (k) electrical work for road lighting, traffic signs and signals;
- (l) motorway communications as required by DMRB;
- (m) highway structures and any required structural approval in principle;
- (n) landscaping;
- (o) proposed departures from DMRB standards;
- (p) walking, cycling and horse riding assessment and review report;
- (q) stage 1 and stage 2 road safety audits and exceptions agreed;
- (r) utilities diversions;
- (s) topographical survey;
- (t) maintenance and repair strategy in accordance with DMRB GD304 Designing health and safety into maintenance or any replacement or modification of it;
- (u) health and safety information including any asbestos survey required by GG105 or any successor document; and
- (v) other such information that may be reasonably required by National Highways to be used to inform the detailed design of the specified works;

“DBFO contract” means the contract between National Highways and the highway operations and maintenance contractor for the maintenance and operation of parts of the strategic road network which are within the Order Limits or any successor or replacement contract that may be current at the relevant time;

“DMRB” means the Design Manual for Roads and Bridges or any replacement or modification of it;

“final certificate” means the certificate relating to those aspects of the specified works that have resulted in any alteration to the strategic road network to be issued by National Highways pursuant to paragraph 46;

“the health and safety file” means the file or other permanent record containing the relevant health and safety information for the authorised development required by the Construction (Design and Management) Regulations 2015⁽³⁾ (or such updated or revised regulations as may come into force from time to time);

“highway operations and maintenance contractor” means the contractor appointed by National Highways under the DBFO contract;

“national highways mitigation works” means works comprised in work no. 6(e) of Schedule 1 of the Order namely;

(a) works to the M1 Junction 10 southbound merge including changing the merge layout type from ‘Layout B – parallel merge’ to a higher capacity ‘Layout C -ghost island merge’; and

(b) works to the M1 Junction 10 northbound diverge including changing the diverge layout type from ‘Layout B option 2 – Two-lane auxiliary diverge’ to a higher capacity ‘Layout D option 1 – ghost island lane drop’.

“nominated persons” means the undertaker’s representatives or the contractor’s representatives on site during the carrying out of the specified works as notified to National Highways from time to time;

“programme of works” means a document setting out the sequence and timetabling of the specified works;

“provisional certificate” means the certificate of provisional completion relating to those aspects of the specified works that have resulted in any alteration to the strategic road network to be issued by National Highways in accordance with paragraph 42 when it considers the specified works are substantially complete and may be opened for traffic;

“road safety audit” means an audit carried out in accordance with the road safety audit standard;

“road safety audit standard” means DMRB Standard HD GG119 or any replacement or modification of it;

“road space booking” means road space bookings in accordance with National Highways’ Asset Management Operational Requirements (AMOR) including Network Occupancy Management System (NOMS) used to manage road space bookings and network occupancy;

“Specification for Highways Works” means the specification for highways works forming part of the manual of contract documents for highway works published by National Highways and setting out the requirements and approvals procedures for work, goods or materials used in the construction, improvement or maintenance of the strategic road network;

“specified works” means so much of any work, including highway works and signalisation, authorised by this Order including any maintenance of that work, as is on, in, under or over the strategic road network for which National Highways is the highway authority or which affects the strategic road network or the level of traffic on the strategic road network in any way;

“strategic road network” means any part of the road network including trunk roads, special roads or streets for which National Highways is the highway authority including drainage infrastructure, street furniture, verges and vegetation and all other land, apparatus and rights located in, on, over or under the highway;

“utilities” means any pipes wires cables or equipment belonging to any person or body having power or consent to undertake street works under the New Roads and Street Works Act 1991⁽⁴⁾; and

“winter maintenance” means maintenance of the road surface to deal with snow and ice.

⁽³⁾ S.I. 2015/51.

⁽⁴⁾ 1991 c. 22.

(3) References to any standards, manuals, contracts, Regulations and Directives including to specific standards forming part of the DMRB are, for the purposes of this Part of this Schedule, to be construed as a reference to the same as amended, substituted or replaced, and with such modifications as are required in those circumstances.

General

3. The undertaker acknowledges that parts of the works authorised by this Order affect or may affect parts of the strategic road network in respect of which National Highways have appointed the highway operations and maintenance contractor.

4.(1) Requirements 33-34 of Schedule 2 of this Order shall be enforceable by National Highways.

