

## PART 9

### FOR THE PROTECTION OF HIGHWAYS ENGLAND

#### **Application**

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

#### **Interpretation**

**118.**—(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;

“the commuted sum” means such sum calculated as provided for in paragraph 128 of this Part of this Schedule and approved by Highways England to be used to fund the future cost of maintaining the HE works;

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

“the designer” means any designer appointed by the Company to design 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) utilities diversions;
- (p) topographical survey;
- (q) site waste management plan;
- (r) maintenance and repair strategy in accordance with Designing for Maintenance Interim Advice Note 69/15 or any replacement or modification of it;
- (s) asbestos survey;
- (t) 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;
- (u) regime of core testing and sampling of existing trunk road pavement construction;
- (v) site investigation survey;
- (w) health and safety information; and
- (x) other such information used to inform the detailed design of the HE works that may be required by Highways England;

“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 123 of this Part of this Schedule;

“the excess” means the amount by which Highways England estimates that the costs referred to in paragraph 123 of this Schedule will exceed the estimated costs pursuant to paragraph 123(4) 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 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;

“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**

**119.**—(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**

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

- (a) a stage 1 and stage 2 road safety audit has been carried out and all recommendations raised by them or any exceptions are approved by Highways England, and
- (b) the detailed design of the HE works comprising of the following details has been submitted to and approved by Highways England—
  - (i) the detailed design information, incorporating all recommendations and any exceptions approved by Highways England under paragraph (a);
  - (ii) the programme of works;
  - (iii) details of proposed road space bookings;
  - (iv) a schedule confirming how relevant routine maintenance obligations imposed on the highway management contractor by the DBFO contract are to be discharged by the Company during execution of the HE works;
  - (v) a scheme of traffic management;
  - (vi) the identity of the contractor and nominated persons;
  - (vii) a process for stakeholder liaison; and
  - (viii) information demonstrating that the walking, cycling and horse riding assessment and review process undertaken by the Company in relation to the HE works has been adhered to in accordance with the DMRB Standard HD 42/17;
- (c) all necessary temporary traffic regulation measures have been made by the Company under article 52(1) or 52(3), or all necessary temporary traffic regulation orders have been made by Highways England;
- (d) at least 56 days' notice of the commencement date of the HE works has been given to Highways England in writing, unless otherwise agreed by Highways England;
- (e) stakeholder liaison has taken place in accordance with the process for such liaison agreed under sub-paragraph (b)(vii); and
- (f) the Company has procured and provided 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 in the selection of materials, goods, equipment and plant.

(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 sub-paragraphs (1)(a) and (1)(b)(i)-(1)(b)(viii) being received by Highways England.

(3) In the event of any disapproval, the Company may re-submit the information required by sub-paragraphs (1)(a) and (1)(b)(i)-(1)(b)(viii) 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 documents and programmes approved under sub-paragraphs (1) and (2) may be subsequently amended by agreement between the Company and Highways England from time to time, both parties acting reasonably.

(5) Within 28 days of a written request by the Company and in any event 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-paragraphs (1) and (2).

### **Construction traffic route surveys**

**121.**—(1) 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 120(1)(b)(v) has been carried out by the Company and has been submitted to and approved in writing by Highways England.

(2) No more than 28 days after the completion of construction of the authorised development, the roads, bridges and retaining walls surveyed under sub-paragraph (1) must be re-surveyed by the Company.

(3) If the re-survey carried out under sub-paragraph (2) 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.

(4) The scheme of remedial works approved under sub-paragraph (3) must be carried out by the Company at its own cost.

### **Construction of the HE works**

**122.**—(1) The HE works must be constructed to the satisfaction of Highways England acting reasonably and in accordance with—

- (a) the information approved under paragraph 120(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 120(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.

(2) The Company must permit and must 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.

(3) The Company must permit and must 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.

(4) 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.

(5) If within 28 days of the date on which a notice under sub-paragraph (4) is served on the Company, the Company has failed to take the steps required by that notice, Highways England may carry out—

- (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.

(6) If during 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.

(7) If within 28 days of the date on which a notice under sub-paragraph (6) 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 demand.

