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**THIS CONCESSION AGREEMENT** is made the [ ]

**BETWEEN:**

- (1) **[GOVERNMENT]** of [ADDRESS] (“Government”); and
- (2) **[CONCESSIONAIRE]** a company registered and incorporated in accordance with the law of [COUNTRY], registered under number [ ] and having its registered office at [ADDRESS] (“the Concessionaire”).

**WHEREAS:**

1. The Government is desirous of having the private sector invest and participate in the development of the nation’s transport system.
2. In accordance with the foregoing policy, interested corporations and consortia were invited to submit proposals for Investing in the existing and the proposed tolled river crossings between [ ] and [ ].
3. Proposals were submitted on behalf of the Concessionaire for the operation and maintenance of the existing tolled crossing and the design, construction, financing, operation and maintenance of a second tolled crossing which proposals have, following revision in negotiation, been incorporated in this Concession Agreement.

**NOW THEREFORE IT IS HEREBY AGREED AS FOLLOW**

**1. Interpretation**

1.1 In this Agreement:

“Accrued Rights” means the benefits (including without limitation the index linked increases to pensions) which shall have accrued in the PENSION up to the Concession Commencement Date.

“ACRR” means the actual cumulative real revenue expressed in [DATE] prices received by the Concessionaire from tolls or monies received in lieu of tolls from insurers or third parties by way of indemnity or damages.

“Act” means the enacted Bill and any and all orders made thereunder.

“Actuary A” means the actuary engaged or employed by the Municipality to negotiate with the Concessionaire’s Actuary pursuant to Clause 22.4 [Taking Over by the Concessionaire of Staff Employed on the Existing Crossing].

“Adjacent Areas” means the areas adjacent to the Site shown or Identified as such on plans numbered 3, 4, 5 and d appearing in Schedule 1, Part 1.

“Adverse Relevant Event” has the meaning set out In Clause 6.1.1 (The Effect of the Bill etc).

“Aerodynamic Tests” means those tests (including but not exclusively, mathematical tests and tests by means of scale models) to enable the Works to be designed and constructed In accordance with the Technical Requirements.

“Agent Bank” means [ ] as agent for the providers of the Senior Bank Facility.

“Approach Roads” means the Connecting Roads and the existing roads linking the Existing and Second Crossings to [ROAD].

“Associated Company” means in respect of a relevant company, a company which is a subsidiary, a holding company or a company which is a subsidiary of the holding company of that relevant company; the terms “subsidiary” and “holding company” being defined in [COMPANY LEGISLATION]. Notwithstanding the provisions of Clause 1.7 this definition shall not be changed In the event of an amendment to the definitions of “subsidiary” or “holding company” contained in the said [COMPANY LEGISLATION] whether by any subordinate legislation or otherwise.

“Base Case” means the base case set out in the Annex to Schedule 2 upon which the financing proposals have been prepared using the Financial Model.

“Base Case Test” has the meaning set out In Clause 6.1.2. “Beneficial Relevant Event” has the meaning set out In Clause 6.1.3.

“Bill” means the proposed legislation to secure all necessary powers required for the grant of the Concession.

“Bank” means [ ].

“CDCR” has the meaning set out in Clams 6.1.4

“Certificate of Commencement” means the certificate to be issued by or on behalf of the Government pursuant to Clause 7 (Certificate of Commencement).

“Certificate of Entry” means the instrument to be issued by or on behalf of the Government pursuant to Clause 8.1 [Vacant Possession] evidencing the grant of Vacant Possession together with the Rights of way.

“Change” means a variation in the design, quality or quantity of the Works and may include additions, substitutions, alterations in design and variations in either or both the Government’s Requirements and the Concessionaire’s Construction Proposals.

“Checker” means [ ] appointed by the Designer to undertake an independent design check of the Design Data or such substitute as may be appointed pursuant to this Concession Agreement.

“Compensation Amount” means the amount payable to the holders of the Preference Shares pursuant to Clause 34.1.1.4 calculated in accordance with the following formula:

$$\sum_{T=1}^{T=N} dt \left[ \frac{1}{1 + \frac{1}{2}} \right]$$

where:

- I is the gross redemption yield on [GOVERNMENT BONDS] (or if such stock has been redeemed in full the stock most closely resembling such stock with a redemption date which is closest to the first occurring redemption date of the Preference Shares) as quoted in the Financial Times on the date prior to the date which is the earlier (“the earlier redemption date”) of (a) the maturity date of the Debenture Stock and (b) the date on which the [GOVERNMENT BONDS] falls to be prematurely redeemed in accordance with its terms and conditions;
- n is the number of semi-annual periods between the earlier redemption date and the twentieth anniversary of the date the first Preference Share was issued and allotted; and
- MoT is the Preference Share dividend projected in the Base Case as being paid in the semi-annual period “t” after the earlier redemption date.

“Concession” means all necessary rights during the Concession Period to design and build the Second Crossing, and to finance, maintain and operate both Crossings.

“Concession Agreement” means this agreement including Schedules 1 to 12 inclusive hereto.

“Concession Commencement Date” means the date specified as such in the Certificate of Commencement or as determined in accordance with Clause 7.3 as the case may be.

“Concession Period” means the period commencing on the Concession Commencement Date and expiring 30 years therefrom or such other date being the date of termination of the Concession as may be determined pursuant to this Concession Agreement.

“Concessionaire’s Actuary” means the actuary engaged or to be engaged by the Concessionaire to negotiate with Actuary A pursuant to Clause 22.4.

“Concessionaire’s Change” means a Change initiated or implemented by the Concessionaire as permitted under this Concession Agreement other than a Government’s Change.

“Concessionaire’s Construction Proposals” means the drawings, specifications, data and programmes for the carrying out of the design, quality assurance procedures, construction, completion, commissioning and testing of the Works as identified in Schedule 3, Part 2.

“Connecting Roads” means such of the Approach Roads as are to be constructed by or on behalf of the Government, namely [ ].

“Construction Contract” means the contract for the design and construction of the Second Crossing bearing even date herewith between the Concessionaire and the Contractor.

“Construction Dispute” means a difference or dispute of whatever nature between the Concessionaire and the Contractor arising under, out of or in connection with the Construction Contract.

“Construction Plant” means plant and equipment to be used by the Contractor in the execution of the Works and which shall not form part of the Permanent Works.

“Contractor” means [ ] in joint venture with [ ] appointed by the Concessionaire to design, build, commission and complete the Works or such substitute as may be appointed pursuant to this Concession Agreement.

“Crossings” means the Existing Crossing and the Second Crossing.

“Debenture Stock” means the [ ] debenture stock to be issued by the Concessionaire pursuant to the subscription agreement made between the Concessionaire and the parties named therein as the subscribers and bearing even date herewith.

“Debt” means the Senior Bank Facility, the [IFI] Facility, the Debenture Stock, any working capital facility and the Government’s Subordinated Debt.

“Default Interest Rate” means a rate of interest equivalent to [2 per cent] above the average of the Base Lending Rates announced by [SPECIFIED BANKS] which are current on the date upon which an amount first becomes overdue. In the event of any variation in the said Base Lending Rates being announced whilst such amount remains overdue the interest payable for the period that such amount remains overdue shall be correspondingly varied from the date of each such variation.

“Design and Certification Procedure” means the procedure set out in Schedule 3, Part 4.

“Design Data” means all specifications, plans, drawings, graphs, sketches, models and other documents prepared or to be prepared by or on behalf of the Concessionaire relating to the design, construction and maintenance of the Works.

“Designer” means [ ] who are to design and certify the design of the Works and, whilst the same are being constructed by the Contractor, to examine the Works and sign certificates as to the quality of construction and adherence to design in respect thereof or such substitute as may be appointed pursuant to this Concession Agreement.

“Detailed Design” means the detailed design to be developed from the preliminary design shown in the Concessionaire’s Construction Proposals in respect of each part of the Permanent Works so as to allow construction of that part in accordance with the Technical Requirements.

“Dispute” means a difference or dispute of whatever nature between the Government (and/or the Government’s Agent and/or the Government’s Representative) of the one part and the Concessionaire of the other part arising under out of or in connection with this Concession Agreement.

“Disputes Resolution Procedure” means the procedure set out in Schedule 5.

“Entrusted Works” means those works not included In the Government’s Requirements but which the Government may request to be carried out pursuant to Clause 21 [Entrusted

Works] including but not limited to works in order to protect the Existing Crossing and, following issue of the Permit to Use, the Second Crossing from sabotage or attempts at sabotage by enemies of the State or subversive factions.

“Exempt Traffic” means pedestrians and the following vehicles which are exempt from Tolls namely:

1. any two-wheeled pedal or motor cycle (whether with or without side car);
2. any vehicle being used in the discharge of the functions of a fire authority under [LEGISLATION];
3. any vehicle being used for police purposes;
4. any vehicle being used for the purposes of the prison service;
5. any ambulance or other vehicle being used by a health authority or by a voluntary organisation or other person under an arrangement made under [LEGISLATION];
6. any other ambulance or disabled passenger vehicles as the same are defined by [LEIGSLATION].
7. a vehicle being used in connection with:
  - 7.1 the collection of Tolls; or
  - 7.2 the inspection, maintenance, improvement or renewal of or other dealing with either of the Crossings or toll plaza areas or any of the highways carried by the Crossings within the toll plaza areas or connecting the new toll plaza area and the Second Crossing (or any structure, works or apparatus on, under or over any such highway);
8. any vehicle which, having broken down on either of the Crossings while travelling in one direction, is travelling in the other direction otherwise than under its own power;
9. any vehicle being driven by a disabled person, or being used for the carriage of one or more disabled persona, which displays a disabled person’s badge issued by virtue of [LEGISLATION];
10. any vehicle used for the purposes of one of the civil defence forces or civil defence services within the meaning of [LEGISLATION].

“Existing Employees” means the persons employed by the Municipality as at the Concession Commencement Date in relation to the maintenance and operation of the Existing Crossing.

“Existing Crossing” means the existing tolled Crossing.

“Existing System” means [ ] road system with which the Project is or is to be connected.

“Expected Date of Issue of the Permit to Use” means the date to be ascertained for the purpose of applying the Primary Test, the Secondary Test or the Base Case Test as follows:

1. the Government shall certify the date which in his reasonable opinion is the expected Concession Commencement Date in the event of the Primary Test, the Secondary Test or the Base Case Test (as the case may be) being satisfied and on the assumption that there will not be any subsequent reference to the Disputes Resolution Procedure; and
2. on the basis of such expected Concession Commencement Date, there shall be ascertained the programmed date for substantial completion of the Works ascertained from the Outline Programme but after taking into account any extensions of time that may have been granted.

“Expected Outstanding Debt” means the sum which the MoT’s accounting officer calculates to be the expected amount due to the consolidated fund of the [COUNTRY] in respect of the Existing Crossing as at the expected Concession Commencement Date and notified as such to the Concessionaire in accordance with Clause 9.1 (Transfer of Outstanding Debt).

“Financial Model” means the financial model created by [BANK] embodied in its financial model software setting out the basis on which the financing of the Concession and/or the costs of and revenue from the Concession have been calculated (including but without limitation the assumptions used, the cell logic network for the financial model software and any accompanying documentation necessary to operate the financial model) whether embodied on tape, disk or other electronic storage medium, copies of which and of the software in which it is embodied to be held in accordance with Clause 38 (Custody of Financial Model).

“Financial Panel” means those persons nominated or agreed pursuant to Schedule 5 Appendix 2 Part I and any replacements as may be appointed for the time being.

“Financial Terms” means the financial proposals brief details of which are set out in Schedule 2, Part 4.

“Force Majeure” means:

1. the occurrence of pressure waves caused by aircraft or other aerial devices travelling at supersonic speeds
2. war, hostilities (whether declared or undeclared), invasion, armed conflict or act of foreign enemy in each case within and affecting [COUNTRY];
3. rebellion, revolution, riot, commotion or disorder (unless solely restricted to employees of the Concessionaire, the Contractor or any sub-contractors), insurrection, military or usurped power, act of terrorism, sabotage, criminal damage or the threat of such acts in each case within [COUNTRY];
4. nuclear explosion, radioactive or chemical contamination or ionising radiation, unless the source or cause of the contamination, radiation or other hazardous thing is brought to or near the Site by the Concessionaire, the Contractor or any sub-contractor.



“Fossils and Antiquities” means all fossils and antiquities and structures or other remains or things either of particular geological or of archaeological interest discovered on the Site or Adjacent Areas or in the course of carrying out Off-Site Works.

“Funding Agreements” means the agreements relating to the Senior Bank Facility, the [IFI] Facility and the Debenture Stock.

“Government” means the government of [COUNTRY].

“Government’s Agent” means [ ] or such replacement as may be appointed for the time being to represent the Government during the design and execution of the Works and more particularly, to fulfil the role identified in Schedule 3, Part 3.

“Government’s Change” means a Change requested by the Government’s Agent and evidenced by a Government’s Change Certificate.

“Government’s Change Certificate” means a certificate to be issued and countersigned in accordance with Clauses 14.2 or 14.3 as the case may be.

“Government’s Representative” means the agent or agents appointed for the time being to represent the Government in connection with the operation and maintenance of both Crossings.

“Government’s Requirements” means the requirements identified in Schedule 3, Part 1.

“Government’s Review Procedure” means the procedure set out in Schedule 3, Part S.

“Government’s Subordinated Debt” means the subordinated debt of [AMOUNT AND CURRENCY] or such lesser amount calculated in accordance with Clause 9.6 (Transfer of Outstanding Debt) as provided for in the subordinated debt facility agreement bearing even date herewith and made between the parties hereto.

“Ground and Geophysical Investigation” means the investigation of all conditions of the Site including its surface and subsoil to enable the Works to be designed and constructed with due regard for those conditions and seismic activity in the region of the Site.

“Hydrological Tests” means those tests (including but not exclusively mathematical tests and tests by means of scale models) to enable design and construction to be undertaken with due regard for estuarial conditions including (but not exclusively) that effect on those conditions of the introduction of the Works into those estuarial conditions.

[“IFI” means [ ].]

[“IFI Facility” means the loan facility of [AMOUNT AND CURRENCY] to be made available pursuant to a facility agreement made between the Concessionaire and [IFI] and bearing even date herewith.]

“Intellectual Property” means all current and future legal and/or equitable interests in registered or unregistered trade marks, service marks, patents, registered designs, utility marks, applications for any of the foregoing, copyrights, unregistered designs, inventions, confidential information, know-how or other intellectual property subsisting in or relating to the Design Data and/or the Works.

“Inter-Creditor Agreement” means the agreement bearing even date herewith and made between the Concessionaire, [LENDERS] and the Government in his capacity as lender.

“Interested Parties” means those persons Identified In Schedule 6 Part 1 who may be affected by the carrying out on or near the Site of the Concessionaire’s obligations hereunder or who are duly authorised by a Statutory Requirement to review or otherwise take an interest in the Works.

“Loss Period” means any period during which traffic on the Crossings or either of them was restricted as a consequence of an occurrence described in Schedule 2, Part 2, paragraph 3.

“Manufacturing Programmes” means the programmes for design, repair, manufacture, installation and transport of major component parts to be prepared and submitted by the Concessionaire pursuant to Clause 13.2 (Programmes).

“Maturity Date” means the maturity date of the Debenture Stock.

“Maximum Concession Period” means the period of 30 years commencing on the Concession Commencement Date.

“MoT” means the Ministry of Transport.

“Municipality” means [ ].