Prior approvals and security

5.—(1) The specified works must not commence until—

- (a) a stage 1 and stage 2 road safety audit has been carried out and all recommendations raised by them or any exceptions are approved by National Highways;
- (b) the programme of works has been approved by National Highways;
- (c) the detailed design of the specified works comprising of the following details, insofar as considered relevant by National Highways, has been submitted to and approved by National Highways—
 - (i) the detailed design information, incorporating all recommendations and any exceptions approved by National Highways under sub-paragraph (a);
 - (ii) details of the proposed road space bookings with National Highways;
 - (iii) the identity of the contractor and nominated persons;
 - (iv) to the extent that this is not provided for in the Construction and Traffic Management Plan in a form that is acceptable to National Highways, a process for stakeholder liaison, with key stakeholders to be identified and agreed between National Highways and the undertaker;
 - (v) information demonstrating that the walking, cycling and horse riding assessment and review process undertaken by the undertaker in relation to the specified works has been adhered to in accordance with DMRB GG142 – Designing for walking, cycling and horse riding;
- (d) to the extent that this is not provided for in the Construction and Traffic Management Plan in a form that is acceptable to National Highways, a scheme of traffic management relating to traffic management on the strategic road network has (where relevant) been submitted by the undertaker and approved by National Highways such scheme to be capable of amendment by agreement between the undertaker and National Highways from time to time;
- (e) stakeholder liaison has (where relevant) taken place in accordance with the process for such liaison agreed between the undertaker and National Highways under sub-paragraph 39(c)(iv);
- (f) National Highways has approved the audit brief and CVs for all road safety audits and exceptions to items raised in accordance with the road safety audit standard;
- (g) the undertaker has agreed the estimate of the commuted sum with National Highways;
- (h) the scope of all maintenance operations (routine inspections, incident management, reactive and third party damage) to be carried out by the undertaker during the construction of the specified works (which must include winter maintenance) has been agreed in writing by National Highways;
- (i) the undertaker has procured to National Highways collateral warranties in a form approved by National Highways from the contractor and designer of the specified works in favour of National Highways to include covenants requiring the contractor and designer to exercise all reasonable skill care and diligence in designing and constructing the specified works, including in the selection of materials, goods, equipment and plant; and

- (j) a condition survey and regime of monitoring of any National Highways assets or structures that National Highways reasonably considers will be affected by the specified works, has been agreed in writing by National Highways.

(2) The undertaker must not exercise—

- (a) article 4 (maintenance of authorised development);
- (b) article 10 (street works);
- (c) article 11 (power to alter layout, etc., of streets);
- (d) article 12 (construction and maintenance of new, altered or diverted streets);
- (e) article 13 (temporary closure and restriction of use of streets);
- (f) article 14 (permanent stopping up or public rights of way);
- (g) article 15 (access to works);
- (h) article 16 (traffic regulation);
- (i) article 19 (discharge of water);
- (j) article 20 (protective works to buildings) insofar as this relates to buildings owned or operated by National Highways;
- (k) article 21 (authority to survey and investigate the land);
- (l) article 22 (felling, lopping and removal of trees, shrubs and hedgerows);
- (m) article 33 (temporary use of land for carrying out the authorised development); or
- (n) article 34 temporary use of land for maintaining the authorised development),

of this Order, over any part of the strategic road network without the consent of National Highways, and National Highways may in connection with any such exercise require the undertaker to provide details of any proposed road space bookings and/or submit a scheme of traffic management for National Highways' approval.

(3) National Highways must prior to the commencement of the specified works or the exercise of any power referenced in sub-paragraph (2) inform the undertaker of the identity of the person who will act as a point of contact on behalf of National Highways for consideration of the information required under sub-paragraph (1) or (2).

(4) National Highways must provide the undertaker with a list of all the structures, assets and pavements to be subject to both a condition survey and regime of monitoring pursuant to sub-paragraph (1)(i) and paragraph 44(1) of this Part of this Schedule before the first condition survey is conducted and the regime of monitoring is implemented.

(5) Any approval or consent of National Highways required under this paragraph—

- (a) must not be unreasonably withheld or delayed;
- (b) must be given in writing;
- (c) in the case of a refusal must be accompanied by a statement of grounds for refusal;
- (d) shall be deemed to have been refused if neither given nor refused within 2 months of the receipt of the information for approval or, where further particulars are requested by National Highways within 2 months of receipt of the information to which the request for further particulars relates; and
- (e) may be subject to any conditions as National Highways reasonably considers necessary.