(8) 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.

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

## **Payments**

**123.**—(1) The Company must fund the full cost of the HE works and any incidental and amended works approved under this Part of this Schedule 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 internal or external staff) in relation to—

- (a) the checking and approval of the information required by paragraphs 120(1)(a) and 120(1)(b);
- (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 120(1)(b)(iv);
- (e) any transfer of any land required for the HE works;
- (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;
- (g) any costs incurred by Highways England in undertaking any necessary statutory procedure required as a result of construction of the HE works, and in preparing and bringing into force any traffic regulation order necessary to construct or implement the HE works, provided that this 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; and
- (h) any value added tax which is payable by Highways England in respect of the costs incurred pursuant to paragraphs (a) to (g) which Highways England cannot otherwise recover from HM Revenue and Customs,

paragraphs (a) to (g) together comprising “the estimated costs”.

(2) The estimated costs must not include any costs payable to the highway 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)-(1)(e) unless such costs are contained within the schedule of estimated costs agreed pursuant to sub-paragraph (1).

(3) The Company and Highways England must, acting reasonably, agree a schedule of the estimated costs prior to the commencement of the HE works and once that schedule is agreed the Company must pay to Highways England the estimated costs prior to commencing the HE works and in any event prior to Highways England incurring any cost.

(4) If at any time after the payment referred to in sub-paragraph (3) has become payable, Highways England reasonably believes 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.

(5) 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.

(6) 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**

**124.**—(1) As soon as—

- (a) a stage 3 road safety audit for the HE works has been carried out and all recommendations raised including remedial works have (subject to any exceptions agreed) been approved by Highways England;
- (b) the HE works incorporating the approved remedial works under sub-paragraph (1)(a) have been completed;
- (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 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.

(3) Following the issue of the provisional certificate Highways England will be responsible for the HE works and must maintain them at its own expense.

(4) The Company must submit to Highways England 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 referred to in sub-paragraph (4) and be responsible for all costs of and incidental to them and provide updated as-built information to Highways England.

## **Opening to traffic**

**125.** 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 were opened to public traffic within 14 days of that date.

## **Final certificate**

**126.—(1)** The Company must apply to Highways England for the issue of the final certificate at the expiration of the period referred to in paragraph 124(1), or if paragraph 124(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 the Company in paragraphs 124(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 124.

## **Security**

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

- (a) the works are 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 Part of this Schedule and the maximum liability of the bond must not exceed the agreed bond sum; and
- (b) the Company has provided a cash surety for 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 123 or to carry out works the need for which arises from a breach of one or more of the obligations of the Company under the provisions of this Part of this Schedule (which must for the avoidance of doubt be a single cash surety for the entirety of the value of the HE works).

(2) Within 28 days of the issue of the final certificate referred to in paragraph 126, Highways England must in writing release the bond provider from its obligations in respect of the 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 required to settle that claim.

## **Commuted sum**

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

(2) The Company must pay to Highways England the commuted sum calculated in accordance with FS Guidance S278 Commuted Lump Sum Calculation Method dated 18<sup>th</sup> January 2010 (or any replacement of it) as modified to reflect reasonable contractual payments to the highway management contractor within 28 days of the date that the HE works become maintainable by Highways England under paragraph 124.

## **Insurance**

**129.** Prior to commencement of the HE works the Company must effect (or must procure that the contractor effects) public liability insurance with an insurer in the minimum sum of £10,000,000 (ten million pounds) in respect of any one claim against any legal liability for

damage, loss or injury to any property or any person as a direct result of the construction of the authorised development by the Company.

### **Indemnity**

**130.**—(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 comply with any order of the court, Highways England must prior to the settlement or compromise of any such claim, demand, action or proceedings consult the Company and 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 30 days of receiving notice of the quantum under sub-paragraph (1)(c), 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.

### **Expert determination**

**131.**—(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 Company and Highways England or, in the absence of agreement, identified by the President of the Institution of Civil Engineers.

(3) The Company and Highways England must use their best endeavours to settle a dispute 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 28 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 (arbitration).

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

