

## SCHEDULES

### SCHEDULE 9

#### PROTECTIVE PROVISIONS

#### PART 6

#### FOR THE PROTECTION OF HIGHWAYS ENGLAND

##### *Application*

**62.** The provisions of this Part of this Schedule apply for the protection of Highways England and have effect unless otherwise agreed in writing between the undertaker and Highways England.

##### *Interpretation*

**63.**—(1) Where the terms defined in article 2 (interpretation) of this Order are inconsistent with sub-paragraph (2) the latter prevail.

(2) In this Part of this Schedule—

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

- (a) as constructed drawings in both PDF and Auto CAD DWG formats for anything designed by the undertaker; in compliance with Interim Advice Note 184 or any successor document;
- (b) list of suppliers and materials used and test results and (where in the opinion of Highways England, following due diligence and assessment while acting reasonably, the carrying out of a specified work may have a materially adverse effect on any part of the highways drainage system maintained by Highways England) CCTV surveys;
- (c) product data sheets and technical specifications for all materials used;
- (d) as constructed information for any utilities discovered or moved during the works;
- (e) method statements for the works carried out;
- (f) in relation to road lighting, signs, and traffic signals any information required by Series 1300 and 1400 of the Specification for Highway Works or any replacement or modification of it;
- (g) organisation and methods manuals for all products used;
- (h) as constructed programme;
- (i) test results and records as required by the detailed design information and during construction phase of the project;
- (j) the health and safety file; and
- (k) other such information as is required by Highways England to be used to update all relevant databases and to ensure compliance with Highways England’s Asset Data Management Manual as is in operation at the relevant time,

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provided that the items referred to in paragraphs (c) and (g) will only be required to be submitted if the relevant specified work would require any of the works of a description referred to in article 17(1)(a) to (e) of this Order are to be carried out in relation to any highway for which Highways England is the highway authority.

“condition survey” means a survey of the condition of Highways England structures, assets (including, but not limited to, drainage and cabling) and pavements within the Order limits that in the reasonable opinion of Highways England may be affected by a specified work. A CCTV survey of specified drains will only form part of a condition survey where the undertaker, following due diligence and assessment, identifies a specified part of the highways drainage system maintained by Highways England that Highways England reasonably considers may be materially and adversely affected by a specified work;

“contractor” means any contractor or sub-contractor appointed by the undertaker to carry out a specified work;

“the DBFO contract” means the contract between Highways England and the highway operations and maintenance contractor for the maintenance and operation of parts of the trunk road network (including the M3, M25 and A30) which are within the Order limits or any successor or replacement contract that may be current at the relevant time;

“detailed design information” means drawings specifications and calculations as appropriate for the following—

- (a) regime of California Bearing Ratio testing;
- (b) earthworks including supporting geotechnical assessments required by CD622 (Managing geotechnical risk) of the DMRB or any successor document and any required strengthened earthworks appraisal form certification;
- (c) proposed departures from DMRB standards;
- (d) utilities diversions;
- (e) topographical survey;
- (f) health and safety information including any asbestos survey required by GD05/16 (asbestos management in trunk road assets) or any successor document; and
- (g) other such information that may be reasonably required by Highways England to inform the detailed design of a specified work.

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

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

“highways structure” means structures or installations within the scope of the DMRB and that are situated under, over or adjacent to a motorway or other trunk road;

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

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

“specified work” means so much of any work authorised by this Order, including any maintenance of that work, as is in or under the trunk road network for which Highways England is the highway authority; and

“trunk road network” for these protective provisions means—

- (a) the crossing under the M3 between junctions 1 and 2 and to the west of Littleton Lane, Ashford as show in the indicative location on the Works Plans Sheet No. 43 (dated June 2019);
- (b) the crossing under the M25 between junctions 11 and 12 and just south of the A320 as shown in the indicative location on the Works Plans Sheet No. 47 (dated June 2019); and
- (c) the crossing under the A30 is to the east of Staines reservoir and Long Lane as show in the indicative location on the Works Plans Sheet No. 53 (dated June 2019).

### *General*

**64.**—(1) The undertaker acknowledges that parts of the works authorised by this Order affect or may affect parts of the trunk road network in respect of which Highways England have appointed the highway operations and maintenance contractor.

(2) Notwithstanding the limits of deviation permitted pursuant to article 6(1) of this Order and the exception to the limits of deviation set out in article 6(2) of this Order, no works in carrying out, maintaining or diverting the authorised development may be carried out under the trunk road network at a distance within 4 metres of the lowest point of the ground.

(3) Notwithstanding the powers granted to the undertaker pursuant to this Order, if the carrying out of any specified work would require any of the works listed in article 17(1)(a) to (e) of this Order to be carried out in relation to any highway for which Highways England is the highways authority, the undertaker must enter into an agreement with Highways England prior to the commencement of any such work.

