

**Application by Port of Tilbury London Limited for an Order Granting Development Consent for a Proposed Port Terminal at the Former Tilbury Power Station ("Tilbury2")**

**Highways England's representations for Deadline 6**

**Highways England: Outstanding issues**

**General**

We note that there are questions by the Examining Authority in their Response to Revision 4 of the draft Development Consent Order, 13 July 2018 (ExA's Response) which have been put only on aspects of the dDCO that have been of interest to and have been the subject of previous comment from Highways England (HE). HE reserves its position to comment further at Deadline 7 dependent upon the responses provided by the Applicant.

The balance of this representation otherwise provides HE's comments on outstanding matters relating to the dDCO concerning HE and other outstanding matters relating the application.

**Response to questions raised in Examining Authority's Response to Revision 4 of the draft Development Consent Order, 13 July 2018**

Item No.	Part of dDCO	Directed To	Comments, Questions, Expectations	HE Response
5.8.31	Schedule 10  Part 9: For the protection of Highways England	Applicant, Highways England (HE)	<p>ExA notes HE's position as stated in its overview to its submission at deadline 5 [REP5-058], in which HE states that it welcomes the inclusion of protective provisions solely for HE's benefit in the latest version of the dDCO, and HE is reviewing these amendments.</p> <p>HE has been in discussion with the Applicant since deadline 4 and has made further progress in progressing outstanding issues. HE has entered into an updated SoCG to reflect the status of progress. "Those discussions also suggest that the Applicant now expects to reach some agreement with HE on the wording of replacement protective provisions (PPs) to appear in the dDCO. By</p>	<p>HE and the Applicant have made progress towards an agreed form of protective provisions solely for HE that will replace the form of provisions currently set out in Part 9, Schedule 10 of dDCO.</p> <p>At this time, drafting changes are still under consideration between the parties and the current expectation is that it will be possible for the parties to reach agreement on the vast majority of outstanding points before close of the examination.</p> <p>HE sets out (further below in Appendix A) the form of draft Protective Provisions that HE is content to have imposed in the dDCO, subject to further dialogue with the Applicant.</p> <p>Highlighted text indicates substantive provisions that remain under consideration between the parties. An outline of HE's rationale for</p>

			<p>agreement with the Applicant, details of the wording of those PPs has not been submitted to the Examination at this time as it is expected that the Parties will very shortly be in a position to present a common ground position on the replacement wording".</p> <p><b>ExA welcomes the progress made with the PPs and notes HE's statement that not all elements of the PPs are likely to be agreed. The Panel also notes the agreement on the application of powers at the Asda roundabout, as well as the status with regard to M25 J30.</b></p> <p><b>ExA requests an update on progress on all these matters from both parties.</b></p>	<p>these provisions is also provided in a table in Appendix A to this statement.</p> <p>The substance of the balance is otherwise understand to be agreed with the Applicant, albeit some further drafting changes may be considered.</p> <p>HE reserves its position to add to its supporting comments in the table further below in the event of further changes or additional matters not agreed arising with the Applicant before close of the examination.</p> <p>The current position on M25 J30 is set out in an updated SOCG agreed with the Applicant. Working with the Applicant, HE has identified a potential improvement scheme and HE is evaluating evidence provided by the Applicant about the amount of mitigation it provides. At this stage it is not possible to say whether the mitigation will be sufficient to overcome HE's concern. HE expects to complete the evaluation early in the week commencing 6 August.</p> <p>The Applicant and HE have discussed the potential requirement for further changes to the dDCO to secure required mitigation.</p> <p>At this stage, it is expected that a change to Requirements (Schedule 2) will be required to include a Grampian requirement for this mitigation. Currently, this is expected to be an extension to draft Requirement No. 7 for the Applicant to enter into a form of agreement with HE</p>
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				for the carrying of required mitigation or the payment of monies to HE to perform the necessary mitigation.
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**The Applicant's proposed amendments to traffic regulation (in particular speed limits) in conjunction with the required works to the Asda roundabout**

We note the request that is made of the Applicant (rather than Highways England (HE)) in ExA's Response, Item No. 5.8.13 and reserve HE's position to comment further on the Applicant's response at Deadline 6.

To assist at this time, HE confirms its understanding that TROs which are detailed in Part 1 of Schedule 8 enable the Applicant to make provisions as set out in that schedule (pursuant to article 52(1)). Notice is to be given to the chief officer of the police and to the traffic authority in whose area the road is situated. The traffic authority can specify the manner in which the Applicant must advertise its intention to exercise the powers. Article 52(8) requires the Applicant to consult such persons as they consider necessary or appropriate before exercising their powers and have regard to the representations made to the Applicant by any such person. The extent of consultation and regard to representations made is at the Applicant's discretion. For this reason, HE has been concerned to ensure that sufficient consideration of proposed changes to speed limits has been capable of being afforded to both HE and Essex Police in relation to Asda Roundabout (Works No.11).