(6) Any change to the identity of the contractor and/or designer of the specified works will be notified to National Highways immediately along with collateral warranties in a form agreed by National Highways.

(7) Any change to the detailed design of the specified works must be approved by National Highways in accordance with sub-paragraph (1) of this Part of this Schedule.

Construction of the specified works

6.—(1) The undertaker must

- (a) give National Highways 28 days' notice in writing of the date on which the specified works will start unless otherwise agreed by National Highways; and
- (b) give National Highways as much notice as is reasonably practicable of any element of the authorised development that the undertaker reasonably considers would significantly affect the strategic road network or the level of traffic on the strategic road network.

(2) The undertaker must comply with National Highways' road space booking procedures prior to and during the carrying out of the specified works and no specified works for which a road space booking is required shall commence without a road space booking having first been secured from National Highways, such road space booking not to be unreasonably withheld or delayed.

(3) The specified works must be carried out by the undertaker to the satisfaction of National Highways in accordance with—

- (a) the relevant detailed design information and programme of works approved pursuant to paragraph 39(1) or as subsequently varied by agreement between the undertaker and National Highways;
- (b) the DMRB, the Manual of Contract Documents for Highway Works, including the Specification for Highway Works, together with all other relevant standards as required by National Highways to include, inter alia; all relevant interim advice notes, the Traffic Signs Manual and the Traffic Signs Regulations and General Directions 2016⁽⁵⁾ save to the extent that exceptions from those standards apply which have been approved by National Highways; and
- (c) all aspects of the Construction (Design and Management) Regulations 2015⁽⁶⁾ or any statutory amendment or variation of the same and in particular the undertaker, as client, must ensure that all client duties (as defined in the said regulations) are undertaken to the reasonable satisfaction of National Highways.

(4) The undertaker must permit and must require the contractor to permit at all reasonable times persons authorised by National Highways (whose identity must have been previously notified to the undertaker by National Highways) to gain access to the specified works for the purposes of inspection and supervision of the specified works.

(5) If any part of the specified works is constructed—

- (a) other than in accordance with the requirements of this Part of this Schedule; or
- (b) in a way that causes damage to the highway, highway structure or asset or any other land of National Highways,

National Highways may by notice in writing require the undertaker, at the undertaker's own expense, to comply promptly with the requirements of this Part of this Schedule or remedy any damage notified to the undertaker under this Part of this Schedule, to the satisfaction of National Highways.

(6) If during the carrying out of the authorised development the undertaker or its appointed contractors or agents causes damage to the strategic road network then National Highways may by notice in writing require the undertaker, at its own expense, to remedy the damage.

(7) If within 28 days on which a notice under sub-paragraph (5) or sub-paragraph (6) is served on the undertaker (or in the event of there being, in the opinion of National Highways, a danger to road users of the strategic road network, within such lesser period as National Highways may stipulate), the undertaker has failed to take the steps required by that notice, National Highways may carry out the steps required of the undertaker and may recover any expenditure incurred by National Highways in so doing, such sum to be payable within 30 days of demand.

(8) Nothing in this Part of this Schedule prevents National Highways from carrying out any work or taking any such action as it reasonably believes to be necessary as a result of or in connection with the carrying out

⁽⁵⁾ S.I. 2016/362.

⁽⁶⁾ S.I. 2015/51.

or maintenance of the authorised development without prior notice to the undertaker in the event of an emergency or to prevent the occurrence of danger to the public and National Highways may recover any expenditure it reasonably incurs in so doing.

(9) In constructing the specified works, the undertaker must at its own expense divert or protect all utilities and all agreed alterations and reinstatement of highway over existing utilities must be constructed to the satisfaction of National Highways.

(10) During the construction of the specified works the undertaker must carry out all maintenance (including winter maintenance) in accordance with the scope of maintenance operations agreed by National Highways pursuant to paragraph 39(1)(h) and the undertaker must carry out such maintenance at its own cost.

