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## ANNEXURE XVIII INSURANCE REQUIREMENTS PART A

### INTRODUCTION

#### 1. Definitions

**"Anticipated Tolling Date"** means the Tolling Date for relevant Highway Sections anticipated in the Financial Base Case.

**"Major Peril"** means storm, tempest, flood, water damage, subsidence, collapse, earthquake and defective design, workmanship or materials.

#### 2. General Requirements

Any insurance policy effected by the Concessionaire as required by the Concession Contract shall:

- (a) be effected in the **international** insurance market with reliable insurers of adequate financial strength and experience which are authorised by the relevant State authorities to provide the relevant cover;
- (b) be on terms approved by the Authority;
- (c) not be amended, cancelled or otherwise terminated by the Concessionaire without the prior approval of the Authority (which approval shall not be unreasonably withheld or delayed);
- (d) to the extent possible, identify the respective rights and interests of the relevant insured parties (if more than one insured party);
- (e) contain a "no cancellation" clause in respect of the policies described in Part B clauses 1, 2, 3, 4, 7 and, unless otherwise agreed by the Authority, Part B clause 8;

**Comment [ID1]:** [note-it will be necessary to check that there is no legal requirement to use domestic insurers].

- (f) contain provisions pursuant to which the insurer agrees that:
- (i) each of the insureds shall for the purposes of the policy be treated as individually and separately insured;
  - (ii) each of the insureds shall be separately insured from any other insured, provided that the total liability of the insurers under each part of the policy concerned shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity stated to be insured by the such policy,
  - (iii) the liability of any insurer to any insured under such policy shall not be conditional upon nor affected by any failure in:
    - A. the due observance and fulfilment of the terms and conditions of such policy; or
    - B. the performance of any duties imposed in terms of such policy,by any other insured party under such policy;
  - (iv) the insurer waives all rights of subrogation or action howsoever arising which it may have or acquire arising out of any occurrence in respect of which any claim is admitted under such policy against any of the insured parties;
  - (v) notwithstanding any other provisions of the policy the insurer shall not:
    - A. avoid this insurance, or any valid claim under it;
    - B. claim damages or any other remedy against any insured party,on the grounds that the risk or the claim was not adequately disclosed, or that it was in any way misrepresented, or increased, unless the insurer establishes deliberate fraudulent non-disclosure or misrepresentation in relation thereto. Non-disclosure or misrepresentation by one insured shall not be attributable to any other insured who did not actively participate in such non-disclosure or misrepresentation knowing it to be such;
  - (vi) the policy provides primary cover for the insured parties and no other policy shall be called into contribution;
  - (vii) in the event of loss, damage or liability covered by such policy which is also covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurer will indemnify the insured parties as if such other policy or policies of insurance were not in force; and

- (viii) it shall waive its rights of recourse (if any) against the insurers who have issued such other policy or policies of insurance;
  - (ix) it shall send copies of all notices of cancellation or any other notices given under or in relation to the policy to the Authority;
- (g) contain only exclusions and other terms and conditions that are a normal feature of such insurances for the property, assets and liabilities to be insured;
- (h) in respect of policies to which paragraph 3(e) above does not apply, contain a provision whereby the policy shall only be cancelled subject to 90 days' notice, or 30 days' notice in respect of non-payment of premium;
- (i) contain a provision that a notice of claim given to the insurer by the Authority or the Concessionaire or any other insured under the policy, shall in the absence of manifest error, be accepted by the insurer as valid notification of a claim in respect of the interests of all insured parties.

**3. Payment**

The Concessionaire shall punctually pay all premiums in respect of all insurance policies required to be effected pursuant to the Concession Contract and shall promptly provide the Authority with copies of all payment receipts if so requested by the Authority.

**4. Copies of Policies**

The Concessionaire shall promptly upon the request of the Authority give the Authority copies of all cover notes, policies, renewal certificates and endorsement slips or such other evidence of the policies arranged or to be arranged.