“NPV Cover Ratio” has the meaning set out In Clause 6.1.5.

“Net Real Revenue Loss” means the amount by which the gross real toll revenue expressed in [DATE] prices which would have been derived over a Loss Period had the traffic using the Crossings during such Loss Period been as estimated in the Base Case (converted to [DATE] prices), exceeds the actual gross real revenue expressed in [DATE] prices from tolls during such Loss Period or monies received in lieu of tolls from insurers or third parties by way of Indemnity or damages relating to such loss.

“Net Real Revenue Loss Lender” means a provider of any finance raised to cover a Net Real Revenue Loss pursuant to Schedule 2, Part 4.

“Non-toll Income” means Income generated by or on behalf of the Concessionaire through charges to Users otherwise than from Tolls or monies received in lieu of Tolls but including without limitation charges for the recovery of vehicles.

“Off-Site Works” means those parts of the Works which are to be executed by the Concessionaire to the road systems giving access to the Site and Adjacent Areas which works are identified In Section 7.2.3 of Schedule 6, Part 2 and Sections 3.20.2 and 3.20.3 of Schedule 3, Part 2.

“Operator” means that person, firm or company appointed by the Concessionaire to undertake the operation and management of both Crossings or such substitute as may be appointed pursuant to this Concession Agreement.



“Operations” means the works on the Site and the Adjacent Areas for the construction, commissioning and testing of the Second Crossing and the operation and maintenance of both Crossings.

“Operations and Routine Maintenance Costs” has the meaning set out in Schedule 2, Part 2, paragraph 1.

“Outline Programme” means the programme of design, investigations, construction and related works contained In Schedule 4.

“Outstanding Debt” means the amount due to the consolidated fund of [COUNTRY] in respect of the Existing Crossing as at the Concession Commencement Date calculated by reference to the accounts currently kept pursuant to [LEGISLATION] and certified as such by the MoT’s accounting officer in accordance with Clause 9.3 (Transfer of Outstanding Debt).

“Panel” means either the Financial Panel or the Technical Panel as the case may be.

“Panel Rules” means the rules of procedure contained in Schedule 5, Appendix 1 or as the same may be modified or amended from time to time.

“Legislative Assembly Process” means those procedural stages which the Bill must undergo prior to becoming law.

“Pension” means the pension of the employees of the Municipality.

“Pension Transfer Value” means the amount determined in accordance with Clause 22.4 which Is equal to the value as at the Concession Commencement Date of the Accrued Rights in respect of those Existing Employees who are employed by the Concessionaire as from the Concession Commencement Date pursuant to Clause 22.1 who on the date immediately preceding the Concession Commencement Date were members of [PENSION] and who consent to or request a transfer of their Accrued Rights from [PENSION] to the pension arrangements to be established by the Concessionaire as referred to In Clause 22.

“Performance Guarantee” means the performance guarantee to be given by the parent companies of the Contractor to the Government pursuant to Clause 4.1.3 (Provision of Guarantees).

“Permanent Works” means the permanent works to be designed, constructed and completed by the Concessionaire in accordance with this Concession Agreement.

“Permit to Use” means the permit to be issued by the Government’s Agent prior to commercial operation of the Second Crossing.

“Plant” means machinery, apparatus and the like intended to form or forming part of the Permanent Works.

“Pre-Concession Period” means that period from signature of the Heads of Agreement to the Concession Commencement Date.

“Preference Shares” means the redeemable preference shares in the Concessionaire.

“Pre-Operation Costs” means those costs incurred by the Concessionaire. during the Pre-Concession Period and where applicable up to the date that Vacant Possession shall be given in the amounts and in respect of the activities authorised by or on behalf of the Government’s Agent (and for this purpose shall include without limitation all fees, Interest and expenses authorised by the correspondence passing between the Concessionaire and the Department of Transport prior to the execution of this Concession Agreement relating to Pre-Operation Costs properly paid by the Concessionaire to lenders during the Pre-Concession Period and where applicable up to the date that Vacant Possession shall be given and any fees, interest and expenses which remain unpaid to the extent that they are properly due and payable by the Concessionaire to any of its lenders).

“Primary Test” has the meaning set out in Clause 6.1.6.

“Project” means the design, construction, financing, operation and maintenance of the Second Crossing and the taking over, operation and maintenance of the Existing Crossing during the Concession Period.

“Project IRR” has the meaning set out in Clause 6.1.7.

“RCRR” means the required cumulative real revenue of [AMOUNT AND CURRENCY] or such other sum certified pursuant to Clause 5.1 [Financial Terms and Documentation] expressed in [DATE] prices which the Concessionaire requires to receive during the Maximum Concession Period.

“RCRR Cover Ratio” has the meaning set out in Clause 6.1.8. “Reference Date” has the meaning set out in Clause 6.1.9.

“Relevant Authorities” means those entities Identified In Schedule 7 whose authority Is required for the carrying out of all or part of the Project.

“Relevant Event” has the meaning defined In Clause 6.1.10.

“Requirements of Interested. Parties” means the requirements of Interested Parties set out In Schedule 6, Part 2.

“Rights of Way” means rights of passage for access and egress to the Site and Adjacent Areas required for the Concession as appear in plans numbered 2, 4, 5 and 6 In Schedule 1, Part 1.

“Schedule of Lane Closures” means a schedule submitted under Clause 20.2 (Traffic Management) Indicating the period or periods during which the Concessionaire plans to close one or move lanes of traffic using either the Existing Crossing or the Second Crossing, or to take any other action liable to restrict traffic flow.

“SDCR” has the meaning set out in Clause 6.1.11.

“Second Crossing” means the second tolled Crossing between Point A and Point B to be designed, constructed, financed, operated and maintained by the Concessionaire during the Concession Period.

“Secondary Test” has the meaning set out in Clause 6.1.12.

“Senior Bank Facility” means the loan of [AMOUNT AND CURRENCY] and letter of credit facility to be made available pursuant to the facility agreement made between the Concessionaire, [LENDERS] and bearing even date herewith.

“Shareholders’ Agreement” means the agreement made between the Concessionaire and the shareholders in the Concessionaire, namely [ ], and bearing even date herewith.

“Short-Fall Finance” has the meaning set out in Schedule 2, Part 4 paragraph 1.

“Site” means the land, spaces, waterway, roads and any surface required for the Concession shown or identified as such on plans numbered 2, 3, 4, 5 and 6 appearing in Schedule 1, Part 1.

“Statutory Requirement” means the requirement of any law, proclamation, rule, regulation, order, resolution, notice, rule of court, by-law or other instrument made under or by virtue of any law of any local authority, statutory undertaker or Relevant Authority who has jurisdiction with regard to the Works or whose systems may be affected by the construction of the Works or the carrying out of pound condition investigations.

“Substitute Proposal” means the proposal for the provision of finance in substitution for the [IFI] Facility referred to in Clause 5.6.3 (Financial Terms and Documentation).

“Technical Panel” means those persons nominated or agreed pursuant to Schedule 5, Appendix 2, Part II and any replacements as may be appointed for the time being.

“Technical Requirements” means the Government’s Requirements and the Concessionaire’s Construction Proposals and the other documents referred to in Schedule 3 as may be amended from time to time by a Change.

“Temporary Works” means all works and things of every kind (other than the Permanent Works) required in or about the execution and completion of the Works.

“Toll” means the toll to be applied to Tolloed Traffic calculated in accordance with Schedule 2, Part 1.

“Tolloed Traffic” means the schedule of tolloed traffic set out in Schedule 2, Part 1, paragraph 2.

“Total Short-Fall Finance Interest” has the meaning set out in Schedule 2 Part 2, paragraph 1.

“Trust Deed” means the trust deed constituting the Debenture Stock bearing even date herewith and made between the Concessionaire and [ ].

“Users” means the users of either of the Crossings.

“Vacant Possession” In relation to any part of the Site or the Adjacent Areas means the right to and delivery of exclusive possession thereof subject to;

1. the existing rights of public passage shown on plans 2, 4 and 5 appearing In Schedule 1, Part 1

2. the right of certain Relevant Authorities to have access to the structures on or to be built upon the Site
3. the right of Users of the Existing Crossing and, upon the issue of the Permit to Use, of the Second Crossing to use the Crossings subject to Tolloed Traffic paying the appropriate Toll and to Users complying with the Concessionaire's requirements for traffic management following the principles contained in Schedule 9
4. the right of contractors employed by the Government to construct the Connecting Roads to have access to parts of the Adjacent Areas as shown on plan 4 appearing In Schedule 1, Part 1
5. the right of the Government to resume certain parts of the Adjacent Areas which are to be used for access to the Site or other parts of the Adjacent Areas pursuant to Clause 8.4

so that save in respect of such rights no other person is in occupation possession or use or has any claims to occupation possession or use thereof.

“V.A.T.” means value added tax.

“Works” means the Permanent Works (including Plant) and the Temporary Works required for the design construction and completion of the Second Crossing.

“Works Programme” means the programme of design, investigations, construction and related works based upon the Outline Programme or any amended or varied version thereof to be submitted by the Concessionaire in accordance with Clause 13.1.

- 1.2 The headings and marginal notes and references thereto in this Concession Agreement shall not be deemed to be part hereof or be taken into consideration in the interpretation or construction hereof.
- 1.3 Clause numbers in this Concession Agreement quoted for reference purposes use a number without a “point” (e.g. Clause 6) when reference is being made to all the clauses having that number before the “point” (e.g. Clause 6.1 to Clause 6.9 inclusive). A reference made using a “point” (e.g. Clause 6.1) refers to that numbered clause (i.e. Clause 6.1). A reference using two or more “points” (e.g. Clause 6.2.1) refers only to that numbered clause (i.e. Clause 6.2.1).
- 1.4 Words importing persons or parties shall include firms, partnerships, corporations and any organisations having legal capacity. Words importing the singular only also include the plural and vice versa where the context requires and words importing the masculine shall be construed as including the feminine where the context so requires.
- 1.5 Wherever in this Concession Agreement provision is made for the giving or issuing of any notice, endorsement, consent, approval, certificate or determination by any person, unless otherwise specified, such notice, endorsement, consent, approval, certificate or determination shall be in writing and the words “notify”, “endorsed”, “consent”, “approval”, “certify” or “determined” shall be construed accordingly.

- 1.6 The language of this Concession Agreement is the English language, which language shall be the ruling language in which this Concession Agreement shall be construed and interpreted. All correspondence, drawings, Design Data, test reports, certificates, specifications and information shall be entirely in the English language. All operating and maintenance instructions, name and rating plates, identification labels and other written and printed matter required for operation and maintenance shall be executed in the English language, as shall instructions and notices to the public and staff and all other signage and information notices.
- 1.7 References to any enactment (including any subordinate legislation) are to be construed as references to that enactment as for the time being amended or modified or to any enactment for the time being replacing or amending the same.
- 1.8 References to revenues or other sums being expressed in [DATED] prices means revenues or sums which have been adjusted to exclude the effects of Inflation after that date as measured by changes in the Retail Prices Index (all items) published by [ ] from the level published in [DATE] for the month of [MONTH]. Revenues received by the Concessionaire (or which, for the purposes of calculating a Net Real Revenue Lost, should have been received by the Concessionaire) during a particular month which are to be expressed IN [DATE] prices shall be adjusted by applying the following formula:

$$R_{(DATE)} = R_n \times \frac{RPI_{(DATE)}}{RPI_{(n-1)}}$$

where

- $R_{(DATE)}$  = the relevant amount of revenue expressed in [DATE] prices;
- $R_n$  = the relevant revenue received (or should have been received) by the Concessionaire during month n;
- $RPI_{(DATE)}$  = the Retail Prices Index (all items) published in [DATE] by the [Statistical Office] for the month of [DATE]; and
- $RPI_{(n-1) YEAR}$  = the Retail Prices index (all items) published or which should have been published by the [Statistical Office] in month n for the month preceding month n.

If the Retail Prices Index is no longer published in its present form references to  $RPI_{(DATE)}$  and  $RPI_{(n-1)}$  in the formula shall be replaced by a reference to such in ex as may replace the Retail Prices Index for the purpose of calculating the amount payable on repayment of [ ] or, in the absence of such other index, such index as the parties may agree or in default thereof as the Disputes Resolution Procedure may determine produces as nearly as possible the same result as the Retail Prices Index would have produced (after adjusting, if necessary, for any differences in the reference dates used in compiling the Retail Prices Index and the replacement Index).

## 2. The Protect and the Pre-Concession Period

- 2.1 Subject to and In accordance with the provisions of this Concession Agreement, the Concessionaire shall have the right and the obligation to carry out the design, construction and completion of the Works and the financing, operation and maintenance during the Concession Period of the Existing Crossing and the Second Crossing which It shall do at Its own cost and risk without recourse to Government funds (otherwise than as expressly provided in this Concession Agreement) or to Government guarantees.
- 2.2 The Second Crossing will comprise a viaduct on either side of the Severn estuary with a single cable-stay bridge over the navigational channel as are shown, together with the toll plaza, on plans 3 and 6 appearing In Schedule 1.
- 2.3 Subject to the payment of the capital sum referred to In Clause 9.2 (Transfer of Outstanding Debt), the Concessionaire shall be entitled to levy Tolls other than on Exempt Traffic for the use of both Crossings during the Concession Period from the Concession Commencement Date In accordance with this Concession Agreement and with the structure set out in Schedule 2, Part 1.
- 2.4 Notwithstanding that the Concession Period shall not commence until the Concession Commencement Date, with effect from [DATE] there has been and will continue to be up to the Concession Commencement Date the Pre-Concession Period during which:
- 2.4.1 the Concessionaire shall procure that the Contractor shall carry out the Aerodynamic Tests, the Hydrological Tests, Ground and Geophysical Investigation and such further design and testing and mobilise such resources as shall be appropriate having regard to the expected Concession Commencement Date (based upon the information to be notified to the Concessionaire pursuant to Clause 7.2 [Certificate of Commencement]) and in respect of which the Government's Agent shall have raised no objection under the Government's Review Procedure; and
- 2.4.2 the Concessionaire shall provide reasonable assistance in the preparation of the environmental statement to be prepared by or on behalf of the Government referred to in Section 3.3.52 of Schedule 3, Part 1 in such form as the Government's Agent may consider appropriate and shall liaise with all appropriate Relevant Authorities in connection with its preparation; and
- 2.4.3 at the request of the Government, the Concessionaire shall afford all reasonable support and assistance in relation to the Legislative Assembly Process during the passage of the Bill.
- 2.5 The Government shall use best endeavours to procure through the exercise of his powers under any relevant legislation access for the Concessionaire to such parts of the Site as the Concessionaire may reasonably require for the purposes of carrying out the Hydrological Tests and Ground and Geophysical Investigation. The Government shall pay such fee for access as the owner or occupier of the relevant area may require and the Concessionaire shall keep the Government indemnified in respect of all claims arising out of the carrying out of such tests or investigations whether arising out of the act, neglect or omission of the Concessionaire, its contractors or agents and its or their employees or sub-contractors of any tier or otherwise except and to the extent that the same arises out of, any act, neglect or



omission of the Government or the Government's Agent or any persons within the control of either of them.

- 2.6 The Concessionaire may give written notice to the Government terminating the right to the Concession if the Bill has not been enacted by [DATE] or, subject to Clause 7.3 (Certificate of Commencement) the Concession Commencement Date has not occurred by [DATE] (or in either case such later date as may be agreed between the parties). To the extent that the Government's Agent shall under Clause 2.4.1 have raised no objection to the Concessionaire carrying out activities, in the event of termination of the Concession or of the right thereto solely because of the exercise by the Concessionaire of his right under either this Clause 2.6 or Clause 7.3 or Clause 8.7 (Vacant Possession) the Government shall reimburse the Concessionaire the Pre-Operation Costs.