### *Prior approvals*

**65.**—(1) No specified work may commence until—

- (a) the programme of works has been approved by Highways England, such approval not to be unreasonably withheld or delayed;
- (b) the following details relating to the specified work have been submitted to and approved by Highways England, such approval not to be unreasonably withheld or delayed—
  - (i) the detailed design information;
  - (ii) details of any proposed road space bookings with Highways England;
  - (iii) (if details have been supplied pursuant to sub-paragraph (ii)) a scheme of traffic management; and
  - (iv) the identity of the contractor and nominated persons.
- (c) (if the carrying out of a specified work requires the booking of any road space with Highways England) a scheme of traffic management and a process for stakeholder liaison has been submitted by the undertaker and approved by Highways England, such scheme to be capable of amendment by agreement between the undertaker and Highways England from time to time;
- (d) any stakeholder liaison that may be required has taken place in accordance with the process for such liaison agreed between the undertaker and Highways England under paragraph (c);
- (e) any further information that Highways England may reasonably request within 14 days of the submission of the detailed design of a specified work has been supplied to Highways England; and

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- (f) a condition survey and a reasonable regime of monitoring the structures, assets and pavements that were surveyed under the condition survey has been submitted to and approved, acting reasonably, by Highways England.
- (2) Highways England must provide the undertaker with a list, which is to be agreed between the parties acting reasonably, of all the structures, assets and pavements to be subject to both a condition survey and reasonable regime of monitoring pursuant to sub-paragraph (1)(f) and paragraph 68(1) of this Part before the first condition survey is conducted and the reasonable regime of monitoring is implemented.
- (3) Highways England must prior to the commencement of a specified work inform the undertaker of the identity of the person who will act as a point of contact on behalf of Highways England to consider the information required under sub-paragraph (1) and of the identity of the person or persons who are authorised to give consent or approval on behalf of Highways England for any matter requiring approval or consent in these provisions.
- (4) Any approval of Highways England required by this paragraph—
  - (a) must not be unreasonably withheld or delayed;
  - (b) in the case of a refusal must be accompanied by a statement of grounds for refusal;
  - (c) is deemed to have been refused if it is neither given or refused within 56 days of the submission of the relevant information (if further information is requested by Highways England any such request must be submitted to the undertaker within 28 days of submission of the relevant information under this sub-paragraph (c) and the provision of such further information by the undertaker will not be deemed to constitute a new application for approval pursuant to this paragraph); and
  - (d) may be given subject to any reasonable conditions as Highways England considers necessary.
- (5) If the undertaker requires entry onto land which forms part of the trunk road network to exercise the powers over that land set out in article 20 (authority to survey and investigate the land) of this Order, the undertaker must supply details of any proposed road space bookings (in accordance with Highways England’s Asset Management Operational Requirements (AMOR) including Network Occupancy Management System (NOMS) used to manage road space bookings and network occupancy) and submit to Highways England and obtain the approval of Highways England of a scheme of traffic management prior to the exercise of the power.

*Construction of the specified work*

- 66.**—(1) The undertaker must, prior to commencement of a specified work, give to Highways England 28 days’ notice in writing of the date on which the specified work will start unless otherwise agreed by Highways England.
- (2) If the carrying out of any part of the authorised development requires the booking of road space with Highways England, the undertaker must comply with Highways England’s usual road space booking procedures prior to and during the carrying out of the specified work and no specified work for which a road space booking with Highways England is required must commence without a road space booking having first been secured from Highways England.
  - (3) Any specified work must be carried out to the reasonable satisfaction of Highways England (acting reasonably) in accordance with—
    - (a) the relevant detailed design information and programme of works approved pursuant to paragraph 65(1)(a) or as subsequently varied by agreement between the undertaker and Highways England;

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- (b) where relevant, the DMRB, the Specification for Highway Works (contained within the Manual of Contract Documents for Highways Works) together with all other relevant standards as required by Highways England to include, without limitation, all relevant interim advice notes and any amendment to or replacement thereof for the time being in force save to the extent that any departures or exceptions from those standards apply which have been approved by Highways England; and
  - (c) any conditions of Highways England notified by Highways England to the undertaker pursuant to paragraph 65(4)(d) of this Part.
- (4) The undertaker must ensure that (where possible) without entering the highway—
- (a) the highway is kept free from mud, soil and litter as a result of the carrying out of a specified work; and
  - (b) the specified work is carried out without disturbance to the highway and so that the highway remains open for traffic at all times unless otherwise agreed with Highways England.
- (5) The undertaker 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 undertaker by Highways England) to gain access to a specified work for the purposes of inspection and supervision of a specified work or method of construction of such work.
- (6) If any specified work is constructed—
- (a) other than in accordance with the requirements of this Part of this Schedule; or
  - (b) in a way that causes damage to the highway, any highway structure or asset or any other land of Highways England,

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

(7) If within 56 days of the date on which a notice under sub-paragraph (6) is served on the undertaker, the undertaker has failed to take steps to comply with the notice, Highways England may carry out the steps required of the undertaker and may recover from the undertaker any expenditure reasonably incurred by Highways England in so doing, such sum to be payable within 30 days of demand. Where the steps required to be taken pursuant to any notice require the submission of any information for the prior approval of Highways England under paragraph 65 of this Part, the submission of that information will evidence that the undertaker has taken steps to comply with a notice served by Highways England under sub-paragraph (6).

