

# 3

## **RIJKSWATERSTAAT DBFM AGREEMENT**

Standard 3.0

Date	28 March 2012
Status	Final

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This Agreement is dated **[signing date]**.

**THE STATE OF THE NETHERLANDS**, Ministry of Infrastructure and the Environment, Directorate-General Waterways and Public Works, with registered office located in The Hague (the **Contracting Authority**), represented by **[●]**;

**[CONTRACTOR'S NAME]**, with registered office in **[●●]** (the **Contractor**), represented by **[●●]**.

have agreed to the following:

## **1. DEFINITIONS**

Terms that are capitalised in this Agreement have the meanings set forth in Schedule 1 (*Definitions*).

## **2. KEY OBLIGATIONS AND TERM**

### **2.1 Key Obligations of the Contractor**

- (a) The Contractor must:
  - (i) carry out all Work to obtain the Commencement Certificate in accordance with this Agreement;
  - (ii) maintain the availability of the RWS Infrastructure in accordance with this Agreement during the period beginning on the Commencement Date and ending on the Expiry Date;
  - (iii) carry out all Work to obtain the Availability Certificate in accordance with this Agreement;
  - (iv) carry out all Work to obtain the Completion Certificate in accordance with this Agreement;
  - (v) carry out all Work in accordance with the Management System;
  - (vi) carry out all Work to obtain the Transfer Certificate in accordance with this Agreement;

- (vii) do everything necessary to realise the above, to the extent that this Agreement does not specifically stipulate otherwise; and
  - (viii) fulfil all its other obligations in terms of this Agreement.
- (b) All costs that the Contractor incurs in order to fulfil the aforementioned obligations will be borne by the Contractor, except to the extent that this Agreement specifically stipulates otherwise.
- (c) No matter what circumstances or events arise during the performance of this Agreement, the Contractor has:
- (i) no right to any payment from the Contracting Authority;
  - (ii) no right to a postponement or suspension of the performance of its obligations; and
  - (iii) no right towards the Contracting Authority in relation to a Contracting Authority Default,
- except to the extent that such rights are specifically stipulated in this Agreement or result from public law.

## 2.2 Key Obligations of the Contracting Authority

The Contracting Authority must:

- (a) starting on the Commencement Date and continuing until and including the Expiry Date, pay the Contractor the Net Availability Payment in accordance with Schedule 2 (*Payment Mechanism*);
- (b) make the Lump-Sum Payment in accordance with Schedule 2 (*Payment Mechanism*); and
- (c) fulfil all its other obligations pursuant to this Agreement.

## 2.3 Term

This Agreement comes into force on the Contract Date and terminates, subject to Article 24.6 (*Continuous Obligations*), on the Expiry Date unless it is terminated earlier in accordance with Article 10 (*Premature Termination*).

## 3. FINANCING

### 3.1 Financial Close

- (a) Financial Close must take place within the [●, = duration of validity] months following [date of final submission].

- (b) If Financial Close cannot take place within this period as a result of a Supervening Event then the period for attaining Financial Close shall be extended until the day that falls 1 month after the day on which the Supervening Event no longer impedes the attainment of Financial Close. The Contractor must endeavour to have the Financial Close take place as quickly as possible.
- (c) If Financial Close still cannot take place [●] months after [date final submission] as a result of a Supervening Event, then both Parties are entitled to terminate the Agreement. In the event of termination of the Agreement on this ground then the Contracting Authority must pay compensation to the Contractor in accordance with Schedule 4 (*Compensation for premature termination*), paragraph 4 (*Termination due to a Force Majeure Event*).
- (d) The Contractor must set the date of Financial Close in consultation with the Contracting Authority.
- (e) On the date of Financial Close, the Contracting Authority and the Contractor must enter into the Direct Agreement with the Security Agent.
- (f) On the date of Financial Close, the Contractor must submit to the Contracting Authority a Confirmation of Financial Close signed by the Facility Agent / Intercreditor Agent in accordance with the model supplied in Schedule 7 (*Models*), Part 3 (*Confirmation of Financial Close*).
- (g) On the date of Financial Close, the Contracting Authority and the Contractor must determine the Gross Availability Payment and the Weighted Average Cost of Capital in accordance with the model supplied in Schedule 7 (*Models*), Part 4 (*Determining GAP and Weighted Average Cost of Capital*).
- (h) Within 20 Working Days after the date of Financial Close, the Contractor must submit to the Contracting Authority a copy (a hardcopy or a copy on a digital data carrier) of the Financing Agreements and the Shareholder Loan Agreements, in the form of complete copies certified by the Contractor. From the date of Financial Close until and including the Expiry Date, the Contractor may not, without the prior authorisation of the Contracting Authority, provide any other security interests on its rights under this Agreement vis-à-vis the Contracting Authority than those set forth in the Financing Agreements on the date of the Financial Close.



### 3.2 Financial Close Guarantee

- (a) The term of validity of the Financial Close Guarantee must extend to **[duration of validity + 1 month]** following **[date of final submission]**. Should the achievement of Financial Close as referred to in Article 3.1 (a) be postponed on account of a Supervening Event then the Contractor must ensure an adequate extension of the term of the Financial Close Guarantee, such that for as long as the Supervening Event persists, the remaining term of the Financial Close Guarantee is always at least 2 months.
- (b) At the same time that the Confirmation of Financial Close is issued or at premature termination pursuant to Article 3.1 (*Financial Close*), paragraph (c), the Contracting Authority must, in accordance with the model supplied in Schedule 7 (*Models*), Part 10 (*Financial Close Guarantee Expiry Notice*), inform the credit institution providing the Financial Close Guarantee that the Financial Close Guarantee is no longer valid as from the date of the Confirmation of Financial Close or as from the date of termination of the Agreement pursuant to Article 3.1 (*Financial Close*), paragraph (c) and return the original copy of the Financial Close Guarantee to the Contractor. The Contractor must confirm receipt of the original copy of the Financial Close Guarantee to the Contracting Authority in accordance with the model supplied in Schedule 7 (*Models*), Part 11 (*Confirmation of Receipt of Financial Close Guarantee*).

### 3.3 Performance Bond

- (a) On the date of Financial Close, the Contractor must provide a Bank Guarantee as security for the fulfilment of its obligations pursuant to this Agreement in the amount of € [●] in accordance with the model supplied in Schedule 7 (*Models*), Part 1 (*Performance Bond*). The Contracting Authority must confirm receipt of the Performance Bond in accordance with the model supplied in Schedule 7 (*Models*), Part 12 (*Confirmation of Receipt of Performance Bond*).
- (b) The term of validity of the Performance Bond must extend to one month after the Scheduled Availability Date. If the Scheduled Availability Date is postponed pursuant to Article 9.2 (*Delay Event*), the Contractor must ensure that the term of the Performance Bond is extended by at least an equal period unless the Contracting Authority has already previously declared to the issuing credit institution that the Performance Bond is no longer valid.
- (c) Within 10 Working Days of the receipt of a declaration from the Contractor's auditor in which the latter confirms that no less than the amount of the Performance Bond referred to under (a) has been expended on components of objects listed for the Completion Date

in Schedule 9, paragraph 2.1 (*RWS Infrastructure Objects*), the Contracting Authority must, unless it informs the Contractor that it disputes the accuracy of the declaration, declare to the credit institution that issued the Performance Bond that the Performance Bond is no longer valid as from the date of the declaration of the auditor and return the original copy of the Performance Bond to the Contractor.

- (d) At the same time the Availability Certificate is issued the Contracting Authority must declare to the credit institution that issued the Performance Bond that the Performance Bond is no longer valid and return the original copy of the Performance Bond to the Contractor unless the Contracting Authority has previously declared to the issuing credit institution that the Performance Bond is no longer valid.

### 3.4 Refinancing

- (a) The Contractor may not enter into a new Financing Agreement with a Financer other than an existing Financer and may not transfer any Financial Agreement to any other than the existing Financer if Grounds for Exclusion or Grounds for Refusal apply to the new Financer.
- (b) The Contractor must ask the Contracting Authority for authorisation before entering into the new Financing Agreement with a Financer other than an existing Financer. This authorisation must be given within 20 Working Days after the Contractor has demonstrated that there are no Grounds for Exclusion with regard to the new Financer, unless the Contracting Authority demonstrates that Grounds for Refusal apply to the new Financer (or a (legal) entity of which the new Financer is a subsidiary in the meaning of Article 2:24a of the Dutch Civil Code or belongs to the same group as the Financer, as referred to in Article 2:24b of the Dutch Civil Code).
- (c) The Contractor must inform the Contracting Authority in advance of any Refinancing other than that referred to in paragraph (b).
- (d) If the Contracting Authority believes that the market is in general able to offer more advantageous financing terms than those in the already existing Financing Agreements, then the Contracting Authority is allowed to submit a request to the Contractor for exploration of Refinancing. The request by the Contracting Authority may not entail any need to supply additional equity capital in the Contractor. Following receipt of the request, the Contractor must make efforts to obtain the most advantageous indicative financing terms for Refinancing from potential lenders. The Contractor must incorporate these indicative financing conditions in a refinancing

plan. The Contractor must submit this refinancing plan to the Contracting Authority within a reasonable period of time after the receipt of the Contracting Authority's request.

- (e) The Contractor must implement the refinancing plan at the request of the Contracting Authority, except if the Contractor cannot reasonably be obliged to do so. If the Contractor is unable to obtain indicative financing conditions or implement the refinancing plan then the Contractor must inform the Contracting Authority accordingly, together with a statement of the reasons. If, in response to any request by the Contracting Authority for exploration of Refinancing, no Refinancing is arranged, the Contracting Authority must compensate the Contractor for the costs incurred by the Contractor for the exploration of Refinancing.
- (f) The Contracting Authority can, at any time, submit a request for exploration of Refinancing as referred to in paragraph (d), but no more frequently than once every 3 years and no sooner than at the Completion Date.
- (g) If there is to be Refinancing, parties must consult concerning the determination of the financial benefit and the payment schedule referred to in paragraph (h). The aforementioned shall be determined on the basis of a comparison between the Contractor's expected payments to its Shareholders before and after the Refinancing, using the Updated Financial Model. In determining the financial benefit, any commissions, penalty interest, breakage costs, and other costs and compensations payable by the Contractor are left out of consideration to the extent that these cannot be viewed as being market conforming.
- (h) The Contractor must pay 50% of the financial benefit achieved through a Refinancing to the Contracting Authority, if applicable added to the financial benefit (before transfer of the refinancing benefit to the Contracting Authority) that the Contractor achieved through earlier Refinancing. The financial benefit of a Refinancing must be calculated according to the provisions in Part 5 (*Special provisions for Refinancing*) of Schedule 10 (*Financial Model Adjustment Guideline*). The transfer takes place according to a payment scheme which shall be determined on the basis of the expected actual realisation of the financial benefit, all other circumstances remaining the same.
- (i) Should the Contractor and the Contracting Authority fail to reach agreement in determining the financial benefit and the payment schedule referred to under (h) within 3 months, the aforementioned shall be determined in application of Article 21 (*Dispute Resolution*).

### 3.5 Financial Model

- (a) On the date of Financial Close the Contractor must deliver the Financial Model that has been completed in accordance with Schedule 10 (*Financial Model Adjustment Guideline*). The Contracting Authority has to confirm receipt of the Financial Model in accordance with the model supplied in Schedule 7, Part 9 (*Confirmation of Receipt of updated Financial Model*).
- (b) Compensation to be paid pursuant to Articles 10 (*Premature Termination*), 3.4 (*Refinancing*), or 20.2 (*Distribution of Surplus Profits*) must be determined by (also) using the Updated Financial Model. Compensation to be paid pursuant to Articles 9.3 (*Compensation event*), must be determined by using the Updated Financial Model at the request of the Contracting Authority.
- (c) The Contractor must supply the Updated Financial Model together with a description of amendments made since the Original Financial Model or, if applicable, since the most recent Updated Financial Model supplied.
- (d) At the request of the Contracting Authority the Contractor must demonstrate, by means of a confirmatory declaration by an independent expert acceptable to the Contracting Authority, that the Updated Financial Model is based upon the Original Financial Model and that the changes are consistent with Schedule 10 (*Financial Model Adjustment Guideline*).

## 4. RWS INFRASTRUCTURE

### 4.1 Issue of the Commencement Certificate

- (a) The Contractor must obtain the Commencement Certificate within [6] months after Financial Close. If the Contractor cannot obtain the Commencement Certificate within this period as a result of a Supervening Event, then the period for obtaining the Commencement Certificate shall be extended until the day that falls 10 Working Days after the day on which the Supervening Event no longer impedes obtaining the Commencement Certificate.
- (b) If the Contractor believes that the conditions for issue of the Commencement Certificate referred to in the Certificate Plan have been fulfilled, the Contractor may submit the documents referred to in the Certificate Plan that demonstrate this to the Contracting Authority. The Contractor may submit these documents to the Contracting Authority in phases.

- (c) Within 20 Working Days after a document as referred to under (a) has been submitted, the Contracting Authority must inform the Contractor whether the Contractor has demonstrated that the conditions for issue of the Commencement Certificate described in the document have been fulfilled. The Contracting Authority may verify whether the conditions for issue of the Commencement Certificate continue to be fulfilled as from 20 Working Days after this notification and until the issue of the Commencement Certificate. The Contracting Authority must notify the Contractor as soon as possible if the Contracting Authority concludes that a condition is not or no longer fulfilled.
- (d) If the Contractor has demonstrated that all conditions for issue of the Commencement Certificate are fulfilled except for the requirement that Financial Close must have occurred, the Contracting Authority must provide the Contractor with a statement indicating that release of the Commencement Certificate only depends on the occurrence of Financial Close within [20] Working Days after receiving all the documents demonstrating the above. The Contracting Authority may verify whether the conditions for issue of the Commencement Certificate continue to be fulfilled even after providing this statement and until the issue of the Commencement Certificate. The Contracting Authority must notify the Contractor as soon as possible if the Contracting Authority concludes that a condition is not or no longer fulfilled.
- (e) In derogation from the provisions of paragraph (c) the Contracting Authority is deemed to have determined that the Financial Close has been achieved and that, consequently, this condition for the issue of the Commencement Certificate has been met, once the Contracting Authority has received the Confirmation of Financial Close as referred to in Article 3.1 paragraph (f) signed by the Facility Agent / Intercreditor Agent.
- (f) The Contract may amend a document which the Contracting Authority has determined does not demonstrate that the conditions described therein have been satisfied, and may resubmit it to the Contracting Authority.
- (g) If the Contractor has demonstrated that all conditions for issue of the Commencement Certificate are fulfilled the Contracting Authority must release the Commencement Certificate to the Contractor within 20 Working Days after it has received all documents that demonstrate this.

- (h) If the Contracting Authority refuses to release the Commencement Certificate, it must notify the Contractor thereof within the same period of 20 Working Days, stating the reasons for its decision.

#### 4.2 Access

- (a) *[In the period beginning on the Contract Date and ending on the day before the Commencement Date, the Contracting Authority must, for the purpose of performing inspections by appointment, grant the Contractor access to the RWS Infrastructure, **[except for the parts of the RWS Infrastructure mentioned in Schedule 15 (Access Exceptions to the RWS Infrastructure)]** to which the Contracting Authority must grant access as of the dates for the respective parts mentioned in this Schedule],<sup>1</sup> where:-*
- (i) *the Contractor must take the rights of third parties to access the RWS **Infrastructure** into consideration;*
  - (ii) *the inspections may not impede the activities of the Contracting Authority and third parties on or related to the RWS **Infrastructure**; and*
  - (iii) *insofar as the RWS **Infrastructure** is part of the public road, waterway, bus lane or railway infrastructure, access shall only be granted once the Contractor has obtained permission from the respective infrastructure manager.*

*For the avoidance of doubt, access is also hereby granted to the Contractor's Agents.]*

- (b) *In the period beginning on the Commencement Date and ending on the Completion Date the Contracting Authority must, for the purpose of carrying out Work, grant the Contractor access to the RWS Infrastructure [with the exception of the **parts of the RWS Infrastructure cited in Schedule 15 (Access Exceptions to RWS Infrastructure)]**, to which the Contracting Authority must grant access starting on the date cited in this Schedule for the respective parts], where:*
- (i) *the Contractor must take account of the fact that the owners or managers of RWS Context Objects, crossing or longitudinal infrastructure and crossing or longitudinal cables and conduits can have access to RWS Infrastructure for the management and maintenance of these RWS Context*

<sup>1</sup> Some sites must still be acquired (which, in the case of compulsory purchase, shall normally take place within 4 weeks after the irrevocable route decision) and, for other sites, it may be undesirable to grant immediate access as at the Commencement Date. In the case of these sites, Schedule 15 stipulates that access shall only be granted as at a date stated in this Schedule.

Objects, infrastructure, cables and conduits, as well as for the work specified in Articles 6.3 and 6.4;

- (ii) the Contractor must take into consideration the rights of third parties to access to the RWS Infrastructure referred to in Schedule 14 (*Rights of third parties to access RWS Infrastructure*); and
- (iii) insofar as the RWS Infrastructure is part of the public road, waterway, bus lane or railway infrastructure, access is only granted once the Contractor has obtained permission from the respective infrastructure manager. The Contractor must take into consideration, in addition to the provisions under (i) and (ii), that third parties other than those referred to in Schedule 14 (*Rights of third parties to access RWS Infrastructure*) also have rights of access to the public road, waterway, bus lane or railway infrastructure.

For the avoidance of doubt, access is also hereby granted to the Contractor's Agents.

- (c) In the period beginning on the day after the Completion Date and ending on the Expiry Date the Contracting Authority must, for the purpose of carrying out Work, grant the Contractor access to the RWS Infrastructure, where:
  - (i) the Contractor must take the rights of third parties to access RWS Infrastructure into consideration; and
  - (ii) insofar as the RWS Infrastructure is part of the public road, waterway, bus lane or railway infrastructure, access shall only be granted once the Contractor has obtained permission from the respective infrastructure manager.

For the avoidance of doubt access is also hereby granted to the Contractor's Agents.

- (d) *[In the period preceding the date when the Route Decision becomes irrevocable, the Contractor may not perform [(where applicable:) with regard to the RWS Infrastructure to which the Route Decision relates] any Work with irreversible consequences / any of the following Work: [●]]*

#### **4.3 Design and Construction**

- (a) The Contractor must design and build the RWS Infrastructure so that as of the Availability Date the RWS Infrastructure:

- (i) at least consists of the objects listed in respect of the Availability Date in Schedule 9, Part 1, paragraph 2.1 (*RWS Infrastructure Objects*), and
  - (ii) meets the Opening Requirements.
- (b) The Contractor must design and build the RWS Infrastructure so that as of the Completion Date the RWS Infrastructure:
- (i) at least consists of the objects listed in respect of the Completion Date in Schedule 9, Part 1, paragraph 2.1 (*RWS Infrastructure Objects*), and
  - (ii) meets the Completion Requirements.

#### **4.4 Availability and maintenance**

- (a) In the period beginning with the Commencement Date and ending on the Availability Date the Contractor must ensure that the RWS Infrastructure:
- (i) consists of the Traffic Lanes as defined in Table 1 of Schedule 2, Schedule 1 (*Traffic Lane Definitions, Category-A Requirements and Category-B Requirements in the Development Phase*);
  - (ii) at least consists of the objects listed in respect of this period in Schedule 9, Part 1, paragraph 2.1 (*RWS Infrastructure Objects*); and
  - (iii) is maintained in accordance with the Category A Requirements applicable to this period and the Category B Requirements.

[If the Contractor wishes that a part of the RWS Infrastructure created after the Commencement Date is made available for public traffic prior to the Availability Date, the Contractor must demonstrate that, on the date of submitting the request for opening to the corresponding authorities, the relevant portion of the RWS Infrastructure meets the relevant Opening Requirements as well as the Category A and Category B requirements in effect during the period beginning on the Availability Date and ending on the Completion Date.]



- (b) In the period beginning on the day after the Availability Date and ending on the Completion Date the Contractor must ensure that the RWS Infrastructure:
  - (i) consists of the Traffic Lanes as defined in Table 1 of Schedule 2, Schedule 2 (*Traffic Lane Definitions, Category-A Requirements and Category-B Requirements in the Operational Phase*);
  - (ii) at least consists of the objects listed in respect of this period in Schedule 9, Part 1, paragraph 2.1 (*RWS Infrastructure Objects*); and
  - (iii) is maintained in accordance with the Category A Requirements applicable to this period and the Category B Requirements.
  
- (c) In the period beginning on the day after the Completion Date and ending on the Expiry Date the Contractor must ensure that the RWS Infrastructure:
  - (i) consists of the Traffic Lanes as defined in Table 1 of Schedule 2, Schedule 2 (*Traffic Lane Definitions, Category-A Requirements and Category-B Requirements in the Operational Phase*);
  - (ii) at least consists of the objects listed in respect of this period in Schedule 9, Part 1, paragraph 2.1 (*RWS Infrastructure Objects*); and
  - (iii) is maintained in accordance with the Category A Requirements applicable to this period and the Category B Requirements.

#### **4.5 Issue of the Availability Certificate**

- (a) If the Contractor believes that the conditions for issue of the Availability Certificate referred to in the Certificates Plan have been fulfilled, the Contractor may hand over the documents referred to in the Certificates Plan that demonstrate this to the Contracting Authority. The Contractor may submit these documents to the Contracting Authority in phases.
  
- (b) The Contracting Authority must inform the Contractor within [20] Working Days after handing over a document as meant in paragraph (a) whether the Contractor has demonstrated that the conditions for issue of the Availability Certificate described in the document have been fulfilled. The Contracting Authority may verify whether the

conditions for issue of the Availability Certificate continue to be fulfilled as from 20 Working Days after this notification and until the issue of the this Certificate. The Contracting Authority must notify the Contractor as soon as possible if the Contracting Authority concludes that a condition is not or no longer fulfilled.

- (c) The Contract may amend a document, which the Contracting Authority has determined does not demonstrate that the conditions described therein have been satisfied, and may resubmit it to the Contracting Authority.
- (d) If the Contractor has demonstrated that all conditions for the issue of the Availability Certificate have been fulfilled then the Contracting Authority must issue the Availability Certificate to the Contractor within 20 Working Days after it has received all the documents that demonstrate this.
- (e) If the Contracting Authority refuses to issue the Availability Certificate, it must notify the Contractor thereof within the same period of 20 Working Days, stating the reasons for its decision.

#### **4.6 Issue of the Completion Certificate**

- (a) If the Contractor believes that the conditions for issue of the Completion Certificate referred to in the Certificate Plan have been fulfilled, the Contractor may hand the documents referred to in the Certificate Plan that demonstrate this to the Contracting Authority. The Contractor may submit these documents to the Contracting Authority in phases.
- (b) Within 20 Working Days after a document as referred to under (a) has been submitted, the Contracting Authority must inform the Contractor whether the Contractor has demonstrated that the conditions for issue of the Completion Certificate described in this document have been fulfilled. The Contracting Authority may verify whether the conditions for issue of the Completion Certificate continue to be fulfilled as from 20 Working Days after this notification and until the issue of this Certificate. The Contracting Authority must notify the Contractor as soon as possible if the Contracting Authority concludes that a condition is not or no longer fulfilled.
- (c) The Contract may amend a document, which the Contracting Authority has determined does not demonstrate that the conditions described therein have been satisfied, and may resubmit it to the Contracting Authority.

- (d) If the Contractor has demonstrated that all conditions for the issue of the Completion Certificate have been fulfilled, the Contracting Authority must hand the Completion Certificate to the Contractor within 20 Working Days after having received all documents demonstrating the above.
- (e) If the Contracting Authority refuses to issue the Completion Certificate then the Contracting Authority must notify the Contractor accordingly within the same period of 20 Working Days, stating the reasons for its decision.

## **5. THIRD PARTY INFRASTRUCTURE**

### **5.1 Access**

- (a) In the period beginning on the Commencement Date and ending on the issue date of the relevant Partial Completion Certificate, the Contracting Authority must, for the purpose of carrying out Work, grant the Contractor access to the Third Party Infrastructure, where:
  - (i) the Contractor must take the rights of third parties to access Third Party Infrastructure into consideration; and
  - (ii) insofar as the Third Party Infrastructure is part of the public road, waterway, bus lane or railway infrastructure, access is only be granted once the Contractor has obtained permission from the respective infrastructure manager.
- (b) If the Contractor has to perform Work on a part of Third Party Infrastructure pursuant to Article 5.4 (g), the Contracting Authority must grant the Contractor access to the relevant portion of Third Party Infrastructure during the period of this Work, where:
  - (i) the Contractor must take the rights of third parties to access Third Party Infrastructure into consideration; and
  - (ii) insofar as the Third Party Infrastructure is part of the public road, waterway, bus lane or railway infrastructure, access is only be granted once the Contractor has obtained permission from the respective infrastructure manager.
- (c) For the avoidance of doubt, the provisions of paragraphs (a) and (b) also grant access to the Contractor's Agents.