HE can confirm that it is cognisant of the details of more recent contact between the Applicant and Essex Police on the consideration of changes to speed limits at Asda Roundabout. We expect that an update will be provided by the Applicant as part of its response to Deadline 6. We are able to confirm HE's understanding of the position as follows:

Essex Police are content as to the proposed speed limit changes is as follows:

- There is no objection to the proposed 30mph speed limit on the ASDA roundabout circulatory and approach;
- There is no objection to the proposed 50mph speed limit on the A1089 between Marshfoot Road junction and the Asda Roundabout *subject to assurances that appropriate methods of enforcing the speed limit are provided in association with the proposed change.*

Accordingly, it is expected and it is understood that *the Applicant agrees that it must consult further with Essex Police on the details of the proposed changes alongside the other changes to Asda Roundabout and road network associated with the Port expansion, as part of any exercise of the above proposed powers.*

This is on the basis of the Applicant's explanation to Essex Police as follows:

- Improvements to the ASDA roundabout are associated with the proposed expansion of the Port of Tilbury;
- Improvements have been agreed with HE and Thurrock Council subject to a road safety audit;
- In respect of speed limit changes:

- the circulatory carriageway of the roundabout (and the immediate approaches) would become subject to a 30mph limit.
- The A1089 north of the roundabout to the Marshfoot junction would become subject to a 50mph limit. This will be introduced as a transition between the national (70mph) speed limit and the proposed 30mph on the roundabout.
- Improvements are at preliminary design stage and would be subject to further consultation as the design develops.

It is also noted that the Applicant has a general power to seek to make other TROs in Article 52(4) with the consent of the traffic authority in whose area the road concerned is situated (article 52(4)). The consultation provisions on these orders are otherwise the same as those set out above, and Article 52(8) is also relevant to this process. HE similarly expects to be consulted on any such proposed orders and has previously confirmed that it is content with the proposed drafting in the dDCO on the basis of this understanding.

#### Required action

HE has agreed with the Applicant to liaise further with Essex Police at this time to gain clarification of the measures required to be secured as part of the dDCO. Depending upon their response, it is anticipated that a further change to the dDCO may be required to secure delivery of the enforcement measures that they outline and to make clear that are further consulted on the proposed speed limit changes at later detailed design stages in relation to the road network where the Applicant relies on the powers in Article 52(1) (as above). The same is required for HE in respect of the SRN.

#### **Lower Thames Crossing (LTC)**

HE raised a point earlier in the examination (Deadline 2) relating to the impact of proposed translocation areas for various fauna (see summary below in the table) on the delivery of the LTC project. The LTC project is subject to promotion as a development consent order which is currently at pre-application stage.

HE considers that this issue remains unresolved and requires further consideration. HE does not accept the Applicant's Deadline 5 response. HE has notified the Applicant of its outstanding concern.

LTC is an "in flight" project and is in the process of design iteration. The preferred route announcement does not currently show a link spur through the works area of concern. However, as stated in the previous representation, the link spur is included as part of the scoping area. At this stage no final decision has been made on the case or otherwise for a new link to the port of Tilbury. HE is also considering options that include the potential use of this area as a construction haul route for LTC. A second public consultation on LTC will be held in Autumn 2018. The area is safeguarded for purposes under Article 18(1) and Schedule 4 paragraph (h) of the Town and Country Planning (Development Management Procedure) (England) Order 2015..

There is therefore a prospect of conflict between use by the Tilbury2 port if utilised for the translocation of species in this area and the delivery of the LTC project. Any agreement by Natural England for the translocation of species to this area may then preclude the use of that area for the LTC project.

HE therefore looks to the Applicant to address this matter by agreement with HE, but failing that HE is considering seeking an addition to the protective provisions (schedule 10, part 9) requiring consent

of HE for the use of this area prior to the seeking of any license for the translocation of species into this area.