### **3. Government's Agent/Government's Representative**

- 3.1 The Government has appointed the Government's Agent to be its agent during the execution of the Works but limited to the exercise of the functions set out In Schedule 3, Part 3 or such further or other functions as the Government may exercise under this Concession Agreement in respect of the Works and as it may notify the Concessionaire in writing from time to time. The Government may give to the Concessionaire written notice of its intention to change the Government's Agent and the date upon which such change shall have effect which date shall be, other than in the case of emergency, such as will not cause serious inconvenience to the Concessionaire in the execution of its obligations hereunder.
- 3.2 The Government shall appoint from time to time a representative as the Government's Representative to act as its agent in connection with the operation and maintenance of both Crossings, and shall notify the Concessionaire in writing of each such appointment.
- 3.3 During any period when a Government's Agent or Government's Representative shall not have been appointed, the Government shall carry out the functions which would otherwise be performed by the Government's Agent or Government's Representative as the case may be.

### **4. Provision of Guarantees**

- 4.1 The Concessionaire shall deliver to the Government at the time of execution of this Concession Agreement:
- 4.1.1 a guarantee in the terms of the draft appearing in Part 2 of Schedule duly executed by the parties named therein (and the Government shall return to the Concessionaire the guarantee submitted in accordance with [the bid documents]); and
  - 4.1.2 a warranty in the terms of the draft appearing in Part 3 of Schedule duly executed by the Contractor; and
  - 4.1.3 a parent company guarantee In the terms of the draft appearing in Part 4 of Schedule duly executed by the parties named therein.
- 4.2 The guarantee referred to In Clause 4.1.1 shall be returned to the Concessionaire on termination of the right to the Concession pursuant to Clause 2.6 (The Project and Pre-

Concession Period], Clause 6 (Effect of the Bill etch Clause 7.3 (Certificate of Commencement] Clause 30 (Force Majeure], on receipt of the capital payment by the Concessionaire pursuant to Clause 9.2 (Transfer of Outstanding Debt] or on termination of the Concession pursuant to Clause 8.7.2 (Vacant Possession).

## 5. Financial Terms and Documentation

5.1 The Financial Terms are the agreed basis upon which the Concessionaire shall finance the Project.

5.1.1 The RCRR calculated in accordance with the Base Case is [AMOUNT AND CURRENCY]. Any adjustment thereto In accordance with this Concession Agreement shall be certified by the Government's Representative and the original of such certificate shall be issued to the Government with a copy to the Concessionaire.

5.1.2 For the purposes of calculating the RCRR in accordance with the Base Case, Non-toll Income has been disregarded. The charges to Users which form the Non-toll Income shall be fair and reasonable having regard to all the circumstances and the Government may object to the same and require that such charges be referred to the Disputes Resolution Procedure in the event that the parties are unable to agree an appropriate level of charge.

5.2 Prior to or contemporaneous with the execution of this Concession Agreement the Concessionaire shall have:

5.2.1 executed or caused to be executed the following documentation in the form and containing the terms approved by the Government:

5.2.1.1 the Senior Bank Facility agreement and the following supplemental agreements:

5.2.1.1.1 the first priority legal mortgage over ordinary shares in the Concessionaire created by [ ] in favour of [ ]; and

5.2.1.1.2 the first priority fixed and floating charge debenture created by the Concessionaire in favour of [ ].

5.2.1.2 [the [IFI] Facility agreement.]

5.2.1.3 the Trust Deed and the following supplemental agreements:

5.2.1.3.1 the subscription agreement relating to the Debenture Stock between the Concessionaire as issuer and the banks and other parties named therein as subscribers; and

5.2.1.3.2 the second priority legal charge over ordinary shares in the Concessionaire created by [ ] in favour of [ ]; and

5.2.1.3.3 the second priority fixed and floating charge debenture created by the Concessionaire in favour of [ ].

- 5.2.1.4 the Government's Subordinated Debt facility and the following supplemental agreements:
  - 5.2.1.4.1 the third priority legal charge over ordinary shares in the Concessionaire created by [ ] in favour of the Government;
  - 5.2.1.4.2 the third priority fixed and floating charge debenture created by the Concessionaire in favour of the Government;
- 5.2.1.5 the Inter-Creditor Agreement;
- 5.2.1.6 the appointment of the Checker;
- 5.2.1.7 the appointment of the Designer;
- 5.2.1.8 the Construction Contract;
- 5.2.1.9 the agreement for the custody of the Financial Model;
- 5.2.1.10 the Shareholders' Agreement and all documents necessary to effect the subscription for and issue of shares in the Concessionaire in accordance therewith and the special resolution referred to in Clause 5.2.2;
- 5.2.2 notified the Government in writing that the special resolution in the terms of the draft annexed to the Shareholders' Agreement has been passed.
- 5.3 The following agreements or sections of agreements as the case may be shall not be amended or materially departed from without there being no objection in accordance with the Government's Review Procedure:
  - 5.3.1 Clauses 1, 5, 9, 13 and 15 of the Shareholders Agreement;
  - 5.3.2 the Construction Contract;
  - 5.3.3 the terms and conditions of engagement of the Designer;
  - 5.3.4 the terms and conditions of engagement of the Checker;
  - 5.3.5 the proposed form of contract with the Operator when agreed pursuant to Clause 23.6 (Operations and Maintenance].
  - 5.3.6 the memorandum and articles of association of the Concessionaire save as required to give effect to the special resolution referred to in Clause 5.2.2.
- 5.4 To the extent that similar provisions do not appear in the Inter-Creditor Agreement, the Funding Agreements shall not materially be amended or departed from without there being no objection in accordance with the Government's Review Procedure.
- 5.5 Neither the engagement nor employment of the following persons shall be terminated without there being no objection in accordance with the Government's Review Procedure to such termination and/or the appointment of any proposed replacement:
  - 5.5.1 the Contractor;

5.5.2 the Designer;

5.5.3 the Checker.

## 6. The Effect of the Bill, etc

6.1 For the purpose of this Clause 6:

6.1.1 “Adverse Relevant Event” means a Relevant Event giving rise to the consequences identified in Clauses 6.1.10.1, 6.1.10.2 or 6.1.10.3;

6.1.2 “Base Case Test” means the determination in accordance with Clause 6.3.3 of whether each of the following conditions is satisfied and the Base Case Test shall be satisfied only if the Financial Model shows that each of the following conditions is satisfied on each relevant date or for each relevant period throughout the Concession Period:

6.1.2.1 for every six month period commencing on a Reference Date (but excluding any period ending after the Maturity Date) the SDCR must be greater than or equal to 1.09:1 except:

6.1.2.1.1 for the six month period ending on the Maturity Date when the CDCR must be greater than or equal to 1.21:1;

6.1.2.1.2 if the CDCR for any relevant six month period is greater than 1.4:1 and less than 2.8:1 in which case the SCDR for the same period must be greater than 1.1:1; and

6.1.2.1.3 if the CDCR for any relevant six month period is greater than 2.8:1, in which case the SCDR for the same period must be greater than 1.02:1;

6.1.2.2 the RCRR Cover Ratio must be at least 1.39:1;

6.1.2.3 on the date 21.5 years after the Concession Commencement Date:

6.1.2.3.1 the Debt shall have been repaid in full; and

6.1.2.3.2 all dividends payable in respect of the Preference Shares shall have been paid and all of the Preference Shares shall have been redeemed; and

6.1.2.3.3 the aggregate amount of cash and permitted Investments owned by the Concessionaire after deducting the amount of all accrued but unpaid liabilities at such time, must not be less than [AMOUNT AND CURRENCY] in then current prices;

6.1.2.4 at each Reference Date the NPV Cover Ratio must be not less than 1.04:1; and

6.1.2.5 the Project IRR must not be less than [ ]% per annum;

- 6.1.3 “Beneficial Relevant Event” means a Relevant Event which gives rise to the consequence Identified in 6.1.10.4;
- 6.1.4 “CDCR” means the cumulative debt coverage ratio determined in accordance with the relevant algorithms contained in the Financial Model;
- 6.1.5 “NPV Cover Ratio” means the net present value cover ratio determined In accordance with the relevant algorithms contained In the Financial Model;
- 6.1.6 “Primary Test” means the determination In accordance with Clause 6.3.1.1 of whether each of the following conditions is satisfied and the Primary Test shall be satisfied only if the Financial Model shows that each of the following conditions is satisfied on each relevant date or for each relevant period throughout the Concession Period:
- 6.1.6.1 for every six month period commencing on a Reference Date (but excluding any period ending after the Maturity Date) the SDCR must be greater than or equal to [ ] except:
- 6.1.6.1.1 for the six month period ending on the Maturity Date when the CDCR must be greater than or equal to [ ];
- 6.1.6.1.2 if the CDCR for any relevant six month period is greater than [ ] and less than [ ], in which case the SDCR for the same period must be greater than [ ]; and
- 6.1.6.1.3 if the CDCR for any relevant six month period is greater than [ ], in which case the SDCR for the same period must be greater than [ ];
- 6.1.6.2 the RCRR Cover Ratio must be at least [ ];
- 6.1.6.3 on the date [ ] years after the Commencement Date:
- 6.1.6.3.1 the Debt shall have been repaid in full; and
- 6.1.8.3.2 all dividends payable in respect of the Preference Shares shall have been paid and all of the Preference Shares shall have been redeemed; and
- 6.1.8.3.3 the aggregate amount of cash and permitted investments owned by the Concessionaire after deducting the amount of all accrued but unpaid liabilities at such time, must be not less than [AMOUNT AND CURRENCY] in then current prices;
- 6.1.6.4 at each Reference Date the NPV Cover Ratio must be not less than [ ]; and
- 8.1.6.5 the Project IRR must be not less than [ ]% per annum;
- 6.1.7 “Project IRR” means the internal rate of return of the Project determined in accordance with the relevant algorithms contained in the Financial Model;

- 6.1.8 RCRR Cover Ratio” means the RCRR cover ratio determined in accordance with the relevant algorithms contained in the Financial Model;
- 6.1.9 Reference Date” means the Expected Date of Issue of the Permit to Use and each subsequent date during the Concession Period which falls at six monthly intervals thereafter up to and including the Maturity Date;
- 6.1.10 “Relevant Event” means a circumstance in which the .Bill as introduced in Legislative Assembly or as amended during the Legislative Assembly Process or any undertakings given during the Legislative Assembly Process or any enacted legislation of [COUNTRY] (other than as provided in Clause 5.8 [Financial Terms and Documentation]) shall give rise to the following consequences:
- 6.1.10.1 performance of this Concession Agreement becoming legally incompatible with the Bill or [COUNTRY] legislation; or
- 8.1.10.2 performance of this Concession Agreement being seriously impeded; or
- 6.1.10.3 the ability of the Concessionaire:
- 6.1.10.3.1 to perform its obligations under this Concession Agreement; or
- 8.1.10.3.2 to repay the Debt and to redeem the Preference Shares and to pay Interest thereon in accordance with the terms of the Funding Agreements not later than the Maturity Date (as such date may be extended by the provisions for the deferral of payments but ignoring the effect of deferral of payments arising out of the event in question) and to discharge its other obligations (including without limitation its obligation in relation to the Government’s Subordinated Debt and any Short-Fall Finance) incurred in connection with this Concession Agreement being seriously impeded; or
- 6.1.10.4 the Concessionaire being materially benefited so that its income or profitability is enhanced;
- 6.1.11 “SDCR” means the semi-annual debt coverage ratio determined in accordance with the relevant algorithms contained in the Financial Model;
- 6.1.12 “Secondary Test” means the determination in accordance with Clause 6.3.1.1 of whether each of the following conditions is satisfied (and the Secondary Test shall be satisfied only if the Financial Model shows that each of the following conditions is satisfied on each relevant date or for each relevant period throughout the Concession Period):
- 6.1.12.1 for every six month period commencing on a Reference Date (but excluding any period ending after the Maturity Date) the SDCR must be greater than or equal to [ ] except that at the Maturity Date when CDCR for the six month period then ending must be greater than or



equal to [ ] taking account of the provision for deferring payment of interest under the Government's Subordinated Debt; and

6.1.12.2 at each Reference Date the NPV Cover Ratio must be not less than [ ].

6.2 Upon the occurrence of a Relevant Event, either party may give written notice to the other. On the giving of such notice each party shall, to the extent practicable, put forward proposals to mitigate or preclude the consequences as are described in the definition of Relevant Event. In any event the parties shall then negotiate in good faith whether or not an amendment to the terms of this Concession Agreement is appropriate having regard to the provisions of Clause 6.7 (except where the provisions of Clauses 6.3.1 or 6.3.2 apply) and, If so, the terms of such amendment.

6.3 In the event that prior to the Concession Commencement Date:

6.3.1 the Bill as introduced In Legislative Assembly or as amended during the Legislative Assembly Process or any undertakings given during the Legislative Assembly Process or legislation related specifically to the Concession or a category of projects which includes the Concession shall give rise to an Adverse Relevant Event then the following provisions shall have effect:

6.3.1.1 if the parties are unable to negotiate an appropriate amendment to the terms of this Concession Agreement to take into account an Adverse Relevant Event, then the parties shall together rerun the Financial Model (but unless the parties otherwise agree such rerun shall not be made prior to the date of completion of the Legislative Assembly Process) without changes in input assumptions of the Base Case except only to the extent that a change to one or more of them is required as a direct consequence of the Adverse Relevant Event or of the said proposals made pursuant to Clause 6.2 to take the Adverse Relevant Event Into account; and

6.3.1.2 If such rerun demonstrates that the Primary Test would not be satisfied then such proposals shall be treated as being Impracticable and if no proposals are found to meet the Primary Test then the right to the Concession shall terminate and the Government shall reimburse the Concessionaire the Pre-Operation Costs; or

6.3.1.3 if such rerun incorporating the said proposals demonstrates that the Primary Test shall be more than satisfied then in any such case the proposals may be adjusted in such a way as the Government may so elect provided that the Primary Test remains satisfied;

6.3.2 except as provided In Clause 6.3.1 If any legislation of [COUNTRY] is enacted which shall give rise to an Adverse Relevant Event, then the provisions of Clauses 6.3.1.1 to 6.3.1.3 shall have effect save that for the purposes of this Clause 6.3.2 the Secondary Test shall be substituted for the Primary Test; or

6.3.3 the Bill as introduced In Legislative Assembly or as amended during the Legislative Assembly Process or any undertakings given during the Legislative Assembly Process or if any legislation shall be enacted in the United Kingdom or by the European Community shall give rise to a Beneficial Relevant Event then if the Government so requires the RCRR and/or the Toll shall be reduced as the

Government shall specify provided that after such reduction the Base Case Test remains satisfied and for this purpose the Financial Model shall be rerun on the basis set out in Clause 6.3.1 mutatis mutandis.

