

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 7

General

HE reserves its position to comment further dependent upon the responses provided by the Applicant at Deadline 7.

HE's Response to Rule 17 letter questions raised in Examining Authority

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| 11 | Highways England (HE) | <p>The Panel has taken Highways England's representations submitted at deadline 1 [REP1-060], specifically section A2, and reiterated at deadline 3 [REP3-046] and deadline 4 [REP4-002] as containing a formal objection to the use of temporary possession powers as they affect Highways England's interests. This position appears to be modified somewhat in HE's submissions at deadline 5 [REP5-058] and deadline 6.</p> <p>We note that the matters still under discussion at deadline 6 are:</p> <ul style="list-style-type: none"> • <u>M25 J30</u>, on which <i>HE states that it 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</i>"; <p><u>Requirement 7 Highway works</u>, which – according to HE - may need to be modified to</p> | <p><u>M25 J30</u></p> <p>HE has reached agreement in principle on mitigation measures to be provided at M25 Junction 30, comprising:</p> <ul style="list-style-type: none"> • alterations to lane markings on the A13 westbound carriageway and exit slip road between the A126 and the slip road stop line at the roundabout; and • alterations to the lane markings on the A282 northbound slip road. <p>Details of the preliminary design have been agreed and are set out in drawings that have been agreed between the Parties and are recorded in the final SoCG.</p> <p>As the works are required as necessary mitigation of the authorised development, HE expects the Applicant to be responsible for all costs associated with the provision of both sets of markings and a commuted lump sum in respect of increased maintenance costs. HE requires that the Applicant enters into a binding agreement to underwrite the costs associated with implementation and maintenance by HE (or its highway management contractor). This agreement needs to be put in place before Works No.3 and/or 8 are in use.</p> <p>Provision will need to be included as an addition to Requirement 7 in Schedule 2. HE has discussed the form of wording for Requirement 7 with the Applicant and it is understood that the following is agreed, with the exception of wording to cap the costs of the works:</p> <p><i>"7.-(1) Work Nos. 3 and 8 must not be</i></p> |

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| | | <p>reflect the need for the Applicant to enter into a form of agreement with HE for the carrying-out of required mitigation or the payment of monies to HE to perform the necessary mitigation;</p> <ul style="list-style-type: none"> • <u>Asda roundabout</u>, on which discussions are ongoing on traffic regulation measures and may necessitate changes to the dDCO, notably Art 52; • <u>Lower Thames Crossing (LTC)</u>, where HE states that there is the possibility of conflict between use of land by Tilbury2 port if utilised for the translocation of species in the area of the LTC and the delivery of the LTC project. <p>HE states that “<i>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</i>”. HE’s proposed protective provisions are included with its submission at deadline 6.</p> <p>We also note the Applicant’s submission <i>Response to ExA Comments on DCO and Related Interested Parties’ Deadline 5 Submissions</i> at deadline 6, items 5.8.8, 5.8.9, 5.8.13, 5.8.14 and 5.8.31.</p> <p>We appreciate that the above matters are related to agreeing satisfactory protective provisions with the Applicant for inclusion in Schedule 10 Part 9 of the draft DCO.</p> <p>Would Highways England</p> | <p><i>opened for use until—</i></p> <p><i>(a) Work Nos. 9A, 9B and 11 have been completed and are available for use by the public; and</i></p> <p><i>(b) the Company has entered into an agreement with Highways England under article 15(1) for the carrying out by Highways England of a package of alterations to the existing road marking on the A13 westbound and A282 northbound approaches to Junction 30 of the M25.</i></p> <p><i>(2) The design of the package of road marking alterations mentioned in sub-paragraph (1)(b) must be in accordance with the Design Manual for Roads and Bridges (or any replacement or modification of it) and generally in accordance with the in-principle design of those alterations agreed between the Company and Highways England during the examination of the application for this Order.</i></p> <p><i>(3) The agreement mentioned in sub-paragraph (1)(b) must include arrangements for the Company to—</i></p> <p><i>(i) pay for the cost reasonably and properly incurred of implementing the road marking alterations mentioned in sub-paragraph (1)(b), up to a limit of £50,000 plus any VAT payable; and</i></p> <p><i>(ii) pay to Highways England a commuted sum that represents the increased maintenance costs, if any, that will be incurred as a result of carrying out those road marking alterations, to be calculated in accordance with FS Guidance s.278 Commuted Lump Sum Calculation Method dated 18th January 2010 (or any replacement of it) as modified to reflect reasonable contractual payments due to be paid by Highways England to the highway management contractor."</i></p> <p>With the exception of the wording "<i>up to a limit of £50,000 plus any VAT payable</i>", the balance of the wording is acceptable HE. HE considers that the highlighted wording should not form part of the wording of the Requirement and should be removed. The parties have recorded this as a "Matter not</p> |