Summary Table of Representations

<b>Examination Stage</b>	<b>Document and Item No.</b>	<b>Party</b>	<b>Response/Representation</b>
Deadline 2	REP2-001 Item 1.2.25	HE	"Highways England has considered the proposed translocation areas and concluded that they are unlikely to interact with the existing Strategic Road Network. However, Highways England submits that the relocation proposals should be reviewed in light of the LTC Scoping Report, to ensure that there is no conflict between the two projects and that no translocations will be undertaken into the LTC works area. Failure to do so may prevent Highways England being able to implement the LTC effectively."
Deadline 3	REP3-017	Applicant	Applicant provided an ecology update dealing with translocation but does not appear to HE to have addressed the issues HE raised in REP2-001.
Deadline 3	REP3-027	Applicant	Applicant submitted a Qualitative Cumulative Effects Assessment of Tilbury2 With Tilbury Energy Centre And Lower Thames Crossing . Section 5.44 deals with translocation and generally takes the line 'Realigning the spur road to the north could in principle avoid these impacts.'
Deadline 3	REP3-046  Item Q2.4	HE	Qu: Does Highways England agree there are no implications arising from the draft EMCP for the Lower Thames Crossing (LTC) works area?  "Highways England has considered the proposed translocation areas and concluded that they are unlikely to interact with the existing Strategic Road Network. However, Highways England submits that the relocation proposals should be reviewed in light of the LTC EIA Scoping Report, to ensure that there is no conflict between the two projects and that no translocations will be undertaken into the LTC works area. Failure to do so may prevent Highways England being able to implement the LTC effectively."
Deadline 4	REP4-018	Applicant	Stage 2 Report (Habitats Regulations Assessment)  Section 6.3 considers the LTC but deals only with SPA/Ramsar issues. There is reference to translocation but not in the context of LTC.
Deadline 5	REP5-032	Applicant	Update Habitats Regulations Assessment Stage 2

			<p>Report.</p> <p>Section 6.3 considers the LTC but deals only with SPA/Ramsar issues, but HE is not aware that it has any direct reference to translocation in the context of LTC.</p>
Deadline 5	REP5-034	Applicant	<p>Mitigation Route Map V2</p> <p>Translocation is mentioned but not in the context of LTC.</p>
Deadline 5	REP5-036 Item Q3.11.1	Applicant	<p>Written Submission of Case on Ecology and HRA issues at ISH of 28 June 2018.</p> <p>Qu: Overall, what are NE's views on the conclusions of the HRA Stage 2 Report [REP4-018] that the proposed Tilbury2 project will not adversely affect the integrity of the Thames Estuary and Marshes Special Protection Area (SPA)/Ramsar site, alone or in combination with other plans or projects?</p> <p>"It is accepted that the in-combination assessment is as far as can be determined on the basis of such information as is yet available about TEC and LTC. If a different conclusion arises once details of those projects come forward, due to Tilbury2 being compliant with the Conservation of Habitats and Species Regulations 2017 on its own terms, it will be for the promoters of those projects to address their consequential effects."</p>
Deadline 5	REP5 – 059	HE	<p>No direct request of HE to respond from ExA and no voluntary response from HE on translocation on the Issue Specific Hearing on Ecology, Habitats Regulations Assessment, and Traffic and Transportation in anticipation of Applicant's written response (REP5-036).</p>

## Appendix A

### Proposed Form of replacement draft HE Protective Provisions

#### PART 9

#### FOR THE PROTECTION OF HIGHWAYS ENGLAND

##### Application

**113.** The provisions of this Part of this Schedule have effect unless otherwise agreed in writing between the Company and Highways England and apply to the HE works.

##### Interpretation

**114.**—(1) Where terms defined in article 2 are inconsistent with the terms defined in subparagraph (2) below, the latter prevail.

(2) In this Part of this Schedule—

“as-built information” means one digital copy of the following information where applicable to the phase of the HE works in question—

(a) as-constructed drawings in both pdf and auto CAD dwg formats for anything designed by the Company;

(b) list of suppliers and materials, test results and CCTV surveys (CCTV 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 1400 of the Specification for Highway Works or any replacement or modification of it, but subject to any exceptions to it (including a replacement or modification of it) as agreed by the Company and Highways England;

(g) organisation and methods manuals for all products used;

(h) as-constructed programme;

(i) test results and records;

(j) a stage 3 road safety audit subject to any exceptions agreed to the road safety audit standard as agreed by the Company and Highways England;

(k) the health and safety file; and

(l) such other information as may be required by Highways England to be used to update any relevant databases and to ensure compliance with Highways England’s Asset Data Management Manual that is in operation at the relevant time;

“commuted sum” means such sum calculated as provided for in paragraph 122 of this Part of this Schedule and approved by Highways England to be used to fund the future cost of maintaining the HE works;

“contractor” means any contractor or sub-contractor appointed by the Company to construct the HE works;