- 6.4 In the event of a dispute between the parties as to the change in the input assumptions referred to In Clause 6.3 arising as a direct consequence of a Relevant Event or the said proposals made pursuant to Clause 6.2, then the matter shall be resolved In accordance with the Disputes Resolution Procedure.
- 6.5 In all cases other than those referred to In Clauses 6.3.1 and 6.3.2 above, the provisions of Clauses 6.6 to 6.9 shall have effect.
- 6.6 If the parties are unable to agree either or both the consequences of a Relevant Event and/or what, If any, amendment to this Concession Agreement or adjustment to the RCRR and/or Toll is appropriate having regard to Clause 6.7, then the matter shall be referred to the Disputes Resolution Procedure with power:
- 6.6.1 to determine which, If any, of the proposals submitted are appropriate;
- 6.6.2 to suggest amendments to such proposals;
- 6.6.3 in the event of an Adverse Relevant Event to declare that this Concession Agreement cannot properly be amended.
- 6.7 For the purposes of Clauses 6.2 and 6.6 and except as expressly provided to the contrary in Clause 6.2 regard shall be had in all cases to all the circumstances, the overall balance of the rights and obligations of the parties under this Concession Agreement and the Interests of the Users of which interests the Government shall as between the parties hereto be the custodian. In the case of a decision under Clauses 6.6.1 or 6.6.2 regard shall be had as to whether this Concession Agreement if so amended would in all respects be legally compatible with the Act and other legislation. In the case of an Adverse Relevant Event regard shall be had in particular but without limitation to the adjustment of the terms of the Concession Agreement so that:
- 6.7.1 the performance by the Concessionaire of its obligations and duties under this Concession Agreement as so adjusted shall no longer be seriously impeded; and
- 6.7.2 the ability of the Concessionaire to repay the Debt and to redeem the Preference Shares and to pay interest thereon in accordance with the terms of the Funding Agreements not later than the Maturity Date (as such date may be extended by the provisions for deferral of payments but ignoring the effect of deferral of payments arising out of the event in question) and to discharge its other obligations (including without limitation its obligation in relation to the Government's Subordinated Debt and any Short-Fall Finance) incurred in connection with this Concession Agreement shall no longer be seriously impeded.
- 6.8 If the decision of the parties or under the Disputes Resolution Procedure is that this Concession Agreement cannot properly be amended having regard to the matters referred to In Clause 8.7 then other than in the case of a Beneficial Relevant Event the Concession and the right thereto shall thereupon terminate and the provisions of Clause 34.1.1 [Consequences of Termination] shall apply.

- 6.9 If the decision under the Disputes Resolution Procedure is that this Concession Agreement can properly be amended having regard to the matters referred to in Clause 8.7; and
- 6.9.1 the parties so agree, then the same shall be so amended;
  - 6.9.2 the Concessionaire disagrees, then the Concession and the right thereto shall thereupon terminate and the provisions of Clause 34.1.2 shall apply;
  - 6.9.3 the Government disagrees, then the Concession and the right thereto shall thereupon terminate and the provisions of Clause 34.1.1 shall apply.

## **7. Certificate of Commencement**

- 7.1 As soon as is appropriate following completion of the Bill, the Government shall issue the Certificate of Commencement which shall:
- 7.1.1 state the Concession Commencement Date which shall not be earlier than 14 days after the date of issue of the Certificate of Commencement nor later than [DATE];
  - 7.1.2 confirm that all relevant powers have been secured to enable the Government to give Vacant Possession of the Site and Adjacent Areas;
  - 7.1.3 confirm that Rights of Way have been secured to a sufficient degree or extent to enable Operations to commence and continue in accordance with the Works Programme without disruption;
  - 7.1.4 confirm that such orders and regulations have been made as will permit the Concessionaire to collect Tolls and to operate the Existing Crossing as a highway in an effective manner and to regulate the Users so as to maintain proper usage.
- 7.2 At the end of each month following the execution of this Concession Agreement, the Government's Representative shall notify the Concessionaire as to progress of the Bill with an estimate of when it is likely to become law.
- 7.3 In the event that there shall be an issue outstanding under Clause 6.3.1 or 6.3.2 (Effect of the Bill etc either at the time of issue of the Certificate of Commencement or prior to the Concession Commencement Date stated therein, then the Concession Commencement Date shall be deferred until such time, if any, that It is established that a proposal exists which satisfies the Primary Test or the Secondary Test as the case may be. Provided that if there shall have been an unresolved reference to the Disputes Resolution Procedure of an issue under Clause 6.3.1 or 6.3.2, then notwithstanding that the Concession Commencement Date will actually be after [DATE] the requirement that the Concession Commencement Date will be not later than [DATE] shall be deemed to have been met provided further that the Concessionaire shall in any event be entitled to give written notice to the Government terminating the right to the Concession under Clause 2.6 if the said reference remains unresolved on [DATE].
- 7.4 For the purposes of Clause 7.3, a reference to the Disputes Resolution Procedure shall be "unresolved" If neither a unanimous decision of the Panel nor an arbitral award has been made In relation to such reference.

## 8. Vacant Possession

8.1 In order to enable the Concessionaire to construct the Second Crossing and to operate and maintain both Crossings, the Government shall grant to the Concessionaire on the Concession Commencement Date (subject to Clause 26.4 (Insurance Obligations) and to the Government receiving from the Concessionaire the capital payment referred to in Clause 9.2 [Transfer of Outstanding Debt]):

- 8.1.1 Vacant Possession of the Site and the Adjacent Areas;
- 8.1.2 rights of support for the structures forming or to form the Crossings;
- 8.1.3 rights of access to such land as may be vested in or controlled by Government so as to carry out testing and construction of the supports for the Second Crossing and the maintenance of both Crossings;
- 8.1.4 rights to occupy air space along the line of the Existing Crossing and the agreed line (as the same may be varied in accordance with this Concession Agreement) of the Second Crossing;
- 8.1.5 rights to occupy the existing administrative building and depot shown on plan 2 in Schedule 1, Part 1 and, following their completion, the right to occupy the administrative building and depot for the Second Crossing;
- 8.1.6 the Rights of Way to a sufficient degree or extent to enable Operations to commence and continue and in respect of the Works in accordance with the Works Programme without disruption.
- 8.1.7 It is the intention of the parties that the rights to be granted pursuant to Clause 8.1 shall be capable of being conferred by virtue of a provision to be contained in the Act and that, other than for the Adjacent Areas, the said rights shall subsist until the end of the Concession Period. Except as expressly provided in the Act, Vacant Possession and the conferring of the said rights shall not entitle the Concessionaire to rely upon any statutory provision or common law right which permits the Concessionaire to maintain as against the Government any right or interest in land.
- 8.1.8 In the event that the Act shall not contain the provision referred to in Clause 8.2.1 or if the Concessionaire shall so require in writing then the Government shall execute such lease, licence or other deed of grant as shall be appropriate to confer any or all of the rights referred to in Clause 8.1 prior to the issue of the Certificate of Commencement. Such lease, licence or other deed of grant shall be upon terms:
  - 8.2.2.1 no more onerous than the terms set out in this Concession Agreement other than a requirement to pay rent or licence fee not exceeding [ ] per annum; and
  - 8.2.2.2 that all the said rights shall terminate at the end of the Concession Period; and

- 8.2.2.3 that the said rights shall subsist for the purposes of carrying out the Project and for no other purposes whatsoever.
- 8.1.9 The grant on the Concession Commencement Date of the rights referred to in Clause 8.1 shall be evidenced by, inter alia, a Certificate of Entry issued by or on behalf of the Government.
- 8.2 Upon the issue of the maintenance certificate for the purposes of the Construction Contract, the Concessionaire shall forthwith surrender such part of the Adjacent Areas as it may not have previously surrendered to the Government or its nominee.
- 8.3 Where the Government grants to the Concessionaire a part of the Adjacent Areas which is to be used solely for the purpose of access to the Site or another part of the Adjacent Areas, then he shall be entitled, upon reasonable notice in writing being given to the Concessionaire, to resume such part or parts as are designated on the plans numbered 3, 4, 5 and 6 appearing in Schedule 1, Part 1 as being capable of being resumed provided always that the Government shall make available to the Concessionaire without charge for the entirety of each such period of resumption alternative and adequate means of access.
- 8.4 The Government shall ensure that the Concessionaire continues to enjoy the rights referred to in Clause 8.1 free from assertion by any person claiming either title under or through the Government or any other entitlement to the detriment of the quiet enjoyment by the Concessionaire of the said rights until:
- 8.4.1 in the case of the Site, the termination of the Concession Period; and
- 8.4.2 in the case of the Adjacent Areas, the Issue of the maintenance certificate under the Construction Contract or the surrender of the Adjacent Areas (whichever shall be the sooner).
- 8.5 Off-Site Works are to be executed on or adjacent to existing highways. To the extent that Off-Site Works are, to be carried out on land or highways in the control or ownership of a highway authority other than the Government, the Government shall upon request assist the Concessionaire in its negotiations with such highway authority. During any period that a highway authority other than the Government shall not have given access to the Concessionaire of areas required to carry out Off-Site Works then and during any such period the Concessionaire shall not be required to carry out the Off-Site Works relating to such area unless and until such area has been made available to the Concessionaire.
- 8.5.1 In the event that the Government fails to grant to the Concessionaire in accordance with Clause 8.1 the rights set out in Clauses 8.1.1 - 8.1.6 inclusive (other than by reason of non-compliance with Clause 9.2 (Transfer of Outstanding Debt) and Clause 26.4 (Insurance Obligations)) by the date stated in Clause 7.1.1 then the Government shall compensate the Concessionaire for all reasonable costs and expenses claimed by the Contractor as a consequence thereof and the provisions of Clause 41 (Payment) shall apply.
- 8.5.2 In the event that the Government shall fail to rectify the default referred to in Clause 8.7.1 by [DATE] or in the event of a then continuing dispute under Clause 6 [The Effect of the Bill], then the Concessionaire may terminate the Concession and shall be entitled to recover in addition to the Pre-Operation Costs all costs and expenses arising from such termination.



## 9. Transfer of Outstanding Debt

- 9.1 Not less than 30 days prior to the expected Concession Commencement Date, the Government shall notify the Concessionaire of the sum calculated by the MoT's accounting officer to be the Expected Outstanding Debt.
- 9.2 On the date upon which the Government gives Vacant Possession the Concessionaire shall pay to the Government in immediately available funds either:
- 9.2.1 if the Expected Outstanding Debt is [AMOUNT AND CURRENCY] or more, [AMOUNT AND CURRENCY]; or
  - 9.2.2 if the Expected Outstanding Debt is less than [AMOUNT AND CURRENCY] but not less than [AMOUNT AND CURRENCY], the balance between [AMOUNT AND CURRENCY] and the Expected Outstanding Debt; or
  - 9.2.3 if the Expected Outstanding Debt is less than [AMOUNT AND CURRENCY] then half of the Expected Outstanding Debt.
- 9.3 Within 180 days after the Concession Commencement Date, the Government shall notify the Concessionaire of the sums certified by the MoT's accounting officer to be the Outstanding Debt.
- 9.4 If the Outstanding Debt is:
- 9.4.1 [AMOUNT AND CURRENCY] or more and the Expected Outstanding Debt was less than [AMOUNT AND CURRENCY], the Concessionaire shall pay to the Government such sum as will result in the Concessionaire paying under Clauses 9.2 and 9.4 a total of [AMOUNT AND CURRENCY];
  - 9.4.2 less than [AMOUNT AND CURRENCY] but more than [AMOUNT AND CURRENCY] and more than the Expected Outstanding Debt, the Concessionaire shall pay to the Government such sum as will result in the Concessionaire paying under Clause 9.2 and 9.4 the balance of the Outstanding Debt less [AMOUNT AND CURRENCY];
  - 9.4.3 less than [AMOUNT AND CURRENCY] but more than [AMOUNT AND CURRENCY] and less than the Expected Outstanding Debt, the Government shall pay to the Concessionaire the difference between the amount paid under Clause 9.2 and the balance of the Outstanding Debt less [AMOUNT AND CURRENCY];
  - 9.4.4 less than [AMOUNT AND CURRENCY] and less than the Expected Outstanding Debt, the Government shall pay to the Concessionaire the difference between the amount paid under Clause 9.2 and half of the Outstanding Debt;
  - 9.4.5 less than [AMOUNT AND CURRENCY] but more than the Expected Outstanding Debt, the Concessionaire shall pay to the Government the difference between the amount paid under Clause 9.2 and half of the Outstanding Debt.
- 9.5 Any amounts due under Clause 9.4 shall not bear interest from the Concession Commencement Date until the due date for payment.



- 9.6 The Concessionaire shall assume responsibility for [AMOUNT AND CURRENCY] or one half of the Outstanding Debt whichever is the less in accordance with the agreement for the Government's Subordinated Debt.
- 9.7 In the event that the Outstanding Debt is greater than [AMOUNT AND CURRENCY], the Concessionaire may be required to continue to collect tolls as an agent of the Government after the expiration of the Concession Period on the basis set out in Clause 35 [Requirement for the Concessionaire to Act as Agent of the Government] for as long as is necessary for the balance between the Outstanding Debt and [AMOUNT AND CURRENCY] (together with accumulated interest, calculated at a rate to be determined by the Government from time to time) to be repaid.

## **10. Design and Construction**

- 10.1 The Concessionaire shall be responsible for the design, construction, completion, commissioning and testing of the Works which shall be carried out subject to Clauses 10.4 and 14 (Government's Changes) in strict accordance with the Technical Requirements, the Design and Certification Procedure and the Government's Review Procedure. Notwithstanding any examination by the Government's Agent, the Concessionaire's responsibility under this Concession Agreement shall not be relieved or absolved or otherwise modified.
- 10.2 The Concessionaire has, prior to the date of this Concession Agreement, caused the appointment of the Designer who shall prepare and supervise the preparation of the Detailed Design, subject to Clauses 10.4 and 14, in accordance with the Technical Requirements and comply with the Design and Certification Procedure. The Designer has, prior to the execution of this Concession Agreement, appointed the Checker who shall check the Detailed Design and comply with the Design and Certification Procedure. The Concessionaire shall be responsible for ensuring that both the Designer and the Checker comply with the obligations imposed upon them in accordance with the Design and Certification Procedure.
- 10.3 The Concessionaire shall not permit the Contractor to commence construction of any part of the Works until the relevant Design Certificate and Check Certificate shall have been submitted to the Government's Agent in accordance with the Design and Certification Procedure. Design Data the subject of a certificate which has been submitted to the Government's Agent in accordance with the Design and Certification Procedure shall not be departed from otherwise than in accordance with Clauses 10.4 and 14 (Government's Changes)
- 10.4 If the Concessionaire proposes to vary or amend the Technical Requirements or to develop specifications in accordance with Section 3.4.2 of Schedule 3, Part 2 such proposal together with all supporting Design Data and together with an explanation of the reasons therefor, including if appropriate the Designer's comments, shall be submitted under cover of a submission document by or through the Concessionaire as a proposed Concessionaire's Change in accordance with the Government's Review Procedure. The Concessionaire shall not proceed to implement a proposed Concessionaire's Change unless and until there has been no objection in accordance with the Government's Review Procedure and the relevant Concessionaire's Change Certificate has been issued by the Designer.