### **5.2 Design, Construction and Maintenance**

- (a) The Contractor must:

- (i) design and build the Third Party Infrastructure so that the corresponding part of the Third Party Infrastructure meets the requirement on the date of the Partial Completion Certificate arising from the documents contained in Schedule 9, Part 5 (*Implementation Agreements*);
- (ii) the Third Party Infrastructure must be maintained subsequent to the Commencement Date in accordance with the obligations arising from the relevant documents included in Schedule 9, Part 5 (*Implementation Agreements*); and
- (iii) meet the other requirements arising from the documents contained in Schedule 9, Part 5 (*Implementation Agreements*),

[all the above with the exception of the requirements stated in each document that the Contracting Authority indicates as not having to be met.]

- (b) If a Partial Completion Certificate is issued for a portion of the Third Party Infrastructure, the Contractor is no longer required to maintain the corresponding portion in accordance with the provisions of Article 5.2 (a) (ii).
- (c) The Contractor must ensure that the final delivery of the relevant part of the Third Party Infrastructure is recorded in a written statement signed by the infrastructure manager of that part of the Third Party Infrastructure in which it declares that the corresponding part of the Third Party Infrastructure satisfies the requirements relating to the Implementation Agreement, with the exception of the requirements that the Contracting Authority indicates as not have to be met.
- (d) If the infrastructure manager of a portion of the Third Party Infrastructure does not fulfil one of his obligations arising from an Implementation Agreement, the Contractor must inform the Contracting Authority of this circumstance. In that case, the Contracting Authority must consult with the infrastructure manager. If this consultation does not result in agreement within 30 Working Days then the Contracting Authority must demand specific performance of the concerned obligation against the infrastructure manager.

### **5.3 Issue of the Partial Completion Certificate**

- (a) If the Contractor is of the opinion that a part of the Third Party Infrastructure for which an Implementation Agreement meets the conditions for issue of a Partial Completion Certificate as referred to

in the Certificate Plan, the Contractor may submit the documents referred to in the Certificate Plan to the Contracting Authority demonstrating this. The Contractor may submit these documents to the Contracting Authority in phases.

- (b) Within 20 Working Days after a document as referred to under (a) has been submitted, the Contracting Authority must inform the Contractor whether the Contractor has demonstrated that the conditions for issue of the Partial Completion Certificate described in this document have been fulfilled. The Contracting Authority may verify whether the conditions for issue of the Partial Completion Certificate continue to be fulfilled as from 20 Working Days after this notification and until the issue of this Certificate. The Contracting Authority must notify the Contractor as soon as possible if the Contracting Authority concludes that a condition is not or no longer fulfilled.
- (c) The Contractor may amend a document, which the Contracting Authority has determined does not demonstrate that the conditions described therein have been satisfied, and to resubmit it to the Contracting Authority.
- (d) If the Contractor has demonstrated that all conditions for the issue of the Partial Completion Certificate have been fulfilled, the Contracting Authority must hand the Partial Completion Certificate to the Contractor within 20 Working Days after having received all documents demonstrating the above.
- (e) If the Contracting Authority refuses to issue the Partial Completion Certificate, it must notify the Contractor thereof within the same period of 20 Working Days, stating the reasons for its decision.
- (f) If the Contractor demonstrates that all of the Contractor's obligations arising from Schedule 9, Part 5 (*Implementation Agreements*) regarding the part of the Third Party Infrastructure to which the Partial Completion Certificate relates have been fulfilled but that the relevant infrastructure manager is unjustifiably withholding approval and unjustifiably refusing to lend cooperation to the transfer, then the Contractor must submit the documents demonstrating this to the Contracting Authority. Within 20 Working Days after the submission of these documents, the Contracting Authority must inform the Contractor whether the latter has demonstrated that the obligations pertaining to the portion of the Third Party Infrastructure in question have been satisfied. If the Contracting Authority believes that the Contractor has demonstrated that the obligations regarding the relevant part of the Third Party Infrastructure have been fulfilled, then the Contracting Authority must issue a statement indicating this to be the case. If the

Contracting Authority refuses to issue a declaration of this nature then it must notify the Contractor accordingly within the same period of 20 Working Days, stating the reasons for its decision.

- (g) Should it transpire, within a period of 6 months after the date of issue of a Partial Completion Certificate, that the part of the Third Party Infrastructure to which the Partial Completion Certificate applies does not satisfy the applicable obligations as a consequence of a Contractor Default, and the Contracting Authority or the infrastructure manager has provided the Contractor with a written request for rectification within this period, the Contractor must ensure that the relevant part of the Third Party Infrastructure ultimately meets the applicable requirements.
- (h) After the issue of a Partial Completion Certificate the Contractor's obligations relating to the part of the Third Party Infrastructure for which the Partial Completion Certificate was issued extend no further than:
  - (i) the obligation arising from paragraph (g); and
  - (ii) the Contractor's obligations in the period after the issue of the Partial Completion Certificate based on the relevant Implementation Agreement.

## **6. THIRD PARTY CABLES AND CONDUITS**

### **6.1 Undisturbed location and temporary protection**

- (a) The Contractor is responsible for the undisturbed location of all Third Party Cables and Conduits during the performance of the Work, unless otherwise agreed in this Agreement or a Project Agreement.
- (b) If the Contractor causes damage to a Third Party Cable or Conduit during the performance of the Work, the Contractor must immediately inform the manager of the cable or conduit concerned and send a copy of this report as soon as possible to the Contracting Authority.
- (c) If a Third Party Cable or Conduit needs to be temporarily protected in connection with the Works, the Contractor must take whatever measures are necessary in order to temporarily protect the Third Party Cable or Conduit. The Contractor must obtain the permission of the manager of the cable or conduit as far as the measures to be taken are concerned. The Contractor must send a copy of the document confirming the permission of the manager of the cable or conduit to the Contracting Authority as soon as possible.

## 6.2 Third Party Cables and Conduits Category 1

The undisturbed location of Category 1 Third Party Cables and Conduits must be maintained.

## 6.3 Third Party Cables and Conduits Category 2

- (a) During the performance of the Work, the Contractor must adhere to the agreements established in the Project Agreements the Contracting Authority has entered into with regard to the relocation, removal or permanent protection of Category 2 Third Party Cables and Conduits. The Contractor must comply with the obligations on the Contracting Authority arising from the Project Agreements included in Schedule 13, with the exception of the obligations specified for each Project Agreement in Schedule 13 that are not transferred to the Contractor. To the extent necessary, the Contractor must make further agreements with the managers of the cables or conduits. When the manager of cables or conduits does not fulfil an obligation arising from the Project Agreement then the Contractor must inform the Contracting Authority accordingly. In that case, the Contracting Authority must consult with the cables or conduits manager. If this consultation does not result in agreement within 30 Working Days then the Contracting Authority must institute a claim for the fulfilment of the concerned obligation against the cables or conduits manager.
- (b) The Contractor must coordinate the performance of the Work to the extent necessary with those who actually relocate, remove or permanently protect the Category 2 Third Party Cables and Conduits located within the RWS Area and Third Party Areas. Relocation, removal or permanent protection of Category 2 Third Party Cables and Conduits does not belong to the Work.
- (c) The Contracting Authority must pay the price specified in the Project Agreement for relocation, removal or permanent protection of Category 2 Third Party Cables and Conduits to the relevant cables and conduits manager.
- (d) If at the suggestion of the Contractor a Category 2 Third Party Cable or Conduit is removed, relocated or permanently protected in a manner that deviates from the Project Agreement, the additional costs are for the account of the Contractor.

## 6.4 Third Party Cables and Conduits Category 3

- (a) If the relocation, removal or permanent protection of a Category 3 Third Party Cable or Conduit is necessary in connection with the Works, the Contractor must make a timely Request for Change on

behalf of the Contracting Authority to the manager of the cable or conduit. The Request for Change must be authorised by the Contracting Authority before it is made to the manager of the cable or conduit.

- (b) If the Contracting Authority refuses to authorise the Request for Change, it must so inform the Contractor within 15 Working Days after receipt of an adequately elaborated draft of the Request for Change. The Contracting Authority may only refuse to authorise the draft Request for Change if the draft does not fulfil the Regulations concerning Cables and Conduits.
- (c) After sending the Request for Change to the cable or conduit manager, the Contractor must reach agreement with the cable or conduit manager concerning the contents of the Project Agreement. The Project Agreement must fulfil the Regulations concerning Cables and Conduits. The agreement must be reached on behalf of the Contracting Authority, subject to the authorisation of the Contracting Authority.
- (d) If the cable or conduit manager does not wish to give access to the estimated costs for permanent protection, relocation or removal of the cable or conduit then the Contracting Authority must, on the request of the Contractor, reach agreement with the cable or conduit manager pursuant to the Regulations concerning Cables and Conduits on the fee to be paid.
- (e) The Project Agreement must be signed by the Contracting Authority. If the Contracting Authority refuses to sign a Project Agreement, it must inform the Contractor thereof within 15 Working Days after receipt of a complete draft for the Project Agreement (including appendices) concerning which the Contractor has reached agreement with the manager of the cable or conduit. The Contracting Authority may only refuse to sign if the Project Agreement does not fulfil the Regulations concerning Cables and Conduits.
- (f) The definitive compensation with regard to a Category 3 Third Party Cable or Conduit paid by the Contracting Authority to the manager of the cable or conduit based on the Project Agreement is for the account of the Contractor, and must be paid by the Contractor to the Contracting Authority at the latter's first request.
- (g) The Contractor may not commence Works for which a relocation, removal or permanent protection of a Category 3 Third Party Cable or Conduit is necessary before a Project Agreement has been signed for this purpose. During the performance of the Work the Contractor must adhere to the agreements that are established in the relevant



Project Agreement. The Contractor must comply with the obligations of the Contracting Authority arising from the Project Agreement. To the extent necessary, the Contractor must make further agreements with the managers of the cables or conduits. When the manager of cables or conduits does not fulfil an obligation arising from the Project Agreement then the Contractor must inform the Contracting Authority accordingly. In that case, the Contracting Authority must consult with the cables or conduits manager. If this consultation does not result in agreement within 30 Working Days then the Contracting Authority must institute a claim for the fulfilment of the concerned obligation against the cables or conduits manager.

- (h) The Contractor must coordinate the performance of the Work to the extent necessary with those who actually relocate, remove or permanently protect the Category 3 Third Party Cables and Conduits located within the RWS Area and Third Party Areas.

## **7. TRANSFER**

### **7.1 Conditions attached to transfer**

The Contractor must ensure that the conditions for the issue of the Transfer Certificate as specified in the Certificate Plan have been met on the Expiry Date.

### **7.2 Transfer inspections**

- (a) With regard to the provisions of Article 7.1 (*Conditions for transfer*), the Parties must jointly inspect the RWS Infrastructure.
- (b) The first inspection must take place no earlier than [36] months and no later than [24] months before the Expiry Date. The last inspection must take place not earlier than [6] months and not later than [3] months before the Expiry Date.
- (c) The inspections shall be carried out at the Contracting Authority's request. The Contracting Authority must make its request to the Contractor no later than 20 Working Days before the inspection.
- (d) The Contractor shall organise the inspections.
- (e) The inspections shall take place according to the provisions of the Management Plan. Within 15 Working Days after each inspection, the Contractor must provide the Contracting Authority with an overview of the Works that must be carried out in addition to those included in the maintenance subplan applicable at the time, for the RWS Infrastructure to comply with the requirements laid down in Article 7.1. (*Conditions for transfer*) as of the Expiry Date. *With this*

overview, the Contractor must supply a schedule for carrying out these additional Works and a list of the associated costs.

- (f) The Contracting Authority may verify whether the overview of additional Work referred to in paragraph (e), its schedule, and the list of associated costs are accurate and complete. Should the Contracting Authority determine that these documents are not accurate and complete, the Contractor must amend the documents as quickly as possible and resubmit them to the Contracting Authority.

### 7.3 Transfer Guarantee

- (a) No later than [24] months prior to the Expiry Date, the Contractor must provide a Bank Guarantee as security for the fulfilment of its obligations pursuant to this Agreement in the amount of € [●] in accordance with the model supplied in Schedule 7 (*Models*), Part 2 (*Transfer Bank Guarantee*).
- (b) The term of validity of the Transfer Bank Guarantee must extend until [12] months after the Expiry Date.
- (c) Should inspections reveal that the Contractor must take further measures for the RWS Infrastructure to fulfil the conditions specified in the Certificate Plan for the issue of the Transfer Certificate on the Expiry Date, of which the costs are higher than the maximum amount stated in paragraph (a) of the Transfer Guarantee, then the Contractor must, within [45] Working Days after sending the summary referred to in Article 7.2 paragraph (e), provide an additional Bank Guarantee for an amount equal to the deficit to a maximum (including the amount referred to in paragraph (a)) of € [●]. The preceding does not apply prior to the date on which the Bank Guarantee mentioned in Article 7.3 paragraph (a) is provided.

### 7.4 Issue of the Transfer Certificate

- (a) No later than 20 Working Days before the Expiry Date, the Contractor must deliver the documents listed in the Certificates Plan demonstrating that on the Expiry Date the RWS Infrastructure meets the conditions for the issue of the Transfer Certificate as cited in the Certificates Plan. *The Contractor may submit these documents to the Contracting Authority in phases.*
- (b) Within 20 Working Days after a document as referred to under (a) has been submitted, the Contracting Authority must inform the Contractor whether the Contractor has demonstrated that the conditions for the issue of the Transfer Certificate described in the document have been fulfilled. *The Contracting Authority may verify*

whether the conditions for issue of the Transfer Certificate continue to be fulfilled as from 20 Working Days after this notification and until the issue of the Commencement Certificate. The Contracting Authority must notify the Contractor as soon as possible if the Contracting Authority concludes that a condition is not or no longer fulfilled.

- (c) The Contract may amend a document, which the Contracting Authority has determined does not demonstrate that the conditions described therein have been satisfied, and may resubmit it to the Contracting Authority.
- (d) If the Contractor has demonstrated that on the Expiry Date all conditions for the issue of the Transfer Certificate have been met then the Contracting Authority must issue the Transfer Certificate to the Contractor on the Expiry Date, notify the credit institution that issued the Transfer Guarantee that the Transfer Bank Guarantee is no longer valid, and return the original copy of the Transfer Guarantee to the Contractor.
- (e) If the Contracting Authority refuses to issue the Transfer Certificate, the Contracting Authority must notify the Contractor thereof within 20 Working Days following the receipt of all the documents specified in paragraph (a), stating the reasons for its decision. The Contracting Authority may not invoke the Transfer Guarantee for 40 Working Days after sending the aforementioned statement of reasons to the Contractor. In this respect, the Contracting Authority must report if and to what extent it intends to invoke the Transfer Guarantee.

## **8. QUALITY ASSURANCE**

### **8.1 Management System**

- (a) The Contractor must set up and maintain a Management System that applies to the Work, including the Work carried out by Agents of the Contractor.
- (b) The Management System must be described in the Management Plan. The Management System and its description in the Management Plan must be organised according to and comply with the requirements of NEN-ISO/IEC 15288:2008, and with the requirements as described in the Management Specifications.
- (c) The Contractor's performance of the Work must comply with the plans laid down in the Management Specifications, Management Plan and the plans contained in [*Schedule 8 (Qualitative Part of the Submission)*]].

- (d) For all system components of the Management System, the Contractor must obtain a quality system subcertificate based on the NEN-ISO 9001:2008 standard that applies to the processes that are part of the relevant subsystem.
- (e) The Contractor must retain the subcertificate referred to in paragraph (d) from the date of issue and throughout the remaining term of this Agreement.
- (f) The component certificate referred to under (d) must be issued by a certifying body that is recognised as such by a national accreditation organisation (in the Netherlands: the Raad voor Accreditatie - Dutch Accreditation Council).

## 8.2 Performance Measurement System

- (a) The Contractor must design and construct the Performance Measurement System in accordance with the Management Specifications and the Management Plan.
- (b) The Contractor must ensure that the Performance Measurement System performs and is maintained in accordance with the *Management Specifications and the Management Plan* throughout the period from the Commencement Date to the Expiry Date.

## 8.3 Inspections

- (a) The Contracting Authority may at any time inspect (or have inspected) whether the Contractor is fulfilling its obligations pursuant to the Agreement. In the context of inspections, the Contractor must provide the Contracting Authority with access to the locations and offices where Work is prepared or performed.
- (b) The Contractor must provide the Contracting Authority, upon the latter's request and in the shortest time possible, any information the Contracting Authority reasonably considers necessary for conducting an inspection.
- (c) In conducting an inspection, the Contracting Authority must endeavour not to obstruct the performance of the Work.
- (d) The Contracting Authority must provide the Contractor within a reasonable time period with the results of the inspection for information purposes.
- (e) The Contracting Authority is not required to exercise its right to carry out inspections.

- (f) Each Party bears the Party's costs of the inspections.

#### **8.4 Consequences of inspections and of examining documents**

- (a) Should the Contracting Authority carry out an inspection, it is not obliged to determine the presence of possible Contractor Defaults.
- (b) An inspection does not signify approval of the performance of the Work. The Contractor remains itself responsible for fulfilling its obligations pursuant to this Agreement.
- (c) The fact of the Contracting Authority's examining a document or checking, finalising, or approving a document, in no case implies the liability or responsibility of the Contracting Authority for its content, nor does it release the Contractor from any responsibility based on this Agreement.
- (d) *[The fact that the Contracting Authority tests products and systems and designates them "suitable for use" in accordance with [Requirement ●] of the Management Specifications, in no case implies the liability or responsibility of the Contracting Authority for these products and systems, nor does it release the Contractor from any responsibility based on this Agreement.]*

#### **8.5 Rectification obligation**

- (a) If the Contractor does not meet a requirement imposed on it pursuant to this Agreement, the Contractor must rectify this within the Permitted Rectification Period or, if no Permitted Rectification Period applies to the rectification obligation in question, within a reasonable period of time, taking into account the period necessary to obtain additionally required financing. The Contractor must submit a proposal for rectification measures that shows this reasonable period to the Contracting Authority asking the Contracting Authority to agree to the period specified in the proposal. If the Contracting Authority cannot consent to the time period cited in the proposal, the reasonable period shall be established in application of Article 21 (*Dispute Resolution*).
- (b) If the Contractor is of the opinion that the rectification is not possible within the Permitted Rectification Period then the Contractor must submit motivated reasons for the infeasibility of completing the rectification work within the Permitted Rectification Period. The Contracting Authority and Contractor must then reach agreement as quickly as possible on a divergent Permitted Rectification Period for this specific instance. The Contractor must record this deviating Permitted Rectification Period in the Performance Measurement System. If the Contracting Authority is of the opinion that the

rectification is possible within the Permitted Rectification Period, the Contracting Authority must inform the Contractor about this as soon as possible and the Permitted Rectification Period shall be defined whilst applying the provisions of Article 21 (*Dispute Resolution*).

- (c) This rectification obligation shall apply to both in the case of a Contractor Default and when not meeting one of the obligations assumed by the contractor based on this Agreement is the result of a Supervening Event but not insofar as not meeting an obligation is the result of a Force Majeure Event.

## 9. SUPERVENING EVENTS

### 9.1 Notification of a Supervening Event

- (a) If the Contracting Authority cannot fulfil its obligations based on this Agreement or can only fulfil them at higher costs as a consequence of a Force Majeure Event, it must inform the Contractor as soon as possible of the following:
- (i) the events or circumstances that constitute the Force Majeure Event;
  - (ii) the obligations based on this Agreement that, according to expectations, cannot be fulfilled as a direct result of the Event, or those that can only be fulfilled at higher costs; and
  - (iii) the expected duration of the inability to fulfil said obligations.
- (b) If the Contractor cannot fulfil its obligations based on this Agreement or can only fulfil them at a Financial Loss as a consequence of a Supervening Event, it must inform the Contracting Authority as soon as possible of the following:
- (i) the events or circumstances that constitute the Supervening Event;
  - (ii) the obligations based on this Agreement that as a direct result of the Event cannot be fulfilled or can only be fulfilled by incurring a Financial Loss;
  - (iii) the expected duration of the inability to fulfil said obligations; and
  - (iv) when the event is a Delay Event or a Postponed Completion Event: a specification of the expected duration of the resultant Critical Delay or Critical Delay in Completion.

In a situation where there is a Critical Delay or a Critical Delay in Completion, the Contractor must inform the Contracting Authority within 10 Working Days after providing the relevant notification whether, and at what additional costs, it expects to be able to compensate for the Critical Delay or Critical Delay in Completion in part or in full. When the Contractor is of the opinion that the period of 10 Working Days is insufficient to issue the information referred to in the previous sentence then it must notify the Contracting Authority, with justification, of the reasonable period of time within which it shall be able to issue the information.

- (c) Within 20 Working Days after providing the notification as referred to in (b) under (i) to (iv) inclusive the Contracting Authority must inform the Contractor of the following:
- (i) whether it accepts or does not accept that a Supervening Event has occurred, whether it accepts or does not accept, insofar as applicable, that a Critical Delay or a Critical Delay in Completion exists and whether it agrees with the duration thereof as reported by the Contractor; or
  - (ii) that the Contracting Authority requires more information to make an assessment.

If the Contracting Authority has not responded within 20 Working Days in one of the ways referred to in this paragraph, the Contracting Authority shall be assumed to have accepted that Supervening Events exist and, insofar as this may apply, that it agrees to the duration of the Critical Delay or Critical Delay in Completion reported by the Contractor.

- (d) If the Contracting Authority requires further information as referred to under (c) under (ii), the Contractor must pass on that information (to the extent that it possesses it) to the Contracting Authority as soon as possible but no later than within 20 Working Days. The Contracting Authority must notify the Contractor in the manner referred to in paragraph (c) within 20 Working Days of the receipt of this information, where the last subparagraph of paragraph (c) is applicable *mutatis mutandis*.
- (e) If the Contracting Authority does not accept that a Supervening Event exists or does not agree with the duration of the Critical Delay or Critical Delay in Completion reported by the Contractor, and the Contractor cannot agree with this notification then the Contractor must inform the Contracting Authority accordingly within 10 Working Days of the Contractor's receipt of the notification, in which event either Party may then institute dispute proceedings pursuant to Article 21 (*Dispute Resolution*). If the Contractor does not inform

the Contracting Authority that it does not agree with the Contracting Authority's notification within the aforementioned period then the Contractor is deemed to have agreed to the Contracting Authority's notification.

- (f) The Financial Loss must be determined by the Parties in accordance with the provisions of Schedule 3 (*Compensation for Supervening Events*) to the extent that these are applicable. In determining the Financial Loss, the Contracting Authority has the right to have an investigation carried out by an independent expert. If the Parties have not been able to reach agreement with regard to the Financial Loss within 3 months after the notification referred to under (b) has been sent, the Financial Loss must be determined in application of Article 21 (*Dispute Resolution*).

## 9.2 Delay Event

- (a) Upon a Delay Event the Planned Availability Date will be extended by the addition of a period equal to the duration of the Critical Delay insofar as the Contractor is not required to make up for this Critical Delay by applying paragraph (b). The Contractor must adapt the Project Planning accordingly.
- (b) If, in the case of a Delay Event, the Contractor can make up for the Critical Delay or part of it while incurring a Financial Loss, the Contractor must do so at the request of the Contracting Authority.
- (c) On the occurrence of a Delay Event the Contracting Authority must pay the Contractor compensation in accordance with Schedule 3 (*Compensation for Supervening Events*), paragraph 1 (*Delayed Completion Event*). The previous sentence shall not apply in the case of a Delay Event as referred to under (c) of the definition thereof.

## 9.3 Compensation Event

In the case of a Compensation Event, the Contracting Authority must pay the Contractor (or where a Contracting Authority Change is concerned, the Contractor may have to pay the Contracting Authority) compensation in accordance with Schedule 3 (*Compensation for Supervening Events*), paragraph 2 (*Compensation Event*).

## 9.4 Force Majeure Event

- (a) If a Force Majeure Event occurs then those obligations that cannot be fulfilled as a result of that Force Majeure Event, or can be fulfilled only by incurring a Financial Loss, shall be suspended for the duration thereof. Should this Agreement be terminated pursuant to



Article 10.6 (*Termination due to a Force Majeure Event*), the obligations shall be deemed to have expired.