“the detailed design information” means details of the following —

- (a) site clearance details;
- (b) boundary and mitigation fencing;
- (c) road restraints systems and supporting road restraint risk appraisal process assessment;
- (d) drainage and ducting and supporting drainage calculations;
- (e) earthworks including supporting geotechnical assessments and any required strengthened earthworks appraisal form certification;
- (f) 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) and supporting lighting calculations;
- (j) electrical work for road lighting, traffic signs and signals;
- (k) highway structures and any required structural approval in principle;
- (l) landscaping;
- (m) proposed departures from DMRB requirements;
- (n) walking, cycling and horse riding assessment and review report;
- (o) stage 1 and 2 road safety audit reports, road safety audit response reports and any road safety audit exceptions reports;
- (p) utilities diversions;
- (q) topographical survey;
- (r) site waste management plan;
- (s) maintenance and repair strategy in accordance with Designing for Maintenance Interim Advice Note 69/15 or any replacement or modification of it;



- (t) asbestos survey;
- (u) regime of california bearing ratio testing;
- (v) regime of core testing and sampling of existing trunk road pavement construction;
- (w) site investigation survey;
- (x) health and safety information; and
- (y) other such information that may be required by Highways England to be used to inform the detailed design of the HE works;

“the DBFO contract” means the contract between Highways England and the highway management contractor for the maintenance and operation of parts of the strategic road network including the A282, M25, A13 (part) and the A1089;

"DRMB" means the Design Manual for Roads and Bridges or any replacement or modification of it;

“the estimated costs” means the estimated costs in respect of the HE works agreed pursuant to paragraph 118 of this part of this Schedule;

“the excess” means the amount by which Highways England estimates that the costs referred to in paragraph 118 of this Schedule will exceed the estimated costs pursuant to paragraph 118(7)(b) of this Schedule;

“the HE works” means Work No. 11 and any works ancillary to Work No. 11;

“the highway management contractor” means the management contractor appointed by Highways England under the DBFO contract in respect of the highway on that part of the strategic road network within which the HE works are situated;

“the nominated persons” means the Company’s representatives or the contractor’s representatives on site during the construction of the HE works as notified to Highways England from time to time;

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

“the road safety audit” means an audit carried out in accordance with the road safety audit standard and with a process to be approved by Highways England prior to it being carried out;

“the road safety audit standard” means the DMRB Standard HD 19/15 or any replacement or modification of it; and

“utilities” means any pipes, wires, cables or other equipment belonging to any person or body having power or consent to undertake street works under the 1991 Act.

## **General**

**115.**—(1) The Company acknowledges that the HE works are situated on highway in respect of which Highways England has appointed the highway management contractor.

## **Prior approvals**

**116.** —(1) The HE works must not commence until—

- (a) the detailed design information;
- (b) the programme of works;
- (c) details of proposed road space bookings;
- (d) a schedule confirming how relevant routine maintenance obligations imposed on the highways management contractor by the DBFO contract are to be discharged by the Company during the execution of the HE works and that such costs will be paid by the Company; and
- (e) a scheme of traffic management,

have been submitted to and approved by Highways England, such approval not to be unreasonably withheld or delayed.

(2) Highways England must notify the Company of its approval or, as the case may be, of its disapproval and the grounds of disapproval, within 56 days of the information required by subparagraph (1)(a)-(d) being received by Highways England.

(3) In the event of any disapproval, the Company may re-submit the information required by subparagraph (1)(a)-(d) with modifications and Highways England must notify the Company of its approval or, as the case may be, of its disapproval and the grounds of disapproval, within 56 days of the revised detailed design information being received by Highways England.

(4) The programme of works and scheme of traffic management approved under sub-paragraph (1) may be amended by agreement between the Company and Highways England from time to time, both parties acting reasonably.

(5) Prior to the commencement of the HE works Highways England must inform the Company of the identity of the person who will act as the point of contact on behalf of Highways England for consideration of the information required under sub-paragraph (1).

(6) The HE works must not commence until the Company has informed Highways England in writing of the identity of the contractor appointed by the Company in respect of the HE works (or the relevant part of the HE works) and the identity of the nominated persons and HE has approved in writing the identity of the contractor.

(7) No work shall commence on the HE works until the Company has provided security for the carrying out of those works as provided for in paragraph 121 below or some other form of security acceptable to Highways England.

(8) The HE works must not be commenced until a Stage 2 road safety audit has been carried out and all recommendations raised by it or any exceptions have been incorporated into the detailed design information approved by Highways England under sub-paragraph (1).

(9) The HE works must not be commenced until all necessary temporary traffic regulation measures have been made by the Company under article 52(3) or until all necessary temporary traffic regulation orders have been made by Highways England.

(10) No work shall commence on the HE works until the Company demonstrates to the satisfaction of Highways England that the walking, cycling and horse riding assessment and review process has been adhered to in accordance with the Design Manual for Roads and Bridges Standard HD 42/17.

(11) No works shall commence on the HE works until stakeholder liaison has taken place in accordance with a process for such liaison, such process to have been agreed between the Company and Highways England.

