

## SCHEDULE 10

### Protective provisions

## PART 17

### For the protection of National Highways Limited

#### **Application etc.,**

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

#### **Interpretation**

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

(2) In this Part of this Schedule—

“acceptable security” means either:

- (a) a parent company guarantee from a parent company in favour of National Highways to cover the undertaker’s liability to National Highways to a total liability cap of £50,000,000.00 (fifty million pounds) (in a form reasonably satisfactory to National Highways and where required by National Highways, accompanied with a legal opinion confirming the due capacity and authorisation of the parent company to enter into and be bound by the terms of such guarantee); or
- (b) a bank bond or letter of credit from an acceptable credit provider in favour of National Highways to cover the undertaker’s liability to National Highways for an amount of not less than £10,000,000.00 (ten million pounds) per asset per event up to a total liability cap of £50,000,000.00 (fifty million pounds) (in a form reasonably satisfactory to National Highways);

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

- (c) as constructed drawings in both PDF and AutoCAD DWG formats showing the location and depth of the pipeline as installed and any ancillary or protective measures installed within the strategic road network;
- (d) as constructed information for any utilities discovered or moved during the specified works;
- (e) method statements for the specified works carried out;
- (f) in so far as it is relevant to the specified works, the health and safety file; and
- (g) such other information as is reasonably required by National Highways to be used to update all relevant databases and to ensure compliance with National Highway’s Asset Data Management Manual as is in operation at the relevant time.

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

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

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

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- (h) site clearance details;
- (i) boundary, environmental and mitigation fencing;
- (j) earthworks including supporting geotechnical assessments required by DMRB CD622 Managing geotechnical risk and any required strengthened earthworks appraisal form certification;
- (k) utilities diversions; and
- (l) other such information that may be reasonably required by National Highways to be used to inform the detailed design of the specified works;

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

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

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

“parent company” means a parent company of the undertaker acceptable to National Highways acting reasonably;

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

“specified works” means so much of the authorised development, including any maintenance of that work, as is on, in, under or over the strategic road network for which National Highways is the highway authority, and specifically including Work No.12 in so far as that crosses the M56 motorway, Work No.16 in so far as that crosses the M53 motorway, and Work No. 22 in so far as that crosses the A41 highway.

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

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

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

## **General**

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

**225.** Notwithstanding the limits of deviation permitted pursuant to article 6 (limits of deviation) of this Order, no works in carrying out, maintaining or diverting the authorised development may be carried out under the strategic road carriageway at a distance less than 4 metres below the lowest point of the carriageway surface.

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

### **Prior approvals and security**

**227.**—(1) Any specified works which involve tunnelling, boring or otherwise installing the pipeline under the strategic road network without trenching from the surface, must be designed by the undertaker in accordance with DMRB CD622 unless otherwise agreed in writing by National Highways.

(2) The specified works must not commence until—

- (a) the programme of works has been approved by National Highways;
- (b) the detailed design of the specified works comprising of the following details, insofar as considered relevant by National Highways, has been submitted to and approved by National Highways—
  - (i) the detailed design information;
  - (ii) the identity and suitability of the contractor and nominated persons; and
  - (iii) a process for stakeholder liaison, with key stakeholders to be identified and agreed between National Highways and the undertaker;
- (c) a condition survey and regime of monitoring of any National Highways assets or structures that National Highways reasonably considers will be affected by the specified works, has been agreed in writing by National Highways; and
- (d) an acceptable security in favour of National Highways for the indemnity set out in paragraph 232 below has been put in place, which security must be maintained in place until the expiry of 12 months following the completion of all of the specified works.

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

(4) Any approval of National Highways required under this paragraph-

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

(5) Any change to the identity of the contractor and/or designer of the specified works will be notified to National Highways immediately and details of their suitability to deliver the specified works will be provided on request.

(6) Any change to the detailed design of the specified works must be approved by National Highways in accordance with paragraph 227(2) of this Part.

### **Construction of the specified works**

**228.**—(1) The undertaker must give National Highways 28 days' notice in writing of the date on which the specified works will start.

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

- (a) the relevant detailed design information and programme of works approved pursuant to paragraph 227(2) above or as subsequently varied by agreement between the undertaker and National Highways;
- (b) in so far as it may be applicable, the DMRB, save to the extent that exceptions from those standards apply which have been approved by National Highways; and
- (c) all aspects of the Construction (Design and Management) Regulations 2015 or any statutory amendment or variation of the same.

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

(4) If any part of the specified works is constructed-

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

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

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

(6) If within 28 days on which a notice under sub-paragraph (4) or sub-paragraph (5) is served on the undertaker (or in the event of there being, in the opinion of National Highways, a danger to road users, within such lesser period as National Highways may stipulate), the undertaker has failed to take the steps required by that notice, National Highways may carry out the steps required of the undertaker and may recover any expenditure reasonably incurred by National Highways in so doing.

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

(8) In constructing the specified works, the undertaker must at its own expense divert or protect all utilities.