(11) The undertaker must notify National Highways if it fails to complete the specified works in accordance with the agreed programme pursuant to paragraph 39(1)(b) of this Part or suspends the carrying out of any specified work beyond a reasonable period of time and National Highways reserves the right to withdraw any road space booking granted to the undertaker to ensure compliance with its network occupancy requirements.

(12) Where in the opinion of National Highways the operation of the airport following construction of any specified work is leading to or may lead to an increase in traffic on the strategic road network beyond tolerable limits, National Highways may serve on the undertaker written notice to cease the operation of all or any part of such specified works until either the national highways mitigation works have been completed or capacity on the strategic road network is otherwise increased.

(13) In the event of a notice being served pursuant to paragraph 12, the undertaker will suspend the operation of all specified works stated in the notice until either the national highways mitigation works have been completed or National Highways serves written notice on the undertaker confirming that capacity on the strategic road network has increased.

Payments

7.—(1) The undertaker must pay to National Highways a sum equal to the whole of any costs and expenses which National Highways reasonably incurs (including costs and expenses for using internal or external staff and costs relating to any work which becomes abortive) in relation to the specified works and in relation to any approvals sought under this Order, or otherwise incurred under this Part, including—

- (a) the checking and approval of the information required under paragraph 40(1) and any advice given to the undertaker relating to the design, specification and programme of the specified works generally;
- (b) the supervision of the specified works;
- (c) the checking and approval of the information required to determine approvals under this Order;
- (d) all reasonable legal, technical and administrative costs and disbursements incurred by National Highways in connection with the Order and sub-paragraphs (a)-(c); and
- (e) any value added tax which is payable by National Highways in respect of such costs and expenses and for which it cannot obtain reinstatement from HM Revenue and Customs,

together comprising “the NH costs”.

(2) The undertaker must pay to National Highways upon demand and prior to such costs being incurred the total costs that National Highways reasonably believe will be properly and necessarily incurred by National Highways in undertaking any statutory procedure or preparing and bringing into force any traffic regulation order or orders necessary to carry out or for effectively implementing the authorised development.

(3) National Highways must provide the undertaker with a fully itemised schedule showing its estimate of the NH costs prior to the commencement of the specified works and the undertaker must pay to National Highways the estimate of the NH costs attributable to the specified works prior to commencing the specified works and in any event prior to National Highways incurring any cost.

(4) If at any time after the payment referred to in sub-paragraph (3) has become payable, National Highways reasonably believes that the NH costs will exceed the estimated NH costs it may give notice to

the undertaker of the amount that it believes the NH costs will exceed the estimate of the NH costs (the excess) and the undertaker must pay to National Highways within 28 days of the date of the notice a sum equal to the excess.

(5) National Highways must give the undertaker a final account of the NH costs referred to in sub-paragraph (1) to (4) within 30 days of the issue of the provisional certificate issued pursuant to paragraph 42(4).

(6) Within 28 days of the issue of the final account—

- (a) if the final account shows a further sum as due to National Highways the undertaker must pay to National Highways the sum shown due to it;
- (b) if the account shows that the payment or payments previously made by the undertaker have exceeded the costs incurred by National Highways, National Highways must refund the difference to the undertaker.

(7) If any payment due under any of the provisions of this Part of this Schedule is not made on or before the date on which it falls due the party from whom it was due must at the same time as making the payment pay to the other party interest at 1% above the Bank of England base lending rate from time to time being in force for the period starting on the date upon which the payment fell due and ending with the date of payment of the sum on which interest is payable together with that interest.

Provisional certificate

8.—(1) Following any closure or partial closure of any of the strategic road network for the purposes of carrying out the specified works, National Highways will carry out a site inspection to satisfy itself that the strategic road network is, in its opinion, safe for traffic and the undertaker must comply with any requirements of National Highways prior to reopening the strategic road network.

(2) As soon as the undertaker considers that the provisional certificate may be properly issued it must apply to National Highways for the provisional certificate.

(3) Following an application for a provisional certificate, National Highways must as soon as reasonably practicable—

- (a) inspect the specified works; and
- (b) provide the undertaker with a written list of works that are required for the provisional certificate to be issued or confirmation that no further works are required for this purpose.