(12) The HE works must not commence until a dilapidation survey of the condition of the roads, bridges and retaining walls along the routes approved for construction traffic for the authorised development as part of the scheme of traffic management approved under the construction traffic management plan has been carried out by the Company and has been submitted to and approved in writing by Highways England.

(13) No more than 28 days after the completion of the HE works, the roads, bridges and retaining walls surveyed under sub-paragraph (12) must be re-surveyed by the Company.

(14) If the re-survey carried out under sub-paragraph (13) indicates that there has been damage to the roads, bridges and retaining walls that have been surveyed, and that such damage is attributable to the use of those roads, bridges and retaining walls by construction traffic for the authorised development, the Company must submit a scheme of remedial works for those damaged routes, bridges and retaining walls to Highways England for its approval in writing which should not be unreasonably withheld or delayed.

(15) The scheme of remedial works approved under sub-paragraph (15) must be carried out by the Company at its own cost.

### **Carrying out of the HE works**

**117.**—(1) The Company must give Highways England 28 days' notice in writing of the date on which the HE works will commence unless otherwise agreed by Highways England.

(2) The HE works must be constructed to the reasonable satisfaction of Highways England and in accordance with—

(a) the information approved under paragraph 116(1) or as subsequently varied by agreement between the Company and Highways England;

(b) the DMRB and the Specification for Highway Works (contained within the Manual of Contract Documents for Highway Works) together with all other relevant standards as required by Highways England (to include all relevant interim advice notes, the Traffic Signs Manual 2008 and any amendment to or replacement of such standards for the time being in force) save to the extent that exceptions to those standards apply which have been approved by Highways England under paragraph 116(1) in respect of the HE works;

(c) the Traffic Signs Regulations and General Directions 2016 or any amendment to or replacement of them; and

(d) all aspects of the Construction (Design and Management) Regulations 2015 or any amendment to or replacement of them.

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

(4) The Company must permit and require the contractor to act upon any reasonable request made by Highways England in relation to the construction of the HE works as soon as reasonably practicable

provided such a request is not inconsistent with and does not fall outside the contractor's obligations under its contract with the Company or the Company's obligations under this Order.

(5) If any part of the HE works is constructed otherwise than in accordance with the requirements of this Part of this Schedule, Highways England may by notice in writing require the Company, at the Company's own expense, to comply with the requirements of this Part of this Schedule.

(6) If within 28 days of the date on which a notice under sub-paragraph (5) is served upon the Company, the Company has failed to take steps to comply with this Part of this Schedule, Highways England may construct:

(i) the HE works; or

(ii) works to reinstate the highway and other land and premises of Highways England

and Highways England may in either case recover from the Company any expenditure reasonably incurred by it in so doing.

(7) If during the construction of the HE works the Company causes any damage to the strategic road network then Highways England may by notice in writing require the Company, at the Company's own expense, to remedy the damage.

(8) If within 28 days of the date on which a notice under sub-paragraph (7) is served on the Company, the Company has failed to take steps to comply with the notice, Highways England may carry out the steps required of the Company and may recover from the Company any expenditure reasonably incurred by Highways England in so doing, such sum to be payable within 30 days of request.

(9) Nothing in this Part of this Schedule prevents Highways England from carrying out any work or taking such action as it reasonably believes to be necessary as a result of the construction of the HE works without prior notice to the Company in the event of an emergency or to prevent the occurrence of danger to the public and Highways England may recover from the Company any reasonable expenditure incurred by Highways England in so doing.

(10) In constructing the HE works the Company must, at its own expense divert or protect all utilities and all agreed alterations and reinstatement to existing utilities must be constructed to the reasonable satisfaction of Highways England.

## **Payments**

**118.**—(1) The Company must fund the whole of the cost of the HE works and all costs incidental to the HE works and must also pay to Highways England in respect of the HE works a sum equal to the whole of any costs and expenses which Highways England incurs (including costs and expenses for using external staff and resources as well as costs and expenses of using in house staff and resources) in relation to—

(a) the checking and approval of the information required by paragraph 116(1);

(b) the supervision of the HE works;

(c) routine maintenance approved under paragraph 116(1)(d);

(d) all legal and administrative costs in relation to paragraphs (a) and (b) above;

(e) all costs in relation to the transfer of any land required for the HE works; and

(f) costs properly payable to the highway management contractor as a consequence of the HE works, including costs incurred in payment of compensation or damages or otherwise arising from any proceedings, actions, claims, demands or liability made against Highways England by the highway management contractor,

together comprising “the estimated costs”.