**5. Combination of Insurance Policies**

The Concessionaire is at liberty to combine any or all of the insurances referred to in Parts B and C respectively into one policy document.

**6. Review**

The Concessionaire shall annually, in consultation with the Authority, review and, subject to the other provisions of the Concession Contract and this Annexure, adjust the extent and adequacy of the coverage provided in terms of the insurances specified in Part B and Part C, if necessary, to ensure that the coverage is commensurate with the related risks.

7. **Compensation for Occupational Injuries or Diseases Act**

The Concessionaire shall comply with all statutory obligations concerning the Compensation for Occupational Injuries or Diseases Act and ensure that the Contractor and the O&M Contractor similarly comply.

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## PART B

### INSURANCE DURING THE INITIAL CONSTRUCTION PERIOD AND DURING ANY ADDITIONAL CONSTRUCTION WORKS

#### 1. CONSTRUCTION ALL RISKS INSURANCE

**Cover:** The construction all risk insurance policy issued in respect of any Construction Works (the "CAR policy") will provide protection against loss of or destruction or damage to the relevant Construction Works.

The CAR policy cover shall include DE5 or similar wording which shall cover the costs necessary to replace, repair or rectify any damage due to a defect in design, plan, specification, materials or workmanship.

Perils will be on an all risks basis to cover loss or damage from any cause.

**Insured Parties:** The Authority, its officials, officers and employees, the Concessionaire, the Lenders, the Independent Engineer, all Contractors and consultants engaged in any Construction Works and other parties with an insurable interest in the Project.

**Sum Insured:** Indemnity shall be on a replacement cost basis for the full replacement value of the relevant Construction Works and other related works at the time of replacement.

**Maximum Deductible:** ●

**Period:** The CAR policy shall be maintained for a period commencing from:

- (a) in the case of the Initial Construction Works, the Effective Date; or
- (b) in the case of any Additional Construction Works, the date of the relevant Construction Contract or as otherwise agreed with the Authority,

and ending on Construction Completion of the relevant Construction Works plus the defects liability period thereafter.

**Comment [ID2]:** [note-advice should be taken on insurance as maintenance will be carried out on a regular basis and the insurance taken out during the operational period will need to reflect that. Consider therefore whether there is a risk of duplicating cover.]

## 2. THIRD PARTY LIABILITY INSURANCE

**Cover:** The third party liability insurance policy will provide protection against all third party claims arising in respect of:

- (a) loss, destruction or damage to real or personal property;
- (b) obstruction, loss of amenities, loss of use of land, water, building, property or right of way;
- (c) liability that may result from latent defects or removal or weakening of support to property
- (d) injury to, or disease or death of persons; and
- (e) legal costs of insured parties in respect of such claims,

arising out of or in connection with the performance of the relevant Construction Works.

**Insured Parties:** The Authority, its officials, officers and employees, the Concessionaire, the Lenders, the Independent Engineer, all relevant Contractors and consultants engaged in any Construction Works and other parties with an insurable interest in the Project.

**Sum Insured:** Such insurance shall be for a minimum of ●.

**Maximum Deductible:** ●

**Period:** The third party liability policy shall be maintained for a period commencing from:

- (a) in the case of the Initial Construction Works, the Effective Date; or
- (b) in the case of any Additional Construction Works, the date of the relevant Construction Contract or as otherwise agreed with the Authority,

and ending on Construction Completion of the relevant Construction Works plus the defects liability period thereafter.

**Comment [ID3]:** [note-there is a risk of duplication here as third party cover will be required during operational period.]

3. **LOSS OF ANTICIPATED REVENUE/COMPLETION DELAY INSURANCE FOR INITIAL CONSTRUCTION WORKS**

**Cover:** The loss of anticipated revenue/completion delay insurance policy will provide protection against loss of anticipated revenue and additional expense caused by the Tolling Date(s) being later than the Anticipated Tolling Date(s) because of the occurrence of indemnifiable loss or damage from perils insured against under the CAR policy.