- (b) In the event of a Force Majeure Event:
  - (i) the Contractor must adopt all measures that are reasonably possible in order to limit the negative consequences of the Force Majeure Event, without being obliged to repair damage to the Infrastructure as a consequence of the Force Majeure Event;
  - (ii) the Parties must consult on the possibilities of continuing this Agreement, in amended form or otherwise. In addition, the Contracting Authority can instruct the Contractor to rectify the consequences of a Force Major Event in exchange for payment of compensation for the Financial Loss involved.
  - (iii) the Contracting Authority must pay the Contractor compensation in accordance with Schedule 3 (Compensation for Supervening Events), paragraph 3 (Force Majeure Event), except in the case of a Force Majeure Event as defined in (a) of the definition thereof.
- (c) Without prejudice to any payment obligations, where relevant, as referred to in paragraph (b) under (iii), the Parties shall not be liable toward each other for any loss as the consequence of a Force Majeure Event. Loss incurred remains entirely for the account of the Party that has incurred the loss.
- (d) In the Agreement, the Parties have set out an exhaustive regulation of the events and circumstances based on which a default cannot be attributed to a Party, as referred to in Article 6:75 of the Civil Code. Apart from such events and circumstances, therefore, a Party cannot rely on that provision.

## **9.5 Delayed Completion Event**

- (a) On the occurrence of a Delayed Completion Event the Scheduled Completion Date shall be postponed by a period equal to the duration of the Critical Delay in Completion, insofar as the Contractor is not obliged to make up for the Critical Delay in Completion in application of the provisions under (b). The Contractor must adapt the Project Planning accordingly.
- (b) If, in the case of a Delayed Completion Event, the Contractor can make up for the Critical Delay in Completion or part of it by incurring a Financial Loss, the Contractor must do so at the request of the Contracting Authority.

- (c) On the occurrence of a Delayed Completion Event the Contracting Authority must pay the Contractor compensation in accordance with Schedule 3 (*Compensation for Supervening Events*), paragraph 4 (*Delayed Completion Event*). The previous sentence does shall apply in the case of a Delayed Completion Event as referred to under (c) of the definition of a Delay Event.

## **10. PREMATURE TERMINATION**

### **10.1 Termination due to an Immediate Termination Event**

- (a) The Contracting Authority may terminate this Agreement as of a date specified by it, in the case of an Immediate Termination Event.
- (b) In the case of termination pursuant to paragraph (a) the Contracting Authority must pay the Contractor compensation, or the Contractor must pay the Contracting Authority compensation, in accordance with Schedule 4 (*Compensation for premature termination*), paragraph 1 (*Termination due to an Immediate Termination Event or Termination due to a Contractor Default*).

### **10.2 Termination due to Contractor Default**

- (a) The Contracting Authority may terminate this Agreement as of a date specified by it in the case of a Contractor Default consisting of a failure to satisfy a Category A Requirement, if:
  - (i) By application of Availability Corrections according to Schedule 2 (*Payment Mechanism*) the Net Availability Compensation over at least [3] consecutive Payment Periods has amounted to less than the following in each of those Payment Periods:
    - (A) [1] % of the Gross Availability Payment with regard to the Payment Periods that commenced prior to the Availability Date; or
    - (B) [50] % of the Gross Availability Payment with regard to the Payment Periods that commenced after the Availability Date; and
  - (ii) The Contractor does not rectify the Contractor Default within a reasonable period subsequently set by the Contracting Authority as specified in Article 11.1 (a) and (b), unless the Contractor Default, given its particular nature or limited significance in view of the whole of the Contractor's obligations, does not warrant termination with all of the associated consequences.

- (b) The Contracting Authority may terminate this Agreement as of a date specified by it in the case of a Contractor Default that does not involve failure to satisfy a Category A Requirement if:
  - (i) the Contracting Authority has determined Penalty Points in connection with (failure to rectify) this Contractor Default in more than [3] consecutive payment periods; and
  - (ii) the Contractor has not rectified the Contractor Default within a further reasonable period set by the Contracting Authority as specified in Article 11.1 paragraphs (a) and (b),

unless termination and its consequences are not justified by the Contractor Default, given its particular nature or limited significance in view of all of the Contractor's obligations.
- (c) In the case of termination pursuant to paragraphs (a) of (b) the Contracting Authority must pay the Contractor compensation, or the Contractor must pay the Contracting Authority compensation, in accordance with Schedule 4 (*Compensation for Premature Termination*), paragraph 1 (*Termination due to an Immediate Termination Event or Termination due to Contractor Default*).

### **10.3 Termination due to Contracting Authority Default**

- (a) The Contractor may terminate this Agreement as of a date specified by it, if a situation of a Contracting Authority Default exists and the Contracting Authority does not remedy that situation within a reasonable period of time as referred to in Article 11.2 (a) and (b), unless the Contracting Authority Default, given its particular nature or limited significance, does not warrant termination with all of the associated consequences.
- (b) In the case of termination pursuant to paragraph (a), the Contracting Authority must pay the Contractor compensation in accordance with Schedule 4 (*Compensation for premature termination*), paragraph 2 (*Termination due to a Contracting Authority Default or discretionary termination by the Contracting Authority*).

### **10.4 Discretionary Termination by the Contracting Authority**

- (a) The Contracting Authority may terminate this Agreement at any time as of a date specified by the Contracting Authority.
- (b) If the fulfilment of this Agreement by the Contracting Authority or the contents of the Contracting Authority Schedules are or come to be in conflict with Regulations, and this cannot be corrected by a

Contracting Authority Change, then the Contracting Authority must terminate this Agreement based on paragraph (a).

- (c) In the case of termination pursuant to paragraph (a), the Contracting Authority must pay the Contractor compensation in accordance with Schedule 4 (*Compensation for premature termination*), paragraph 2 (*Termination due to a Contracting Authority Default or discretionary termination by the Contracting Authority*).

#### **10.5 Termination due to a prolonged Delay Event or prolonged Delayed Completion Event**

- (a) The Contractor may terminate this Agreement with immediate effect:
  - (i) if, in the case of a Delay Event other than a Compensation Event, a Force Majeure Event or a Delay Event as referred to under (c) of the definition thereof, the Critical Delay persists for longer than 2 years, or it is certain that the Critical Delay shall persist for longer than 2 years; or
  - (ii) if, in the case of a Delayed Completion Event other than a Compensation Event, a Force Majeure Event or an event as referred to under (c) of the definition thereof, the Critical Delay in Completion persists for longer than 2 years, or it is certain that the Critical Delay in Completion shall persist for longer than 2 years.
- (b) The Contracting Authority may terminate this Agreement with immediate effect:
  - (i) If, in the case of a Delay Event other than a Force Majeure Event or a Delay Event as referred to under (d) or the definition thereof, the Critical Delay persists for longer than 2 years, or it is certain that the Critical Delay shall persist for longer than 2 years;
  - (ii) *[if the Contractor selects the option mentioned in paragraph 1.4(b) of Schedule 3;]* or
  - (iii) if, in the case of a Delayed Completion Event that is not a Force Majeure Event or an event stipulated under (c) or the definition thereof, the Critical Delay in Completion persists for longer than 2 years, or it is certain that the Critical Delay in Completion shall persist for longer than 2 years.

- (c) In the event of termination on the grounds of paragraphs (a) or (b) then the Contracting Authority must pay the Contractor compensation in accordance with Schedule 4 (*Compensation for premature termination*), paragraph 3 (*Termination due to a prolonged Delay Event*).

#### **10.6 Termination due to a Force Majeure Event**

- (a) If a Force Majeure Event, not being a Force Majeure Event that prevents achievement of Financial Close as stipulated in Article 3.1 paragraph (c), lasts 180 Working Days without the Parties having reached agreement on the continuation of this Agreement, or once it becomes evident that the Agreement shall not be continued as a result of such a Force Majeure Event, either Party has the right to terminate the Agreement with immediate effect.
- (b) In the case of termination pursuant to paragraph (a), the Contracting Authority must pay the Contractor a compensation in accordance with Schedule 4 (*Compensation for premature termination*), paragraph 4 (*Termination due to a Force Majeure Event*).

#### **10.7 Direct Agreement**

The rights based on Article 10 (*Premature termination*) can only be exercised subject to the Direct Agreement. In the event of any contradictions between provisions in this Agreement and provisions in the Direct Agreement the provisions in the Direct Agreement shall prevail.

#### **10.8 Determination of compensation**

The Parties must determine the compensation referred to in this Article 10 (*Premature Termination*). If the Parties cannot reach an agreement within 40 Working Days after termination of this Agreement, the compensation shall be determined in accordance with the provisions of Article 21 (*Dispute Resolution*).

### **11. DEFAULTS**

#### **11.1 Contractor Default**

- (a) If a Contractor Default occurs, the Contracting Authority may inform the Contractor and the provisions as referred to in Article 8.5 (*Rectification Obligation*) shall apply. If a Permitted Rectification Period has not been defined for the rectification of a Contractor Default, the Contracting Authority may, in derogation to the provisions in Article 8.5 paragraph (a) and (b), set a reasonable period to rectify this Contractor Default that the Contractor must

meet. If the Contractor cannot agree to this period, the Contractor must inform the Contracting Authority as soon as possible and a reasonable period shall be determined by application of the provisions of in Article 21 (*Dispute Resolution*)

- (b) If a Contractor Default occurs and the Contractor has not remedied it within the applicable time period pursuant to paragraph (a) of this article, the Contracting Authority may:
  - (i) submit a claim for specific performance based on Article 3:296 of the Dutch Civil Code;
  - (ii) rectify the Contractor Default, or have it rectified by third party;
  - (iii) take measures pursuant to Article 18.6 (*Traffic Safety*) to the extent that these measures need to be taken as a consequence of a Contractor Default,
  - (iv) terminate the Agreement pursuant to Article 10.2 and with due regard for the provisions of Article 10.7.
- (c) If the Contracting Authority, pursuant to paragraph (b) under (ii), rectifies a Contractor Default or has the Contractor Default rectified by a third party or, takes measures pursuant to paragraph (b) under (iii), then the Contractor must pay the Contracting Authority compensation of an amount equal to the costs paid by the Contracting Authority to third parties (in case of involvement of third parties) and equal to the internal costs incurred by the Contracting Authority as determined by the standard internal direct pricing (in case of measures taken by the Contracting Authority ), both increased by a 10% surcharge.
- (d) In the event of a Contractor Default and an Immediate Termination Event the Contracting Authority has no rights other than those expressly stated in this Agreement. Thus, the Contracting Authority may, in such a case, for example:
  - (i) not suspend its obligations pursuant to this Agreement;
  - (ii) not claim damages from the Contractor; and
  - (iii) not demand dissolution of this Agreement.

### **11.2 Contracting Authority Default**

- (a) If a Contracting Authority Default occurs, the Contractor may inform the Contracting Authority thereof and may set a reasonable deadline

for the Contracting Authority to remedy the Contracting Authority Default.

- (b) If the Contracting Authority believes that the deadline set by the Contractor is insufficient, within reasonable limits, for the correction of the Contracting Authority Default then the Contracting Authority may inform the Contractor of this within 10 Working Days after receipt of the notification from the Contractor. The notification of the Contracting Authority must be accompanied by a proposal for the rectification measures to be adopted and a time schedule for carrying them out. If the Contractor does not reject the remedial time period referred to in this proposal within 10 Working Days after receiving it, the time period shall be considered to have been accepted by the Contractor. If the Contractor rejects the deadline for correction referred to in the proposal and the Contracting Authority does not agree to this then the Contracting Authority must commence claim proceedings pursuant to Article 21 (*Dispute Resolution*) within 10 Working Days after receipt of the rejection.
- (c) If a Contracting Authority Default occurs and the Contracting Authority has not rectified it within the period pursuant to paragraphs (a) or (b) of this Article then the Contractor may:
  - (i) institute proceedings for the fulfilment of the Contracting Authority's payment obligations on the grounds of Article 3:296 of the Dutch Civil Code; or
  - (ii) exercise the termination rights expressly granted to the Contractor in this Agreement.
- (d) In the event of a Contracting Authority Default the Contractor has no other rights than those expressly stated in this Agreement. Thus, the Contractor may, in such a case, for example:
  - (i) not suspend its obligations pursuant to this Agreement;
  - (ii) not claim damages from the Contracting Authority; and
  - (iii) not demand dissolution of this Agreement.

## **12. LIABILITY AND INDEMNITY**

### **12.1 Liability**

- (a) The Contracting Authority is, to the extent that this Agreement does not expressly state otherwise, not liable for loss incurred by the Contractor. For example, the Contracting Authority is not liable for:

- (i) loss incurred by the Contractor that is the consequence of the condition the Existing Infrastructure, the RWS Infrastructure, or the Third Party Infrastructure is in, or for objects that are in, on or near the Existing Infrastructure, the RWS Infrastructure, or the Third Party Infrastructure;
  - (ii) the content of information provided by the Contracting Authority to the Contractor;
  - (iii) the contents of the Contractor Schedules or any inconsistency between the Contractor Schedules and other parts of the Agreement; or
  - (iv) the contents of a document based on the sole fact that the Contracting Authority has had access to that document, has assessed it or has (tacitly or otherwise) agreed to it.
- (b) The Contracting Authority is liable to the Contractor for any loss for which the Contracting Authority is liable in law to the Contractor other than on the basis of this Agreement, including loss that the Contractor may incur as a consequence of an unlawful act (tort) on the part of the Contracting Authority, providing this liability does not result from an event that qualifies as a Contracting Authority Default.
- (c) The Contractor is, to the extent that this Agreement does not expressly state otherwise, not liable for loss incurred by the Contracting Authority.
- (d) The Contractor is liable to the Contracting Authority for any loss for which the Contractor is liable under law to the Contracting Authority other than on the basis of this Agreement, including loss that the Contracting Authority may incur as a consequence of an unlawful act (tort) on the part of the Contractor, providing this liability does not result from an event that qualifies as a Contractor Default.

## 12.2 Contracting Authority Indemnities

- (a) To the extent not due to a Contractor Default, the Contracting Authority must indemnify the Contractor against:
- (i) claims of third parties for compensation for loss incurred by an unlawful act (tort) on the part of the Contracting Authority;
  - (ii) claims of third parties based on an (alleged) infringement of Intellectual Property Rights in the performance of the Work with regard to any part of the Existing Infrastructure;



- (iii) claims of third parties arising from the Contractor's observance of the directions and instructions issued by the Contracting Authority on the grounds of Article 18.6 (*Traffic Safety*) or Article 18.7 paragraph (b) to the extent that those directions or instructions did not need to be issued as a consequence of a Contractor Default;
  - (iv) all claims of third parties in connection with the performance of the Work that exceed the maximum amounts referred to in Article 12.3 (*Contractor Indemnities*), paragraph (c); and
  - (v) claims of third parties as a consequence of a Contracting Authority Default.
- (b) The Contracting Authority must indemnify the Contractor against claims of third parties with regard to loss incurred as a consequence of the unavailability or decreased availability of the Infrastructure for public traffic.
  - (c) The indemnity by the Contracting Authority does not apply to claims of third parties based on an agreement these third parties have signed with the Contractor, insofar as the Contractor would not be liable for them in the absence of that agreement.

### 12.3 Contractor Indemnities

- (a) To the extent not due to a Contracting Authority Default, the Contractor must indemnify the Contracting Authority against:
  - (i) claims of third parties for compensation of loss incurred by an unlawful act (tort) of the Contractor;
  - (ii) claims of third parties based on an (alleged) infringement of intellectual or industrial rights in the performance of the Work (except insofar as such infringement is based on a Contracting Authority Schedule or concerns an (alleged) infringement as referred to in Article 12.2 (a) under (ii) (*Contracting Authority Indemnities*));
  - (iii) Third Party claims in connection with a Contractor Default, with the exception of Third Party claims concerning damage incurred as a result of the unavailability or decreased availability of the Infrastructure for public traffic;
  - (iv) all negative consequences of the failure by the Contracting Authority or Contractor to comply with Regulations relating to working conditions and occupational health and safety as well as the Aliens Employment Act, except to the extent that

non-fulfilment is the consequence of an act or omission on the part of the Contracting Authority; and

- (v) claims of cable or conduit administrators in connection with the performance of the Work.
- (b) The indemnity by the Contractor does not apply to claims of third parties that are based on an agreement that these third parties have signed with the Contracting Authority, insofar as the Contracting Authority would not be liable for them in the absence of that agreement.
- (c) The liability of the Contractor to the Contracting Authority pursuant to this article is limited to the amount of:
  - (i) in the period beginning on the Contract Date and ending on the Availability Date, € **[maximum]** per claim;
  - (ii) in the Availability Period, € **[maximum]** per claim; and
  - (iii) in the period beginning on the Availability Date and ending on the Expiry Date, € **[maximum]** per claim;

## 13. CHANGES

### 13.1 Change

The Parties can only change this Agreement by way of a document prepared and signed by the Parties for that purpose.

### 13.2 Contracting Authority Change

- (a) If the Contracting Authority proposes a change to [*Schedule 8 ([Qualitative Part of Submission]) or] Schedule 9 (Schedule of Requirements)* or the definitions of "Scheduled Availability Date" or "Scheduled Expiry Date" and the resulting changes in Schedule 2 (*Payment Mechanism*), this is designated a Contracting Authority Change.
- (b) If:
  - (i) a Relevant Change in Law necessitates an amendment of this Agreement;
  - (ii) [*the Route Decision, as it stands at the time of becoming irrevocable, deviates in content from the Route Decision as it stood on the date two weeks prior to [date Final Submission], and this necessitates an amendment of this Agreement]; [or]*

- (iii) this Agreement, with the exception of the Contractor Schedules, imposes an act in conflict with Regulations or the intellectual or industrial property rights of a third party, and this can be remedied by means of an amendment to the Agreement; *[or*
- (iv) *the adoption of measures or recommendations arising from Req. [●] of the Management Specifications leads to an amendment of this Agreement (excepting the Contractor Schedules)],*

the Parties must introduce the amendment as a Contracting Authority Change. A Change as referred to in this paragraph (b) may concern any provision in this Agreement, including Contractor Schedules. *[If the results of the Work performed earlier by the Contractor must be undone due to the deviation as referred to in this paragraph (b) under (ii), then the Contracting Authority Change must also include an order to undo these results.]*

- (c) A Contracting Authority Change may not result in:
  - (i) substantive changes to the Work as compared to this Agreement's original purpose; or
  - (ii) the Contractor having to act contrary to Regulations in the performance of the Work.
- (d) A Contracting Authority Change is a Compensation Event.
- (e) If the Contractor can demonstrate a Contracting Authority Change has had an adverse effect on the risk profile of the Work or on the Lenders then the Contracting Authority shall pay compensation for or bear the additional risks.

### 13.3 Contractor Change

- (a) If the Contractor proposes a change to [Schedule 8 [(*Qualitative Part of Submission*)] or the Schedule of Requirements, this is designated a Contractor Change.
- (b) *If the adoption of measures or recommendations arising from Req. [●] of the Management Specifications results in an amendment of the Contractor Schedules, then the Parties must introduce the change as a Contractor Change.*
- (c) If the Contractor Schedules impose an action in conflict with Regulations, other than as a consequence of a Relevant Change in Law, or with intellectual or industrial property rights of a Third Party

and this can be remedied by an amendment of the Agreement then the Parties must introduce that change as a Contractor Change.

- (d) A Contractor Change may not result in the Contractor having to act contrary to Regulations.
- (e) The Contractor may propose a change to the documents enclosed in Schedule 9, Part 5 (*Implementation Agreements*) and Part 6 (*Agreements with Stakeholders*), provided that this change relates to the obligations imposed on the Contractor pursuant to Article 5.2(a) or Article 18.4, subject to the condition that the relevant Stakeholder demonstrably agrees in writing to the change and subject to the condition that the Contractor continues to fulfil its other obligations arising from this Agreement. The Contractor must submit any such changed document, signed by the relevant interested party, to the Contracting Authority for the Contracting Authority's signature for approval. The Contracting Authority must sign the changed document within 20 Working Days after receipt, unless the change:
  - (i) is detrimental to the Contracting Authority's position; or
  - (ii) is detrimental to the position of other interested parties.

The change will only come into force once the changed document has been signed by the Contracting Authority. Once signed by the Contracting Authority, the changed documents are assumed to be included in Schedule 9, Part 5 (*Implementation Agreements*)) [and Part 6 (*Agreements with Stakeholders*)]. Article 13.3 is not applicable to this Contractor Change.

- (f) To the extent that the Parties have not agreed otherwise, the consequences of a Contractor Change are borne by the Contractor.

#### **13.4 Procedures for Contracting Authority Changes and Contractor Changes**

In the case of both Contracting Authority and Contractor Changes, the Parties must follow the procedures and determine the (financial) consequences in the manner described in Schedule 5 (*Changes*).

### **14. INSURANCE**

#### **14.1 Insurance benefits for material loss**

- (a) The Contractor must ensure that payments made by the insurer on the basis of an insurance policy that the Contractor concludes or has

concluded to cover material damage to the Infrastructure shall only be made in accordance with Article 14 of the Direct Agreement.

- (b) No later than the commencement date of the insurance coverage as referred to in paragraph (a), the Contractor must demonstrate that the provisions of paragraph (a) have been met, by submitting the complete terms and conditions of the insurance policy.

#### **14.2 Policy terms and conditions during the Availability Period**

- (a) The Contractor must, no earlier than [●] Working Days but no later than 25 Working Days before the expected Scheduled Availability Date, provide the Contracting Authority the complete terms and conditions, including a specification of premium amounts, of the insurance policies taken out by the Contractor as referred to in Schedule 11 (*Insurance*).
- (b) If, at the time the Contractor provides the policy terms and conditions in accordance with the provisions of subsection (a), a risk against which the Contractor should purchase coverage according to Schedule 11 (*Insurance*) has become Non-Insurable, the provisions of Article 14.3 (b) and (e) for this risk shall be applicable correspondingly.
- (c) If at the time the Contractor makes the policy terms and conditions available according to the provisions of subsection (a), an Extraordinary Premium Increase has taken place, the provisions of Article 14.3 (a) and (d) shall be applicable correspondingly. If an Extraordinary Premium Decrease has taken place at that time, the provisions of Article 14.4 shall be applicable correspondingly.
- (d) The indicative conditions referred to in Schedule 11 (*Insurance*) shall be replaced by the prevailing policy terms and conditions within 20 Working Days after the Contractor has made the policy terms and conditions available in accordance with the provisions of paragraph (a). This amendment of the Agreement must be implemented as a change as referred to in Article 13.1.

#### **14.3 Extraordinary Premium Increases and Non-Insurable risk**

- (a) The Contractor must notify the Contracting Authority within 10 Working Days if an Extraordinary Premium Increase takes place during the Operational Phase. The Contracting Authority must, in the event of an Extraordinary Premium Increase, choose one of the following two options:
  - (i) the Contracting Authority regards the Extraordinary Premium Increase as a Compensation Event, where the

Contractor, in derogation from the provisions of Schedule 3 (*Compensation for Supervening Events*), paragraph 2 (*Compensation Event*) receives compensation for 85% of the Financial Loss deriving from the Extraordinary Premium Increase. The Contractor shall then continue to bear the risks covered by the insurance taken out by the Contractor that was subject to the Extraordinary Premium Increase. For the avoidance of doubt the Parties agree that the Financial Loss of the Extraordinary Premium Increase applies only to that part of the total premium increase that exceeds 30%; or

- (ii) the Contracting Authority regards one or more risks that give cause to the Extraordinary Premium Increase as a Non-Insurable risk, after which the provisions of paragraph (b) apply, unless the occurrence of the risk results in liability on the part of the Contractor vis-à-vis the Contracting Authority.
- (b) During the Operational Phase, the Contractor must inform the Contracting Authority within 5 Working Days if any risk involving consequences against which the Contractor is insured under the insurance coverage specified in Schedule 11 (*Insurance*) becomes Non-Insurable. In such a case, the Parties must consult to determine how the Non-Insurable risk should be managed. If the Parties cannot reach agreement regarding the manner in which the Non-Insurable risk should be managed within 10 Working Days after notification by the Contractor, the Contracting Authority must do the following:
- (i) if the Non-Insurable nature of the risk involves liability to third parties, a choice shall be made between the following two options:
    - (A) the Contracting Authority allows this Agreement to continue, where the provisions of paragraph (b) under (ii) of this Article regarding the relevant risk is applicable correspondingly; or
    - (B) the Contracting Authority terminates this Agreement and pays the Contractor compensation for damages in accordance with Article 10.6 (*Termination due to a Force Majeure Event*);
  - (ii) If the Non-Insurable nature of a risk is different than that indicated in (i), allow this Agreement to continue, and if this risk arises, make a choice between the two following options:

- (A) the Contracting Authority transfers an amount to the Contractor's insurance account, in accordance with the Direct Agreement, which is equal to the insurance payment that would have been paid had the risk not become Non-Insurable, as though the payment was an insurance payment; or
- (B) the Contracting Authority terminates this Agreement and pays the Contractor a compensation in accordance with Article 10.6 (*Termination due to a Force Majeure Event*) plus the total compensation amount the Contractor has paid pursuant to subsection (c) and, should this concern a liability risk with respect to third parties, pays the respective third party a sum equal to the insurance payments that would have been paid out had the risk not become Non-insurable.