(2) The estimated costs must not include any costs payable to the highways management contractor by Highways England to undertake any of the obligations for which costs may become due by the Company under sub-paragraph (1)(a)-(d) unless they are included within the estimated costs pursuant to sub-paragraph 1(f).

(3) The estimated costs do not include any sums payable by the Company to the contractor, but do include any value added tax which is payable by Highways England in respect of such costs which it cannot otherwise recover from HM Revenue and Customs.

(4) The Company must pay to Highways England within 30 days of demand and prior to such costs being incurred the total costs that Highways England believes will be properly and necessarily incurred by it in undertaking any statutory procedure or preparing and bringing into force any traffic regulation order necessary to construct or for effectively implementing the HE works provided that this sub-paragraph will not apply to the making of any orders which duplicate traffic regulation measures contained in, or which may be made by the Company under, this Order.

(5) The Company must pay to Highways England the costs referred to in sub-paragraph (1)(a) prior to those costs being incurred by Highways England.

(6) The Company and Highways England must agree a schedule of the estimated costs to be incurred above prior to the commencement of the HE works.

(7) The Company must make the payments of the estimated costs as follows—

(a) the Company must pay a sum equal to the estimated costs agreed under sub-paragraph (6) prior to commencing the HE works and in any event prior to Highways England incurring any cost; and

(b) if at any time after the payment referred to in sub-paragraph (7)(a) has become payable and Highways England reasonably estimates that the costs will exceed the estimated costs it may give notice to the Company of the amount by which it then reasonably estimates those costs will exceed the estimated costs (“the excess”) and the Company must pay to Highways England within 30 days of the date of that notice a sum equal to the excess.

(8) If Highways England have received the as built information within 91 days of the issue of the final certificate for the HE works pursuant to paragraph 120 Highways England shall give the Company a final account of the costs referred to in sub paragraph (1) above and within 28 days from the expiry of the 91 day period -

(a) if the account shows a further sum as due to Highways England the Company shall pay to Highways England the sum shown due to it in that final account; and

(b) if the account shows that the payment or payments previously made have exceeded those costs Highways England shall refund the difference to the Company.

(9) 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 rate payable in respect of compensation

under section 32 (rate of interest after entry on land) of the 1961 Act 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.

(10) Highways England is not entitled to costs or expenses incurred under any limb of subparagraph (1) if those costs or expenses are included as part of the estimated costs under any other limb of that sub-paragraph.

### **Provisional certificate and defects period**

**119.**—(1) As soon as—

(a) the HE works have been completed;

(b) a stage 3 road safety audit for the HE works has been carried out and any resulting recommendations have been complied with and any exceptions agreed by Highways England;

(c) the Company has provided a plan clearly identifying the extent of any land which is to become highway maintainable at public expense by Highways England upon the issue of the provisional certificate; and

(d) the as-built information has been provided to Highways England,

Highways England must issue a provisional certificate of completion in respect of the HE works.

(2) The Company must at its own expense remedy any defects in the HE works which Highways England has reasonably identified in a notice given in writing to the Company during a period of 12 months from the date of the provisional certificate.

(3) The Company must remedy defects identified by Highways England in the notice given by Highways England under sub-paragraph (2) in accordance with the following timescales:

(a) in respect of matters of urgency, within 24 hours of receiving the notice;

(b) in respect of matters which Highways England considers to be serious defects, within 14 days of receiving notification of the same; and

(c) in respect of all other defects notified to the Company, within 4 weeks of receiving notification of the same.

(4) Following the issue of the provisional certificate Highways England will be responsible for the HE works and must maintain them at its own expense. The Company must submit stage 4(a) and stage 4(b) road safety audits as required by and in line with the timescales stipulated in the road safety audit standard.

(5) The Company must comply with the findings of the stage 4(a) and stage 4(b) road safety audits and be responsible for all costs of and incidental to them and provide updated as-built information to Highways England.

### **Final certificate**

**120.**—(1) The Company must apply to Highways England for the issue of the final certificate at the expiration of the 12 month period referred to in paragraph 119(2), or if paragraph 119(2) applies at the expiration of the date on which any defects or damage arising from defects during that period have

been made good to the reasonable satisfaction of Highways England and subject to the Company complying with the requirements on Company in paragraphs 119(3) to (5) inclusive.

(2) If the provisions of sub-paragraph (1) are satisfied Highways England must issue a final certificate, such certificate not to be unreasonably withheld or delayed.