**Insured Parties:** The Authority, The Concessionaire and the Lenders.

**Sum Insured:** Such insurance shall be for a minimum of ●.

**Maximum Deductible:** ●.

**Period:** This policy shall be maintained for a period commencing from the Effective Date and ending on Construction Completion of the Initial Construction Works.

4. **LOSS OF ANTICIPATED REVENUE/COMPLETION DELAY INSURANCE FOR ADDITIONAL CONSTRUCTION WORKS (IF REQUIRED BY THE AUTHORITY)**

**Cover:** The loss of anticipated revenue/completion delay insurance policy will provide protection against loss of anticipated revenue and additional expense caused by the Tolling Date being later than the Anticipated Tolling Date because of the occurrence of indemnifiable loss or damage from perils insured against under the CAR policy concerned.

**Insured Parties:** The Authority, The Concessionaire and the Lenders.

**Sum Insured:** ●

**Maximum Deductible:** This insurance shall be subject to a maximum deductible as is reasonable and agreed with the Authority.

**Period:** This policy shall be maintained for a period commencing from the date of relevant Construction Contract and ending on Construction Completion of the Additional Construction Works.

5. **EMPLOYERS LIABILITY INSURANCE**

**Cover:** Legal liability insurance for death of or bodily injury to or illness of any person employed by the insured party.

**Insured Party:** The Concessionaire (the Concessionaire shall ensure the Contractor shall purchase equivalent cover).

**Sum Insured:** ●

**Maximum Deductible:** ●

**Period:** This policy shall be maintained for a period commencing from:

(a) In the case of the Initial Construction Works, the Effective Date; or

(b) In the case of any Additional Construction Works, the date of the relevant Construction Contract or as otherwise agreed with the Authority,

and ending on Construction Completion of the relevant Construction Works plus the defects liability period thereafter.

#### 6. **MOTOR VEHICLE THIRD PARTY LIABILITY INSURANCE**

**Cover:** Motor vehicle third party liability insurance covering third party property damage and death of or bodily injury to any person for all vehicles used in respect of the Construction Works must be arranged.

**Insured Party:** The Concessionaire (the Concessionaire shall ensure the Contractor shall purchase equivalent cover).

**Sum Insured:** ●

**Maximum Deductible:** ●

**Period:** This policy shall be maintained for a period commencing from

(a) In the case of the Initial Construction Works, the Effective Date; and

(b) In the case of any Additional Construction Works, the date of the relevant Construction Contract or as otherwise agreed with the Authority,

and ending on Construction Completion of the relevant Construction Works plus the defects liability period thereafter.

**Comment [ID4]:** [note-this is a jurisdictional issue. In some jurisdictions particularly the USA there is a choice as to the level of cover for third party liability and therefore in a highly litigious society it makes sense to require certain levels of cover. This does not apply in all jurisdictions].



7. **PROFESSIONAL INDEMNITY INSURANCE FOR INITIAL CONSTRUCTION WORKS**

**Comment [ID5]:** [note-this will depend upon nature of the CAR policy and property insurance].

**Cover:** The Professional Indemnity Insurance policy will provide protection against breach of duty owed in a professional capacity involving liability arising by reason of error, omission or professional negligence in the design and supervision of the Initial Construction Works.

**Insured Parties:** The Authority, its officials, officers and employees, the Concessionaire, the Independent Engineer, the Lenders Technical Adviser (as defined in the Loan Agreements), the Initial Contractor and other parties with an insurable interest in the Project to the extent required.

**Sum Insured:** ●

**Maximum Deductible:** ●

**Period:** This policy shall be maintained for a period commencing from the Effective Date and ending six years after Construction Completion of the Initial Construction Works and shall apply in respect of any professional activity carried out in respect of the Initial Construction Works including activities of the Insured carried out in connection with the Project prior to the inception date of the policy.