(9) The undertaker must notify National Highways if it fails to complete the specified works in accordance with the agreed programme of works pursuant to paragraph 227(2)(b) of this Part, or suspends the carrying out of any specified work beyond 14 days, and National Highways reserves the right to withdraw any road space booking granted to the undertaker to ensure compliance with its network occupancy requirements.

## **Payments**

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

- (a) the checking and approval of the information required under paragraph 227(2);
- (b) the supervision of the specified works;
- (c) any costs reasonably incurred under paragraph 228(7) of this Part, and
- (d) any value added tax which is payable by National Highways in respect of such costs and expenses and for which it cannot obtain reinstatement from HM Revenue and Customs, together comprising “the NH costs”.

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

(3) If at any time after the payment referred to in sub-paragraph (2) has become payable, National Highways reasonably believes that the NH costs will exceed the reasonably estimated NH costs it may give notice to the undertaker of the amount that it reasonably believes the NH costs will exceed the estimate of the NH costs (the excess) and the undertaker must pay to National Highways within 28 days of the date of the notice a sum equal to the excess.

(4) National Highways must give the undertaker a final account of the NH costs referred to in sub-paragraph (1) above within 91 days of the date of completion of the specified works as set out in the programme of works.

(5) Within 28 days of the issue of the final account:

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

(6) If any payment due under sub-paragraph (2) above, 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 3% above the Bank of England base lending rate from time to time being in force for the period starting on the date upon which the payment fell due and ending with the date of payment of the sum on which interest is payable together with that interest.

### **Condition survey and as built details**

**230.**—(1) The undertaker must, as soon as reasonably practicable after completing the specified work, arrange for any highways structures and assets that were the subject of the condition survey under paragraph 227(2)(c) to be re-surveyed and must submit the re-survey to National Highways for its approval. The re-survey will include a renewed geotechnical assessment required by DMRB CD622 if the specified works include any works beneath the strategic road network.

(2) If the re-surveys carried out pursuant to sub-paragraph 230(1) indicates that any damage has been caused to a structure or asset, the undertaker must submit a scheme for remedial works in writing to National Highways. National Highways must remedy any damage identified in the re-surveys and National Highways may recover any expenditure it reasonably incurs in so doing from the undertaker.

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

(4) Within 30 days of completion of the specified works, the as built details must be provided by the undertaker to National Highways.

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## **Insurance**

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

## **Indemnity**

**232.** The undertaker fully indemnifies National Highways from and against all reasonable costs, claims, expenses, damages, losses and liabilities suffered by National Highways directly arising from the construction, maintenance or use of the specified works or exercise of or failure to exercise any power under this Order within 30 days of demand save for any loss arising out of or in consequence of any negligent act or default of National Highways and always excluding any indirect or consequential loss suffered by National Highways.

## **Maintenance of the specified works**

**233.**—(1) The undertaker must, prior to the commencement of any works of external maintenance to the specified works, give National Highways 28 days' notice in writing of the date on which those works will start unless otherwise agreed by National Highways, acting reasonably. Works of inspection or maintenance undertaken from within the pipeline will not be subject to this paragraph.

(2) If, for the purposes of maintaining the specified works, the undertaker needs to occupy any road space, the undertaker must comply with National Highways' road space booking requirements and no maintenance of the specified works for which a road space booking is required shall commence without a road space booking having first been secured.

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

## **Land**

**234.**—(1) The undertaker must not, in reliance on or in exercise of any power under this Order, interfere with, remove, damage or prevent or impair the functioning of, and must on reasonable request (or in case of emergency, on demand) allow access by National Highways to, the highway drainage assets located in plots 2-14, 4-20, 5-01, 5-02, 5-03, 5-04, 5-10, 5-12, 5-14, 5-15, 5-20, 5-22, 5-23, 6-02, 6-03, 6-04, 6-05, 6-06,

(2) The undertaker must not, in reliance on or in exercise of any power under this Order, interfere with, remove or prevent access by National Highways in pursuance of any right held over plots 2-03, 2-14 and 5-05.

(3) The undertaker must not, in reliance on or in exercise of any power under this Order, acquire, extinguish or remove any right National Highways holds for the purposes of its undertaking in any of the plots listed in sub-paragraphs (1) and (2) and plot 9-04.

## **Expert Determination**

**235.**—(1) Article 47 (arbitration) of the Order does not apply to this Part of this Schedule.

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

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

(3) On notification by either party of a dispute, the parties must jointly instruct an expert within 14 days of notification of the dispute.

(4) All parties involved in settling any difference must use all reasonable but commercially prudent endeavours to do so within 21 days from the date that an expert is appointed.

(5) 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 7 days of the expert's appointment;
- (b) permit a party to comment on the submissions made by the other party within 7 days of receipt of the submission;
- (c) issue a decision within 7 days of receipt of the submissions under sub-paragraph (b); and
- (d) give reasons for the decision.

(6) 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 47 (arbitration).

(7) 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.