(4) When—

- (a) a stage 3 road safety audit for the specified works has been carried out and all recommendations raised including remedial works have (subject to any exceptions agreed) been approved by National Highways, such approval not to be unreasonably withheld or delayed;
- (b) the specified works incorporating the approved remedial works under sub-paragraph (4)(a) and any further works notified to the undertaker pursuant to sub-paragraph (3)(b) have been completed to the satisfaction of National Highways;
- (c) the as built information has been provided to National Highways; and
- (d) the undertaker has paid the commuted sum to National Highways,

National Highways must promptly issue the provisional certificate.

(5) The undertaker must submit a stage 4 road safety audits as required by and in line with the timescales stipulated in the road safety audit standard.

(6) The undertaker must comply with the findings of the stage 4 road safety audit and must pay all reasonable costs of and incidental to such and provide updated as-built information to National Highways.

Opening

9. The undertaker must notify National Highways not less than 56 days in advance of the intended date of opening to the public of the strategic road network and the undertaker must notify National Highways of the actual date the strategic road network will be opened to the public within 14 days of that date.

Final condition survey

10.—(1) The undertaker must, as soon as reasonably practicable after making its application for a provisional certificate pursuant to paragraph 42(2), arrange for the highways structures and assets that were the subject of the condition survey to be re-surveyed and must submit the re-survey to National Highways for its approval.

(2) The re-survey will include a renewed geotechnical assessment required by DMRB CD622 if the specified works include any works beneath the strategic road network.

(3) If the re-surveys carried out pursuant to paragraph 44(1) indicates that any damage has been caused to a structure or asset, the undertaker must submit a scheme for remedial works in writing to National Highways for its approval in writing and the undertaker must carry out the remedial works at its own cost and in accordance with the scheme submitted.

(4) If the undertaker fails to carry out the remedial work in accordance with the approved scheme, National Highways may carry out the steps required of the undertaker and may recover any expenditure it reasonably incurs in so doing.

(5) National Highways may, at its discretion, at the same time as giving its approval to the re-surveys pursuant to paragraph 44(1) give notice in writing that National Highways will remedy any damage identified in the re-surveys and National Highways may recover any expenditure it reasonably incurs in so doing.

(6) The undertaker must make available to National Highways upon request copies of any survey or inspection reports produced pursuant to any inspection or survey of any specified work following its completion that the undertaker may from time to time carry out.

(7) Any approval of National Highways required under this paragraph must not be unreasonably withheld or delayed.

Defects period

11.—(1) The undertaker must at its own expense remedy any defects in the strategic road network as are reasonably required by National Highways to be remedied during the defects period.

(2) All identified defects must be remedied in accordance with the following timescales—

- (a) in respect of matters of urgency, within 24 hours of receiving notification for the same (urgency to be determined at the absolute discretion of National Highways);
- (b) in respect of matters which National Highways considers to be serious defects or faults, within 14 days of receiving notification of the same; and
- (c) in respect of all other defects notified to the undertaker, within 4 weeks of receiving notification of the same.

(3) Following the expiry of the defects period National Highways has responsibility for routine maintenance of the strategic road network save for any soft landscaping works which must be established and which must thereafter be maintained for a period of 3 years by and at the expense of the undertaker.

Final certificate

12.—(1) The undertaker must apply to National Highways for the final certificate no sooner than 12 months from the date of the provisional certificate.

(2) Following receipt of the application for the final certificate, National Highways must as soon as reasonably practicable—

- (a) inspect the strategic road network; and

(b) provide the undertaker with a written list of any further works required to remedy or make good any defect or damage in the strategic road network or confirmation that no such works are required for this purpose.

(3) The undertaker must carry out such works notified to it pursuant to sub-paragraph 46(2).

(4) When National Highways is satisfied that—

(a) any defects or damage arising from defects during the defects period and any defects notified to the undertaker pursuant to sub-paragraph 11(2) and any remedial works required as a result of the stage 4 road safety audit have been made good to the satisfaction of National Highways; and

(b) the NH costs have been paid to National Highways in full,

National Highways must issue the final certificate after which the bond shall be released in full.

(5) The undertaker must pay to National Highways within 28 days of demand the costs reasonably incurred by National Highways in identifying the defects and supervising and inspecting the undertaker's work to remedy the defects that it is required to remedy pursuant to these provisions.