Should the Contracting Authority terminate this Agreement on the grounds of Article 14.3, paragraph (b), under (i) (B) or under (ii) (B) then the Contracting Authority may not continue the Work or have the Work continued in unchanged form.

- (c) Commencing on the date that the provisions of paragraph (b) under (i) under (A) or in paragraph (b) under (ii) become applicable, the Contractor shall pay the Contracting Authority compensation equal to the premium that the Contractor paid on account of the Non-Insurable risk immediately prior to the Non-Insurability of that risk.
- (d) Commencing at the time of the notification referred to in paragraph (a) the Contractor must demonstrate once a year that an Extraordinary Premium Increase there still necessarily exists. If an Extraordinary Premium Increase no longer exists, the Contractor must so inform the Contracting Authority within 5 Working Days. As of the date on which the Extraordinary Premium Increase no longer exists, the Parties shall terminate any arrangement established according to the provisions of paragraph (a) under (i). If any arrangement has been established in accordance with the provisions of paragraph (a) under (ii), the Contractor must specify in its notification the shortest possible period within which the risk can in fact be insured against. Once this period has elapsed, the risk will no longer be considered to be Non-Insurable and the arrangement established in accordance with the provisions of paragraph (a) under (ii) will be considered to have terminated. Termination of an agreement established in accordance with the provisions of subsection (a) does not have retroactive effect.

- (e) Commencing with the notification referred to in subsection (b), the Contractor must, once every Quarter, make enquiries to determine whether the relevant risk can once again be insured on commercially acceptable terms. Should this be the case, the Contractor must inform the Contracting Authority thereof within 5 Working Days. In so doing, the Contractor must specify the shortest possible period within which the risk can actually be effected . Once this period has elapsed, the risk will no longer be considered to be Non-Insurable and the agreement established in accordance with the provisions of paragraph (b) under (ii) will be considered to have terminated. If the risk can be insured again under commercially acceptable terms, but an Extraordinary Premium Increase occurs with respect to that risk, the provisions of paragraph (a) apply.
- (f) The provisions of this Article 14.3 are applicable correspondingly to insurance not mentioned in Schedule 11 (*Insurance*) which the Contractor purchases under Article 13.1 to replace the insurance referred to in Schedule 11 (*Insurance*).

#### **14.4 Extraordinary Premium Decrease**

- (a) The Contractor must notify the Contracting Authority if an Extraordinary Premium Decrease takes place during the Operational Phase. The Contractor shall pay the Contracting Authority compensation commencing on the date on which the Extraordinary Premium Decrease occurs. This compensation is equal to 85% of the difference between the premium that the Contractor paid immediately prior to the Extraordinary Premium decrease and the premium that the Contractor paid after the Extraordinary Premium decrease occurred.
- (b) If the Contractor demonstrates that an Extraordinary Premium decrease no longer exists then the Contractor is no longer obliged to pay compensation as referred to in paragraph (a) to the Contracting Authority.
- (c) The provisions of this Article 14.4 are correspondingly applicable to insurance not mentioned in Schedule 11 (*Insurance*) which the Contractor purchases under Article 13.1 to replace the insurance referred to in Schedule 11 (*Insurance*).

#### **15. SHAREHOLDERS**

- (a) The transfer or issuing of a share in the capital of the Contractor leading to a change of Control over the company of the Contractor, may only take place with the Contracting Authority's consent or in accordance with the Direct Agreement.



- (b) In derogation from the provisions of paragraph (a) consent of the Contracting Authority is not required in case of a transfer of a share to a legal entity belonging to the same group as the transferring shareholder, as referred to in Article 2:24b of the Dutch Civil Code.
- (c) Should this lead to the transfer of Control over the company of the relevant legal entity, the consent of the Contracting Authority is also required for the transfer of a share in the capital of a (legal) entity that:
  - (i) directly or indirectly has Control over the company of the Contractor; or
  - (ii) is a custodian or manager, managing partner or an administrator, of a fund that directly or indirectly has Control over the company of the Contractor.
- (d) In derogation from the provisions of paragraph (c), the consent of the Contracting Authority is not required where the transfer of a share is concerned:
  - (i) to a legal entity that belongs to the same group as the transferring legal entity, as referred to in Article 2:24b of the Dutch Civil Code; or
  - (ii) by means of trading on any stock exchange established in the European Union or the United States of America.
- (e) The Contracting Authority provide the consent referred to in paragraphs (a) and (c) within 20 Working Days after the Contractor has submitted a completed BIBOB (Public Administration (Probity in Decision-making) Act) questionnaire or a comparable document deriving from regulations introduced in the place thereof that demonstrates with respect to the acquirer that no Grounds for Exclusion are present, unless the Contracting Authority demonstrates during this period that Grounds for Refusal apply to the acquirer or to a (legal) entity of which the acquirer is a subsidiary in the sense of Article 2:24a of the Dutch Civil Code or that belongs, with the acquirer, to the same group, as referred to in Article 2:24b of the Dutch Civil Code.
- (f) If the Contracting Authority provides consent as referred to in paragraphs (a) or (c) with regard to the new shareholder no Grounds for Exclusion are considered to exist.

**16. SUBCONTRACTORS**

**16.1 Significant Subcontractors**

- (a) The Contractor must ensure that a Significant Subcontractor listed in the following table remains actively involved in the performance of the Work during the period mentioned therein, unless compelling circumstances prevent it from doing so.
- (b) Significant Subcontractors:

Significant Subcontractor	Period
[●]	[●]
[●]	[●]

**16.2 New Subcontractors**

- (a) The Contractor and its Subcontractors, for whom the Contracting Authority has granted consent earlier according to this paragraph of this article, may only establish an agreement for the performance of part of the Work with a Subcontractor after receiving consent from the Contracting Authority.
- (b) The provisions of paragraph (a) are not applicable to the conclusion of an agreement for the performance of part of the Work with a new Subcontractor if:
  - (i) the new Subcontractor does not possess any Intellectual Property rights that shall be employed in connection with the Work and will not carry out any activities that are expected to create Intellectual Property rights; and
  - (ii) the value of the contract with the new Subcontractor is less than € 1,000,000.
- (c) The Contracting Authority must grant the consent mentioned in paragraph (a) within 20 Working Days after:
  - (i) the Contractor has submitted a signed agreement as referred to in Article 17.2 (*Subcontractor Agreements*) concluded between the Contractor and a new Subcontractor who possesses Intellectual Property rights that shall be employed in connection with the Work or shall carry out

activities that are expected to create Intellectual Property rights; and

- (ii) if the value of the Contract exceeds € 1,000,000, the Contractor has provided a completed BIBOB questionnaire (or a comparable document stemming from regulations introduced in the place thereof) demonstrating that there are no Grounds for Exclusion with regard to the Subcontractor;

unless the Contracting Authority demonstrates during this period that a Ground for Refusal applies to the new Subcontractor. If the Contracting Authority grants authorisation then no Grounds for Exclusion are considered to apply to the new Subcontractor.

## **17. INTELLECTUAL PROPERTY RIGHTS**

### **17.1 Licence to Contracting Authority**

- (a) The Contractor hereby grants the Contracting Authority an unconditional, non-exclusive, irrevocable and transferable, royalty-free licence that is not limited in terms of time and cannot be terminated, with the right to grant sublicences, for the use (always with due regard for the provisions of Articles 17.4 and 17.5) of all its Intellectual Property Rights that have been or shall be created as a result of the Work and Documents, the works embodied therein and arising therefrom, or otherwise pursuant to this Agreement, including the rights for which the Subcontractors have granted it a licence based on the agreements referred to in Article 17.2 (Agreements with Subcontractors).
- (b) To the extent that for the performance of the Agreement, licences must be obtained for Intellectual Property Rights of third parties – such as for the reuse of old designs or for the use of standard software – the Contractor must endeavour to acquire the necessary licences on behalf of and in the name of the Contracting Authority. If it is not possible to acquire these licences in the name of the Contracting Authority then the Contractor must consult with the Contracting Authority and the authorisation of the relevant third parties must be at least such that the Contracting Authority is not bound to the Contractor for the future operation and maintenance of the Work, and can continue the operation and maintenance, where relevant by outsourcing to a third party.
- (c) The Contractor must conclude the Escrow Agreement with the Contracting Authority and the Escrow Agent relating to the designs, software and documents covered by Intellectual Property Rights as referred to in paragraph (a) on the Contract Date.

## 17.2 Agreements with Subcontractors

The Contractor must conclude a written agreement with the Significant Subcontractors and all other individual Subcontractors who possess Intellectual Property Rights that shall be employed in connection with the Work or will carry out activities that are expected to create Intellectual Property Rights in accordance with the model supplied in Schedule 7 (*Models*), Part 6 (*Agreement in respect of Intellectual Property Rights*).

## 17.3 Alteration and destruction

The Contractor may:

- (i) not invoke Article 25, paragraph 1, subparagraphs (a), (b) and (c) of the Copyright Act in connection with documents, work embodied therein, or any design or work arising therefrom, while duly complying with the provisions of Article 25, paragraph 3 of said act; and
- (ii) not object to a complete or partial alteration or destruction of the Documents, work embodied therein, or any design or work arising therefrom.

## 17.4 Development

- (a) The Contracting Authority may realise or arrange for the realisation of the design or work that is embodied in the Documents or arises therefrom on one occasion, either in whole or in part, without the intervention of the Contractor or the Contractor's Subcontractors ("reproduction" in the sense of Article 13 of the Copyright Act) and may also realise them or arrange for their realisation in the event of the premature termination of this Agreement on the grounds of Article 10.1 (*Termination due to an Immediate Termination Event*), Article 10.2 (*Termination due to a Contractor Default*), Article 10.5 (*Termination due to a prolonged Delay Event*) or Article 10.6 (*Termination due to a Force Majeure Event*).
- (b) Realisation includes the right of the Contracting Authority to engage third parties for this type of use. The Contractor hereby relinquishes any right to deny the type of use referred to in this provision, in particular the right to rely in this context on any Intellectual Property Rights in order to hinder or limit such use.

## 17.5 Repeated realisation

The Contractor's permission is required to realise the design, work or elements thereof in a manner other than that indicated in Article 17.4. The

Contractor must give its consent but may attach reasonable conditions thereto, including the payment of a reasonable compensation.

#### **17.6 Licence to Contractor for Existing Infrastructure**

The Contracting Authority herewith grants the Contractor, for the term of this Agreement, unconditional, irrevocable, transferable and royalty-free licence, with the right to grant sublicenses to third parties, to use the Intellectual Property Rights with regard to the Existing Infrastructure and the work embodied therein for the Work.

### **18. MISCELLANEOUS PROVISIONS**

#### **18.1 Regulations, Infrastructure Decree, Binding Rules and Guidelines**

The Contractor must ensure that the Infrastructure complies with the Regulations, the Route Decision and the Binding Standards and Guidelines, and that the implementation of the Work is carried out in accordance with them.

#### **18.2 Occupational safety and health**

- (a) The Contractor must adopt the necessary measures to be able to guarantee the safety of Agents and other persons present in the RWS Area or Third Party Area with the permission of the Contractor or the Contracting Authority, except in cases involving public roads, waterways, bus lanes or railway infrastructure.
- (b) The Contractor must ensure compliance with the existing statutory obligations of the Contracting Authority in relation to the Work with regard to working conditions and health and safety at work.
- (c) The Contractor must comply with the provisions of the Aliens Employment Act and require its subcontractors to comply with the provisions of this act.
- (d) The Contractor must, partly on behalf of the Contracting Authority, establish the identity of all aliens involved in the performance of the Work and must verify the authenticity and validity of the proofs of identity and the work permits of these aliens.
- (e) The Contractor must, also on behalf of the Contracting Authority, keep copies of these documents in its records for at least the period required by the Aliens Employment Act.
- (f) The Contractor must have compliance with the Aliens Employment Act and the provisions of paragraph (c) through (e) of this article verified at least once a [•] by a third party that it engages for this purpose. The Contractor shall send the third party's findings to the Contracting Authority as part of the Quarterly Statement. This does

not affect the Contracting Authority's right to verify or have another party verify the Contractor's compliance with the Aliens Employment Act and the provisions in paragraph (c) through (e) at any given moment.

### 18.3 Permits

- (a) The Contractor must acquire all permits necessary for the Works with the exception of permits under [*the Flora and Fauna Act, the Nature Conservancy Act and the Forestry Act*], which the Contracting Authority shall acquire in its own name.
- (b) The Contractor must ensure that all permits that it must acquire in accordance with paragraph (a) are placed in its name, [*with the exception of notifications under the Forestry Act, which must be drawn up in the name of the Contracting Authority*].
- (c) The Contractor must comply with Schedule 9, Part 3, Annex 1 (*Coordination Regulations for Permits*), or regulations introduced in the place of those regulations, when applying for Permits in the Development Phase.
- (d) For the purpose of the Works of the Contractor, the Contracting Authority must endeavour to have Permits that are granted in the Contracting Authority's name and concern the Existing Infrastructure placed in the name of the Contractor, insofar as necessary. The Contractor must grant its full cooperation in this regard.
- (e) The Contractor must ensure that all Permits issued in its name concerning a part of Third Party Infrastructure as referred to in Article 5.4 (a) are placed in the name of the administrator of the part of the Third Party Infrastructure in question on the date of the issue of the relevant Partial Completion Certificate as referred to in Article 5.4 (a).
- (f) The Contractor hereby grants the Contracting Authority an irrevocable power of attorney to issue Permits that have been issued in the name of the Contractor in the name of a substitute contractor, in the event of a restructuring as referred to in Article 8 of the Direct Agreement, or in the name of the step-in entity should a replacement DBFM Agreement enter into effect as referred to in the Direct Agreement.
- (g) The Contractor herewith grants irrevocable power of attorney to the Contracting Authority have the Permits, issued at that time in the name of the Contractor, issued (or to issue them) in the name of the Contracting Authority as of the Expiry Date or as of the date of earlier termination of this Agreement.

- (h) If necessary, the Contractor must provide reasonable cooperation to the Contracting Authority for the acquisition and retention of the Permits.

#### **18.4 [Agreements with stakeholders]**

*[The Contractor must comply with the obligations that arise to the Contracting Authority under the documents included in Schedule 9, Part 6 (Agreements with stakeholders), with exception of the obligations mentioned in the documents for which there is explicit statement that the Contractor need not comply.]*

#### **18.5 State Property Levies**

The Contractor is exempt from State property levies insofar as the Contractor obtains sand, gravel or soil from State property if the Contractor uses the same in the Work, on the condition that the Contractor has concluded an agreement with the State Property Service prior to performance of the Work, as stipulated in [Req. ●] of the Management Specifications.

#### **18.6 (Traffic) safety**

If the manager of the Infrastructure deems it necessary to take immediate measures:

- (a) because an event or circumstance arises that jeopardises safety on the Infrastructure; or
- (b) in the interest of traffic safety on the Infrastructure,

the Contractor must employ such measures as quickly as possible. The manager of the Infrastructure may also employ the measures (or have them employed) without the intervention of the Contractor.

#### **18.7 Incident Management, managing slippery conditions, traffic accidents and abnormal loads**

- (a) Incident Management and managing slippery conditions on the Infrastructure shall be carried out by the administrator of the Infrastructure or on its behalf.
- (b) In the event of traffic accidents or abnormal loads on the Infrastructure, the Contractor must take traffic-related measures on the instructions of the manager of the Infrastructure and within the reasonable time limit set by the latter.

**18.8 [Costs of utilities]**

- (a) *[The Contracting Authority shall bear the costs of the electricity consumption of the technical installations that are part of the RWS Infrastructure during the period starting on the Commencement Date and ending on the Availability Date.*
- (b) *In the period commencing on the Availability Date and ending on the Expiry Date, the Contractor shall bear the costs (for the delivery and network including surcharges, taxes and other levies) of the electricity consumption of all installations and systems that are part of the RWS Infrastructure which shall be settled in accordance with the provisions in Schedule 2 (Payment Mechanism), paragraph 1.5 (Settlement of electricity consumption charges).*
- (c) *In the period commencing on the Commencement Date and ending on the Expiry Date, the Contractor shall bear the costs for the delivery and network including surcharges, taxes and other levies of the construction power that the Contractor has used.*
- (d) *Should there be a Change to this Agreement, the Contracting Authority and Contractor shall together determine the influence of the Change on electricity consumption.]*

**18.9 Coordination**

The Contractor must comply with [●] with regard to the Work on the interface between the RWS Infrastructure and [●].

**18.10 Contracting Authority's obligation to provide information**

The Contracting Authority must endeavour to inform the Contractor as quickly as possible of any circumstances known to the Contracting Authority that could impede the appropriate performance of the Work and to furnish information in the Contracting Authority's possession about the Work that the Contracting Authority can, in reasonableness, presume to be necessary or of value to the Contractor for the best possible fulfilment of the Contractor's obligations pursuant to this Agreement.

**18.11 Market Conformity**

- (a) If, pursuant to this Agreement, an amount needs to be tested to assess whether it is market conforming and the relevant amount is based on an agreement concluded by the Contractor or the Contracting Authority then it is necessary to test whether the amount (or the provision in the agreement on which the amount is based) was market conforming at the time of the conclusion of that agreement.



- (b) Amounts owed to the European Investment Bank will be considered to be market conforming if they are in accordance with the conditions usually applied by the European Investment Bank at the time of the conclusion of the agreement on which the amount is based.

### **18.12 Ownership released materials**

Materials released from the RWS and Third Party Infrastructure during the performance of the Work and that are not reused in the performance of the Work, shall become the property of the Contractor, unless otherwise agreed.

## **19. INDEXATION**

### **19.1 Price Level**

Each amount expressed in Euros in this Agreement is based on the price level as at **[fill in: date]**.

### **19.2 Non-Indexed Amounts**

The following amounts shall not be indexed:

- (a) the Lump-Sum Payment;
- (b) the Financial Close Guarantee; and
- (c) the Performance Bond.

### **19.3 Indexation of Gross Availability Payment**

The Gross Availability Payment (GAP) and the Availability Value shall be indexed on the Contract Date and thereafter once a year on 1 January in accordance with the Indexation Formula given in Schedule 2 (*Payment Mechanism*), paragraph 1.2 (*Indexation of Gross Availability Payment and the Availability Value*). The indexation of the Gross Availability Payment is based on the adjusted amount of the Gross Availability Payment at the time of the Financial Close as determined in accordance with paragraph 1.1 of Schedule 2. The indexation of the Availability Amount is based on the amounts specified in paragraph 2.5 of Schedule 2.

### **19.4 Indexation of Other Amounts**

- (a) In all cases other than those stated in the Articles 19.2 and 19.3, each amount in this Agreement expressed in Euros is indexed on the Contract Date and subsequently every year as at 1 January so that they can be quoted for the relevant year  $t$ . For this purpose, these amounts are multiplied by  $q_t$ .
- (b)  $q_t$  is the result from the following formula:

$$q_t = (j_t / j_{[●]})$$

ratio between the index figures of the Consumer Price Index for the publication period January in year t and the publication period January [●].

the index figure = the Consumer Price Index (all categories, total expenditure, first publication, as published by Netherlands Statistics (CBS) that reflects the relationship between the value of a quantity for a given publication period and the value of the quantity that the publishing authority adopts for the base period

$J_T$  = index figure for the January publication period in year t

### 19.5 Process

Indexation of the amounts referred to in Articles 19.3 and 19.4 shall take place on 1 January of each year in the following manner:

- (a) the Contractor must inform the Contracting Authority of the following as quickly as possible and by no later than [●] of the relevant year:
  - (i) the amounts resulting from the calculation according to the provisions in paragraph 1.2 of Schedule 2, including the price level of the concerned year, the Index Number and the underlying index figures; and
  - (ii) the amounts resulting from the calculations carried out in accordance with the provisions of paragraph 1.3 of Schedule 2, including the price level in the relevant year and the underlying index figures;
- (b) the Contracting Authority must inform the Contractor within 20 Working Days of the receipt of this notice of whether the Contracting Authority approves the amounts under (a) and the associated price level; and
- (c) if the Contracting Authority approves the amounts under (a) and the associated price level then these are applied as from 1 January of the current Calendar Year.

### 19.6 Later availability of the index figures for the Indexation Formula

- (a) If an index figure required for the calculation as referred to in Article 19.5 (a) under (i) has not yet been determined at the moment that this calculation is performed, then the Contractor must use the

provisional publication or the most recent known price index figure instead.

- (b) The Contractor must notify the Contractor of the amounts resulting from the calculation carried out in accordance with the provisions of paragraph 1.2 of Schedule 2, including the price level in the relevant year, the Index numbers and the underlying index figures, as soon as possible after the determination of the index figure with publication period as included in the table in paragraph 1.2 of Schedule 2.
- (c) The Contracting Authority must inform the Contractor within 20 Working Days of the receipt of this notice of whether the Contracting Authority approves the amounts under (b) and the associated price level; and
- (d) If the Contracting Authority approves the amounts as referred to under (b) and the associated price level then these are applied as from 1 January of the current Calendar Year.
- (e) Within 20 Working Days after receipt of the approval, the Contractor must determine the difference between the amounts paid by the Contracting Authority based on the calculation as referred to in paragraph (a) and the amounts calculated on the basis of paragraph (b). If the amounts the amounts the Contracting Authority has paid pursuant to the calculation as referred to in paragraph (a) are greater than the amounts calculated for the same period pursuant to the provisions of paragraph (b) then the Contractor must pay the difference to the Contracting Authority. If the amounts the amounts the Contracting Authority has paid pursuant to the calculation as referred to in paragraph (a) are lower than the amounts calculated for the same period pursuant to the provisions of paragraph (b) then the Contracting Authority must pay the difference to the Contractor.
- (f) The Contractor must include the difference as referred to in paragraph (e) in the Periodic Statement in accordance with the provisions of Schedule 2 (*Payment Mechanism*), paragraph 5.1 (*Periodic Statement*).

## **20. EXCESS PROFITS**

### **20.1 Weighted Average Return on ShareCapital**

Within 3 months after (i) the issue of the Transfer Certificate and (ii) the liabilities of the Contractor to the Contracting Authority in connection with the Work other than the payment obligations pursuant to this Article 20.1 have been established (with or without the application of Article 21 (*Dispute*

*Resolution*) then the Contractor must provide the Contracting Authority with an Adjusted Financial Model that must demonstrate the weighted average return after taxes on the share capital and the Shareholder Loans granted by the Shareholders (AR%) .

## 20.2 Distribution of excess profits

If the return referred to in Article 20.1 (AR%) is greater than [●]% then the Contractor must pay the Contracting Authority, with due regard for Article 20.3, an amount such that the final average return is lowered to [●]% plus [50%] of the difference between AR% and [●]%. The calculation of this amount shall not take account of the financial benefit achieved with a Refinancing arrangement that the Contractor is not obliged to pay the Contracting Authority pursuant to Article 3.4 (h).

## 20.3 Maximum

The amount to be paid based on Article 20.2 shall not exceed the present value (as of the Expiry Date) of the amounts paid by the Contracting Authority to the Contractor pursuant to Article 9 (*Supervening Events*) during the term of this Agreement.

## 20.4 Weighted Average Cost of Capital

If, pursuant to this Agreement, amounts must be stated at present value and no discount rate is prescribed then the statement must be made using the Weighted Average Cost of Capital.

## 21. DISPUTE RESOLUTION

### 21.1 Disputes

- (a) If a dispute arises between the Parties in connection with or pursuant to this Agreement then the Parties must confer on the issue.
- (b) Should the dispute not be resolved by means of consultations within 20 Working Days then the dispute shall, upon request of one of the Parties, be submitted to a Dispute Resolution Board in accordance with the provisions of Article 21.2 (*Expert opinion*).
- (c) In derogation from the provisions of the foregoing paragraph, the Parties may, under circumstances requiring swift action, at any time present the dispute before a judge hearing the application for interim relief in The Hague.
- (d) Even where this Agreement does not expressly provide that a dispute shall be settled between the Parties according to the

provisions of Article 21, either of the Parties may have a dispute that results from this Agreement settled according to the provisions of Article 21.