- 10.5 The Concessionaire may object to any of the Government's Requirements or any Government's Change but only on the grounds of stability, safety or practicability, in which event the Concessionaire shall make a submission to the Government's Agent setting out its objections and its alternative proposals. Such objection and proposals shall be dealt with in accordance with the Government's Review Procedure save that if the Government's Agent does not accept that the objection to the Government's Requirement or Government's Change is proper or that the proposals are appropriate, then the matter shall be referred to the Disputes Resolution Procedure with power to require the Government to amend the Government's Requirements or Government's Change if thought fit.
- 10.6 The Concessionaire shall not make any payment to the Contractor in respect of a Milestone (as defined In the Construction Contract) nor shall a substantial completion certificate for the purposes of the Construction Contract be issued unless and until the Designer has issued a Construction Certificate for the Works or the part in respect of which the Contractor has requested payment or the issue of a substantial completion certificate as the case may be.
- 10.7 The Concessionaire warrants that:
- 10.7.1 it has fully considered and understood the Government's Requirements; and
  - 10.7.2 the design of the Works will In all respects meet the requirements of this Concession Agreement and in particular the Technical Requirements; and
  - 10.7.3 the Permanent Works and Temporary Works will comprise only materials and goods which will be of sound and merchantable quality and have been manufactured and prepared in accordance with the Technical Requirements and in particular with the quality assurance procedures to be established pursuant to Clauses 13.4 and 13.5 [Programmes and Quality Assurance] and all workmanship shall be in accordance with sound construction practice applicable at the time of construction and the Permanent Works will comprise only materials and goods which are new; and
  - 10.7.4 the Concessionaire will at all times comply with the requirements of the Government's Agent as permitted under this Concession Agreement and the Requirements of Interested Parties and any Statutory Requirement and where design, workmanship, methods of construction, materials, Plant, commissioning, testing or maintenance are to be reviewed by the Government's Agent or other Interested Parties timeous notice will be given so as to enable such review to be carried out; and
  - 10.7.5 the design of the Works and each part thereof will meet in an respects the requirements for adequacy, stability and safety provided for in the Technical Requirements and the standards:
    - 10.7.5.1 in the case of the loading requirements relating to vehicles using the Second Crossing, and of the requirements relating to shipping impact resistance, stated in the Government's Requirements;
    - 10.7.5.2 in the case of [STANDARDS], codes of practice and other relevant international standards, insofar as they relate to design, promulgated at the date of this Concession Agreement;

10.7.5.3 in all other cases, applying at the date of execution of the Works.

- 10.8 The Concessionaire shall indemnify the Government against all claims, losses, costs and expenses brought or alleged by third parties prior to the expiry of the Concession Period which may arise out of or in connection with any breach of the warranties set out in Clause 10.7.
- 10.9 The Concessionaire shall supply such evidence as to its ability to meet its obligations under Clause 10.8 as the Government may reasonably request from time to time.
- 10.10 From the date of execution of this Concession Agreement until the issue of the maintenance certificate under the Construction Contract the Concessionaire shall submit to the Government's Agent 5 copies of:
- 10.10.1 a formal monthly progress report together with 8 copies of an abbreviated version thereof to be passed by the Government's Agent to the Technical Panel, covering all relevant aspects of the Works and highlighting all actual or potential departures from the Works Programme and all grounds for a substantial Dispute which have occurred or which may reasonably be foreseen as likely to occur and all substantial disagreements between the Concessionaire, the Contractor, the Designer or the Checker material to the design or construction of the Work. The progress report shall state the proposed measures to be taken by the Concessionaire to overcome such departures or to resolve such grounds for a Dispute; and
- 10.10.2 such other reports as may be reasonably required to be produced by the Concessionaire so as to comply with the Requirements of Interested Parties.
- 10.11 The form of the monthly progress reports, and of any other reports as may be required, shall be agreed with the Government's Agent such agreement not to be unreasonably withheld;
- 10.12 The Concessionaire shall procure that the Contractor shall, in conjunction with the Government's Agent, brief the members of the Technical Panel as to the principal engineering and operational aspects of the Second Crossing if the chairman of the Technical Panel so requests within 6 months of execution of this Concession Agreement.
- 10.13 In the event of breach of any of Clauses 10.1 - 10.4 inclusive, the provisions set out in Schedule 3, Part 5, Paragraph 7 and following shall apply.

## **11. Design Tests and Site Inspection**

- 11.1 Without limiting the scope of its obligations under Clause 11.3 and 11.4 the Concessionaire shall procure that the Contractor shall undertake such Aerodynamic Tests, Hydrological Tests and Ground and Geophysical Investigation and such further design and testing as shall be appropriate having regard to the provisions of Section 3.7 of Schedule 3, Part 1.
- 11.2 Before undertaking such tests and investigations as are referred to in Clause 11.1 the Concessionaire shall provide the Government's Agent with a description of such tests and investigations which, are proposed to be undertaken and with such further information and explanation of such tests and investigations as the Government's Agent may reasonably require and have due regard to such comment as the Government's Agent may offer to the Concessionaire before deciding what tests and investigations are appropriate.

- 11.3 With regard to the carrying out of its obligations under this Concession Agreement, the Concessionaire shall be deemed prior to executing this Concession Agreement to have:
- 11.3.1 inspected and examined the Site and Its surroundings;
  - 11.3.2 satisfied itself as to the nature of the climatic, hydrological and general conditions of the Site, the nature of the ground and subsoil, the estuary bed and estuary surface conditions, the form and nature of the Site, the risk of Injury or damage to property adjacent to the Site and to occupiers of such property, the nature of the materials (whether natural or otherwise) to be excavated, the nature of the design, work and materials necessary for the execution of the Works;
  - 11.3.3 satisfied itself as to the means of communication with and access to and through the Site and accommodation it may require, the possibility of interference by persons (other than the Government) and other than persons claiming rights or title through, under or paramount to the Government with access to or use of the Site and Adjacent Areas after the Concessionaire shall have been given Vacant Possession with particular regard to the Requirements of Interested Parties, and the precautions and times and methods of working necessary to prevent any nuisance or interference, whether public or private being caused to any third parties;
  - 11.3.4 generally obtained for itself all necessary information as to the risks, contingencies and all other circumstances which may influence or affect the Concessionaire's Proposals and its obligation to design, execute, complete, commission, test and maintain the Works and its other obligations in respect of the Works under this Concession Agreement.
- 11.4 For the avoidance of doubt, notwithstanding the Aerodynamic Tests, Hydrological Tests, the Ground and Geophysical Investigations and such further design and testing as shall be appropriate having regard to the provisions of Section 3.7 of Schedule 3, Part 1, the Concessionaire shall not be entitled to make any claim against the Government whether in damages or for extensions of time for completion on the grounds of any misunderstanding or misapprehension in respect of the matters referred to in Clause 11.3 or on the grounds that incorrect or Insufficient information (including but not limited to the guidance notes issued and studies and reports commissioned by Government identified in the Concessionaire's Construction Proposals) was given to it by any person, whether or not in the employ of the Government nor, unless expressly provided in this Concession Agreement, shall the Concessionaire be relieved from any risks or obligations imposed on or undertaken by it in relation to the Works on any such ground or on the ground that it did not or could not foresee any matter which may, in fact, affect or have affected the design, construction, completion, testing and maintenance of the Works or the meeting of Its obligations In respect of the Works under this Concession Agreement.

## **12. Access and Facilities for Government's Agent**

The Concessionaire shall procure that:

- 12.1 office accommodation and facilities in accordance with Section 3.3.56 of Schedule 3, Part 1 shall be made available to enable the Government's Agent to maintain a presence on the Site and to perform its functions under this Concession Agreement; and

- 12.2 the Government's Agent shall have subject to complying with all relevant safety procedures unrestricted access to all parts of the Site and the Adjacent Areas and to any site or workshop where materials are being manufactured for the Works for the purposes of general inspection and of attending any test or investigation being carried out In respect of the Works; and
- 12.3 the Government's Agent shall have the right to attend monthly Site and other similar progress meetings.

### **13. Programmes and Quality Assurance**

13.1 There appears in Schedule 4 a copy of the Outline Programme based upon the programme appearing in Schedule 4 to the Heads of Agreement. The Concessionaire shall procure the preparation of the Works Programme in accordance with the Construction Contract and shall submit to the Government's Agent a copy thereof and a copy of any version thereof subsequently varied or amended in accordance with the Construction Contract in each case accompanied by a Works Programme Certificate in accordance with (and as defined in) the Construction Contract. The Concessionaire shall subject to Clause 17 [Extension of Time for Completion of the Works] be responsible for ensuring that the carrying out of design and the investigations works appearing in the Concessionaire's Construction Proposals and the construction and related works, the duration of all activities including design, the obtaining of consents, statutory approvals, construction, commissioning, testing and maintenance are all in accordance with the Works Programme and for the purposes of Schedule 2, Part 2, paragraph 4 the date specified for completion shall be the date calculated by reference to the end of the period for completion shown on the Outline Programme adjusted in accordance with Clause 17. Subject to the Government's rights of termination under Clause 32 [Termination by Reason of Default] by reason of:

13.1.1 Clause 31.4 (Events of Default);

13.1.2 Clause 31.5;

13.1.3 Clause 31.6 (to the extent that such persistent or flagrant neglect shall arise from a failure to proceed with the Works or any part thereof in accordance with such programme as may be agreed between the parties or determined by the Disputes Resolution Procedure at any time after receiving notice pursuant to Clause 32.2)

the sole remedy of the Government in respect of any default by the Concessionaire of its - obligations under this Clause 13.1 shall be a reduction of the RCRR in accordance with Schedule 2, Part 2, paragraph 4.

- 13.2 The Concessionaire shall prepare a Manufacturing Programme for each major component or part and shall submit the same to the Designer for review within 8 weeks of the appointment of the relevant sub-contractor or where no sub-contractor is appointed not less than 6 weeks before the commencement of manufacture of the relevant part. Each Manufacturing Programme shall accord with the Works Programme and shall include provision for design, design review procedure, manufacture, and installation of the part or parts.
- 13.3 Following review by the Designer, the Manufacturing Programme shall be submitted to the Government's Agent together with a Manufacturing Programme Certificate (as defined in



the Construction Contract) confirming that the same is in accordance with the Works Programme.

- 13.4 Schedule 8 contains the Concessionaire's outline of a quality manual and draft quality plans. It is the intent of the parties that the management organisation responsibilities and procedures for the quality assurance activities will be contained in a quality assurance programme to cover the Works cycle from design to procurement and construction, testing, completion and maintenance. This will be contained in:
- 13.4.1 a full quality manual; and
  - 13.4.2 a full quality plan; and
  - 13.4.3 the Designer's quality plan
  - 13.4.4 Within 21 days of the date of execution of this Concession Agreement the Concessionaire will submit to the Government's Agent drafts of the documents referred to in Clauses 13.4.1, 13.4.2 and 13.4.3 based upon the outline appearing in Schedule 8 and containing the requirements for testing. The Government's Review Procedure shall apply to the said drafts when submitted. When endorsed "received" by the Government's Agent, or when any comments endorsed have been incorporated within the drafts, the full quality manual, the full quality plan and the Designer's quality plan shall become control documents.
  - 13.4.5 At the same time as submitting the Designer's quality plan pursuant to Clause 13.5.1 the Concessionaire shall submit a draft detailed schedule of services to be carried out by the Designer and a draft detailed schedule of services to be carried out by the Checker. The draft schedules services will be developed from the schedules annexed to the appointment of the Designer or the appointment of the Checker as the case may be as referred to in Clauses 5.2.1.6 and 5.2.1.7 respectively. The Government's Review Procedure will apply to the said drafts when submitted. When endorsed "received" by the Government's Agent or when any comments endorsed have been incorporated therein the Concessionaire shall procure that the same shall be adhered to by the Designer or by the Checker as the case may be.
  - 13.4.6 During the Pre-Concession Period the Concessionaire shall submit in accordance with the Government's Review Procedure the quality procedures and method statements which shall contain the requirements for witnessing tests including provisions for notification and hold points. When endorsed "received" by the Government's Agent or when comments endorsed have been incorporated within the drafts the quality procedures and method statements shall become control documents.
  - 13.4.7 Not later than 1 year prior to the date for completion calculated from the Outline Programme the Concessionaire shall submit to the Government's Agent In accordance with the Government's Review Procedure its proposals for the installation, commissioning, testing and certification of the equipment for the collection of Tolls Including axle counters and wire loops. When endorsed "received" by the Government's Agent or any comments have been incorporated within the proposals the same shall become control documents.



13.5 The Concessionaire shall be responsible for ensuring that the Designer complies with the Designer's plan and that the Contractor complies with the full quality plan.

#### **14. Government's Changes**

14.1 The Government's Agent may issue a request in writing to the Concessionaire for a Government's Change. Where in the opinion of the Concessionaire a Government's Change would require an additional payment to the Contractor or the grant of an extension to the period for completion for the purposes of the Construction Contract or where the Government's Agent requests a Government's Change in accordance with Clause 38 (Fossils and Antiquities) the Concessionaire shall furnish the Government's Agent within 21 days of the request (or within such other period as may be agreed between the Concessionaire and the Government's Agent) with estimates of:

14.1.1 the value of the additional payment if any (providing all necessary supporting information, including calculations by reference to the values contained in the Construction Contract);

14.1.2 the length of any extension of time which the Concessionaire believes the Contractor would be entitled to under the Construction Contract;

14.1.3 the amount of any direct loss and/or expense to which the Contractor may be entitled under the Construction Contract.

14.2 The Concessionaire or, if the Concessionaire shall so elect, the Contractor on its behalf and the Government's Agent shall then take reasonable steps to agree the Concessionaire's estimates referred to in Clause 14.1. The agreement so reached when ratified by the Government shall be binding upon the Concessionaire and the Government as to the amount to be paid by the Government, the dates when payment is to be made and the extension of time to be granted. The Government shall confirm whether or not he ratifies such agreement as soon as practicable and shall be deemed not to have ratified in the absence of confirmation in writing to the Concessionaire within [28 days] of such agreement. Promptly after receiving confirmation of such ratification the Concessionaire shall cause the Designer to submit through the Contractor and the Concessionaire the Government's Change Certificate to the Government's Agent who shall within [14 days] of its receipt countersign and return it to the Concessionaire. Upon receipt of the countersigned Government's Change Certificate the Concessionaire shall cause the Contractor to Implement the Government's Change and the Government's Agent shall grant an extension of time under Clause 17 of the agreed length (if any).

14.3 If the parties are unable to agree the Concessionaire's estimates then subject to the Government agreeing to make payment therefor on an interim basis in accordance with the procedures for payment contained in the Construction Contract the Concessionaire shall cause the Designer to submit through the Contractor and the Concessionaire the Government's Change Certificate to the Government's Agent for countersigning by it.

14.3.1 The Concessionaire shall cause the Contractor to identify in any application for an interim payment certificate under the Construction Contract as a separate Item the amounts claimed in respect of such Government's Change and, to the extent appropriate, provide vouchers evidencing such amounts.

- 14.3.2 Evaluation of the value of the Government's Change shall be made by the Government's Agent applying the principles contained In the Construction Contract together with the application of principles relating to costs Incurred for delay and disruption, if any.
- 14.3.3 In granting an extension of time if any under Clause 17 the Government's Agent will have full regard to the desirability of the Contractor receiving timeous decisions under the Construction Contract.

## **15. Government's Review Procedure**

- 15.1 A submission by or through the Concessionaire of:
- 15.1.1 a proposed Concessionaire's Change in accordance with Clause 10.4; or
  - 15.1.2 an objection to any of the Government's Requirements or any Government's Change in accordance with Clause 10.5; or
  - 15.1.3 a notice of a proposed course of action on the part of the Concessionaire (including but not limited to submissions pursuant to Clause 13.5 (Programmes and Quality Assurance) which, under the terms of this Concession Agreement, is expressly required to be submitted to the Government's Review Procedure
- shall be dealt with in accordance with the provisions of Schedule 3, Part 5.
- 15.2 Notwithstanding the application of the Government's Review Procedure to matters of design the Concessionaire shall not seek to recover any losses or damages which may arise out of any failure of design and shall obtain from the Contractor waivers of liability in favour of the Government and the Government Agent in respect of any such claims.