Security

13. The specified works must not commence until—

(a) the undertaker procures that the specified works are secured by a bond from a bondsman first approved by National Highways in the agreed form between the undertaker and National Highways to indemnify National Highways against all losses, damages, costs or expenses arising from any breach of any one or more of the obligations of the undertaker in respect of the exercise of the powers under this Order and the specified works under the provisions of this Part of this Schedule provided that the maximum liability of the bond must not exceed the bond sum; and

(b) the undertaker has provided the cash surety which may be utilised by National Highways in the event of the undertaker failing to meet its obligations to make payments under paragraph 41 or to carry out works the need for which arises from a breach of one or more of the obligations of the undertaker under the provisions of this Part of this Schedule.

Commuted sums

14.—(1) National Highways must provide to the undertaker an estimate of the commuted sum, calculated in accordance with FS Guidance S278 Commuted Lump Sum Calculation Method dated 18 January 2010 or any successor guidance, prior to the commencement of the specified works.

(2) The undertaker must pay to National Highways the commuted sum prior to the issue of the provisional certificate.

Insurance

15. Prior to the commencement of the specified works the undertaker must ensure public liability insurance is in place with an insurer in the minimum sum of £10,000,000.00 (ten million pounds) in respect of any one claim against any legal liability for damage loss or injury to any property or any person as a direct result of the execution of specified works or use of the strategic road network by the undertaker.

Indemnity

16.—(1) Subject to sub-paragraphs (2) and (3) the undertaker fully indemnifies National Highways from and against all costs, claims, expenses, damages, losses and liabilities suffered by National Highways arising from the construction, maintenance or use of the specified works or exercise of or failure to exercise any power under this Order within 14 days of demand save for any loss arising out of or in consequence of any negligent act or default of National Highways.

(2) Sub-paragraph (1) does not apply to any costs, claims, expenses, damages, losses and liabilities which were caused by or arose out of the negligence or default of National Highways or its officers, servants, agents or contractors or any person or body for whom it is responsible.

(3) If any person makes a claim or notifies an intention to make a claim against National Highways which may reasonably be considered likely to give rise to a liability under this paragraph then National Highways must—

- (a) as soon as reasonably practicable give the undertaker reasonable notice of any such third party claim or demand, specifying the nature of the indemnity liability in reasonable detail; and
- (b) not make any admission of liability, agreement or compromise in relation to the indemnity liability without first consulting the undertaker and considering their representations.

(4) National Highways must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands and penalties to which the indemnity under this paragraph applies where it is within National Highway's reasonable gift and control to do so and which expressly excludes any obligation to mitigate liability arising from third parties which is outside of National Highway's control.

(5) National Highways must provide an explanation of how any claim has been mitigated or minimised or where mitigation or minimisation is not possible an explanation as to why, if reasonably requested to do so by the undertaker and only in relation to costs that are incurred which are within National Highways' direct control.

Maintenance of the specified works

17.—(1) The undertaker must, prior to the commencement of any works of maintenance to the specified works, give National Highways 28 days' notice in writing of the date on which those works will start unless otherwise agreed by National Highways, acting reasonably.

(2) If, for the purposes of maintaining the specified works, the undertaker needs to occupy any road space, the undertaker must comply with National Highways' road space booking requirements and no maintenance of the specified works for which a road space booking is required shall commence without a road space booking having first been secured, such road space booking not to be unreasonably withheld or delayed.

(3) The undertaker must comply with any reasonable requirements that National Highways may notify to the undertaker, such requirements to be notified to the undertaker not less than 14 days' in advance of the planned commencement date of the maintenance works.

(4) The provisions of paragraph 43 apply to the opening of any part of the strategic road network following occupation of any road space under this paragraph.

Expert determination

18.—(1) Article 52 (arbitration) of the Order does not apply to this Part of this Schedule.

(2) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers.

(3) All parties involved in settling any difference must use best endeavours to do so within 21 days from the date of a dispute first being notified in writing by one party to the other and in the absence of the difference being settled within that period the expert must be appointed within 21 days of the notification of the dispute.

(4) The expert must—

- (a) invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 21 days of the expert's appointment;
- (b) permit a party to comment on the submissions made by the other party within 21 days of receipt of the submission;
- (c) issue a decision within 42 days of receipt of the submissions under sub-paragraph (b); and
- (d) give reasons for the decision.

(5) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 52 (arbitration).

(6) The fees of the expert are payable by the parties in such proportions as the expert may determine or, in the absence of such determination, equally.