## 21.2 Expert opinion

- (a) The Dispute Resolution Board consists of three members unless the Parties agree that the Dispute Resolution Board shall consist of one member.
- (b) If the Dispute Resolution Board consists of three members, then each Party must appoint one member to the Dispute Resolution Board within 15 Working Days after the deadline referred to in Article 21.1 (b). These appointed members of the Dispute Resolution Board must jointly appoint a third member of the Dispute Resolution Board, who shall act as the chairman of the Dispute Resolution Board, within 10 Working Days after they have both been appointed.
- (c) If the Dispute Resolution Board consists of one member, then the Parties must jointly appoint the expert within 15 Working Days after the deadline referred to in Article 21.1 (b).
- (d) If an expert has not been appointed within the period specified in paragraph (b) or paragraph (c), then the expert is appointed by the President of The Hague District Court upon request of one of the Parties. Articles 1025 to 1035 inclusive of the Code of Civil Procedure are applicable to the opinion, appointment and functioning of the Dispute Resolution Board.
- (e) The conditions for appointing members of the Dispute Resolution Board are established by the Parties in consultation with the prospective members of the Dispute Resolution Board.
- (f) The costs of the Dispute Resolution Board and the costs for legal assistance are borne by the unsuccessful Party unless the Dispute Resolution Board determines otherwise.
- (g) Unless the Parties agree otherwise, the procedure shall be as follows:
  - (i) The Party taking the initiative sends, within four weeks of the appointment of the Dispute Resolution Board, the members of the Dispute Resolution Board a request for a binding opinion, and also sends a copy to the other Party. The request shall comprise at least a description of the dispute, the point of view of the respective Party, and the relevant documents;

- (ii) the other Party must respond in writing to the request within 4 weeks;
  - (iii) the Parties, depending on the needs of the Dispute Resolution Board, have the opportunity to further explain their positions to the Dispute Resolution Board in writing or subsequently verbally, with or without supporting documents. The Dispute Resolution Board shall in any case ensure the diligent process of the Expert Opinion; and
  - (iv) the Dispute Resolution Board must issue its opinion to the Parties within 4 weeks of the last permitted procedural step of the Parties.
- (h) The Contractor may implead a Subcontractor.
  - (i) The opinion of the Dispute Resolution Board is a binding opinion (an opinion by a third party as referred to in Article 7:900, paragraph 2 of the Dutch Civil Code) unless one Party informs the other Party that it cannot concur with the opinion within 4 weeks of the issue of the opinion and has submitted the dispute to the civil court within this period.
  - (j) If a Party submits the dispute to a civil court, then the Parties must comply with the advice of the Dispute Resolution Board until the civil court delivers a judgment that deviates from that advice.

### **21.3 Choice of Forum**

- (a) Disputes arising on the basis of this Agreement, or further agreements ensuing thereof, are settled by The Hague District Court.
- (b) The plaintiff's claim is denied for procedural reasons, if the dispute has not been submitted to an Dispute Resolution Board according to the provisions of Articles 21.1 and 21.2.

### **21.4 Competence in Third Party Notice Procedure**

- (a) Should the Contracting Authority implead the Contractor in proceedings that have been instituted against the Contracting Authority by a third party before the civil court then the Contractor cannot rely on any regulations regarding binding opinions that were agreed between the Parties.
- (b) Should the Contractor implead the Contracting Authority in proceedings that have been instituted against the Contractor by a third party before the civil court then the Contracting Authority

cannot rely on any regulations regarding binding opinions that were agreed between the Parties.

## 22. COMMUNICATION

### 22.1 Language

Unless this Agreement provides otherwise, any communication between the Parties shall occur in Dutch.

### 22.2 Communication

The Contractor must communicate with the Contracting Authority and third parties in accordance with the provisions of the Management Specifications.

### 22.3 Notifications and Approvals

- (a) All documents that must be given to the Contracting Authority based on this agreement, or which the Contracting Authority has a right to peruse, must be written in Dutch. In derogation of the above, Financing Agreements, Subcontractor Agreements, Shareholder Loan Agreements, the Original Financial Model, the Updated Financial Model, the declaration referred to in Article 3.5(d), the declaration mentioned in Article 22.5(c) and the declaration specified in Article 22.5(c) may be drawn up in English.
- (b) All notifications, announcements, requests and other communications on the grounds of this Agreement must be submitted in writing, to the Contracting Authority at the address **[postal address / email address of the Contracting Authority]** and to the Contractor at the address **[postal address / email address of the Contractor]**. It is the responsibility of the sender to demonstrate that the other Party has received the communication.
- (c) All approvals and consent by a Party required on the grounds of this Agreement must be received in advance and in writing.

### 22.4 Representatives

- (a) Each of the Parties must appoint one or more persons as its representative(s) in matters concerning the performance of this Agreement by means of a notification to the other Party.
- (b) In signing this Agreement, the Contracting Authority designates **[name of representative]** as its representative as referred to under (a).

- (c) In signing this Agreement, the Contractor designates ***[name of representative]*** as its representative as referred to under (a).
- (d) A Party may replace (a) representative(s) whom it has appointed or appoint one or more additional representatives by means of a notification to the other Party.
- (e) A Party may stipulate in the notification that only two jointly acting representatives designated by that Party shall have the authority to represent it.
- (f) A Party may stipulate in the notification that, with regard to making a proposal for a Change or agreeing to another change to this Agreement, the Party may only be represented by representatives specially designated for these purposes.

## 22.5 Declarations

- (a) The Contracting Authority declares by signing this Agreement that it is authorised to enter into this Agreement and that its obligations based on this Agreement are legal and binding.
- (b) The Contractor declares by signing this Agreement that it is authorised to enter into this Agreement and that its obligations based on this Agreement are legal and binding.
- (c) On the date of Financial Close, the Contractor must, in accordance with the model including in Schedule 7 (*Models*), Part 7 (*Declaration of the conclusion of Financing Agreements*), declare that it has concluded the Financing Agreements and the Shareholder Loan Agreements in accordance with the drafts submitted to the Contracting Authority as indicated in the Financial Close Protocol.
- (d) Should the Contracting Authority find that the drafts indicated in paragraph (c) do not contain any provisions that, for purposes of this Agreement, cannot be viewed as being market-based, the Contracting Authority shall make a declaration to this effect on the date of Financial Close based on the model included in Schedule 7 (*Models*), Part 8 (*Declaration of Market Conformity*).
- (e) On the date of Financial Close, the Contractor must, in accordance with the model included in Schedule 7 (*Models*), Part 13 (*Declaration regarding securities*), declare that the Contractor has provided no other securities for rights of the Contractor vis-à-vis the Contracting Authority based on this Agreement than those stipulated in the Financing Agreements.



- (f) On the date of Financial Close, the Contractor must, in accordance with the model included in Schedule 7 (*Models*), Part 14 (*Subcontractors Declaration*), declare that all Subcontractors that, to the extent already known, have been or shall be engaged by the Contractor in the performance of the Work have entered into agreements as referred to in Article 17.2 (*Subcontractor Agreements*), that these agreements have been legally signed by the relevant Parties and that these agreements have all been submitted to the Contracting Authority.

## **23. CONFIDENTIALITY**

### **23.1 Confidentiality**

- (a) The Contracting Authority and the Contractor shall not divulge Confidential Information to any person whatsoever and shall ensure that such information is treated confidentially (excepting circumstances described in Article 23.2).
- (b) The Contractor shall ensure that all Subcontractors and Agents meet the provisions under (a).

### **23.2 Exceptions**

- (a) A Party may divulge Confidential Information:
  - (i) to its Agents to the extent required in order to exercise or fulfil the rights or obligations based on this Agreement;
  - (ii) to providers of share capital or external capital or the Parties that are involved in the (syndication of) the financing of the Contractor;
  - (iii) to the extent that this information is necessary for financial accounts and reports;
  - (iv) insofar as it is required to do so according to Regulations (other than the Government Information (Public Access) Act (WOB)); or
  - (v) insofar as this is required pursuant to a legal ruling.
- (b) The Contracting Authority may furthermore divulge Confidential Information:
  - (i) insofar as required by the Government Information (Public Access) Act (WOB);

- (ii) insofar as required to maintain, update or upgrade the RWS Infrastructure or have these tasks executed after termination of this Agreement; or
  - (iii) to the extent necessary for the performance of Agreements between the Contracting Authority and third parties.
- (c) In such cases as referred to in paragraph (a) under (iii) and in paragraph (b) under (i), the Parties must confer before the Confidential Information is divulged.
- (d) In the case referred to under (b) under (i), at the request of the Contractor, the Contracting Authority must rely, to the extent possible, on the grounds for exception and limitations included in Articles 10 and 11 of the Government Information (Public Access) Act (WOB).

## **24. FINAL PROVISIONS**

### **24.1 Applicable law**

This Agreement is governed by the laws of the Netherlands.

### **24.2 Exclusion**

The provisions of Articles 7:400 to 7:413, inclusive, of the Civil Code and Articles 7:750 to 7:769, inclusive, of the Civil Code are not applicable.

### **24.3 Assignment of rights**

- (a) Transfer by one Party of its rights based on this Agreement is only possible with the permission of the other Party, unless this concerns an assignment of rights based on a Financing Agreement, the Direct Agreement or a guarantee agreement signed pursuant to a Financing Agreement or the Direct Agreement.
- (b) The Contracting Authority may transfer its legal relationship with the Contractor pursuant to this Agreement to a Third Party, provided that the Contracting Authority guarantees the fulfilment of the obligations of that Third Party pursuant to this Agreement. The Contractor grants its authorization in advance for this transfer.

### **24.4 Waiver**

- (a) The Contractor may not rely on retention rights or reservation of ownership rights and must ensure that its Subcontractors do not and shall not rely on such rights.

- (b) As far as this is possible, the Parties relinquish their right to rely on this Agreement being or becoming null and void.

#### **24.5 Entire Agreement**

This Agreement, the Direct Agreement and the Escrow Agreement comprise all the agreements made by the Parties up to and including the Contract Date with regard to the object of this Agreement and replaces all agreements made earlier between the Parties in this regard.

#### **24.6 Continuous obligations**

Provisions from this Agreement which, due to their nature, also have the purpose of continuing in effect after the termination of this Agreement retain their validity after the termination of this Agreement.

#### **24.7 Contradictions**

- (a) In the event of a contradiction between a Contractor Schedule and another part of this Agreement then the latter shall prevail.
- (b) In the event of a contradiction between the Route Decision and the Schedule of Requirements then the Route Decision shall prevail.
- (c) In the event of a conflict between the Binding Standards and Guidelines on the one hand and another part of this Agreement on the other, with the exception of the Contractor Schedules, the latter shall take precedence.
- (d) In the event of the contradiction between different Binding Standards and Guidelines, the following order of precedence:
  - (i) RWS publications;
  - (ii) CUR and CROW publications;
  - (iii) NNI publications; and
  - (iv) third party publications.
- (e) In the event of contradiction between Binding Standards and Guidelines of equal rank, the most recent document shall prevail over the document of earlier date.

#### **24.8 Unforeseen circumstances**

With respect to the occurrence of unforeseen circumstances the Parties agree that they have willingly and wittingly entered into this long-term Agreement and that the mechanisms that are included in this Agreement are

already intended to deal with the consequences of any possible unforeseen circumstances that may arise.

**24.9 No Third Party provisions**

No provision in this Agreement is meant as a provision in favour of third parties as envisaged in Article 6:253 Civil Code.

**THE KINGDOM OF THE NETHERLANDS [NAME OF CONTRACTOR]**

[signature]

[signature]

[name representative]

[name representative]

## SCHEDULES

### SCHEDULE 1 DEFINITIONS

Shareholder	A holder of shares in the capital of the Contractor.
Shareholder Loan	A loan granted to the Contractor by a Shareholder (or by a group of legal entities attached to a Shareholder) that is subordinated to the credit made available to the Contractor under the Financing Agreements.
Commencement Certificate	A written notification from the Contracting Authority to the Contractor confirming that the conditions for issue of the Commencement Certificate referred to in the Certificate Plan have been met.
Commencement Date	The date [which is [●] Working Days after the date] on which the Contracting Authority issues the Commencement Certificate. If a time of day on the Commencement Date is significant for a provision in this Agreement, this time of day shall be 11:59 p.m., unless explicitly stipulated otherwise.
Closure	An uninterrupted closure of a Traffic Lane or another traffic measure affecting a Traffic Lane resulting in a reduction in the permitted maximum speed.
Deviation	A deviation in the preparation or execution of the Work in relation to the Management Plan
Bank Guarantee	A bank guarantee that is issued by a credit institution that has a rating of at least [●] by Standard & Poor's or [●] by Moody's and is recorded in the register referred to in Article 1, sub-Article 107 of the Financial Supervision Act.
Significant Subcontractor	A Subcontractor as referred to in Article 16.1 (b) ( <i>Significant Subcontractors</i> ).
Availability Certificate	A written notification from the Contracting

	Authority to the Contractor confirming that the conditions for issue of the Availability Certificate referred to in the Certificate Plan have been met.
Availability Adjustment	See paragraph 2 ( <i>Availability Adjustment</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).
Availability Date	The date on which the Contracting Authority signs the Availability Certificate. If a time of day on the Availability Date is significant for a provision in this Agreement, this time of day shall be 11:59 p.m., unless explicitly stipulated otherwise.
Availability Deduction	See paragraph 2.2 ( <i>Availability Deduction</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).
Availability Value	See paragraph 2.5 ( <i>Availability Value</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).
Existing Infrastructure	The Infrastructure as present on the Commencement Date.
Payment period	A Quarter.
Confirmation of Financial Close	See Article 3.1 ( <i>Financial Close</i> ), paragraph (b), and Schedule 7 ( <i>Models</i> ), Part 3 ( <i>Confirmation of Financial Close</i> ).
Binding Standards and Guidelines	The documents referred to in Schedule 9, Part 2, paragraph 1.3.
Contracting Authority Schedules	The schedules that form part of this Agreement, with the exception of the Contractor Schedules.
Contractor Schedules	(a) [Schedule 8 ( <i>Qualitative Part of Submission</i> )]; and (b) [●].
Supervening Event	A Force Majeure Event, a Delay Event, a Delayed Completion Event, or a Compensation Event.
Penalty Points	See paragraph 3.4 ( <i>Penalty Points</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).

Bonus Percentage	The percentage as stipulated in Schedule 2 ( <i>Bonus Percentage</i> ), paragraph 3.3.
Gross Availability Payment	See paragraph 1.1 ( <i>Gross Availability Payment</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).
Extraordinary Premium Decrease	A decrease of more than 30% of the total actual premiums for the insurance policies referred to in Schedule 11 ( <i>Insurance</i> ) due as compared to the total indicative premiums for insurance policies referred to in Schedule 11, indexed according to the Consumer Price Index as published by Statistics Netherlands (CBS) that is the result of general circumstances in the international insurance market and not the result of the acts or omissions of the Contractor.
Extraordinary Premium Increase	An increase of more than 30% of the total actual premiums for insurance policies referred to in Schedule 11 ( <i>Insurance</i> ) due as compared to the total indicative premiums for the insurance as referred to in Schedule 11, indexed according to the Consumer Price Index as published by the Statistics Netherlands (CBS), that is the result of general circumstances in the international insurance market and not the result of the acts or omissions of the Contractor.
Category A Requirements	<p>(i) In the Development Phase: The requirements as stated in Schedule 2, Appendix 1, Table 2 (<i>Category A Requirements for the Development Phase</i>); and</p> <p>(ii) in the period beginning on the Availability Date and terminating on the Completion Date: The requirements as stated in Schedule 2, Appendix 2, Table 2 (<i>Category A Requirements for the Availability Phase-Completion Date</i>); and</p> <p>(iii) in the period beginning on the Completion Date and terminating on the End Date: the requirements as stated in Schedule 2, Appendix 2, Table 4 (<i>Category A Requirements for the Completion Date-End Date</i>).</p>
Category B Requirements	(i) In the Development Phase: the requirements as stated in Schedule 2, Appendix 1, Table 3 ( <i>Category B Requirements for the</i>

	<p><i>Development Phase</i>); and</p> <p>(ii) in the period beginning on the Availability Date and terminating on the Completion Date: the requirements as stated in Schedule 2, Appendix 2, Table 3 (<i>Category B Requirements in the Availability Phase-Completion Date</i>); and</p> <p>(iii) in the period beginning on the Completion Date and terminating on the End Date: the requirements as stated in Schedule 2, Appendix 2, Table 5 (<i>Category B Requirements for the Completion Date-End Date</i>).</p>
Certificate Plan	Schedule 9, Part 4 ( <i>Certificate Plan</i> ).
Dispute Resolution Board	See Article 21.2 ( <i>Expert opinion</i> ).
Third Party Context Objects	The objects specified in paragraph 3.2 of Part 1 of Schedule 9.
RWS Context Objects	The objects specified in paragraph 2.3 of Part 1 of Schedule 9.
Contract Date	The date on which this Agreement is signed. If a time of day on the Contract Date is significant for a provision in this Agreement, this time of day shall be 11:59 p.m., unless explicitly stipulated otherwise.
Partial Completion Certificate	A written notification from the Contracting Authority to the Contractor confirming that the conditions for issue of the Partial Completion Certificate listed in the Certificate Plan have been met.
Direct Agreement	The agreement signed on the date of Financial Close between the Contracting Authority, the Security Agent, and the Contractor, which is attached as Schedule 6 ( <i>Direct Agreement</i> ).
Document	Information supplied by the Contractor pursuant to the Management Plan and the other obligations of the Contractor, regardless of the nature of the data carrier.
Lump-Sum Payment	The payment due by the Contracting Authority on the grounds of paragraph 4.1 ( <i>Lump-Sum</i>



	<i>Payment</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).
Expiry Date	<p>The day that falls:</p> <p>(a) [●] years after the Availability Date [, or</p> <p>(b) <i>If the Availability Date falls earlier than the Scheduled Availability Date, [●] years after the Availability Date:</i></p> <p><i>plus as many Calendar Days as lie between the Availability Date and the Scheduled Availability Date; and</i></p> <p><i>Minus the number of Calendar Days with which the Scheduled Availability Date is moved on account of a circumstance as referred to under (c) of the definition of a Postponement Event, to the extent that the total number of Calendar Days is smaller than or equal to the number of Calendar Days as referred to under (b) (i);</i></p> <p><i>so that the maximum number of Calendar Days that are added as a result to the period of [●] years shall be 180 Calendar Days.]</i></p> <p>If a time of day on the End Date is significant for a provision in this Agreement, this time of day shall be 11:59 p.m., unless explicitly stipulated otherwise.</p>
Escrow Agent	The party under (3) to the Escrow Agreement.
Escrow Agreement	The agreement signed on the Contract Date by the Contracting Authority, Contractor and the Escrow Agent in accordance with the model enclosed in Schedule 7 ( <i>Models</i> ), Part 5 ( <i>Escrow Agreement</i> ).
Operational Phase	The period commencing on the day after the Availability Date and ending on the Expiry Date.
Facility Agent / Intercreditor Agent	The legal entity that signs the Financial Close Certificate for the benefit of the Lenders.
Financial Close	The date on which the conditions precedent included in the Financing Agreements are fulfilled or lapse.
Financial Close Guarantee	The bank guarantee submitted with the final

	submission.
Financial Model	The Original Financial Model or the most recent Updated Financial Model.
Financial Loss	An increase in the Contractor's expenses or a decrease in its income, to be demonstrated, insofar as this is market conforming and covered by the arranged insurance, where costs savings, the moment of inception of the increase of the expenses or the decrease of the income, and the manner of payment is taken into account, and where a negative Financial loss is set to zero, unless there is a Contracting Authority Change.
Lender	Every (legal) entity with which a Financing Agreement is concluded.
Financing Agreement	<p>(a) every agreement, bond, or other arrangement in terms whereof credit, including guarantee facilities and letters of credit, is made available to the Contractor for the purpose of financing the Works;</p> <p>(b) other agreements, bonds, or arrangements from which (potential) amounts due, including rating agency fees and agency fees, in relation to the financing of the Works are evident;</p> <p>(c) instruments for covering interest rate risk, exchange rate risk, inflation risk and other derivatives or related options entered into or taken out in connection with the (financing of the) Works;</p> <p>(d) arrangements related to (a), (b) or (c), including inter-creditor agreements, securities, and monoline wraps; and</p> <p>(e) letters of credit issued in connection with the Work,</p> <p>in all cases to the extent that they are not a Shareholder Loan.</p>
Updated Financial Model	The Original Financial Model that is updated by the Contractor taking Schedule 10 ( <i>Financial Model Adjustment Guideline</i> ) into account.
Third Party Area	The area indicated as such in the drawings enclosed in Schedule 9, Part 1, paragraph 1.2 ( <i>Third-Party Area</i> ).

RWS Area	The area indicated as such in the drawings enclosed in Schedule 9, Part 1, paragraph 1.2 ( <i>RWS Area</i> ).
Use	<p>With regard to Intellectual Property Rights:</p> <ul style="list-style-type: none"> <li>(a) The use for the purposes of the management and maintenance of the Infrastructure, including partial or complete alteration and/or destruction;</li> <li>(b) the use of images of the Infrastructure;</li> <li>(c) the development as referred to in Article 17.4 (<i>Development</i>); and</li> <li>(d) the repeated development as referred to in Article 17.5 (<i>Repeated Development</i>).</li> </ul>
Scheduled Availability Date	[●●], or the date adjusted pursuant or Article 9.2 ( <i>Delay Event</i> ), where relevant.
Scheduled Completion Date	<ul style="list-style-type: none"> <li>(a) To the Availability Date: That date that is [●●] Calendar Days after the Scheduled Availability Date; and</li> <li>(b) from the Availability Date: the date [●●] Calendar Days after the Availability Date or a later date as determined in accordance with Article 9.5 paragraph (<i>Delayed Completion Event</i>).</li> </ul>
Dispute Resolution	See Article 21 ( <i>Dispute Resolution</i> ).
Force Majeure Event	<p>The circumstance as a result of which the Contractor is unavoidably unable to comply, or is only able to comply while incurring a Financial Loss, with its obligations in terms of this Agreement, or the Contracting Authority is unavoidably unable to comply or is only able to comply therewith by incurring greater costs, insofar as this circumstance (i) is not qualified as a Compensation Event and (ii) this results from one or more of the following events or circumstances:</p> <ul style="list-style-type: none"> <li>(a) a disruption of the Financial Markets that occurs before Financial Close;</li> <li>(b) war, civil war, or acts of terrorism in the Netherlands;</li> <li>(c) nuclear explosions or explosions of</li> </ul>

	<p>explosive substances, insofar as not caused by the Contractor;</p> <p>(d) ionising radiation or radioactive, chemical, or biological contamination in or close to the RWS Area or Third Party Area insofar as they occur after the Contract Date, is not the consequence of an Incident and are not caused by the Contractor;</p> <p>(e) a crashing aircraft or spacecraft (or a part thereof) or a shock wave caused by a supersonic aircraft;</p> <p>(f) a meteorite strike, volcanic eruption or hurricane;</p> <p>(g) an earthquake of a magnitude greater than 6 on the Richter scale; or</p> <p>(h) flooding not the result of local rainfall [or leakage of the Infrastructure] not caused by the Contractor.</p>
<p>Delayed Completion Event</p>	<p>A circumstance or an event as referred to under (a), (b), (c) and [●●] of the definition of a Delay Event that occurs after the Availability Date insofar as the circumstance or event gives cause to a Critical Delay in Completion, with the exception of delays caused a Contractor Default other than as in the circumstance referred to in (c) of the definition of a Delay Event.</p>
<p>Delay Event</p>	<p>One or more of the following events or circumstances insofar as these give rise to a Critical Delay and insofar as these are not the result of a Contractor Default, with the exception of the circumstances referred to under (c):</p> <p>(a) a Compensation Event;</p> <p>(b) a Force Majeure Event;</p> <p>(c) the Lenders exercising of their rights pursuant to the Direct Agreement;</p> <p>(d) [the Route Decision has not become irrevocable on [●]]; or</p> <p>(e) [●●].<sup>2</sup></p>

<sup>2</sup> The risks that, on the basis of the risk apportionment in the tender phase, must be regarded as a Delay Event are to be entered here.