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| | | <p>please confirm by deadline 7 (16 August 2018) whether it is content with the form of protective provisions included in Schedule 10 Part 9 of the draft DCO in the latest version: Revision 5 at deadline 6. If not, would HE state whether agreement has been reached between the Applicant and HE about the form of protective provisions to be included in the final draft of the DCO to be submitted by the Applicant at deadline 7, and the draft DCO as a whole, and again if not, what precise amendments HE would be seeking.</p> <ul style="list-style-type: none"> • Would HE also confirm whether the objection to temporary possession powers is maintained or withdrawn. | <p>agreed" in the final SoCG and rely on their respective submissions as part of this submission.</p> <p>HE's position is that the figure proposed is not acceptable in principle nor the calculation capable of being confirmed at this stage before detailed design.</p> <p>There is no basis for an exception to the general principle that works to the SRN occasioned by proposed authorised development should be payable in full by the promoter. There should be no expectation that the public purse is required to incur the balance of any costs in excess of the cap if they are reasonably required to be undertaken in consequence of the works outlined - works that are agreed by the Parties to be necessary to make the authorised development acceptable.</p> <p>The figure proposed is formed by the Applicant on its own assessment of the cost of the works and their implementation. This is unacceptable to HE and cannot be relied upon without further verification by HE at a later date. The works are subject to final detailed design and will need to be submitted for approval and arrangements for implementation secured in the agreement to be secured under article 15. This is standard practice in respect of any improvements on the SRN and is the point in time at which costing information will be considered by HE. In any event, HE has not been provided by the Applicant with costings at this time, to carry out any such verification even though it would be on the preliminary works and premature to do so.</p> <p><u>Asda Roundabout</u></p> <p>Following Deadline 6, Highways England has corresponded further with Essex Police who have made it expressly clear in writing to Highways England that they require speed enforcement cameras to be provided as a condition of their approval to the reduction of the speed limit at Asda roundabout. This correspondence has been provided to the Applicant.</p> |

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| | | | <p>The Applicant's Deadline 6 response states its view that no further changes are needed to the Deadline 6 dDCO as the powers already in the dDCO will facilitate these works if required:</p> <ul style="list-style-type: none"> • Article 52 (5) requires PoTLL to notify the police again when the TRMs are put in place. • The need for measures if required could be a condition of any approval by Highways England of the Asda Roundabout works as a whole pursuant to the HE PPs. • If any measures were to be required, article 8 would give PoTLL the power to install them subject to HE's consent. <p>The generality of the Applicant's position can be agreed by Highways England and is recorded in the final SoCG. Highways England will consult Essex Police at the point of detailed design and engage them again on the question of whether enforcement measures are required in light of further information. If Essex Police still require enforcement measures, the Parties are in agreement that HE can impose this as a condition of its approval of Works No.11.</p> <p><u>Lower Thames Crossing</u></p> <p>Following discussion with the Applicant, Highways England withdraws its suggestion that the draft DCO include a protective provision requiring consent to be obtained from HE for the use of land for the translocation of species from the Tilbury2 site. The position is as set out in the final SoCG submitted at Deadline 7.</p> <p><u>Protective Provisions</u></p> <p>HE has continued to engage in detailed discussion with the Applicant in relation to the form of HE PPs to be include in the dDCO and has further narrowed matters that we not yet agreed at Deadline 6. At this time, HE remain not agreed in respect of a</p> |

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| | | | <p>few elements of the HE PPs but are otherwise in agreement in respect of the substantial majority of provisions and their application.</p> <p>Set out in Annex A are updated draft HE PPs put forward by HE for inclusion in the dDCO in substitution for the form that is currently contained in Part 9 of Schedule 10 of the dDCO. Sections highlighted are understood to not be agreed in with the Applicant but the parties are continuing in discussion and will update the Examination with any further update before the end of the Examination.</p> <p>The Table in Annex A provides an update on the subject not agreed and HE's rationale for its inclusion.</p> <p>HE is aware that the Applicant at Deadline 7 is promoting a reformulation of the draft HE PPs in substantively the same or similar form to the version set out below in Annex A, subject to matters under discussion and not yet agreed. HE has not been able to consider this reformulation of the HE PPs before submission for Deadline 7 but is intending to consider the proposed changes before the end of Examination and will provide final comments in writing. The expectation is that this can be done jointly with the Applicant where possible.</p> <p>The draft is otherwise understood to be substantively agreed with the Applicant.</p> <p><u>Temporary possession powers</u></p> <p>HE's position on temporary possession/stopping up is as set out in REP5-058 noting in particular that there are practical and cost implications of the Applicant seeking to exercise any such rights and that HE anticipates that construction under temporary possession/stopping up would require the A1089 between Marshfoot interchange and the dock entrance to operate as a PoT private road for a period of 4-5 years.</p> <p>HE has reached an agreed position with the Applicant in this respect as recorded in the final SoCG between the Parties. Briefly stated, HE's understanding is that the Applicant accepts that whilst it is seeking to</p> |