## **16. Inspection and Bringing Into Operation of the Second Crossing**

- 16.1 Following receipt of the certificate of substantial completion of the Works in accordance with Schedule 3, Part 4, paragraph 6 the Government's Agent shall within 28 days of receipt of such certificate carry out an Inspection of the Second Crossing.
- 16.2 The Government's Agent shall within 14 days of carrying out such Inspection either:
- 16.2.1 issue a Permit to Use whereupon the Second Crossing shall as soon as practicable be made available for public use; or
  - 16.2.2 notify the Concessionaire in writing of his decision not to issue a Permit to Use and state the reasons for such decision.
- 16.3 The Government's Agent may refuse to issue a Permit to Use but only if:
- 16.3.1 there has been and continues to be material non-compliance with the Technical Requirements or with the Design and Certification Procedure or with the procedure for the installation, commissioning, testing and certification referred to in Clause 13.5.4 (Programmes and Quality Assurance); or

- 16.3.2 the Second Crossing has not been completed to such extent as to be suitable for public use; or
  - 16.3.3 there has been and continues to be a failure on the part of the Concessionaire to take appropriate corrective measures following prior notification, with reasons, by the Government's Agent of a material breach by the Concessionaire of its obligations under this Concession Agreement and of an intention not to issue a Permit to Use in the absence of appropriate corrective measures; or
  - 16.3.4 use of the Second Crossing would present a material risk to safety of Users or those authorised or permitted to pass under the viaduct or bridge forming the Works; or
  - 16.3.5 there has been and continues to be a breach of Clause 26.3.2 (Insurance Obligations).
- 16.4 In the event of service of a notice by the Government's Agent under Clause 16.2.2 and following completion by the Concessionaire of such further works or other measures necessary or appropriate to remedy or remove the cause of the refusal to issue a Permit to Use, the Concessionaire may give further notice to the Government's Agent and the provisions of Clauses 16.1 - 16.3 inclusive shall thereafter apply to such notice mutatis mutandis.
- 16.5 The Government shall procure that like orders and regulations as apply to the usage of the Existing Crossing shall apply to the extent appropriate to the Second Crossing so that the same shall be available for public use as a highway immediately following the issue of the Permit to Use.

## **17. Extension of Time for Completion of the Works**

- 17.1 If it appears that completion of the Works will be delayed by reason of:
- 17.1.1 a failure by the Government to give Vacant Possession in the circumstances set out in Clause 8.7.1;
  - 17.1.2 Force Majeure; or
  - 17.1.3 a Government's Change including a Government's Change pursuant to Clause 38 (Fossils and Antiquities); or
  - 17.1.4 an event of material damage being caused by a collision with the Works by a vessel, vehicle or aircraft which was or ought to have been under the control of a third party for whom the Concessionaire, the Contractor or its sub-contractors were not responsible and provided that the collision shall not have been caused by or contributed to in any significant way by the Concessionaire, the Contractor or its sub-contractors; or
  - 17.1.5 an event within Clause 27 (Interruption of Operations) except an event under Clause 27.3 where the parties agree or the Disputes Resolution Procedure finds that the Government was reasonable

then except where there has already been an agreement as to an extension of time with the Government's Agent under Clause 14.2 (Government Changes) or otherwise then subject to Clauses 17.2 and 17.3 there shall be granted under Clause 17.6 an extension of the period for such completion to the extent the delay suffered cannot reasonably be made good by the Concessionaire taking reasonable steps to mitigate the delay.

- 17.2 The Concessionaire shall give notice in writing to the Government's Agent as long as it can reasonably foresee an event occurring which will cause de.; to or impede completion of the Works or if the same is not foreseeable as soon as it shall become aware of such event but in any case within 28 days of such event becoming apparent to the Concessionaire of the Contractor or of the date upon which the same ought reasonably to have become apparent to the Concessionaire or the Contractor. Thereafter but in any event not later than [21 days] after such notification the Concessionaire shall give further written details to the Government's Agent which shall include:
- 17.2.1 a statement of which of Clauses 17.1.1 - 17.1.5 the claim is based upon; and
  - 17.2.2 details of the circumstances from which the delay or impediment arises; and
  - 17.2.3 details of the contemporary records which the Concessionaire will maintain to substantiate its claim; and
  - 17.2.4 details of the consequences whether direct or indirect which such delay or impediment may have upon completion of the Works; and
  - 17.2.5 details of any measures which the Concessionaire (subject to there being no objection in accordance with the Government's Review Procedure) proposes to adopt to mitigate the consequences of such delay or impediment.
- 17.3 If the Concessionaire has failed to comply with the strict requirements as to the giving of notice and further details under Clause 17.2 the Government's Agent shall request the Concessionaire to submit details to the Government as to the reasons for such failure. If the Government has not stated that he is satisfied with the reasons given within [28 days] of their receipt the Concessionaire may refer the matter to the Disputes Resolution Procedure and if either the Government is satisfied or the decision of the Disputes Resolution Procedure is that the reasons are sufficient then the Government's Agent shall proceed to the evaluation of the request or requests for extensions of time in accordance with Clause 17.6.
- 17.4 As soon as the Concessionaire shall receive or become aware of any supplemental information which may substantiate its claim then, provided that there shall have been no undue delay in either the receipt or becoming aware of such information, the Concessionaire may submit further particulars based on such information to the Government's Agent.
- 17.5 The Government's Agent will, after receipt of written details under Clause 17.2 or of further particulars under Clause 17.4, be entitled by notice in writing to require the Concessionaire to provide such further supporting particulars as it may reasonably consider necessary.
- 17.6 Subject to the Concessionaire complying with Clause 17.2 or in default thereof the Government or the Technical Panel being satisfied as to the sufficiency of the reasons for

default and subject to the Concessionaire putting forward proposals as to the reasonable steps which it intends to take in order to mitigate any delay the Government's Agent shall, as soon as reasonably practicable grant to the Concessionaire in writing, either prospectively or retrospectively, such extension of the period identified in the Outline Programme for substantial completion of the Works as may in the opinion of the Government's Agent be justified and the Government's Agent shall fix a revised period for completion. The Government's Agent shall be entitled to have regard to the fact of whether or not the Concessionaire actually took reasonable steps to mitigate delay in determining any subsequent applications for an extension of time.

17.7 The Concessionaire shall have no other claim against the Government in respect of delay or disorganisation of work arising from the occurrences mentioned above except where such is elsewhere expressly provided for in this Concession Agreement.

## **18. Connecting Roads, etc**

18.1 The Government shall carry out and complete the construction of the Connecting Roads on or before either the date shown for substantial completion of the Second Crossing in the Works Programme or such later date for completion as may be fixed by the Government's Agent In the event of extensions of time being granted under Clause 17 (Extension of Time for Completion of the Works). In the event of failure to complete such construction by such date or revised date or by the date of Issue of the Permit to Use (whichever shall be the later) the Government shall compensate the Concessionaire In accordance with Schedule 2, Part 2, paragraph 3 for each subsequent day of delay until the Connecting Roads have been completed.

18.2 The repositioning of the railway crossing at [ ] shown on plan 4 In Schedule 1, Part 1 shall be carried out by [ ] or in default thereof the Government shall commission the Concessionaire to have the same executed by the Contractor as Entrusted Works. The cost of such repositioning shall not be borne by the Concessionaire save that the Concessionaire shall make a contribution towards the expense of [AMOUNT AND CURRENCY] payable during the execution of the works of repositioning in accordance with Clause 41 (Payment).

18.3 The Government shall commission the Concessionaire to have executed by the Contractor as Entrusted Works the emergency and maintenance access roads at [LOCATION] shown on plan 5 in Schedule 1, Part 1 to the extent that the same are to be constructed on the Site and/or the Adjacent Areas.

## **19. Repair and Other Works**

19.1 The Government shall carry out and complete prior to the Concession Commencement Date at no cost to the Concessionaire the repair works to the Existing Crossing currently being executed and the construction of an additional toll booth within the toll plaza for the Existing Crossing at a location to be determined by the Government.

19.2 In the event that a latent defect In the Existing Crossing shall become patent and such defect ought reasonably to be remedied or rectified during the Concession Period the parties shall endeavour to agree the required remedial action to be taken and in default of agreement the difference shall be referred to the Disputes Resolution Procedure. The costs of and associated with execution of the remedial work shall be borne by the Government.



- 19.3 The Concessionaire shall be responsible for managing the execution of such remedial works and, unless the parties otherwise agree, all work including design work connected with such remedial works shall be subject to competitive tender and to a review process by the Government similar to the review process adopted in connection with the Works.
- 19.4 For the avoidance of doubt except as expressly provided in Schedule 2, Part 2, paragraph 3 the Government shall have no liability to the Concessionaire in respect of any loss of profit, loss of income, loss of contract or any other losses arising out of or in connection with the existence of a latent defect and the execution of the remedial works other than bearing the cost of the execution of the remedial works.
- 19.5 The Government's Representative shall not more than eight months before the expected Concession Commencement Date give two months' notice expiring not later than [5 months] before such date to the Concessionaire of its intention to commence a joint visual inspection of the Existing Crossing with the Concessionaire. For the purposes of this Concession Agreement the, term "latent defect" shall mean any defect which could not reasonably have been ascertained during such visual inspection but shall not include those defects which are identified in the draft maintenance manual contained in Schedule 10, Part 3 provided that the amount of welding shall not exceed the amount stated In Section 7.1.2 of Schedule 10, Part 2, Section 2.
- 19.6 If during the visual inspection referred to in Clause 19.5 defects other than of the type identified in Clause 19.5 shall become apparent then the Government may elect either to have them rectified himself or to have the Concessionaire assume responsibility for carrying them out in which case the provisions of Clauses 19.2 and 19.3 shall apply to such remedial works.
- 19.7 The Government shall repair and maintain the Approach Roads for the duration of the Concession Period having regard to the character of the highway and the traffic which is reasonably to be expected to use it and by the standard of maintenance appropriate for a highway of that character and used by such traffic.
- 19.8 When carrying out winter maintenance for the Approach Roads, namely the application of treatment for and removal of ice and snow or when reasonably requested by the Concessionaire so to do, the Government shall carry out the same on the toll plaza and carriageways of the Crossings.

## **20. Traffic Management**

- 20.1 The Concessionaire shall carry out the traffic management and regulation functions in accordance with the provisions of Schedule 9.
- 20.2 Within 2 months of Royal Assent the Concessionaire shall submit to the Government's Representative in accordance with the Government's Review Procedure a Schedule of Lane Closures for the period commencing on the Concession Commencement Date and ending on the 31st December of the third year following the year in which the Concession Commencement Date falls. On the 1st October of the calendar year following the year in which the Concession Commencement Date falls and thereafter on the 1st October of every subsequent year the Concessionaire shall submit to the Government's Representative in accordance with the Government's Review Procedure a Schedule of Lane Closures for the three year period commencing on the 1st January of the subsequent year.



- 20.3 If a requested lane closure period is unacceptable, the Government's Representative shall notify the Concessionaire thereof with reasons and shall indicate a period when such unacceptable period can be re-scheduled on the basis that each such re-scheduled period shall be as close as reasonably practicable to the requested lane closure period and of equal duration. The Concessionaire shall thereupon amend the relevant Schedule of Lane Closures accordingly and resubmit the same to the Government's Representative in accordance with the Government's Review Procedure.
- 20.4 The Concessionaire shall not effect any lane closures for maintenance or repair works save in accordance with:
- 20.4.1 a Schedule of Lane Closures to which no objections have been made under the Government's Review Procedure;
  - 20.4.2 the procedures set out in Clause 20.6; or
  - 20.4.3 the procedures to be established under Clause 20.7.
- 20.5 Notwithstanding the Government's Review Procedure the Government's Representative may upon 180 days prior written notice require the Concessionaire to reschedule a lane closure period provided, however, that the Government's Representative may not require that such lane closure period be brought forward any earlier than [180 days] from the date of notification of such requirement or that a lane closure within such [180 day] period be deferred without the consent of the Concessionaire.
- 20.6 If the need arises for un-programmed maintenance or repair works (not being an emergency) otherwise than in accordance with an approved Schedule of Lane Closures, the Concessionaire shall forthwith notify the Government's Representative of such need and request approval of the proposed commencement date and estimated duration of the works. The Government's Representative's approval of such works shall not be unreasonably withheld or delayed.
- 20.7 The Concessionaire shall co-operate with the Government's Representative in establishing, before the date of Vacant Possession, maintenance, operating and traffic management procedures, including emergency procedures, for the Existing Crossing and, before the date of Issue of the Permit to Use, like procedures for the Second Crossing.
- 20.8 The Government shall use reasonable endeavours to co-ordinate his maintenance programme for the Approach Roads with the Schedules of Lane Closures so as to minimise any disruption to the operation of the Project. Other than in the case of emergency In which case the Government's Representative shall give immediate notice to the Concessionaire of the carrying out of works the Government's Representative shall at the time of considering the Schedule of Lane Closures give notice to the Concessionaire of any intended repair or maintenance works of which the Government's Agent or the Government is aware.

## **21. Entrusted Works**

- 21.1 The Concessionaire shall carry out in accordance with the provisions of this Clause 21 all and any Entrusted Works as the Government may specify save that in so specifying the Government shall not require Entrusted Works to be carried out in a manner which unnecessarily impedes or restricts traffic flows.

- 21.2 The Government shall notify the Concessionaire of its intention to require the Concessionaire to carry out Entrusted Works and shall include in such notice a description and/or specification of such Entrusted Works adequate to enable the Concessionaire to assess the nature and extent thereof and the likely effect upon Operations together with an indication of the time by which such Entrusted Works are to be completed. The Concessionaire shall submit its comments on such notice within such period as the Government may reasonably require.
- 21.3 The Government shall, having due regard to the Concessionaire's comments, cause the preparation of all documents and materials necessary and appropriate for the Concessionaire to invite tenders for the Entrusted Works. The Concessionaire shall take such steps as the Government may reasonably require to solicit tenders and/or shall enter into a contract or contracts for the carrying out of the Entrusted Works with a contractor or contractors of appropriate standing chosen by the Government after consultation with the Concessionaire. The said contract or contracts shall be managed by the Concessionaire and be subject to such procedures for supervision and review as the Government may reasonably require.
- 21.4 The Concessionaire shall be entitled to reimbursement in full of all costs due under the contract or contracts for the carrying out of Entrusted Works together with such element to cover the Concessionaire's profit and overheads as may be reasonable in relation to the carrying out of the Entrusted Works.