<p>Compensation Event</p>	<p>The circumstance as a result of which the Contractor is unable to comply with its obligations pursuant to the Agreement or is only able to comply while incurring a Financial Loss, insofar as this results from one or more of the following events or circumstances and to the extent that it is not the result of a Contractor Default or a Force Majeure Event:</p> <ul style="list-style-type: none"> <li>(a) a Contracting Authority Default</li> <li>(b) a Contracting Authority Change;</li> <li>(c) a Relevant Change in Law;</li> <li>(d) the Contractor's observance of instructions or the employment of traffic measures in terms of Article 18.7 (<i>Incident Management, prevention of slippery conditions, traffic accidents, and abnormal loads</i>);</li> <li>(e) the implementation of measures as referred to in Article 18.6 (<i>Traffic Safety</i>);</li> <li>(f) the Contracting Authority's granting of access to third parties to the RWS Area during the Development Period, or the exercise by third parties of rights of access to the RWS Area with which the Contractor has to comply in accordance with Article 4.2 (<i>Access</i>);</li> <li>(g) damage to the Infrastructure that is the result of an Incident or of Incident Management, the consequences of which arise after the Commencement Date and that is not the result of acts or omissions of the Contractor;</li> <li>(h) damage to the RWS Infrastructure other than the due to the use of grit to control ice caused by work carried out after the Commencement Date (i) by third parties under the orders of an manager of the Third Party Infrastructure or (ii) by cable or conduit managers or by third parties on the order of these managers;</li> <li>(i) carrying out work to make up a Critical Delay, Critical Delay in Completion or a part thereof at the request of the Contracting Authority (as referred to in paragraph (b) of Article 9.2 (<i>Delay Event</i>) or Article 9.5 (<i>Delayed</i></li> </ul>
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	<p><i>Completion Event</i>);</p> <p>(j) implementing measures on the grounds of Article 9.2(c) (<i>Force Majeure Event</i>) paragraph (b) under (ii);</p> <p>(k) a manager of the Third Party Infrastructure does not comply with the relevant Implementation or Elaboration Agreement for a period that is longer than 6 months after the period of 30 Working Days as referred to in Section 5.2 paragraph (d).</p> <p>(l) a manager of Category 2 or 3 Cables and Conducts does not comply with the relevant Project Agreement longer than 6 months following 30 Working Days, as stipulated in Article 6.3 paragraph (a) or 6.4 (g); [or</p> <p>(m) ●●].<sup>3</sup></p>
<p>Weighted Average Cost of Capital</p>	<p>The weighted average cost of capital that must be determined by the Parties on the basis of the <i>Financial Model upon Financial Close</i>.</p>
<p>Immediate Termination Event</p>	<p>One of the following events or circumstances, insofar as not resulting from a Contracting Authority Default or a Force Majeure Event:</p> <p>(a) a Bank Guarantee is not issued in conformity with Articles 3.2 (<i>Financial Close Guarantee</i>), 3.3 (<i>Performance Bond</i>), or 6.3 (<i>Transfer Guarantee</i>);</p> <p>(b) the Commencement Certificate is not issued within the period as referred to in Article 4.1, paragraph (a) ;</p> <p>(c) the Financial Close is not attained (or it is certain that Financial Close will not be attained) within the time period referred to in Article 3.1 (<i>Financial Close</i>);</p> <p>(d) The Availability Certificate is not delivered (or it is certain that the Availability Certificate shall not be delivered) within [●] months after the Scheduled Commencement Date;</p> <p>(e) The Completion Certificate is not delivered (or it is certain that the Completion Certificate shall not be delivered) within [●] months after the</p>

<sup>3</sup> The risks that, on the basis of the risk apportionment in the tender phase, must be regarded as a Compensation Event are to be entered in this space.

	<p>Scheduled Completion Date;</p> <p>(f) a share is transferred contrary to Article 15 (<i>New shareholders</i>);</p> <p>(g) the Contractor acts contrary to Article 3.4 (<i>Refinancing</i>);</p> <p>(h) the Contractor suspends the execution of practically all Works for a period of [15] consecutive Working Days (unless this is envisaged in planning previously delivered by the Contractor to the Contracting Authority);</p> <p>(i) a payment obligation of the Contractor pursuant to a Financing Agreement is called up early in accordance with the grounds for early repayment in the Financing Agreement other than on the grounds of Refinancing; or</p> <p>(j) the Contractor:</p> <p>(i) submits a petition for a (provisional) judicial settlement or is granted a judicial settlement;</p> <p>(ii) files a petition for voluntary liquidation or is placed into liquidation; or</p> <p>(iii) is dissolved.</p>
<p>Refinancing</p>	<p>The alteration of the payment obligations (in extent or in scheduling) of the Contractor pursuant to an existing Financing Agreement, or the conclusion of a new Financing Agreement, with the exception of:</p> <p>(a) assuming supplementary financing that is necessary as the result of a Supervening Event;</p> <p>(b) syndicating out or transferring (parts of) an existing Financing Agreement to the extent that this does not result in changes in the Contractor's payment obligations;</p> <p>(c) a refinancing as envisaged in the Original Financial Model; and</p> <p>(d) refinancing which is deemed necessary to prevent the liquidation of the Contractor;</p> <p>(e) A refinancing that takes place as a consequence of an (impending) Contractor Default in the performance</p>

	<p>of an obligation pursuant to the Financing Agreements, provided that the obligations of the Contracting Authority are not increased as a consequence of this refinancing; and</p> <p>(f) a refinancing that takes place in the context of a restructuring as envisaged in the Direct Agreement.</p> <p>A change in the payment obligations of the Contractor vis-à-vis the Lenders with respect to the payment obligations as they stood on <b>[final submission date]</b>, insofar as these changes are not the result of a change in the reference rates and insofar as these changes are not among the exceptions mentioned in (a) through (e), is also considered to be Refinancing.</p>
Agent	Every (legal) entity, whether or not as an employee, that carries out work or provides services for the benefit of or on behalf of the Contracting Authority or the Contractor.
Incident	<p>(a) A traffic accident or breakdown involving one or more vehicles or trailers and possibly involving fire or explosion on the Infrastructure or underlying or crossing infrastructure;</p> <p>(b) the presence of a dropped load or substantial leak from vehicles on the Infrastructure;</p> <p>(c) a train derailment, fire or explosion;</p> <p>(d) a fire or explosion on a vessel or a collision by a vessel; or</p> <p>(e) contact between the Infrastructure and a part of a vehicle not intended for that purpose or of its load not intended for that purpose.</p>
Incident Management	Incident management as referred to in the "RWS Incident Management Policy Rules" (Official Gazette 1999, 89) or regulations in the place thereof.
Indexation Formula	See paragraph 1.2 ( <i>Indexing of Gross Availability Payment and the Availability Value</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).
Index Number <sub>t,p</sub>	The figure by which the Gross Availability Payment and Availability Value are multiplied to



	express them at the price level on 1 January of the relevant year $t$ falling in period $p$ , such in accordance with the provisions of Schedule 2, paragraph 1.2 ( <i>Indexation of Gross Availability Payment and the Availability Value</i> ).
Infrastructure	The RWS Infrastructure and the Third Party Infrastructure insofar as no Partial Completion Certificate has been issued for the Third Party Infrastructure.
Third Party Infrastructure	All infrastructural objects located in the Third Party Area and grounds with the exception of objects specified in Schedule 9, Part 1 ( <i>System definitions</i> ), paragraph 3.1 ( <i>Objects outside the Third Party Area</i> ) and excluding Third Party Context Objects.
RWS Infrastructure	All infrastructural objects located in the Third Party Area with the exception of objects specified in Schedule 9, Part 1 ( <i>System definitions</i> ), paragraph 2.2 ( <i>RWS Objects outside the RWS Area</i> ) and excluding RWS Context Objects.
Intellectual Property Rights	All present and future rights over intellectual property, in their most comprehensive form, including, but not limited to: copyright, patents, trademarks, utility model rights, domain names, database rights and know-how that arise or shall arise in connection with the Documents, the works incorporated therein or the works arising therefrom or as a result of this Agreement.
Third Party Cables and Conduits	All cables and conduits situated within the RWS Area and Third Party Area, of which the Contracting Authority is not the administrator.
Third Party Cables and Conduits Category 1	The Third Party Cables and Conduits stated in Schedule 13, Part 1 ( <i>Cables and Conduits Category 1</i> ).
Third Party Cables and Conduits Category 2	The Third Party Cables and Conduits for which the Contracting Authority has concluded the

	Project Agreements, as included in Schedule 13, Part 2 ( <i>Cables and Conduits Category 2</i> ), prior to the Contract Date.
Third Party Cables and Conduits Category 3	The Third Party Cables and Conduits not covered by Third Party Cables and Conduits Category 1 or 2.
Calendar Days	All the days in a year.
Small Change	A Change that shall result in an (expected) Financial Loss smaller than [●].
Clock Hour	An hour that starts and ends on the whole hour.
Critical Delay	<p>A delay in the Work that makes it impossible to avoid the Scheduled Availability Date being exceeded by more than the following (additional) number of Calendar Days without incurring a Financial Loss:</p> <ul style="list-style-type: none"> <li>(a) if the circumstance or event that caused the delay occurs in the period up to two years before the Scheduled Availability Date: 14 Calendar Days;</li> <li>(b) if the circumstance or event that caused the delay occurs in the period starting from two years before the Scheduled Availability Date up to and including the Scheduled Availability Date: 7 Calendar Days;</li> </ul> <p>or in derogation from (a) and (b):</p> <ul style="list-style-type: none"> <li>(c) if the delay is the consequence of a Contracting Authority Default, a Contracting Authority Change or a Relevant Change in Law: 0 Calendar Days;</li> </ul> <p>determined according to the procedure as included in [●] of the Management Specifications.</p>
Critical Delay in Completion	<p>A delay in the Work that makes it impossible to avoid the Scheduled Completion Date being exceeded by more than the following number or Calendar Days without incurring a Financial Loss:</p> <ul style="list-style-type: none"> <li>(a) 7 Calendar Days;</li> </ul>

	<p>or in derogation from (a):</p> <p>(b) when the delay is the consequence of a Contracting Authority Default, a Contracting Authority Change or a Relevant Change in Law: 0 Calendar Days;</p> <p>determined according to the procedure as included in [●] of the Management Specifications.</p>
Quarter	A 3-month period from 1st January up to and including 31st March, 1st April up to and including 30th June, 1st July up to and including 30th September, or 1st October up to and including 31st December.
Quarterly Statement	See [●] of the Management Specifications.
Quarter of an Hour	A period of 15 minutes that starts for each Clock Hour at :00, :15, :30, and :45.
Management Plan	The plans included in Schedule 8 ( <i>Qualitative Part of Submission</i> ) and all other plans under any name whatsoever that together describe the Contractor's Management System.
Management Specifications	The requirements stipulated in Schedule 9, Part 3 ( <i>Management Specifications</i> ).
Management System	The Contractor's business environment consisting of the required processes, which can be supported by a structure of methods, procedures, techniques, auxiliary resources, and trained personnel.
Multiplier	The percentage in accordance with the provisions of paragraph 2.4 ( <i>Multiplier (<math>m_{\text{Quarter of an Hour}}</math>)</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).
Net Availability Payment	See paragraph 1.4 ( <i>Determining Gross Availability Payment</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).
Subcontractor	A (legal) entity (directly or indirectly) engaged by the Contractor for the purpose of carrying out Work.
Non-Insurability	A risk that is not insurable on the international insurance market with reputable insurers with a

	credit rating of at least [●] or is not usually insured by such insurers, unless the risk has become non-insurable as a consequence of acts or omissions of the Contractor and unless the occurrence of the risk results in liability on the part of the Contractor vis-à-vis the Contracting Authority.
Original Financial Model	The financial model that is certified by the Parties as such on the Contract Date.
Opening Requirements	The requirements that, in accordance with Schedule 9, Part 2 ( <i>Output Specifications</i> ) and Schedule, Part 3 ( <i>Management Specifications</i> ) apply to the Availability Date.
Output Specifications	The requirements stipulated in Schedule 9, Part 2.
Transfer Certificate	A written notification from the Contracting Authority to the Contractor confirming that the conditions for issue of the Transfer Certificate listed in the Certificate Plan have been met.
Transfer Requirements	The requirements that, in accordance with Schedule 9, Part 2 ( <i>Output Specifications</i> ) and Schedule, Part 3 ( <i>Management Specifications</i> ) apply to the Expiry Date.
Transfer Guarantee	See Article 7.3 ( <i>Transfer Guarantee</i> ).
Agreement	This agreement (including schedules belonging thereto).
Shareholder Loan Agreement	Every Agreement granting the Contractor a Shareholder Loan.
Party	The Contracting Authority or the Contractor.
Periodic Statement	See paragraph 5.1 ( <i>Periodic Statement</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).
Performance Correction	See paragraph 3 ( <i>Performance Correction</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).
Performance Deduction Percentage	See paragraph 3.2 ( <i>Performance Deduction Percentage</i> ) of Schedule 2 ( <i>Payment Mechanism</i> ).

Performance Measurement System (PMS)	The system specified in [●] of the Management Specifications.
Schedule of Requirements	Parts 1 to 6 inclusive of Schedule 9 ( <i>Programme of Requirements</i> ).
Project Agreement	An agreement between the Contracting Authority and a cable or conduit administrator regarding the relocation, removal or permanent protection of a Category 2 or 3 Third Party Cable or Conduit.
Project Plan	The planning identified as [●●], as updated and handed over to the Contracting Authority according to [●] of the Management Specifications.
Development Phase	The period commencing on the Commencement Date and ending on the Availability Date.
Regulations	Every applicable provision that is stipulated in: <ul style="list-style-type: none"> <li>(a) A statutory provision (which includes legislation in the formal sense, subordinate legislation, and provisions of international law or EC law) or in a generally binding regulation or in a Permit or a ruling of any governmental authority, on a national, supranational or inter-governmental level (which also includes an administrative authority or supervisory or policy-making authority) that is binding on the Contractor (with the exception of the Route Decision); or</li> <li>(b) a Relevant Policy Rule.</li> </ul>
Regulations on Cables and Conduits	<ul style="list-style-type: none"> <li>(a) The "Agreement regarding the removal of cables and conduits outside the area of authority as concluded between the Minister of Transport, Public Works, and Water Management, Energie-Ned, VELIN and VEWIN" on 10 February 1999 signed by the Minister of Transport, Public Works, and Water Management and coordinating organisations of cable and conduit administrators (published in the Government Gazette 1999, no. 97);</li> <li>(b) The Loss Compensation Arrangement for the removal of cables and conduits</li> </ul>

	<p>in and outside of Rijkswaterstaat works and railway works 1999 (NKL 1999) of 12th May 1999 (Dutch Government Gazette 1999 no. 97);</p> <p>(c) the Cable and Conduits Compensation Protocol (SKL 01-26) of 14 September 2001 accompanying subparagraph (a) and (b) and the associated Project Agreement model (fixed price and subsequent calculation) with appendices;</p> <p>(d) the Telecommunications Act and the Project Agreements model (fixed price and subsequent calculation) with appendices drawn up by the Contracting Authority in that context;</p> <p>(c) the Cooperation Protocol dated 1st January 2001 between Rijkswaterstaat and NS Railinfrabeheer B.V. (formerly ProRail B.V.), pursuant to which the accountable party bears all the costs;</p> <p>(d) <i>[supplement with regulations of relevance to the project and are in force ]</i>;</p> <p>or such substitute or supplementary regulations of which the Contracting Authority has informed the Contractor prior to the conclusion of a Project Agreement with a cable or conduit administrator.</p>
<p>Relevant Policy Rules</p>	<p>(a) The documents referred to in Schedule 9, Part 2, paragraph 1.2 (<i>Relevant Policy Rules</i>);</p> <p>(b) the Regulations on Cable and Ducts; or</p> <p>other regulations and documents that replace or supplement the above.</p>
<p>Relevant Change in Law</p>	<p>An amendment to, or introduction or revocation of Regulations other than a Permit that takes effect after <b>[the date that lies two weeks before the date of the Final Submission]</b> or a change in the interpretation thereof by the highest court after that date, and that the Contractor could not reasonably foresee on <b>[the date that lies two weeks before the date of the Final Submission]</b>, which is understood to mean that there have not yet been any written, public announcements or statements by or on</p>

	<p>behalf of the relevant authority, body or institution that brought about the amendment to, or introduction or revocation of the Regulations, other than a Permit, regarding the text of the of the amendment or introduction or the time of the implementation of the amendment, introduction or revocation and:</p> <ul style="list-style-type: none"> <li>(a) that specifically relates to the Contractor or to contractors in similar agreements to this Agreement; or</li> <li>(b) that specifically relates to the RWS Infrastructure or the Third Party Infrastructure; or</li> <li>(c) that compels the Contractor to invest more capital (costs which generally speaking are depreciated over a period longer than 1 year).</li> </ul>
Traffic Lane	<p>A traffic lane or road shoulder which:</p> <ul style="list-style-type: none"> <li>(a) Is referred to for the Development Phase in Schedule 2, Appendix 1, Table 1 (<i>Traffic Lane Definitions for the Development Phase</i>).</li> <li>(b) Is referred to for the Operational Phase in Schedule 2, Annex 2, Table 1 (<i>Traffic Lane Definitions for the Operational Phase</i>).</li> </ul>
Lane Closure	<p>See paragraph 2.3 (<i>Traffic Lane Closure</i>) of Schedule 2 (<i>Payment Mechanism</i>).</p>
Security Agent	<p>The legal entity that holds the security rights for the benefit of the Lenders and that concludes the Direct Agreement.</p>
Contracting Authority Default	<p>A default by the Contracting Authority with respect to compliance with one or more of its obligations in terms of this Agreement, which includes circumstances under which it is certain that compliance without default shall be impossible, insofar as this default is not:</p> <ul style="list-style-type: none"> <li>(a) the result of a Contractor Default; or</li> <li>(b) the result of a Force Majeure Event.</li> </ul>
Contractor Default	<p>A default by the Contractor with respect to compliance with one or more of its obligations in</p>

	<p>terms of this Agreement, which includes circumstances under which it is certain that compliance without default shall be impossible, insofar as this default is not:</p> <ul style="list-style-type: none"> <li>(a) the result of a Supervening Event;</li> <li>or</li> <li>(b) an Immediate Termination Event.</li> </ul>
Permitted Rectification Period	<p>The period specified for a requirement in Schedule 2, Annex 3 (<i>Category A Requirements and Permitted Rectification Periods</i>) Table 1 and 2, as extended or reduced pursuant to Annex 2, paragraph 3.4 (<i>Rectification Periods</i>).</p>
Route Decision	<p>The [●] route decision.</p>
Route Section	<p>A route section which:</p> <ul style="list-style-type: none"> <li>(a) Is referred to for the Development Phase in Schedule 2, Appendix 1, Table 1 (<i>Traffic Lane Definitions for the Development Phase</i>).</li> <li>(b) Is referred to for the Operational Phase in Schedule 2, Annex 2, Table 1 (<i>Traffic Lane Definitions for the Operational Phase</i>).</li> </ul>
Exclusion Criteria	<p>An exclusion criterion as envisaged in Article 45 of Directive 2004/18/EC (or one that is introduced in its place) where the said regulation describes the manner in which the Contractor can demonstrate that this is not applicable to the legal entity in question, or the circumstance that as regards the legal entity in question:</p> <ul style="list-style-type: none"> <li>(a) (only where a new Shareholder is concerned, and as long as equity capital still has to be paid or loans have to be provided by that Shareholder) is not likely to have adequate financial resources for this purpose; or</li> <li>(b) (only if a new Financer is involved) it is unlikely to have adequate financial resources to fulfil its obligations in terms of the Financing Agreement.</li> </ul>
Performance Bond	<p>See Article 3.3 (<i>Performance Bond</i>).</p>



Implementation agreements	The documents in Schedule 9, Part 5 ( <i>Implementation Agreements</i> )
Permit	Any ruling, traffic ruling, official ruling, permit, exemption, notification, decision or other consent of a public-law nature that is required for the Work, with the exception of the Route Decision.
Disruption of the Financial Markets	The occurrence of extraordinary circumstances in the financial markets of the European Union that has a negative effect on the Contractor's access to national or international capital or interbank markets (including EURIBOR).
Disseminated Information	The information included in the documents referred to in Schedule 13 ( <i>Disseminated Information</i> ).
Confidential Information	The content of this Agreement and all information relating thereto that because of its nature must remain confidential, such as documents, computer files, specifications, formulae, evaluations, methods, processes, technical descriptions, reports and other data, files, drawings, models, and calculations, as well as the documentation or information provided in the course of the procedures by virtue of Article 21 ( <i>Dispute Resolution</i> ).
Request for Change	A request from the Contracting Authority to a cable or conduit administrator to proceed to relocate, remove or permanently protect a Third Party Cable or Conduit Category 3 that is required in connection with the Work.
Completion Certificate	A written notification from the Contracting Authority to the Contractor confirming that the conditions for issue of the Completion Certificate listed in the Certificate Plan have been met.
Completion Date	The date on which the Contracting Authority issues the Completion Certificate. If a time of day on the Completion Date is significant for a provision in this Agreement, this time of day shall be 11:59 p.m., unless explicitly stipulated otherwise.

Completion Requirements	The requirements that, in accordance with Schedule 9. Part 2 ( <i>Output Specifications</i> ) and Schedule, Part 3 ( <i>Management Specifications</i> ) apply to the Completion Date.
Refusal Criteria	<p>An exclusion criterion as envisaged in Article 45 of Directive 2004/18/EC (or one introduced in its place), where said regulation does not describe the manner in which the Contractor can demonstrate that this is not applicable to the legal entity in question, or else circumstances where the legal entity in question:</p> <ul style="list-style-type: none"> <li>(a) has its registered office or principal place of business in a country against which the Contracting Authority, or a treaty organisation to which the Contracting Authority belongs, has imposed economic or political sanctions;</li> <li>(b) is directed by persons involved in illegal or terrorist activities;</li> <li>(c) by way of its principal activity acquires claims against enterprises that are in financial difficulty; or</li> <li>(d) is engaged in a material dispute with the Contracting Authority which could be detrimental to the Contractor's fulfilment of this Agreement.</li> </ul>
Working Day	Any day except a Saturday, Sunday or public holiday or a day considered equivalent thereto in terms of the General Extension of Time-limits Act.
Work	The work the Contractor must carry out and the services the Contractor must provide pursuant to this Agreement.
Change	A Contracting Authority Change or a Contractor Change.
Contracting Authority Change	See Article 13.2 ( <i>Contracting Authority Change</i> ).
Contractor Change	See Article 13.3 ( <i>Contractor Change</i> ).
Control	Control as envisaged in the SER (Social and Economic Council) ruling on the 2000 Merger Code (even when these rules do not apply).



## SCHEDULE 2 PAYMENT MECHANISM

### 1. Availability Payment

#### 1.1 GROSS AVAILABILITY PAYMENT (GAP)

- (a) The Gross Availability Payment (GAP) is € [●●] per Payment Period. The amount of the Gross Availability Payment (GAP) shall be adjusted on the date of Financial Close on the basis of the procedure described in Schedule 10, Part 2 (*Special provisions for Financial Close*) and established according to Schedule 7 (*Models*), Part 5 (*Determining GAP and Weighted Average Cost of Capital Interest Rate*).
- (b) The adjusted amount of the Gross Availability Payment (GAP) on the date of Financial Close shall be applied from the Commencement Date onwards.
- (c) The Gross Availability Payment (GAP) may be adjusted in terms of Schedule 3 (*Compensation for Supervening Events*), paragraph 2.3.

#### 1.2 INDEXATION OF GROSS AVAILABILITY PAYMENT AND AVAILABILITY VALUE

- (a) The amounts of the Gross Availability Payment and Availability Value are indexed on 1 January so they can be quoted at the price level for the respective year t. To this end these amounts are multiplied by the Index Number<sub>t,p</sub>.
- (b) The Index Number<sub>t,p</sub> is calculated from the Indexation Formula and is a percentage. The Indexation Formula is as follows:

$$\text{Index Number}_{t,p} = 1 + \sum_{n=1}^6 (a_{n,p} \times m_{n,t})$$

where:

Index Number<sub>t,p</sub> = Index Number for the year t in period p

index n = index as supplied in the table below

period p = a period of 5 Calendar Years with the exception of the first period that begins on the Contract Date and runs until 31 December of the Calendar Year inclusive in which the Availability Date falls and the last period that begins on 1 January of year after the year that the penultimate period ends and ends on the Expiry Date

a<sub>n,p</sub> = weighting factor pertaining to index n in period p as supplied in the table below

$$m_{n,t} = (i_{n,t} / i_{n,[●]}) - 1$$

movement in index n on the basis of the index figures for index n for a specified publication period in year t (as enclosed in the following table) and publication period January [●]

index figure = a number, published by CROW, CBS or Eurostat, that reflects the relationship between the value of a quantity for a given publication period and the value of said quantity used as a base period by the publishing authority.