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| | | | <p>secure a "basket" of powers from which it might draw upon, HE has the opportunity to approve later (at detailed design stage) the subject and methods of works in relation to Asda Roundabout and to impose such conditions as it considers reasonable. HE has explained to the Applicant that seeking to exercise temporary possession powers (which would be used in tandem with temporary stopping up powers) would likely attract the need for the imposition of onerous conditions regarding methods of working and associated requirements in respect of the works and timing of handing back.</p> <p>On this basis Highways England withdraws its in principle objection to temporary possession powers.</p> |

Appendix A

Revised Proposed Form of replacement draft HE Protective Provisions

HE updated draft PPs for Deadline 7

SCHEDULE 10

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 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 as a method for a ground penetration test for valuation of the mechanical strength of the ground on which new construction of highway is to take place;
- (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;

“DMRB” 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 a highway in respect of which Highways England has appointed the highways 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

(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) The HE works must not be commenced until the Company has made arrangements for the provision of security for the carrying out of those works as provided for in paragraph 121 below or some other form of security that is 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 DMRB Standard HD 42/17.

(11) No HE works shall commence on the authorised development 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 sub-paragraph (1)(d) 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 construction of the authorised development, the roads, bridges and retaining walls surveyed under sub-paragraph (10) must be re-surveyed by the Company.

(14) If the re-survey carried out under sub-paragraph (11) 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 must not be unreasonably refused.

(15) The scheme of remedial works approved under sub-paragraph (14) must be carried out by the Company at its own cost.

Construction 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 satisfaction of Highways England acting reasonably 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 and the contractor 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 reasonably 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) all legal and administrative costs in relation to paragraphs (a) and (b) above;

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

(e) any 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, acting reasonably, agree a schedule of the estimated costs 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 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 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.

(9) Highways England is not entitled to costs or expenses incurred under any limb of sub-paragraph (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.

(3) The Company must pay to Highways England within 30 days of demand the costs reasonably incurred by Highways England in identifying defects and supervising and inspecting the Company's work to remedy such defects pursuant to paragraph 119.

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 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 sum

122.—(1) Before commencing the HE works the Highways England must provide the Company with an estimate of the commuted sum. The Company must provide Highways England with not less than 56 days' notice in writing on the date of commencement of the HE works.

(2) The Company must within 28 days of the date that the HE works become maintainable by Highways England under paragraph 119 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 of it) as modified to reflect reasonable contractual payments due to be paid by Highways England to the highway management contractor .

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 construction of the HE works by the Company.

Indemnity

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;

(b) unless Highways England is otherwise required to do so sooner as a requirement in law or to provide with any order of the court, Highways England must prior to the settlement or compromise of any such claim, demand, action or proceedings; have regard to any representations made by the Company in respect of any such claim, demand, action or proceedings provided that such representations are received promptly and in any event not later than 14 days after notification is given in accordance with sub-paragraph (1); and

(c) 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</p> |

| | |
|---|--|
| | <p>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> <p>This informs a number of approaches adopted by HE in its PPs.</p> |
| 116(5) - identity of the contractor | <p>HE's position is set out in its response at Deadline 7. 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 (or CPS) will consider this list and any potential derogation from the approved list of contractors at the earliest appropriate time.</p> |
| 116(7) and 121 - security (bond and cash deposit) | HE has set out its in principle position and requirements for security at Deadline 7 and this has not changed. |
| 116(11) - stakeholder liaison | HE has set out its position at Deadline 7. CPS needs to be consulted by the Applicant at the detailed design stage. This is unchanged. |
| 116(12) to (15) - dilapidations survey | HE has set out its position in principle at Deadline 7. This is unchanged. |
| 123(1) - public liability insurance | HE has set out its position at Deadline 7 and this has not changed. |
| 124(b) - Indemnity | <p>The Applicant has sought changes to the indemnity provisions which requires its approval to any claim, demand etc made against HE in respect of the HE Works where HE is claiming under the indemnity. HE is content to provide the Applicant with an opportunity to make representations to HE and for those to be taken into account before any claim, demand etc is settled recognising that the Applicant is ultimate payer. However, as a public body, HE must retain control of the processing and settling claims, demands etc against it and cannot be subject to final say of the Applicant. HE's stance is in line with the practice of other undertakers and it is noted appears to the agreed position adopted with at least another undertaker on this Project, National Grid.</p> |