(8) Highways England may, at its discretion, in its notice in writing to the undertaker given pursuant to sub-paragraph (6) state that Highways England intend to put right the damage notified to the undertaker, and if it intends to do so it must give the undertaker not less than 28 days' notice of its intention to do so and Highways England may recover from the undertaker any reasonable expenditure incurred by Highways England in so doing.

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

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### *Payments*

67.—(1) The undertaker must pay to Highways England a sum equal to the whole of any costs and expenses which Highways England incurs (including costs and expenses for using internal or external staff) in relation to any specified work including—

- (a) the checking and approval of the information required under paragraph 65(1);
- (b) the supervision of a specified work;
- (c) contractual costs properly payable to the highway operations and maintenance contractor as a consequence of any specified work, including costs incurred by the highway operations and maintenance contractor in carrying out the tasks referred to in sub-paragraphs (a) and (b) of this paragraph, in which case Highways England will be responsible for the payment of any sums received from the undertaker under this paragraph to the highway operations and maintenance contractor;
- (d) reasonable legal and administrative costs, reasonably and properly incurred, in relation to sub-paragraphs (a), (b) and (c); and
- (e) any value added tax which is payable by Highways England only in respect of such costs and expenses arising under this paragraph 67(1) and for which it cannot obtain reinstatement from HM Revenue and Customs,

together comprising “the HE costs”.

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

(3) Highways England must provide the undertaker with a fully itemised invoice showing its estimate of the HE costs prior to the commencement of a specified work and the undertaker must pay to Highways England the estimate of the HE costs prior to commencing a specified work 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 HE costs will exceed the estimated HE costs in respect of a specified work it may give notice to the undertaker of the amount that it believes the HE costs will exceed the estimate of the HE costs (excess) and the undertaker must pay to Highways England within 28 days of the date of the notice a sum equal to the excess.

(5) Highways England must give the undertaker a final account of the costs, as a fully itemised invoice, referred to in sub-paragraph (1) within 30 days of the undertaker notifying to Highways England that a specified work has been completed.

(6) Within 30 days of the issue of the final account—

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

(7) If any payment due under any of the provisions of this Part of this Schedule is not made on or before the date on which it falls due the party from whom it was due must at the same time as making the payment pay to the other party interest at 1 per cent above the rate payable in respect of compensation under section 32 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.

### *Completion of a specified work*

**68.**—(1) Within 56 days of the completion of a specified work, the undertaker must arrange for the highway structures, assets and pavements that were the subject of the condition survey carried out in respect of the specified work to be re-surveyed and must submit the re-survey to Highways England for its approval.

(2) If the re-survey carried out pursuant to sub-paragraph (1) indicates that any damage has been caused to any highways structure or pavement, the undertaker must submit a scheme for remedial works in writing to Highways England for its approval in writing, which must not be unreasonably withheld or delayed, and must carry out the remedial works at its own cost and in accordance with the scheme submitted.

(3) If the undertaker fails to carry out the remedial work in accordance with the approved scheme, Highways England may carry out the steps required of the undertaker and may recover from the undertaker any expenditure reasonably incurred by Highways England in so doing, such sum to be payable within 30 days of demand.

(4) Highways England may, at its discretion, at the same time as giving its approval to the condition survey, give notice in writing to the undertaker stating that Highways England will remedy the damage identified by the condition survey and Highways England may recover from the undertaker any reasonable expenditure incurred by Highways England in so doing.

(5) Within 10 weeks of the completion of a specified work, the undertaker must submit to Highways England the as built information, both in hard copy and electronic form.

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

### *Indemnification*

**69.**—(1) The undertaker must indemnify Highways England from and against all costs, expenses, damages, losses and liabilities suffered by Highways England arising from or in connection with any claim, demand, action or proceedings resulting from—

- (a) the construction or maintenance of a specified work; and
- (b) the placing or presence in or under the highways of the pipeline being constructed as part of the authorised development,

provided that Highways England notifies the undertaker upon receipt of any claim and following the acceptance of any claim notifies the quantum of the claim to the undertaker in writing.

(2) Within 30 days of the receipt of the notification referred to in sub-paragraph (1) the undertaker must pay to Highways England the amount specified as the quantum of such claim.

(3) Sub-paragraphs (1) and (2) do not apply if the costs, expenses, liabilities and damages were caused by or arose out of the neglect or default of Highways England or its officers, servants agents or contractors or any person or body for whom it is responsible.

### *Expert determination*

**70.**—(1) Article 48 (arbitration) of this Order does not apply to this Part of this Schedule.

(2) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed

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by the parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers.

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

(4) The expert must—

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

(5) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 48 (arbitration).

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