### **Security**

**121.**—(1) Subject to paragraph 116(7) above the Company will provide security for the carrying out of the HE works as follows -

(a) prior to the commencement of the HE works the works will be secured by a bond in a form and for a bond sum first approved by Highways England to indemnify Highways England against all losses, damages, costs or expenses arising from any breach of any one or more of the obligations of the Company under the provisions of this Schedule and the maximum liability of the bond shall not exceed the agreed bond sum; and

(b) prior to the commencement of the HE works the Company shall provide the a cash surety to a sum first approved by Highways England which may be utilised by Highways England in the event of the Company failing to meet its obligations to make payments under paragraph 118 or to carry out works the need for which arises from a breach of one or more of the obligations of the Company (which must for the avoidance of doubt be a single cash surety for the entirety of the HE Works).

(2) Within 20 working days of the issue of the final certificate referred to in paragraph 120, Highways England shall in writing release the bond provider from its obligations in respect of the revised bond sum and release the remainder of the cash surety to the Company save insofar as any claim or claims have been made against the bond or liability on its part has arisen prior to that date in which case Highways England will retain a sufficient sum to meet all necessary costs.

### **Commuted sums**

**122.**—(1) Before commencing the HE works the Company must provide Highways England with an estimate of the commuted sum.

(2) The Company must pay to Highways England a commuted sum calculated in accordance with FS Guidance S278 Commuted Lump Sum Calculation Method dated 18th January 2010 (or any replacement or modification of it) within 28 days of the date that the HE works become maintainable by Highways England under paragraph 119.

### **Insurance**

**123.**—(1) Prior to commencement of the HE works the Company must effect public liability insurance with an insurer in the minimum sum of £10,000,000.00 (Ten million pounds) against any legal liability for damage loss or injury to any property or any person as a direct result of the execution of the HE works or any part thereof by the Company.

### **Indemnification**

**124.** (1) The Company must in relation to the construction of the HE works take such precautions for the protection of the public and private interests as would be incumbent upon it if it were the highway authority and must indemnify Highways England from and against all costs, expenses, damages, losses and liabilities arising from or in connection with or ancillary to any claim, demand, action or proceedings resulting from the design and construction of the HE works provided that—

- (a) Highways England notifies the Company immediately upon receipt of any such claim, demand, action or proceedings; and
- (b) following the acceptance of any such claim, demand, action or proceedings, Highways England notifies the Company of the quantum in writing.
- (2) Within 14 days of receiving notice of the quantum under sub-paragraph (1), the Company must pay Highways England the amount specified as the quantum.
- (3) Sub-paragraphs (1) and (2) do not apply if the costs, expenses, damages, losses and liabilities were caused by or arise out of the neglect or default of Highways England or its officers, servants, agents, contractors or any person or body for whom it is responsible.
- (4) The Company must notify Highways England of the intended date of opening of the HE works to public traffic not less than 14 days in advance of the intended date and the Company must notify Highways England of the actual date that the HE works are open to public traffic within 14 days of their opening to public traffic.

### **Collateral warranties**

**125.** Before commencing the HE works, the Company must procure and provide to Highways England collateral warranties from the contractor and designer of the HE works in favour of Highways England and the highway management contractor requiring the contractor and designer to exercise all reasonable skill, care and due diligence in designing and constructing the HE works including the selection of materials, goods, equipment and plant.

### **Expert determination**

**126.**—(1) Subject to sub-paragraph (5), article 60 (arbitration) 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 their 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 submissions to the expert in writing and copied to the other parties 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 parties within 21 days of receipt of the submission;

(c) issue a decision within 42 days of receipt of the submissions under 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 60.

(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 a determination, equally.

**Outline of HE's rationale for draft protective provisions not yet agreed with the Applicant**

Provision in Replacement HE dPPs - Paragraph No.	Comment
General	<p>Ordinarily, protective provision are provided for the benefit of statutory undertakers in development consent orders and similar legislative instruments such as Transport and Works Act Orders.</p> <p>However, HE differs from other beneficiaries and prospective beneficiaries of protective provisions because it is a highway authority and, in particular the highway authority for the strategic road network. A highway is a place where the public has the right to pass and re-pass. As such, a highway composed in the strategic road network may be assumed to be a location where the public will be present at all times.</p> <p>Consequently, the highway - and the strategic road network in particular - are afforded particular protection. It is not appropriate for an approach applicable to other statutory undertakers, however important or sensitive their undertakings may be, to be applied to the highway and the highway authority.</p>
116(6)	<p>HE's highway management contractor, Connect Plus (CPS) needs to be satisfied as to the ability of the contractor to carry out the works safely and effectively and will be expected to be from the approved list of contractors or to agree to a derogation from the approved list. This is standard approach.</p> <p>HE understands that the Applicant has already begun the public procurement process for its works (under OJEU) which includes the works to the SRN and has a list of preferred bidders that would comprise the proposed contractors for the satisfaction of this provision. HE is seeking to consider this list and any potential derogation from the approved list of contractors.</p> <p>However, this remains a matter for HE's appointed highways management contractor, CPS to determine at the appropriate time and this provision is required, albeit HE continues to seek to consider the Applicant's request for earlier consideration at this time.</p>
116(7) and 121	<p>HE provided an initial outline of its rationale for its requirements for security in it's response to ExA's second written questions [TRO30003-000793] at 2.8.48 and 2.18.4(iii).</p>