8. **PROFESSIONAL INDEMNITY INSURANCE FOR ADDITIONAL CONSTRUCTION WORKS**

**Cover:** The Professional Indemnity Insurance policy will provide protection against any breach of duty owed in a professional capacity involving liability arising by reason of error, omission or professional negligence in the design and supervision of such Additional Construction Works.

**Insured Parties:** The Authority, its officials, officers and employees, the Concessionaire, the Independent Engineer, the Lender's Technical Adviser (as defined in the Loan Agreements), the relevant Contractor and other parties with an insurable interest in the Project.

**Sum Insured:** ●

**Maximum Deductible:** ●

**Period:** This policy shall be maintained for a reasonable period (having regard to the scope of the Additional Construction Works) as agreed with the Authority.

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## PART C

### INSURANCE DURING OPERATION AND MAINTENANCE

All insurance in this Part C shall be effective from the Effective Date of the Concession Contract or the delivery of any part of the Site (but only to the extent that such insurances have not been effected under Part B) to the Concessionaire and maintained in force and renewed as required until the termination of the Concession Contract for any reason, including expiry of the Concession Period.

#### 9. ASSETS ALL RISK INSURANCE

**Cover:** The asset all risk insurance policy will provide protection against loss of or destruction or damage to the Highway and the Concessionaires other insurable properties.

The assets all risk insurance policy shall cover the costs necessary to replace, repair or rectify any damage from any cause and such perils as are insurable by the South African Special Risks Insurance Association.

**Insured Parties:** The Authority, its officials, officers and employees, the Concessionaire, the Independent Engineer, the Lenders, all contractors and consultants engaged in Operation and Maintenance and other parties with an insurable interest in the Project.

**Sum Insured:** Such insurance shall be for a minimum of ●.

**Maximum Deductible:** ●

#### 10. BUSINESS INTERRUPTION CONSEQUENTIAL LOSS INSURANCE

**Cover:** The business interruption consequential loss insurance policy will provide protection against loss of revenue and additional expense resulting from the occurrence of indemnifiable loss or damage from perils insured against under the asset all risks insurance policy referred to in paragraph 9 above.

**Insured Parties:** The Authority, The Concessionaire, the O&M Contractors and the Lenders.

**Sum Insured:** Such insurance shall be for a minimum of ●.

**Maximum Deductible:** ●.

11. **THIRD PARTY LIABILITY INSURANCE**

**Comment [ID6]:** [note-risk of duplication with insurance taken out concurrent with CAR].

**Cover:** The third party liability insurance policy will provide protection against all third party claims arising in respect of:

- (a) loss, destruction or damage to real or personal property;
- (b) obstruction, loss of amenities, loss of use of land, water, building, property or right of way;
- (c) liability that may result from latent defects or removal or weakening of support to property
- (d) injury to, or disease or death of persons; and
- (e) legal costs of insured parties in respect of such claims,

arising out of or in connection with the Operation and Maintenance or any activities related thereto.

**Insured Parties:** The Authority, its officials, officers and employees, the Concessionaire, the Independent Engineer, the Lenders, all contractors and consultants engaged in Operations and Maintenance and other parties with an insurable interest in the Project.

**Sum Insured:** Such insurance shall be for a minimum of ●.

**Maximum Deductible:** ●

12. **EMPLOYERS LIABILITY INSURANCE**

**Cover:** Legal liability insurance for death of or bodily injury to or illness of any person employed by the insured party

**Insured Party:** The Concessionaire (the Concessionaire shall ensure the O&M Contractors shall purchase equivalent cover).

**Sum Insured:** ●

**Maximum Deductible:** There shall be no deductible.

13. **MOTOR VEHICLE THIRD PARTY LIABILITY INSURANCE**

**Comment [ID7]:** [note-see observation above]

**Cover:** Motor vehicle third party liability insurance covering third party property damage and death of or bodily injury to any person for all vehicles used in respect of any Construction Works and Operation and Maintenance Works must be arranged.