$i_{n,t}$  = index figure for index n for a specific publication period (as supplied in the table below) in year t.

n	index n	publishing Authority	publication period	$a_{n,1}$	$a_{n,2}$	$a_{n,3}$	$a_{n,4}$	$a_{n,5}$
1	[●●]	[●●]	January	[●●]	[●●]	[●●]	[●●]	[●●]
2	[●●]	[●●]	January	[●●]	[●●]	[●●]	[●●]	[●●]
3	[●●]	[●●]	January	[●●]	[●●]	[●●]	[●●]	[●●]
4	[●●]	[●●]	January	[●●]	[●●]	[●●]	[●●]	[●●]
5	[●●]	[●●]	January	[●●]	[●●]	[●●]	[●●]	[●●]
6	[●●]	[●●]	January	[●●]	[●●]	[●●]	[●●]	[●●]

If the base year is changed or the manner of determination, composition or publication of the index figures changes or an index figure is no longer published then the Contractor and Contracting Authority must consult with each other to reach agreement on the consequences in a manner that approximates the original principles as much as possible.

**1.3 NET AVAILABILITY PAYMENT DUE**

The Net Availability Payment (NAP) is due during the period starting on the Commencement Date and ending on the Expiry Date, or on such an earlier date as of which the Agreement ends.

**1.4 DETERMINING THE NET AVAILABILITY PAYMENT (NAP)**

(a) For the Payment Period within which the Commencement Date falls:

the Net Availability Payment (NAP) is equal to [20]% of the Gross Availability Payment (GAP) in proportion to the number of Calendar Days in the relevant Payment Period after the Commencement Date, less the Availability Adjustment (AA), and less the Performance Correction (PC).

$$\text{NAP} = a \times 20\% \times \text{GAP} - \text{AA} - \text{PC}$$

where:

- (i) the Gross Availability Payment (GAP) is calculated according to the provisions of paragraph 1.1 of this Schedule;
- (ii) the Availability Adjustment (AA) is calculated according to the provisions in paragraph 2 of this Schedule;
- (iii) the Performance Correction (PC) is calculated according to the provisions in paragraph 3 of this Schedule; and
- (iv) 'a' shall be calculated by dividing the number of Calendar Days in the Payment Period in question that fall before the Commencement Date by the total number of Calendar Days in the Payment Period in question.

- (b) As from the Payment Period in which the Commencement Date falls and until the Payment Period in which the Availability Date falls:

the Net Availability Payment (NAP) is equal to [20] per cent of the Gross Availability Payment (GAP) minus the Availability Adjustment (AA) and minus the Performance Correction (PC).

$$\text{NAP} = [20]\% \times \text{GAP} - \text{AA} - \text{PC}$$

where:

- (i) the Gross Availability Payment (GAP) is calculated according to the provisions of paragraph 1.1 of this Schedule;
- (ii) the Availability Adjustment (AA) is calculated according to the provisions in paragraph 2 of this Schedule; and
- (iii) the Performance Correction (PC) is calculated according to the provisions in paragraph 3 of this Schedule.

- (c) For the Payment Period within which the Availability Date falls, the following applies:

the Net Availability Payment (NAP) equals [20] per cent of the Gross Availability Payment (GAP) in proportion to the number of Calendar Days in the relevant Payment Period before the Availability Date, plus one hundred percent of the Gross Availability Payment (GAP) in proportion to the number of Calendar Days in the relevant Payment Period from the Availability Date less the Availability Adjustment (AA) and less the Performance Correction (PC).

$$\text{NAP} = a \times [20]\% \times \text{GAP} + b \times \text{GAP} - \text{AA} - \text{PC}$$

where:

- (i) the Gross Availability Payment (GAP) is calculated according to the provisions of paragraph 1.1 of this Schedule;
  - (ii) the Availability Adjustment (AA) is calculated according to the provisions in paragraph 2 of this Schedule; and
  - (iii) the Performance Correction (PC) is calculated according to the provisions in paragraph 3 of this Schedule;
  - (iv) 'a' is calculated by dividing the number of Calendar Days in the relevant Payment Period that falls before the Availability Date by the number of Calendar Days in the relevant Payment Period; and
  - (v) 'b' is calculated by dividing the number of Calendar Days in the relevant Payment Period after the Availability Date by the number of Calendar Days in the relevant Payment Period.
- (d) As from the Payment Period after the Payment Period in which the Availability Date falls, through the Payment Period in which the Expiry Date falls, the following applies:

the Net Availability Payment (NAP) equals the Gross Availability Payment (GAP) less the Availability Adjustment (AA) and less the Performance Correction (PC).

$$\text{NAP} = \text{GAP} - \text{AA} - \text{PC}$$

where:

- (i) the Gross Availability Payment (GAP) is calculated according to the provisions of paragraph 1.1 of this Schedule;
  - (ii) the Availability Adjustment (AA) is calculated according to the provisions in paragraph 2 of this Schedule; and
  - (iii) the Performance Correction (PC) is calculated according to the provisions in paragraph 3 of this Schedule.
- (e) For the Payment Period within which the Expiry Date falls:

the Net Availability Payment (NAP) is equal to the Gross Availability Payment (GAP) in proportion to the number of Calendar Days before the Expiry Date less the Availability Adjustment (AA) and less the Performance Correction (PC).

$$\text{NAP} = a \times \text{GAP} - \text{AA} - \text{PC}$$

where:

- (i) The Gross Availability Payment (GAP) is calculated according to the provisions of paragraph 1.1 of this Schedule;
  - (ii) the Availability Adjustment (AA) is calculated according to the provisions in paragraph 2 of this Schedule;
  - (iii) the Performance Correction (PC) is calculated according to the provisions in paragraph 3 of this Schedule; and
  - (iv) 'a' is calculated by dividing the number of Calendar Days in the Payment Period in question that fall before the Expiry Date by the number of Calendar Days in the Payment Period in question.
- (f) Should, according to these calculations the value of the Net Availability Payment be less than zero, it shall be considered to be zero.

#### 1.5 SETTLEMENT OF ELECTRICITY CONSUMPTION CHARGES

- (a) The electricity payment is the amount that is paid to settle energy costs (the costs for the electricity supply and network, including surcharge, taxes and other fees).
- (b) The amount of the electricity payment is established annually on 1 January, initially in the calendar year following the year containing the Availability Date.
- (c) The electricity payment is the result of a formula, which is as follows:

$$\text{Electricity Payment}_t = P_{bh} \times Q_{wh,t-1} + P_{bl} \times Q_{wl,t-1}$$

where:

- (i)  $\text{Electricity Payment}_t$  = the amount of the electricity payment in year t;
- (ii)  $P_{bh}$  = the basic price for the supply and transmission of electricity at the high rate, which is [●] per kWh
- (iii)  $Q_{wh,t-1}$  = the quantity of electricity (kW/h) actually consumed at the high rate in year t-1, as determined in accordance with Req. [●] of the Management Specifications, providing this consumption occurs prior to the Availability Date
- (v)  $P_{bl}$  = the basic price for the supply and transmission of electricity at the low rate, which is [●] per kWh
- (vii)  $Q_{wl,t-1}$  = the quantity of electricity (kW/h) actually



consumed at the low rate in year t-1, as determined in accordance with Req. [●] of the Management Specifications, providing this consumption occurs prior to the Availability Date.

- (d) If the Electricity Payment is positive, the Contracting Authority then owes this amount to the Contractor.
- (e) If the Electricity Payment is negative, the Contractor then owes this amount to the Contracting Authority.

## 2. Availability Adjustment

### 2.1 AVAILABILITY ADJUSTMENT (AA)

The Availability Adjustment (AA) of the Payment Period shall be equal to the sum of the Availability Deductions per Quarter ( $\Sigma$  ADs) over all the Quarters in the corresponding Payment Period.

$$AA = \Sigma AD$$

### 2.2 AVAILABILITY DEDUCTION (AD)

- (a) An Availability Deduction per Quarter (AD) is an amount that is allocated to a Quarter of an Hour in which there may be one or more Lane Closures. This amount is determined as follows:

$$AD = m_{\text{Quarter of an Hour}} \times AV_{\text{Quarter of an Hour}}$$

where:

- (i) The Multiplier ( $m_{\text{Quarter of an Hour}}$ ) is calculated for the relevant Quarter of an Hour in accordance with the provisions of Part 2.4 of this Schedule; and
- (ii) The Availability Value ( $AV_{\text{Quarter of an Hour}}$ ) is calculated for the relevant Quarter of an Hour in accordance with the provisions of paragraph 2.5 of this Schedule.

### 2.3 LANE CLOSURE

- (a) One of more Lane Closures is deemed to occur when:
  - (i) a Category A requirement is not met; or
  - (ii) a Closure occurs which is requested by the Contractor for the execution of the Works,

whereby the number of Lane Closures resulting from a circumstance stated in (i) or (ii) is determined according to the applicable provisions of the "availability consequence" column of Table 1

(*Category A Requirements and Permitted Rectification Periods*) in Annex 3 of this Schedule 2 (*Payment Mechanism*).

- (b) In derogation from the provisions under (a) a Lane Closure is not deemed to have occurred when:
- (i) the Category A Requirements are not met due to a Compensation Event as envisaged in (g) of the definition thereof and the Contractor, within twice the Rectification Period (the second Rectification Period in accordance with paragraph 3.5 (f)), has seen to it that the Category A Requirements are again fulfilled. The provisions in paragraph 3.5 (d) and (e) are applicable correspondingly;
  - (ii) the situation in paragraph 2.3 (a) under (i) or (ii) is the result of a Supervening Event that is not a Compensation Event as envisaged under (g) of the definition thereof;
  - (iii) the Category A Requirements are not met and the Contractor requests a Closure that meets the requirements of the procedure provided in the Annex 2 of the Management Specifications (*Ad hoc procedure for renewed compliance with Category A Requirements*), but:
    - (A) the road manager does not grant permission for the Closure requested. In that case, the Contractor shall be deemed to have submitted a new application for a Closure at the time the road manager gives notice of its refusal, to commence as soon as the road manager next indicates that a Closure may take place. This exception applies as from the time the road manager notifies the Contractor that no permission for the requested Closure is to be given until the next time the road manager indicates a Closure may take place; or
    - (B) the road manager does not indicate within the period laid down in [●] of the Management Specifications (*Ad hoc procedure for renewed compliance with the Category A Requirements*) whether it grants permission. On expiry of this period, the Contractor is, in that case, deemed to have submitted a new application for a Closure beginning at the time the road manager indicates that the next Closure may take place. This exception is applicable from the end of the period laid down in [●] of the Management Specifications (*Ad hoc procedure for renewed compliance with the Category A Requirements*) to the time that the road manager indicates a Closure may take place; or
  - (iv) if the Category A Requirement is not met during the first [●] Working Days following the Commencement Date and the Contractor has provided assurance that the Category A Requirement is met once again within twice the time of the

Permitted Rectification Period (the second Permitted Rectification Period in accordance with paragraph 3.5 (e)).

- (c) Lane Closures that take place in the same Traffic Lane within the same Route Section on the same day and in the same Quarter of an Hour are regarded as a single Lane Closure.
- (d) The time at which the Lane Closure commences is determined as follows:
  - (i) A Lane Closure as referred to in paragraph 2.3 (a) under (i) commences at the earliest of the following times:
    - (A) the time that must be automatically indicated and recorded in the Performance Measurement System as the time when the Category A Requirements were no longer met in accordance with the provisions in [●];
    - (B) the time at which, according to the Contractor's damage and disruption register referred to in [●] of the Management Specifications, the Category A Requirements are no longer met;
    - (C) the time at which the Contractor provides notification as referred to in Req. 00602 of the Management Specifications;
    - (D) the time at which the Contractor reports to the road manager in accordance with in [●] of the Management Specifications (Ad hoc procedure for renewed compliance with the Category A Requirements); or
    - (E) the time at which the Contracting Authority reports a circumstance to the Contractor that demonstrates that the Category A Requirements have not been met; and
  - (ii) in the situation referred to in paragraph 2.3 (a) under (ii) the Lane Closure begins, without prejudice to the provisions of paragraph 2.3 (d) under (i), at the time at which the necessary traffic signalling is activated in accordance with the procedure stipulated in [●] of the Management Specifications, or, if traffic signalling is not yet in place, at the time of the activation of (mobile) traffic measures that implement the physical Closure; and
  - (iii) in the situation as referred to in paragraph 2.3 (b) under (i) and (iv), the Lane Closure commences at the time that the second Permitted Rectification Period expires.
- (e) The time at which a Lane Closure ends is determined as follows:

- (i) A Lane Closure as referred to in paragraph 2.3 (a) under (i) terminates at the latest of the below-indicated times:
  - (A) the time that is automatically indicated and recorded in the Performance Measurement System as the time when the Category A Requirements were again met in accordance with the provisions of [●];
  - (B) the time at which, according to the Contractor's damage and disruption register referred to in [●] of the Management Specifications, the Category A Requirements were again met; and
  - (C) the time at which the Contractor reports the termination of the traffic measure to the motorway administrator in accordance with the prevailing procedures for traffic measures as referred to in [●] of the Management Specifications;

and
- (ii) a Lane Closure as indicated in paragraph 2.3 (a) under (ii) terminates at the time that the Contractor reports the termination of the traffic measure to the road manager in accordance the traffic measure procedures in effect, as mentioned in [●] of the Management Specifications.

**2.4** MULTIPLIER ( $M_{\text{QUARTER OF AN HOUR}}$ )

- (a) The Multiplier ( $m_{\text{Quarter}}$ ) for a particular Quarter of an Hour shall be calculated by:
  - (i) For Quarters of Hours from the Commencement Date to the Availability Date:  
[●]; and
  - (ii) For Quarters of Hours from the Availability Date to the Expiry Date inclusive:  
[●].
- (b) The Multiplier ( $m_{\text{Quarter}}$ ) has a minimum value of 0 (zero) and a maximum value of 1 (one).

**2.5** AVAILABILITY VALUE ( $AV_{\text{QUARTER OF AN HOUR}}$ )

The Availability Values ( $AV_{\text{Quarter of an Hour}}$ ) are defined in the following table:

Every Quarter of an Hour from 11 p.m. to 5 a.m.	[●]
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Every Quarter of an Hour from 5 a.m. to 11 p.m.	[●]
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### 3. Performance Correction

#### 3.1 PERFORMANCE CORRECTION (PC)

The Performance Correction (PC) for the respective Payment Period is equal to the Gross Availability Payment (GAP) multiplied by the balance of the Deduction Percentage (PD%) less the Bonus Percentage (BP%).

$$PD = GAP (PK\% - BP\%)$$

where:

- (i) the Gross Availability Payment (GAP) for the calculation is equal to the provisions of paragraph 1.1 of this Schedule; and
- (ii) The balance of the Performance Deduction Percentage less the Bonus Percentage (PK% - BP%) is set at 0 (zero) if the balance of the Performance Deduction Percentage less the Bonus Percentage (PK% - BP%) from the calculation is less than 0 (zero).

#### 3.2 PERFORMANCE DEDUCTION PERCENTAGE (PD%)

The Performance Deduction Percentage (PD%) is equal to the number of Penalty Points that the Contracting Authority records in the concerned Payment Period multiplied by 0.1%. If the Contracting Authority assesses Penalty Points in the period as from the Agreement Date until the Commencement Date, then these Penalty Points are deemed to have been determined in the Quarter in which the Commencement Date falls. If the applicable part of the Gross Availability Payment reduced by the Availability Adjustment is insufficient in the Quarter in question to charge the full amount of the Performance Correction in that Quarter, then the largest possible number of the Penalty Points assessed between the Agreement Date and the Commencement Date are deemed to have been assessed in a subsequent Quarter that is as much later as necessary to effectively enable full deduction of the Performance Correction ensuing from these Penalty Points from the applicable part of the Availability Payment reduced by the Availability Adjustment.

#### 3.3 BONUS PERCENTAGE (BP%)

The Bonus Percentage (BP%) for the relevant Payment Period is equal to:

- (i) [●]% if the Performance Deduction Percentage (PD%) was zero in the 2 (two) preceding Quarters;
- (ii) the Bonus Percentage in the previous Payment Period (BP%<sub>q-1</sub>) less the Performance Deduction Percentage in the

previous Payment Period (PD%<sub>q-1</sub>) if the balance is greater than zero (0%);

- (iii) zero (0%) in the Payment Period in which the Commencement Date falls;
- (iv) zero (0%) in the Payment Period after the Payment Period in which the Commencement Date falls; and
- (v) zero (0%) in all other cases.

**3.4 PENALTY POINTS**

- (a) In the case of an event or circumstance that falls under one of the categories named in the following table then the Contracting Authority may determine the Penalty Points according to the table for that category. If the Contracting Authority decides to fix Penalty Points then he must fix them in accordance with the amount listed in the relevant category in the table and not with less.

	Category:	Penalty Points:
<b>Table I: SAFETY</b>		
1.	An accident due to a Contractor Default has taken place, as a result of which one or more people have died or been seriously injured.	10
2.	An accident, other than as referred to under point 1, has taken place as a result of a Contractor Default.	6
3.	A situation has arisen as a result of a Contractor Default in which the safety of road users has either directly or indirectly been placed in jeopardy.	4
4.	A situation has arisen as a result of a Contractor Default in which the safety of third parties (who are not road users) and/or Agents has either directly or indirectly been placed in jeopardy.	3
<b>Table II: PROCESS CONTROL</b>		
5.	A Contractor Default relating to compliance with Article 8.1 ( <i>Management System</i> ) paragraphs (d) or (e) or with [●] of the Management Specifications with respect to satisfying the capability levels stipulated in [●] of the Management Specifications.	3

	Category:	Penalty Points:
6.	A Contractor Default in relation to the occurrence of one of the following circumstances: (a) the performance of Work without: (i) released Documents as envisaged in requirement [●] of the Management Specifications; (ii) a concluded Project Agreement as referred to in Article 6.4 (Third Party Cables and Conduits Category 3); or (iii) that the Contractor has informed the Contracting Authority in good time, as envisaged in requirement [●] of the Management Specifications; (b) the reliability of the data from the Performance Measurement System being lower than the reliability described in [●] (c) [●].	1
8.	The non-rectification of a Contractor Default in accordance with Article 8.5 ( <i>Rectification Obligation</i> ), with the exception of Contractor Defaults that fall under categories 12 to 16 inclusive.	4
9.	A Contractor Default with regard to the provisions in document [●]. <sup>4</sup>	[2 per week]
10.	A Contractor Default consisting of the failure to report a Deviation in good time as indicated in the Management Specifications.	[●]
11.	A Contractor Default consisting of the failure to rectify a Deviation in accordance with the Management Specifications.	[●]
<b>Table III: MAINTENANCE</b>		
12.	A Contractor Default whereby the Contractor has failed to comply with the requirements stipulated in Table 2 of Appendix 3 of this Schedule, except as a consequence of a Compensation Event under (g) [ <i>and not within the first [●] Working Days after the Commencement Date</i> ].	The number of penalty points that are listed in Table I for the requirement in question.
13.	A Contractor Default where the (first) Permitted Rectification Period has expired and the Contractor has failed to comply with the requirements stipulated in Table 2 of Annex 3 of this Schedule, except as a consequence of a Compensation Event under (g) [ <i>and not within the first [●] Working Days after the Commencement Date</i> ].	The same number of penalty points as stipulated above under Category 12, plus 1.
14.	A Contractor Default where, on the occurrence of a Compensation Event pursuant to (g) the requirements stipulated in Table 1 or Table 2 of Annex 3 to this Annex are not met within the first Permitted Rectification Period.	The number of penalty points that are listed in Tables I and II for the requirement in question.

<sup>4</sup> Deze categorie leent zich voor de verwijzing naar een raakvlakdocument waarin eisen worden gesteld aan (voor)tijdige oplevering van een deel van het werk, bijv. als overeengekomen in een bestuursovereenkomst



	<b>Category:</b>	<b>Penalty Points:</b>
15.	A Contractor Default where the requirements stipulated in Table 2 of Annex 3 to this Annex are not met within the first [●] <sup>5</sup> Working Days after the Commencement Date and the Contractor fails to ensure that these requirements are met within twice the time of the Rectification Period (the second Rectification Period in accordance with paragraph 3.5 (f), unless this relates to a new Rectification Period in connection with a Compensation Event pursuant to (g).	<i>[The number of penalty points listed in Table 2 of Annex 3 to this Annex for the relevant requirement.]</i>
16.	A Contractor Default where the Contractor fails to comply with the requirements within a new Permitted Rectification Period as determined according to paragraph 3.5 (f).	The Penalty Points listed under Categories 13, 14 or 15 above respectively, plus 1.

- (b) If a Contractor Default falls within more than one category at the same time then the Contracting Authority may only impose Penalty Points of one category, namely the category specifying the highest number of Penalty Points for the relevant Contractor Default.

### 3.5 PERMITTED RECTIFICATION PERIODS

- (a) Any transgression of the Permitted Rectification Period is determined by establishing the period between the time at which the Permitted Rectification Period commences and the time at which the requirements as referred to in Categories 13, 14, 15 and 16 in the table under (a) of paragraph 3.4 have been met.
- (b) The time at which the Permitted Rectification Period commences is determined as follows:
- (i) if the requirements in Annex 3 of this Schedule are not met as a consequence of an Incident, and the remedy necessitates a Closure, the Permitted Rectification Period shall begin at the point in time referred to in [●] of the Management Specifications.
  - (ii) In all other cases the earliest of the following times shall apply:
    - (A) the time that must be automatically indicated and recorded in the Performance Measurement System as the time when the relevant requirement were no longer met in accordance with the provisions in [●];
    - (B) the time at which, according to the damage and disturbance report of the Contractor as referred to in [●] of the Management Specifications, the requirement in question was not met;

<sup>5</sup> In accordance with the number of working days listed in paragraph 2.3 sub (b) under (iv) of this Annex.

- (C) The point in time that the Contractor reports to the Contracting Authority in accordance with the procedure as stipulated in [●] (*Standard Procedure*) of the Management Specifications;
  - (D) The point in time that the Contractor makes a report as referred to in [●] of the Management Specifications; and
  - (E) the time at which the Contracting Authority notifies the Contractor of a circumstance that demonstrates that the relevant requirement has not been met.
- (c) The time when compliance with the requirements as referred to in categories 12 through 16 listed in the table under (a) of paragraph 3.4 is restored is the last of the following times:
- (A) the time that is automatically indicated and recorded in the Performance Measurement System as the time when the relevant requirement was again met in accordance with the provisions of [●];
  - (B) the time at which, according to the damage and disturbance report of the Contractor as referred to in [●] of the Management Specifications, the requirement in question was again met; and
  - (C) the time at which the Contractor reports the termination of the traffic measure to the road manager in accordance with the prevailing procedures for traffic measures as referred to in [●] of the Management Specifications.
- (d) If the Contractor requests a Closure for the performance of Work that complies with the requirements stipulated in [●] (*Standard Procedure*) of the Management Specifications for which a Permitted Rectification Period has been stipulated and if the road manager does not consent to the Closure that was requested, the Permitted Rectification Period shall be extended by a period equal to the period from the refusal of the Closure to the time that the Contracting Authority stipulates that the Closure may take place. If the Contractor requests a Closure that complies with the requirements stipulated in Annex 2, paragraph 3.1 (*Standard Procedure*) of the Management Specifications, for the performance of Work for which a Permitted Rectification Period has been stipulated, and the road manager fails to indicate within the period covered by this procedure whether or not it grants consent, the Rectification Period shall be extended by a period equal to the period from the end of this response time to the time that the road manager indicates that the Closure may take place.
- (e) If a Closure is granted to the Contractor in accordance with [●] (*Standard Procedure*) of the Management Specifications for the performance of Work for which a Permitted Rectification Period has been stipulated and is subsequently withdrawn prematurely by the

road manager, then the Permitted Rectification Period will be extended by a period equal to the period from the withdrawal of permission for the Closure until the time that the road manager grants new permission for the Closure.