## **22. Taking Over by Concessionaire of Staff Employed on the Existing Crossing**

- 22.1 It is the intent of the parties that the Concessionaire shall offer to employ as from the Concession Commencement Date as many of the Existing Employees as are required to carry out its proposals for the operation and maintenance of the Existing Crossing appearing in Schedule 10 and that the terms of each offer of employment including future pension arrangements shall be no less favourable than those currently enjoyed by the recipient of such offer.
- 22.2 The Concessionaire shall, on or before [DATE] submit to the Government full details of the terms of employment, including without limitation terms as to future pension arrangements, which the Concessionaire proposes to make in respect of such of the Existing Employees as It intends to offer to employ in accordance with Clause 22.1, together with copies of draft agreements for giving effect to such proposals.
- 22.3 The Concessionaire shall make such revisions to the terms, arrangements and draft agreements referred to in Clause 22.2 as the Government may reasonably require in writing to ensure:
- 22.3.1 that, in so far as the application of terms as to future pension arrangements by the Concessionaire to Existing Employees who will be transferred into the employment of the Concessionaire will be a change in the terms of employment of such persons, that change will not be materially to their detriment;
- 22.3.2 that the funding of those pension arrangements, and the assumptions on which those arrangements in so far as they relate to funding) are proposed, are adequate.
- 22.4 Following execution of this Concession Agreement the Concessionaire shall instruct the Concessionaire's Actuary to negotiate in good faith with Actuary A with a view to agreeing

the actuarial method and assumptions to be used for the purpose of calculating the Pension Transfer Value, a mechanism for any adjustment thereto arising from any major change in the conditions underlying that agreed method or any of the agreed assumptions before the Concession Commencement Date and a mechanism for determining the Pension Transfer Value after the Concession Commencement Date in the event that the Concessionaire and The Municipality are unable to agree the same. If by the time of the Bill becomes law either:

22.4.1 such agreement has not been reached; or

22.4.2 such agreement having been reached, the Municipality has not undertaken in a manner reasonably satisfactory to the Concessionaire to procure that the Pension Transfer Value (together with an appropriate adjustment in respect of the period from the Concession Commencement Date to the date of actual payment of the Pension Transfer Value) will be paid to the pension scheme to be established by the Concessionaire pursuant to the foregoing provisions of this Clause 22;

then unless the Concessionaire and the Government otherwise agree in writing the Concessionaire shall not be obliged to accept any liability in respect of the Accrued Rights of any of the Existing Employees. In no circumstances shall any dispute between the Municipality and the Concessionaire or relating to the calculation of the Pension Transfer Value be determined by the Disputes Resolution Procedure.

22.5 In the event that [EMPLOYMENT LEGISLATION] applies to any Existing Employees whom the Concessionaire is not bound to employ pursuant to Clause 22.1, then the Government shall as between the Concessionaire and the Government hold harmless the Concessionaire from any claims made by those Existing Employees.

### **23. Operation and Maintenance**

23.1 Subject to the Concessionaire being given Vacant Possession thereof the Concessionaire shall be responsible as from the Concession Commencement Date for the maintenance of the Existing Crossing in accordance with the principles set out in Schedule 10.

23.2 The Concessionaire shall prepare and submit in accordance with the Government's Review Procedure to the Government's Agent within [3 months] of issue of the Permit to Use a maintenance manual for and as built drawings of the Second Crossing. The said maintenance manual shall follow the format of the manual contained in Schedule 10, Part 3.

23.3 The Concessionaire shall maintain the Second Crossing in accordance with the provisions set out in Schedule 10 and the manual prepared and submitted pursuant to Clause 23.2.

23.4 Subject to the Concessionaire being given Vacant Possession thereof the Concessionaire shall operate the Existing Crossing as from the so Concession Commencement Date and the Second Crossing as from the date of issue of the Permit to Use in accordance with the principles set out in Schedule 10.

23.5 The Concessionaire shall not materially vary the provisions for operation and maintenance of either of the Crossings without the prior written agreement of the Government.

- 23.6 The Concessionaire shall use prudent commercial endeavours to appoint a contractor or contractors for the operation and maintenance of both the Crossings upon such terms as it shall think fit save that:
- 23.6.1 the terms of the first such contract shall not materially depart from the heads appearing in Schedule 11 and shall be subject to the Government's Review Procedure; and
- 23.6.2 the terms of any contract which shall be due to expire within [3 years] of the expected date of termination of the Concession shall be subject to the prior written approval of the Government, such approval not to be unreasonably delayed or withheld. Such contract shall, if reasonably practicable, be for a period of [5 years] and shall require the contractor to give a [15%] performance bond for the final year in terms reasonably acceptable to the Government and which bond shall be capable of being assigned to the Government.
- 23.7 The Concessionaire shall allow any of the Relevant Authorities access to the Site throughout the Concession Period to carry out relevant work (including without limitation surveys and inspections) to either or both Crossings subject, other than in the case of an emergency, to reasonable notice being given. Whenever practicable such access may be limited so that the same shall not unnecessarily impede or restrict traffic flows.

## **24. Legislation**

- 24.1 Except as provided for in Clause 6 (Effect of the Bill etc) the Concessionaire will be solely responsible for ensuring compliance with all applicable legislation.
- 24.2 The Concessionaire confirms that it will procure that the Contractor shall:
- 24.2.1 not unlawfully discriminate on the grounds of colour, sex, religion, political opinion or nationality and in particular but without limitation the Contractor shall not discriminate on the grounds of nationality in the selection of sub-contractors; and
- 24.2.2 that works and supplies to a value at [DATE] prices of not less than [ ] of the Contract Sum (as defined in the Construction Contract) shall be made the subject of international competitive bidding procedures in accordance with [PROCUREMENT LAWS].

## **25. Liability with Respect to Users and Third Parties**

As between the Concessionaire and the Government and subject to any provisions in the Act which may extend for the benefit of the Concessionaire, the Concessionaire alone will bear without recourse to the Government any responsibility for damage arising out of a breach of its obligations under the Concession Agreement and suffered by Users or by any other third parties caused howsoever by the Concessionaire, its employees, agents or contractors of any tier. The Concessionaire will hold the Government fully protected and indemnified in respect of any such damage.

## **26. Insurance Obligations**

26.1 The Concessionaire shall, provided that the same shall be available at commercial rates of premium, take out and maintain or procure the taking out and maintenance of the following insurance:

26.1.1 during construction:

26.1.2 during operation

26.1.2.1 full structure, plant and equipment (property damage);

26.1.2.2 full third party;

26.1.2.3 business disruption insurance other than for latent defects;

26.1.2.4 employees' compensation.

26.2 The Concessionaire shall furnish to the Government copies of insurance policies in terms reasonably acceptable to the Government and from time to time proof that all relevant premia have been paid, that the relevant policy or policies remain in existence and that the Government's interest is endorsed thereon.

26.3 Without prejudice to the generality of Clause 26.2, the Concessionaire shall:

26.3.1 prior to the Concession Commencement Date:

26.3.1.1 supply such evidence of compliance with Clause 26.1.2 as may be reasonably requested by the Government in relation to the Existing Crossing; and

26.3.1.2 supply such evidence of compliance with Clause 26.1.1 as may be reasonably requested by the Government in relation to the Works;

26.3.2 prior to issue of the Permit to Use supply such evidence of compliance with Clause 26.1.2 as may be requested by the Government in relation to the Second Crossing.

26.4 The Concessionaire shall investigate and report to the Government annually as to whether latent defect insurance is available for the Existing Crossing and whether business disruption insurance linked to such latent defect insurance is available. The Government may request the Concessionaire to effect such insurance subject to agreement being reached between the parties as to compensation for the premia.

## **27. Interruption of Operations**

27.1 Except as otherwise expressly provided in this Concession Agreement In the event of any act or omission by the Government or the Government adversely affecting the rights and obligations of the Concessionaire under this Concession Agreement then the Concessionaire shall notify the Government's Agent or Government's Representative as the case may be stating the basis of the claim and the remedy required.



- 27.2 In the event of any third party claiming title under or through the Government or title paramount to any part of the Site and, during the construction of the Works, the Adjacent Areas or otherwise asserting rights granted by the Government or by any person deriving title under or through the Government and of such claim adversely affecting the rights and obligations of the Concessionaire under this Concession Agreement, then the Concessionaire shall notify the Government stating the basis of the claim and to the extent that the claim is admitted or sustained then except to the extent that the Government may where appropriate perfect his title in which case he shall do so:
- 27.2.1 if the claim is made prior to the Concession Commencement Date and to the extent that the result is analogous to an Adverse Relevant Event then the provisions of Clause 6.3.1.1 - 6.3.1.3. inclusive shall apply mutatis mutandis;
- 27.2.2 If the claim is made after the Concession Commencement Date to the extent that the same is analogous to an Adverse Relevant Event the provisions of Clause 6.6 and following shall apply.
- 27.3 In the event that the Government may consider that a breach of an obligation under this Concession Agreement by the Concessionaire may create an immediate and serious threat to public safety the Government may give notice requiring the Concessionaire forthwith to take steps in order to mitigate or preclude such threat in the event that the Concessionaire shall fail to take such steps as the Government may think necessary within such time as the Government shall think fit then the Government may employ others to take such steps as may be necessary to mitigate or preclude such threat. To the extent that the parties shall agree or that the Disputes Resolution Procedure shall find that no such breach had occurred or the Government was not reasonable in requiring the Concessionaire to take such steps, then the Government shall compensate the Concessionaire for the costs of taking such steps including without limitation amounts (if any) reasonably and properly payable to the Contractor and any additional losses (other than a Net Real Revenue Loss which shall be recovered in accordance with Schedule 2, Part 2, paragraph 3) incurred by the Concessionaire through the Government having taken such action. Such costs and losses shall be recovered In accordance with the provisions of Clause 41 (Payment). In all other cases the costs and losses shall be borne by the Concessionaire.

## **28. Intellectual Property and Confidentiality,**

- 28.1 The Concessionaire shall:
- 28.1.1 make available to the Government without charge such materials documents and data of any nature acquired or brought Into existence In any manner whatsoever by the Concessionaire as he may reasonably request for the purposes of exercising his rights or carrying out his duties under this Concession Agreement or carrying out any statutory duty; and
- 28.1.2 use all - reasonable endeavours to make available to the Government such materials and documentation, acquired or brought Into existence by third parties as he reasonably request for the purposes referred to in Clause 28



- 28.2 The Concessionaire:
- 28.2.1 hereby grants the Government a transferable nonexclusive royalty free licence (carrying the right to grant sublicenses) to use the rights to all and any Intellectual Property which may be vested In the Concessionaire; and
- 28.2.2 where any such Intellectual Property rights are vested in any third party, shall use all reasonable endeavours to procure the grant of a like licence to the Government for any purpose related to the construction of the Second Crossing and the operation, repair, reconstruction and maintenance of both Crossings.
- 28.3 The Concessionaire shall indemnify the Government from and against all claims and proceedings made or brought during the Concession Period for or on account of infringement of any Intellectual property rights in respect of any plant or machinery and equipment used In connection with the Works or Operations.
- 28.4 The Concessionaire may use without charge but without any liability on the part of the Government, all documents which are or were acquired or brought into existence by or on behalf of the Government for the purposes of the construction or maintenance of the Existing Crossing or the construction of the Second Crossing.
- 28.5 Each party shall hold in confidence all documents and other information whether technical or commercial supplied by or on behalf of the other party (including without limitation all documents and information supplied in the course of proceedings under the Disputes Resolution Procedure) and shall not except with the other party's written authority or as otherwise required by law publish or otherwise disclose the same otherwise than for the purposes contemplated by this Concession Agreement provided that the Concessionaire may subject to appropriate confidentiality restrictions pass such documents and other information which it is obliged to supply by the terms of the Funding Agreements.
- 28.6 The Concessionaire shall not without the prior written authority of the Government publish alone or in conjunction with any other person any articles, or other material relating to any dispute arising under the Concession Agreement nor impart to any radio or television programme any information regarding any such dispute.
- 28.7 In the event that the Concessionaire does not settle or defend proceedings relating to any infringement or alleged infringement of any of the Intellectual Property then the Government may, at his option have the conduct of the same and the Concessionaire shall, at the request of the Government, co-operate fully with the Government in any such action, claim or proceeding.
- 28.8 The Concessionaire shall at the request of the Government execute any document, swear any declaration or oath and do all such things as may be reasonably requested by the Government for the purpose of confirming or registering a licence granted pursuant to Clause 28.2.
- 28.9 Clause 28 shall survive the termination of this Concession Agreement irrespective of the reason for termination.

## 29. Tax

- 29.1 The tax regime within which the Concessionaire has prepared the financial proposals appearing in Schedule 2 is that ruling at [DATE]. Each change to the tax regime shall be dealt with in accordance with the following procedures
- 29.1.1 If the change is made prior to the Concession Commencement Date and increases the cost of the Debt to the Concessionaire relating to the taxation of index-linked receipts in the hands of the providers of such Debt then save as provided In Clause 29.3 the provisions of Clauses 8.3.1.1 - 8.3.1.3 Inclusive shall apply mutatis mutandis;
- 29.1.2 if the change is made prior to the Concession Commencement Date but is not a change referred to in Clause 29.1.1 then, save as provided In Clause 29.3, the provisions of Clause 6.3.2 (if the change is adverse to the Concessionaire) or Clause 6.3.3 (if the change is beneficial to the Concessionaire) shall apply rnutatis rnutandis;
- 29.1.3 if a change of the type referred to in Clause 29.1.1 is made on or after the Concession Commencement Date which seriously impedes the Concessionaire's ability to repay the Debt and to redeem the Preference Shares and to pay interest thereon in accordance with the Funding Agreements not later than the Maturity Date (as such date may be extended by the provisions for deferral of payments but ignoring the effect of deferral of payments arising out of the event in question) and to discharge its other obligations (including without limitation its obligations in relation to the Government's Subordinated Debt and any Short-Fall Finance) incurred in connection with the Concession Agreement then the Toll and/or RCRR will be increased to the extent necessary to ensure that the position of the creditors in respect of the Debt and the holders of the Preference Shares is no better and no worse than if such a change had not occurred. If the parties are unable to agree as to the level of any increase in the Toll and/or RCRR then the question of the level of any such increase shall be referred to the Disputes Resolution Procedure;
- 29.1.4 if a change of the type referred to in Clause 29.1.2 is made on or after the Concession Commencement Date then the provisions of Clauses 6.6-6.9 inclusive shall apply on the basis that the change constitutes an Adverse Relevant Event or, as the case may be, a Beneficial Relevant Event.
- 29.2 The Concessionaire has prepared the financial proposals appearing in Schedule 2 based on an assumption that the Concessionaire is not required to account for [SALES TAX]. in respect of Tolls. If that assumption should be incorrect a change in the tax regime shall be deemed to have occurred on the date of this Concession Agreement and the provisions of Clauses 6.3.1.1 - 8.3.1.3 Inclusive shall apply mutatis mutandis. For the avoidance of doubt the Concessionaire will not voluntarily elect to waive any exemption from [SALES TAX].
- 29.3 For the purpose of applying Clauses 6.3.1.1 - 8.3.1.3, 6.3.2 and 6.3.3 respectively in accordance with Clauses 29.1.1, 29.1.2 or 29.2 in the event that a rerun of the Financial Model is required such re-run shall be carried out as soon as practicable and need not be deferred to the date of completion of the Legislative Process.

### **30. Force Majeure**

30.1 If the parties agree or it is determined through the Disputes Resolution Procedure that Force Majeure:

30.1.1 has prevented the Concessionaire from, or delayed the Concessionaire in, fulfilling any obligation under this Concession Agreement, the Concessionaire may:

30.1.1.1 make application to the Government's Agent for an extension of time pursuant to Clause 17 (Extension of Time for Completion of the Works); and/or

30.1.1.2 in the event of a Net Real Revenue Loss being caused, seek additional finance in accordance with the provisions of Schedule 2, Part 4, paragraph 2;

30.1.2 has rendered the performance of this Concession Agreement, financially or practicably Impossible or affected the performance of this Concession Agreement for a period of time which has a fundamental effect on the rights or obligations of either of the parties hereto or that as a consequence of Force Majeure lenders to or holders of preference shares in the Concessionaire would thereby be put in a substantially worse position than they would have been in had there been no such event of Force Majeure, then the Concession, or the right thereto, shall terminate.