**Insured Party:** The Concessionaire (the Concessionaire shall ensure the O&M Contractors shall purchase equivalent cover).

**Sum Insured:** ●

**Maximum Deductible:** ●

14. **FIDELITY GUARANTEE**

**Cover:** This policy will provide protection against losses incurred due to employee dishonesty including collusion with others.

**Insured Parties:** The Concessionaire and other parties with an insurable interest in the Project to the extent required by any contract with such other party.

**Sum Insured:** ●

**Maximum Deductible:** ●

## PART D

### FORM OF BROKERS' LETTER OF UNDERTAKING

(To the Authority)

Dear Sirs,

We confirm that the insurances (the "**Insurances**") are in effect on and in respect of the risks set out in the attached cover notes as at the date hereof. Terms defined in the Concession Contract between [the Authority and the Concessionaire] (the "**Concession Contract**") shall have the same meaning when used in this letter.

Pursuant to instructions received from the Concessionaire and in consideration of the Authority approving our appointment or continuing appointment as brokers in connection with the insurances covered by this letter, we hereby undertake in respect of the interests of the insured parties and the Authority in the insurances referred to in the attached cover notes, binder or certificate from [the insurers/us]:

1. to use our reasonable endeavours to incept each policy substantially in the forms detailed in Annexure XVIII to the Concession Contract and to have each endorsed substantially in the forms attached hereto and to notify the Authority promptly if we fail to do so;
2.
  - (i) to advise the Authority promptly upon receipt of notice of any material changes which are proposed to be made in the terms of the Insurances and which, if effected, would result in any material reduction in limits or coverage (including those resulting from extensions) or in any increase in deductibles, exclusions or exceptions,
  - (ii) to notify the Authority at least 90 days prior to the expiry of these Insurances if we have not received instructions from the Concessionaire to negotiate renewal, and, in the event of our receiving instructions to renew, to advise the Authority promptly of the details thereof, and
  - (iii) to notify you at least 90 days prior to us ceasing to act as brokers to the Concessionaire (unless owing to circumstances beyond our control we cannot give such notice in which case we shall notify the Authority promptly upon becoming aware that we shall cease, or that we have ceased, so to act);
3. to advise you without unreasonable delay
  - (a) if any insurer cancels or gives notice of cancellation of any of the Insurances and in any event at least 90 days before such cancellation is to take effect (unless owing to circumstances beyond our control we are unable to do so in which case we shall notify the Authority promptly upon becoming aware of such cancellation or notice of cancellation);

- (b) of any act of omission or of any event of which we have knowledge and which might reasonably be foreseen as invalidating or rendering unenforceable in whole or in part of the Insurances; and
  - (c) of any claim under any of the Insurance arranged by us that is notified to us.
4. to disclose to the insurers and to the Authority any fact, change of circumstance or occurrence which we know to be material to the risks insured against under the Insurances promptly when we become aware of such fact, change of circumstance or occurrence (always providing that the foregoing shall not act to vary or displace the duty of disclosure of the insured parties);
  5. to hold the insurance slips or contracts, the policies with any renewal thereof and any new or substitute policies (in each case, issued only with the Authority's consent), to the extent held by us.

The above undertakings are given:

- (a) on the Policies referred to above for premiums due under the Policies and subject to any insurers' right of cancellation (if any) following default in excess of 30 days in payment of such premiums, but we undertake to advise the Authority as soon as practicable if any such premiums are not paid to us by the due date and to give the Authority reasonable opportunity of paying such amounts of such premiums outstanding before notification of cancellation on behalf of the insurers; and
- (b) subject to our continuing appointment for the time being as insurance brokers to the Concessionaire (such appointment continuing in any event until the expiry of the relevant claims period).

This letter shall be governed by and construed in all respects in accordance with the law of [ here insert host country].

Yours faithfully