This can further summarised and is expanded as follows:

**Purpose of financial security** - The purpose of providing security as these provisions anticipate is to address the situation where works are - for whatever reason - left incomplete or in some way defective. Financial security must be provided either by way of bond, which is conventional in relation to highway schemes, and also deposition of funds.

This is important to preserve the safety and integrity of the highway - for reasons of public safety and to ensure the proper efficient functioning of the network. As such, it is not appropriate for works to remain in an incomplete state on the network.

What HE is seeking is that the Applicant is treated in the same way as all other developers, however well-funded. As such, it is immaterial that a Grampian requirement (condition precedent) implies that for a development to function works must be completed. The same is equally true of all works where a s278 agreement is required. Should works not proceed or should some other difficulty arise meaning that a principal development fails, then the public interest and highway safety require that works be completed.

It is not enough to say that there is no doubt that works will be completed - any developer can assert this. The only way to be certain that this will occur is if financial provision is made.

**Bond and surety** - The reason for the requirement of a Bond and a cash surety is to ensure that liquid funds are available prior in the period whilst a call on a bond is being made. This is because the time taken to release funds from a bond may be protracted. There is no double counting here, since the cash surety would be treated as part of the overall surety sum protected also by the bond. An alternative is for the entire surety to be made available in cash.

**Other findings on funding** - It has been suggested that financial assurance is not required because the Secretary of State will have made a finding that there is a reasonable prospect of funding being available to complete the works comprised in the project as a whole. However, that is not the same as the need to protect the highway network.

The finding as to the funding statement (if made) would be that there was a reasonable prospect of finances being available over the relevant period. For the highway network to be protected, the need is different: certainty that the works in question are funded and will be completed or the road reinstated.

Similarly, the prospective finding that the Applicant is a fit and proper statutory undertaker does not address the question of whether financial assurance is needed. Wealthier and better

	funded entities would be subject to the same provisions as are required of the Applicant
116(11)	HE expects a robust stakeholder information and liaison process to be undertaken in accordance with its standard approach, administered by its service provider, CPS. Matters to be covered will include the timing of works and traffic management changes together with any restrictions on access. CPS under the DBFO contract will determine at the appropriate time whether a further letter drop is required in addition to consultation undertaken pursuant to the DCO process is necessary and which will have regard to the extent and nature of the proposed detailed works.
116(12) to (15)	This is a standard requirement, the principle of which we understand is not resisted by the Applicant. The Applicant is concerned as to the workability of the provision due to the nature of existing heavy goods vehicles already on this part of the SRN (in addition to the construction vehicles that will be added). HE accepts that it will be for it to demonstrate causation and effect but that otherwise the principle requirement for this provision is sound.
118(8)	We understand that the principle of this provision is agreed, but the Applicant wishes for HE to consider alternative wording of the provision HE is willing to consider the same if it is provided.
114(1) and 121(1)(b)	Highways England requires the security of cash security so that they have sufficient funds to deal with upfront costs, because it can take time to call on a bond.
123	<p>HE provided an initial outline of its rationale for its requirements public liability insurance in its response to ExA's second written questions [TRO30003-000793] at 2.18.4.</p> <p>As noted above, the strategic road network is almost constantly occupied by the travelling public and the very highest protection for the public is required.</p> <p>Therefore, public liability insurance is required of all persons who carry out works on the strategic road network. It is inconceivable that any other entity would be allowed to carry out works of the nature of those proposed without such insurance. There is no reason why the Applicant should be treated differently to any other body.</p> <p>Examples of such a requirement include:</p> <ul style="list-style-type: none"> <li>• Highways England's own contractors;</li> <li>• Parties carrying out works to the strategic road network under a s278 Agreement; and</li> </ul>

	<ul style="list-style-type: none"><li>• DBFO delivery partners of Highways England, such as those tasked with delivering works to the M25 itself.</li></ul> <p>Relatively speaking, the Applicant will be modest in scale with the bodies carrying out such works. There is no reason why the Applicant should be treated differently to any other party.</p> <p>Significantly, it can be borne in mind that this is simply a cost which the Applicant must bear - in order to protect the public. That cost can be passed on to the Applicant's contractor or it may be borne itself. There is no reason that the Applicant should be exempt from the proper protection of the public.</p>
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