30.2 In the event of termination pursuant to Clause 30.1.2, the Government shall pay to the Concessionaire such sum as shall be necessary in accordance with Clause 34.1.1.

### **31. Events of Default**

The following are events of default:

31.1 the Concessionaire enters into voluntary or involuntary liquidation or dissolution (other than a solvent liquidation, with the prior consent of the Government for the purposes of amalgamation or reconstruction), or makes a composition or an arrangement with, or assignment in favour of, its creditors, or is the subject of a proposal for a voluntary arrangement for a composition of debts or scheme of arrangement approved in accordance with [INSOLVENCY LEGISLATION] there is an appointment of an administrator, or agrees to carry out the Concession under a committee of Inspection of its creditors, or a receiver, administrator or administrative receiver (as defined in [INSOLVENCY LEGISLATION]), trustee or liquidator is appointed over any substantial part of its assets, or under any law or regulation relating to reorganisation, arrangement or readjustment of debts, or any resolution passed in connection with its dissolution or liquidation or any petition is filed or similar proceedings are commenced for the appointment of an administrator, receiver, administrative receiver, trustee or liquidator which remains undischarged for a period of [12 weeks] from the date of filing or commencement unless such petition or proceedings are being actively contested by the Concessionaire In good faith and by appropriate injunctive or other proceedings.

31.2 the Concessionaire amalgamates, merges or consolidates with any person except on terms and with the person having prior written approval of the Government;

31.3 without the prior consent of the Government:

- 31.3.1 the Concessionaire becomes the subsidiary of any company (other than a company which is a shareholder of the Concessionaire at the date hereof or an Associated Company);
- 31.3.2 the right to cast more than [50 per cent] of the votes capable of being cast on a poll at general meetings of the Concessionaire becomes, in any circumstances other than as described above, vested in any one person or any two or more persons acting together other than in accordance with the terms of any charge over the shares of the Concessionaire granted by way of security for any borrowings of the Concessionaire permitted under this Concession Agreement; and for the purposes of Clauses 31.3.1 and 31.3.2:
- “subsidiary” has the meaning given to it in [RELEVANT LEGISLATION]; and two or more persons shall be deemed to be acting together if they would be treated doing so under [RELEVANT LEGISLATION];
- 31.4 repudiation of this Concession Agreement by the Concessionaire; or
- 31.5 the Concessionaire without good cause ceasing to design or construct the Works or maintain and operate either of the Crossings; or
- 31.6 despite a previous warning in writing the Concessionaire neglecting persistently or flagrantly to comply with any-of its obligations under this Concession Agreement;
- 31.7 serious deterioration in the financial condition of the Concessionaire including a notice received by the Government of an intention to withdraw financial commitments in favour of the Concessionaire or the material change or likelihood of material change in the Financial Terms without the prior written consent of the Government provided that Clause 31.7 shall not apply to either of the following events:
- 31.7.1 any payment in respect of any Debt not being made by the Concessionaire by virtue of the provisions of the Inter-Creditor Agreement; or
- 31.7.2 any call by [IFI] upon the Letter of Credit to be issued pursuant to the Senior Debt Facility.

## **32. Termination by Reason of Default**

- 32.1 The Government shall be entitled:
- 32.1.1 in the case of events of default referred to in Clauses 31.1, 31.2 or 31.3, to determine the Concession or the right thereto forthwith on written notice; or
- 32.1.2 in the case of events of default referred to in Clauses 31.4 to 31.7, to serve notice of default on the Concessionaire allowing a reasonable period, being not less than 7 days and not more than 2 months, requiring the Concessionaire to remedy the breach or put forward a programme for the remedying of the breach (including where appropriate a termination of the Contractor’s employment in accordance with Clause 5.5.1 (Financial Terms and Security Documents)).

32.2 In the event of service of a notice under Clause 32.1.2, the Concessionaire shall remedy the breach before the expiry of the relevant Period as stated in the said notice or in accordance with such programme as may have been accepted in writing by the Government or within such other period or programme as may be agreed or determined by the Disputes Resolution Procedure as being reasonable. If the breach is not so remedied, and unless the said notice has been withdrawn by further written notice, the Government may thereupon terminate the Concession or the right thereto forthwith on written notice.

### **33. Termination by Reason of Financial Return or Expiry of Time**

The duration of the Concession Period shall be established and the Concession shall terminate in accordance with the provisions of Schedule 2, Part 3 unless the Concession or the right thereto shall have previously been determined in accordance with the provisions of this Concession Agreement.

### **34. Consequences of Termination**

34.1 Save as otherwise expressly provided, upon termination of the Concession or of the right thereto:

34.1.1 save as otherwise provided in Clause 34.1.2 all assets and liabilities of the Concessionaire shall be vested in the Government and, in the case of termination under Clauses 6.8 and 6.9.3 (The Effect of the Bill etc) and Clause 30 (Force Majeure) the Government shall in particular but without limitation pay to the Concessionaire (to the extent that such liabilities have been incurred) such sum as shall be necessary to:

34.1.1.1 discharge the Senior Bank Facility and the [IFI] Facility;

34.1.1.2 discharge any other loans permitted by this Concession Agreement (including any permitted working capital facility and any outstanding Short-Fall Finance);

34.1.1.3 redeem the Debenture Stock early in accordance with the early redemption provisions set out in the Trust Deed;

34.1.1.4 redeem the Preference Shares: in the case of Clause 30 [Force Majeure] applying at par and in the cue of Clauses 6.8 and 6.9.3 [The Effect of the Bill, etc] applying by paying the par value and the Compensation Amount to which the holders of the Preference Shares are entitled;

34.1.1.5 pay to the Contractor such sum as shall be the difference between monies held by the Concessionaire for the account of the Contractor and the costs incurred by the Contractor in performing its obligations under the Construction Contract up to the date of termination, including the costs of protecting the Works and demobilising; and

34.1.1.6 pay any unwinding costs incurred by the Concessionaire in connection with interest rate swaps arranged for the Concessionaire solely for the purpose of hedging its interest rate exposure under the Funding Agreements;



**PROVIDED THAT** if the Concessionaire makes any profit by reason of the unwinding of any interest rate swaps referred to in Clause 34.1.1.6 or if it can be demonstrated that investors in and lenders to the Concessionaire would thereby be put in a better position than they would have been in had there been no such termination under Clauses 6.8 or 8.9.3 or event of Force Majeure, the amount otherwise payable by the Government shall be reduced by the amount of such profit (after taking account of any tax payable by the Concessionaire on such profit) or as the case may be to the extent necessary to put such investors and lenders in no better or worse position than they would have been in had there been no such termination or event of Force Majeure;

- 34.1.2 under Clause 6.9.2 or Clause 32 (Termination by Reason of Default, all assets. (other than cash investments described in the Government Subordinated Debt facility which shall be applied in satisfaction of the loans and debts described in Schedule 2, Part 4 in accordance with the priorities therein specified) and such liabilities of the Concessionaire (other than the Debt and other loans and debts) as the Government shall by notice in writing elect to take shall be vested in the Government and in the case of assets free of all set-offs liens, charges. or other security interests.
- 34.2 Subject to Clause 34.1, upon termination of the Concession or of the right thereto:
- 34.2.1 the obligations upon the Concessionaire and the Government hereunder shall cease other than under those Clauses which expressly provide for continuing obligations or which are required to give effect to such termination or the consequences of such termination;
- 34.2.2 if during the execution of the Works and if the Government so elects, the Construction Contract shall be novated to it or the Construction Plant and all materials and plant shall remain available to him for the purposes of completing the Works;
- 34.2.3 the Concessionaire shall hand over to the Government the Existing Crossing and the Second Crossing in accordance with the standard contained in Schedule 10 and in accordance with the requirements of the Concession Agreement;
- 34.2.4 the Government shall purchase from the Concessionaire at a fair market value and free from any security interest all stock of materials, road vehicles, spare parts and other moveable property owned by the Concessionaire and reasonably required in connection with the operation and maintenance of both Crossings;
- 34.2.5 the Concessionaire shall deliver to the Government “as built drawings” showing all alterations made since the commencement of operation for each of the Crossings and maintenance and operation manuals for the same;
- 34.2.6 In the event that the ACRR exceeds the RCRR the provisions of Schedule 2, Part 3, paragraph 5 shall apply.
- 34.3 In the event that on termination of the Concession otherwise than under Clause 32 there are monies standing due to the Government whether:-
- 34.3.1 being unpaid Government’s Subordinated Debt; or



34.3.2 any other debt owing to the Government under the terms of this Concession Agreement the Concessionaire shall be relieved of the obligation to pay such monies.

### **35. Requirement for the Concessionaire to Act as Agent of the Government**

The Concessionaire may be required by the Government in writing, such notice to be given not less than [12 months] prior to the expected end of the Concession Period, to collect or procure a company reasonably acceptable to the Government to collect tolls and operate the Crossings as an agent of the Government commencing from the end of the Concession Period for as long as the Government may require provided that such period shall not exceed [5 years] in the aggregate. The basis of this arrangement will be the same as that agreed by the Concessionaire with the Operator for the [5 years] preceding the end of the Concession Period subject to the Government being satisfied prior to the execution of such operating agreement that this arrangement is reasonable in terms of responsibilities, obligations, incentives and fee structure.

### **36. Fossils and Antiquities**

36.1 Fossils and Antiquities as between the Government and the Concessionaire shall be deemed to be the absolute property of the Government. The Concessionaire shall take all reasonable precautions to prevent its workmen or any other persons from removing or damaging any such article or thing and shall immediately on discovery thereof and before removal inform the Government's Agent of such discovery and carry out such instructions as the Government's Agent may give as to the disposal of the same.

36.2 No extensions of time will be granted for delays nor increases in costs allowed caused by compliance with Clause 36.1 except to the extent that there shall be material delay or material Increase In the cost of the execution of the Works in which case the Government's Agent shall request a Government's Change pursuant to Clause 14.1 (Government's Changes).

### **37. Records**

37.1 The Concessionaire shall maintain and make available for inspection by or on behalf of the Government those records relating to design, construction, operation and maintenance set out in Schedule 12.

37.2 The Concessionaire shall provide to the Government as soon as may be available and in any event within [60 days] after the end of the first [6 months] of its financial years beginning with the current one, certified true copies of its unaudited accounts as at the end of and for that [6 month] period and, as soon as they shall have been finalised but no later than [180 days] after the end of each accounting reference period of the Concessionaire part or all of which falls between the date of this Concession Agreement and the date of termination of the Concession, a copy of the Concessionaire's audited accounts in respect of that period prepared In accordance with [COMPANY LEGISLATION] together with copies of all related directors' and auditors' reports.

37.3 If at any time after the provision to him of the documents referred to in Clause 37.2 above the Government notifies the Concessionaire of any matter which gives him concern and which arises In connection with anything in such documents, the Concessionaire shall Instruct its auditors to prepare as soon as is reasonably practicable a report on that matter,

giving such further Information, amplification or explanation as is reasonable having regard to the contents of the Government's notification; and the Concessionaire shall provide the Government with a copy of that report within seven days of the Concessionaire's receipt of it from its auditors.

### **38. Custody of Financial Model**

Within [5 days] of execution of this Concession Agreement, 12 copies of the Financial Model necessary for the performance of the Primary Test, the Secondary Test or the Base Case Test will be lodged by [ ] (after verification of the identity of Financial Model by [ ] on behalf of the Government) with [ ] to be held in custody upon agreed terms and conditions. The parties shall agree a substitute custodian in the event that [ ] shall cease to act as custodian. The costs of these custody arrangements shall be met in the first instance by the Government who may require payment of one half of such costs by the Concessionaire.

### **39. Notices**

39.1 Notices shall be deemed to have been received:

39.1.1 by hand and by recorded delivery when so delivered;

39.1.2 by telex upon sending subject to receipt of authorised answerback;

39.1.3 by facsimile upon sending subject to confirmation of uninterrupted transmission by a transmission report.

39.2 The address for service for each of the parties hereto shall be the respective address appearing against its or his name at the beginning of this Concession Agreement. Service upon the Government's Agent shall be to the address shown in the definition at Clause 1. The Government shall notify the Concessionaire of the address for service upon the Government's Representative.

39.3 Either party may change its or his nominated address to another address in [COUNTRY] but only by prior notice to the other party with a copy to the Government's Agent and to the Government's Representative. The Government's Agent and the Government's Representative may change their respective addresses by prior notice to each other and to the parties hereto.

### **40. Further Assurances**

40.1 Each of the parties agrees to execute and deliver all such further instruments and do and perform all such further acts and things as shall be necessary or expedient for the carrying out of the provisions of this Concession Agreement.

40.2 Without prejudice to the generality of the above, the Government shall at the written request of the Concessionaire afford all reasonable assistance to the Concessionaire and the Contractor during its or their negotiations with any Interested Party.

## **41. Payment**

- 41.1 In the event of either party (“the payee”) becoming entitled to payment from the other party (“the payer”) either under the terms of this Concession Agreement or pursuant to any subsequent agreement between the parties, the following provisions shall apply in the absence of any written agreement to the contrary.
- 41.2 The payee shall deliver an invoice setting out adequate details of the payment required or the cost, expense or liability incurred or assumed and identifying the Clause or other basis upon which entitlement to such payment is claimed.
- 41.3 The payer shall settle the said invoice within 28 days of the date of receipt thereof.
- 41.4 Without prejudice to the payee’s right to receive payment in accordance with Clause 41.3, interest shall accrue on any sum due and owing to the payee at the Default Interest Rate calculated on a daily basis if and to the extent that payment is not received in accordance with Clause 41.3.

## **42. Assignment and Sub-Contracting**

- 42.1 The Concessionaire shall not without the prior written consent of the Government’s Representative assign the Concession Agreement or any part thereof or any benefit or Interest therein or thereunder otherwise than by grant of floating charges pursuant to the Funding Agreements and the Government’s Subordinated Debt facility agreement.
- 42.2 The Concessionaire shall procure that the Contractor shall not be permitted to assign the Construction Contract without the Concessionaire having obtained the prior written consent of the Government provided that the Works may be sub-contracted by the Contractor without consent except where the Technical Requirements otherwise require and subject always to compliance with the principles relating to the Designer and Checker.

## **43. Authority of Contractor to Act on Behalf of Concessionaire**

As against the Government, the Contractor shall be deemed to have full authority for and on behalf of the Concessionaire to do any act or thing under this Concession Agreement relating to the design and construction of the Works unless the Government has received prior written notice of the withdrawal in whole or in part of such authority provided that the Contractor shall not in any event be entitled to act for and on behalf of the Concessionaire in relation to any step or proceeding under the Disputes Resolution Procedure without having submitted to the Government a copy of the prior written notice given by the Contractor to the Concessionaire of its intention so to do.

## **44. Settlement of Disputes**

Except as expressly provided in Clause 22.4 all Disputes shall be resolved in accordance with the provisions set out in Schedule 5.

## **45. Proper Law**

This Concession Agreement is subject to the law of [COUNTRY] and, subject to the provisions of Schedule 5, to the non-exclusive jurisdiction of the Courts of [COUNTRY].

IN WITNESS whereof the parties hereto have executed this Concession Agreement as a Deed the day and year first before written

**GOVERNMENT** )

.....

**CONCESSIONAIRE** )

.....

SAMPLE

**Dated**

**GOVERNMENT**  
**and**  
**CONCESSIONAIRE**

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**Concession Agreement  
regarding the existing Tolloed Crossing  
and the proposed Second Tolloed Crossing**

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