- (f) If the Contractor does not comply with the requirements as referred to in categories 13, 14 or 15 within the relevant Permitted Rectification Period then a new Permitted Rectification Period shall be applicable to the relevant requirement which is equal to 20% of the original Permitted Rectification Period. If the Contractor does not comply with the relevant requirements within the new Permitted Rectification Period then a further new Permitted Rectification Period shall be applicable which is equal to 20% of the original Permitted Rectification Period.
- (g) If the road manager requests the Contractor to postpone the performance of Work for which a Permitted Rectification Period has been specified in view of the traffic-flow needs then the Permitted Rectification Period shall be extended by a period equal to the period from the start of this postponement to the time at which the road manager allows the next Closure to take place.
- (h) If the Contractor requests a Closure in accordance with the procedure as referred to in [●](*Standard Procedure*) of the Management Specifications for the performance of Work for which a Permitted Rectification Period has been stipulated, then the Permitted Rectification period will be extended by a period equal to the period from the submission of the request to the time at which the road manager grants permission for the Closure.

### 3.6 REPETITION DEDUCTION

- (a) If a Contractor Default for which Penalty Points have been specified is repeated within the same or the following Payment Period and the Default falls within the same category, then the Contracting Authority may re-impose the same number of Penalty Points as on the previous occasion, increased by 1 (one) point, etc.
- (b) If a Contractor Default as specified in the table under Category 5 lasts for longer than one week then the Contracting Authority may impose 1 (one) additional Penalty Point for each further week the Contractor Default endures, such to a maximum of 20 (twenty) additional Penalty Points per Payment Period for the relevant Contractor Default.

## 4. Lump-Sum Payment

### 4.1 LUMP-SUM PAYMENT

On the day on which the Completion Certificate is issued, the Contracting Authority shall owe the Contractor the amount of € [●] (the Lump-Sum Payment).

**4.2 INVOICING AND REMITTANCE OF THE LUMP-SUM PAYMENT**

- (a) The Contractor issues the Contracting Authority an invoice for the Lump-Sum Payment within 5 Calendar Days after that Payment becomes due.
- (b) The Lump-Sum Payment must be paid no later than the 30th Calendar Day after receipt of invoice by the Contracting Authority.

**5. INVOICING AND PAYMENT**

**5.1 PERIODIC STATEMENT**

- (a) The Quarterly Statement includes a Periodic Statement of the Net Availability Payment and other amounts due (all amounts at the price level in accordance with articles 19.3 and 19.4) pursuant to the Agreement at the end of each Payment Period which the Contractor issues to the Contracting Authority within 30 Calendar Days after the end of the relevant Payment Period. The Periodic Statement must contain a detailed analysis of the way in which the amounts are determined and must provide supporting documentation, as referred to in Req. [●] of the Management Specifications.
- (b) Periodic Statements are addressed as follows:
 

Rijkswaterstaat Dienst Infrastructuur  
attn. [●]  
PO Box 8185  
3503 RD UTRECHT
- (c) The Contracting Authority may request further information from the Contractor for an assessment of the accuracy of the Periodic Statement. A request for further information is without prejudice to the provisions of paragraph 5.2 (*Invoicing and payment period*).
- (d) The Lump-Sum Payment is not included in the Periodic Statement.
- (e) The Contracting Authority must inform the Contractor as soon as possible, but no later than within 10 Calendar Days from receipt of the Periodic Assessment, as to whether it disputes all or part of the Periodic Statement. If the Contractor is unable to concur with the contention then Article 21 (*Dispute Resolution*) is applicable.

**5.2 INVOICING AND PAYMENT PERIOD**

- (a) Within 10 Calendar days following receipt of the report mentioned in subparagraph 5.1(a), the Contractor shall send the Contracting Authority:
  - (i) an invoice (or a credit note in case the statement indicates that, on balance, the Contractor owes an amount to the Contracting Authority) for the undisputed portion; and

- (ii) an invoice (or a credit note in case the statement indicates that, on balance, the Contractor owes an amount to the Contracting Authority) for the disputed portion; and
- (b) The invoices of credit notes referred to in subparagraph (a)(I) shall be addressed as follows:
  - Rijkswaterstaat Dienst Infrastructuur  
attn. de crediteurenadministratie  
thereby stating [●]  
PO Box 8185  
3503 RD Utrecht  
The Netherlands
- (c) The invoices or credit notes referred to in subparagraph (a)(I) shall be addressed as follows:
  - Rijkswaterstaat Dienst Infrastructuur  
attn. [●]  
PO Box 8185  
3503 RD UTRECHT
- (d) An invoice or credit note must be paid no later than the 30th Calendar Day after the date of the Contracting Authority's receipt thereof.
- (e) If the Contracting Authority disputes the amount of an invoice, in part or in full, then it may suspend the payment of the disputed part of the invoice amount. The Contracting Authority must then notify the Contractor as soon as possible that the Contracting Authority contends the invoice together with a statement of the reasons. If the Contractor is unable to concur with the contention then Article 21 (*Dispute Resolution*) is applicable. Should it transpire that the Contracting Authority unjustifiably contended the invoice then the Contracting Authority owes the interest as referred to in paragraph 5.3 (Interest owed on late payment) from the time that the Contracting Authority would have been obliged to settle the invoice if the invoice had not been contested. The Contractor must issue the Contracting Authority an invoice for the undisputed part of the invoice amount.
- (f) Each invoice or credit note must specify the amount of turnover tax due.

### 5.3 INTEREST OWED ON LATE PAYMENT

Unless explicitly stipulated otherwise in this Agreement, interest equal to the penalty interest due on the basis of the Financing Agreements shall be levied on an invoice or credit note in arrears, starting on from the day after the due date (such to the extent that this penalty interest is market conforming).

**5.4** SET-OFF

Unless stipulated otherwise in this Agreement the Contracting Authority may set off amounts payable to the Contractor pursuant to this Agreement with amounts receivable from the Contractor pursuant to this Agreement. In derogation from the preceding sentence, the set-off option for Schedule 4, Parts 2, 3, and 4, is provided for in Paragraphs 2.2, 3.2, and 4.3, respectively, of that Schedule.

**5.5** EUROS

All invoices and payments pursuant to this Agreement are stated and made in Euros.

**5.6** TURNOVER TAX

All amounts stated in this Agreement are exclusive turnover tax.

**5.7** UPDATING TRAFFIC LANE DEFINITIONS IN DEVELOPMENT PHASE

The Contractor must adapt Table 1 in Annex 1 during the Development Phase as follows:

- (a) The Contractor must submit a proposal to the Contracting Authority for the adjustment of Table 1 in Appendix 1 and accompanying drawings at least 3 months before changes take place in the actual use of the Traffic Lanes as defined in that table and the accompanying drawings, together with a proposal for the time at which the updated version is to become applicable;
- (b) the Contractor must thus adjust Table 1 of Annex 1 so that it is clear which Traffic Lanes are replaced by other Traffic Lanes in connection with the provisions of Article 4.4 (i); and
- (c) The Contractor must submit the updated version of Table 1 of Annex 1 to the Contracting Authority for approval.

## ANNEX 1

### TRAFFIC LANE DEFINITIONS, CATEGORY A REQUIREMENTS AND CATEGORY B REQUIREMENTS IN THE DEVELOPMENT PHASE

#### DRAWINGS

Detailed drawings of the RWS Infrastructure Route Sections during the Development Phase specified in Table 1 are given in the following drawings:

[●]

#### Table 1: Traffic Lane Definitions in the Development Phase

[●]

#### Table 2: Category A Requirements in the Development Phase

[The Category A Requirements in the Development Phase (by means of references to Schedule 9, Part 2 (*Output Specifications*)).]

#### Table 3: Category B Requirements in the Development Phase

[The Category B Requirements in the Development Phase (by means of references to Schedule 9, Part 2 (*Output Specifications*) and Schedule 9, Part 3 (*Management Specifications*)).]

## ANNEX 2

### TRAFFIC LANE DEFINITIONS, CATEGORY A REQUIREMENTS AND CATEGORY B REQUIREMENTS IN THE OPERATIONAL PHASE

#### DRAWINGS

Detailed drawings of the RWS Infrastructure Route Sections during the Operational Phase specified in Table 1 are given in the following drawings:

[●]

#### Table 1. Traffic Lane Definitions, Operational Phase

[●]

#### Table 2: Category A Requirements from the Availability Date to the Completion Date

[The Category A Requirements from the Availability Date to the Completion Date (by means of references to Schedule 9, Part 2 (*Output Specifications*)).]

#### Table 3: Category B Requirements from the Availability Date to the Completion Date

[The Category B Requirements from the Availability Date to the Completion Date (by means of references to Schedule 9, Part 2 (*Output Specifications*) and Schedule 9, Part 3 (*Management Specifications*)).]

#### Table 4: Category A Requirements from the Completion Date to the Expiry Date

[The Category A Requirements from the Completion Date to the Expiry Date (by means of references to Schedule 9, Part 2 (*Output Specifications*)).]

#### Table 5: Category B Requirements from the Completion Date to the Expiry Date

[The Category B Requirements from the Completion Date to the Expiry Date (by means of references to Schedule 9, Part 2 (*Output Specifications*) and Schedule 9, Part 3 (*Management Specifications*)).]





**SCHEDULE 3**

**PERMITTED RECTIFICATION PERIODS**

**Table 1 Category A Requirements and Permitted Rectification Periods**

Category A Requirement	Requirement valid from	Requirement valid up to and including	Consequence for Availability	Rectification Period (hours)	No. Penalty Points per Traffic Lane	Source

**Table 2 Category B Requirements and Permitted Rectification Periods**

Category B Requirement	Requirement valid from	Requirement valid up to and including	Rectification Period (hours)	No. Penalty Points	Source

**SCHEDULE 3: COMPENSATION FOR SUPERVENING EVENTS****1. Delay Event****1.1 COMPENSATION**

Following the occurrence of a Delay Event (that is not a Compensation Event), the Contracting Authority must pay the Contractor compensation equal to (a), unless the compensation under (b) is lower than the compensation under (a), in which event the Contracting Authority must pay the Contractor compensation equal to (b):

(a) the total of:

(i) the commitment fees, to the extent that they are market conforming, and the interest on the principal amounts (including the interest on the principal amounts) outstanding pursuant to the Financing Agreements that can be attributed to the relevant Critical Delay;

and

(ii) the amount owed to the Contractor under the Financing Agreements with regard to changes in the dates on which the Contractor shall pay the outstanding amounts there under, to the extent that those changes arise from the relevant Critical Delay and insofar as this amount market conforming.

or

(b) the total of:

(i) the interest on the principal amounts, including the interest on the principal amounts, outstanding pursuant to the Financing Agreements that can be attributed to the relevant Critical Delay;

and

(ii) the amount that the Contractor owes in respect of the repayment of the principal sums and the interest on the principal sums outstanding pursuant to the Financing Agreements exclusive of the repayment of the principal sums (and the interest on the capital sums) resulting from the Lump-Sum Payment that can be attributed to the relevant Critical Delay;

and

- (iii) the amount that the Contractor owes pursuant to the Financing Agreements as a result of changes in the dates on which the Contractor shall repay the principal amounts outstanding, including the interest on the principal sums, pursuant to the Financing Agreement that would have been repaid with the Lump-Sum Payment to the extent that these changes arise from the relevant Critical Delay and to the extent that the amounts are market conforming;

## 1.2 PAYMENT OF COMPENSATION

- (a) Compensation must be paid in the Payment Period after the Payment Period in which the duration of the Critical Delay is determined.
- (b) If the duration of the Critical Delay cannot be determined in full at the end of the Payment Period in which the Critical Delay began then the compensation paid in each Payment Period must be pro rata to the number of Calendar Days on which the Critical Delay occurred in the previous Payment Period. Schedule 2 (*Payment Mechanism*), paragraph 5 (*Invoicing and payment*) is applicable to the extent relevant.

## 1.3 REPAYMENT OF COMPENSATION

- (a) If the Contracting Authority must pay compensation as referred to in paragraph 1.1 subparagraph (b) then the Contractor must repay the Contracting Authority by no later than the Expiry Date:
  - (iv) the amount as referred to in paragraph 1.1 subparagraph (b) (i), augmented with possible interest results and reduced by the interest on the principal amounts that would have been repaid with the Lump-Sum Payment; and
  - (v) the amount as referred to in paragraph 1.1 subparagraph (b) (ii).
- (b) The Contractor must include payments that it makes to the Contracting Authority pursuant to paragraph 1.3 (a) in the Periodic Statement in accordance with the provisions of Schedule 2 (*Payment Mechanism*), paragraph 5.1 (*Periodic Statement*).
- (c) The Contractor may not make any payments to Shareholders (including dividend, etc., on shares and the repayment of Shareholder Loans) before the amount as referred to in paragraph 1.3 (a) has been repaid in full to the Contracting Authority, unless the Contractor has already made a payment of at least an equal or larger amount to the Contracting Authority pursuant to paragraph 1.3 (a) in the concerned Quarter.

## [1.4 CUMULATIVE CRITICAL DELAY EXCEEDING 2 (TWO) YEARS

*Notwithstanding the provisions of paragraph 1.1, if a Delay Event other than a Compensation Event results in the cumulative Critical Delay due to the Delay Event together with any Critical Delay cumulating from previous Delay Events other than Compensation Events exceeding 2 years, the Contracting Authority shall select from the following two options:*

- (d) *the Contracting Authority must pay additional compensation to the Contractor equal to the sum of:*
  - (i) *the interest on the principal amounts (including the interest on the principal amounts) outstanding pursuant to the Financing Agreements that can be attributed to the relevant Critical Delay;*
  - and*
  - (ii) *all that is owing the Contractor as repayment of principal amounts (and interest accumulated on principals) stemming from Financing Agreements, including repayment of the principal amounts (including interest accumulated on principals) arising from the Lump-Sum Payment (as determined in accordance subparagraphs 4.1(b) and (c) of Schedule 2) and is attributable to the relevant Critical Delay;*
  - or*
- (e) *the Contracting Authority terminates this Agreement with immediate effect pursuant to Article 10.5A, subparagraph (b)(ii).*

*If the Contracting Authority does not opt for the choice indicated under (b) no later than the day that is 20 Working Days after the day on which the cumulative Critical Delay exceeded a period of 2 years, the Contracting Authority is then deemed to have selected the option under (a).*

## 1.5 PAYMENT OF COMPENSATION

- (f) *The compensation specified in subparagraph 1.4 (a) must be paid in the Payment Period following the Payment Period in which the cumulative Critical Delay exceeds 2 years.*
- (g) *If the full duration of the Critical Delay due to the relevant Delay Event cannot be determined by the end of the Payment Period in which the cumulative Critical Delay exceeds 2 years:*
  - (i) *the compensation specified in subparagraph 1.4 (a) (ii) relating to repayment of principal amounts (including interest accumulated on principals) stemming from the Lump-Sum Payment, as defined in subparagraphs 4.1 (b) and (c) of Schedule 2, shall be paid in the Payment Period following the Payment Period in which the cumulative Critical Delay exceeds a period of 2 years; and*

- (ii) *the other compensation indicated in subparagraph 1.4 (a) shall be paid for each payment period in proportion to the number of calendar days implicated in the Critical Delay during the previous Payment Period.*

*Schedule 2, section 5 (Invoicing and payment) applies insofar as relevant.*

## 1.6 REPAYMENT OF COMPENSATION

- (a) *If the Contracting Authority must pay compensation as referred to in paragraph 1.4 (a) then the Contractor must repay the Contracting Authority:*
  - (i) *no later than the Expiry Date, the amount referred to in subparagraph 1.4 (a) (i) plus any resulting interest;*
  - (ii) *on the Completion Date (by offsetting the Lump-Sum Payment), the amount referred to in paragraph 1.4 (a) (ii) regarding repayment of principal amounts (including accumulated interest on the principals) stemming from the Lump-Sum Payment (as defined in Schedule 2, subparagraphs 4.1 (b) and (c)), and*
  - (iii) *no later than the Expiry Date, the amount referred to in subparagraph 1.4 (a) (ii) not relating to repayment of principal amounts (including interest accumulated on principals) stemming from the Lump-Sum Payment.*
- (b) *The Contractor must include payments it makes to the Contracting Authority pursuant to paragraph 1.6 (a)(i) and (iii) in the Periodic Statement in accordance with the provisions of Schedule 2 (Payment Mechanism), paragraph 5.1 (Periodic Statement).*
- (c) *The Contractor may not make any payments to Shareholders (including dividend, etc., on shares and the repayment of Shareholder Loans) before the amount as referred to in paragraph 1.6 (a)(i) and (iii) has been repaid in full to the Contracting Authority, unless the Contractor has already made a payment of at least an equal or larger amount to the Contracting Authority pursuant to paragraph 1.6 (a) in the Quarter concerned.]*

## 2. Compensation Event

### 2.1 COMPENSATION

- (a) *The Contracting Authority shall compensate the Contractor for the Financial Loss resulting from the Compensation Event in question.*
- (b) *If the Financial Loss appears to be smaller than € 0 in the event of Compensation Events other than a Contracting Authority Change, the Financial Loss is nil.*
- (c) *For the purpose of determining the Financial Loss the Contractor*

shall send the Contracting Authority a specification of the Financial Loss in which, to the extent applicable, the following items are to be included in all cases, where the Contractor supplies further information and itemisation concerning each item:

<b>TABLE SPECIFICATION OF THE FINANCIAL LOSS</b>	
Direct costs (including materials and labour, not including entailed subcontractor costs)	open book
Engineering costs (% of direct costs)	[●]%
One-off, time-bound general construction site costs (including (de)mobilisation, construction costs, fees, insurance) (% of direct costs)	[●]%
Standardised increment for market conforming general costs and profit (% of direct costs)	[●]%
Other organisational costs (% of direct costs)	[●]%
Risks (only for pre-calculation)	open book
Delay costs due to a Critical Delay or Critical Completion Delay as referred to in paragraph 1.1 and paragraph 4.1 of this Schedule	open book
A decrease in income	open book
Processing costs (incl. engineering costs) for a Contractor Change	€ [●]
Processing costs (incl. engineering costs) for a Compensation Event other than a Contractor Change	€ 0
Total	

- (d) Substantiation of the Financial Loss by the Contractor should be based on the "open book" principle. This means that, for the purpose of justifying the Financial Loss, the Contractor must supply the Contracting Authority, to the extent necessary and upon the latter's first request, all information and documents - whether or not from third parties, including all subcontractors referred to in article 16 associated with the respective increase in future expenditures or decrease in future income. As a minimum, this information involves any information related to planning, price and financing of the Activities connected to the Financial Loss.
- (e) The Contractor must ensure that the substantiation of the Financial Loss, to the extent that it is related to the following documents, is consistent with and can be traced in the following documents the Contractor must make available to the Contracting Authority on the Commencement Date:

(i) the agreement concluded with [the EPC contractor] with reference number [●●]; and

(ii) the agreement concluded with the [O&M contractor] with reference number [●●].

- (f) Should the information included in the documents referred to under (e) no longer be current then the Contractor must, within 10 Working Days of being notified of such, provide the Contracting Authority with the current information.
- (g) Any costs that the Contractor needs to make for deployment of subcontractors and other third parties and that are part of the Financial Loss should be market conforming.
- (h) Should the Contracting Authority dispute part or all of the substantiation for the Financial Loss, the Contracting Authority must, as quickly as possible, notify the Contractor of the dispute and the reasons for it, if necessary providing documents in support.
- (i) Should the Contractor disagree with the reasons for the Contracting Authority's dispute, the Parties must confer and, if they fail to reach an agreement on the Financial Loss within 40 Working Days, have the extent of the Financial Loss determined in accordance with Article 21.2 (*Expert Opinion*).
- (j) In determining a Financial Loss as a result of a Delay Event as stipulated in paragraph (g) of the definition of thereof, the Contractor must use the prices listed in the following table.

Product	Unit	Price
Supply, installation and removal of a visual screen without road closure	Per 100 meter per day	[●]
Supply, installation and removal of VMS vehicles	Per unit per day	[●]
Supply, installation and removal of complete road closure (collision absorber, signs) 1 Traffic Lane	For at most 500 metres a day	[●]
Supply, installation and removal of complete road closure (collision absorber, signs) 2 Traffic Lanes	For at most 500 metres a day	[●]



Supply, installation and removal of complete road closure (collision absorber, signs) 3 or more Traffic Lanes	For at most 500 metres a day	[●]
Repair of guard rail without road closure	Per instance $\leq 10$ meter	[●]
Repair of guard rail without road closure	Per instance $> 10$ meter en $\leq 100$ meter	[●]
Cold asphalt repair without road closure	Per instance $\leq 1$ m <sup>2</sup>	[●]
Cleaning of drain asphalt	Per instance $\leq 20,000$ m <sup>2</sup>	[●]
Sweeping, vacuuming or rinsing of asphalt without road closure	Per instance $\leq 20,000$ m <sup>2</sup>	[●]
Warm asphalt repair without road closure	Per instance $\leq 350$ m <sup>2</sup>	[●]
Repair / replacement of light posts (incl. fixtures and lighting) without road closure	Per unit per instance	[●]
Straightening of light posts without road closure	Per unit per instance	[●]
Removal of (overturned) private vehicles without road closure	Per a maximum 3 units per instance	[●]
Removal of (overturned) private vehicles without road closure	Per unit per instance	[●]
Repair / replacement of hectometre sign without road closure	Per unit	[●]
Repair / replacement of marker / reflector posts without road closure	Per unit	[●]
Repair / Replacement of reflector (on guardrail / barrier) without road closure	Per unit	[●]
Repair / replacement of curve signs without road closure	Per unit	[●]
Repair / replacement of wildlife mirrors without road closure	Per unit	[●]

Emergency road service for DVM	Per shift (8 hours)	[●]

- (k) The prices in the above table are indexed annually in accordance with Article 19.4 (Indexing of other amounts).

## 2.2 THRESHOLDS

In derogation from the provisions of paragraph 2.1, in the case of a Compensation Event (other than a Contracting Authority Change, a Contracting Authority Default, or making up time lost in a Critical Delay or a Critical Delay in Completion on the Contracting Authority's request) the Contracting Authority is required to compensate the amount determined in paragraph 2.1 only when the amount is equal to or greater than € [●].

## 2.3 PAYMENT OF COMPENSATION

- (a) The Contracting Authority must pay compensation for the Financial Loss in one of the following manners to be chosen by the Contracting Authority:
- (i) As a lump sum;
  - (ii) in instalments at intervals to be determined by the Contracting Authority that are beyond the scope of the Availability Deductions (AD) and the Performance Corrections (PC) referred to in Schedule 2 (*Payment Mechanism*); or
  - (iii) by means of an adjustment of the Gross Availability Payment (GAP).
- (b) if the Contracting Authority opts for payment in accordance with subparagraph (a)(ii) then the periodic compensation shall be as in line as possible, when the conditions remain unchanged, with the expected actual realisation of the Financial Loss. The financing costs resulting from the Contracting Authority opting for payment in accordance with (ii) are part of the Financial Loss. If the Contracting Authority opts to pay the Contractor compensation (either in whole or in part) in the form of a periodic payment or an adjustment of the Gross Availability Payment (GAP) and this choice results in the Contractor's need for additional financing then the Contractor must, when so requested by the Contracting Authority, endeavour to raise this additional financing under the most favourable conditions (without additionally being obliged to allow providers of the financing to share in previously furnished securities). The financing costs resulting from the Contracting Authority opting for payment in accordance with (iii) are part of the Financial Loss. To the extent that the Contractor:

- (i) is unable to succeed in raising financing subject to conditions that are acceptable to the Contracting Authority and the Contractor within three months of receiving a request to that effect from the Contracting Authority; or
  - (ii) does not obtain approval for the financing from the Lenders,
- then the compensation shall be paid in a manner that does not necessitate any additional financing.
- (c) The Contracting Authority shall indicate, on the basis of provisional insight into the extent and distribution over time of the compensation, which of the methods as set out under (a) he wishes to adopt. The Contracting Authority shall make this choice timely in such a way that payment can be performed in accordance with the provisions in paragraph 2.3 under (f) of this Schedule.
  - (d) If the Contracting Authority elects to compensate the Contractor in the form of an adjustment of the Gross Availability Payment (GAP), then:
    - (i) Schedule 10 (*Financial Model Adjustment Guideline*) shall apply insofar as this is relevant; and
    - (ii) Schedule 2 (*Payment Mechanism*) shall be adjusted accordingly.
  - (e) Paragraph 5 of Schedule 2 (*Payment Mechanism*) shall apply to the extent that it is relevant.
  - (f) The compensation must be immediately paid in accordance with subparagraph (a)(i) or the first instalment in accordance with subparagraphs (a)(ii) or (iii) during the Payment Period following the Payment Period in which the amount of the Financial Loss was determined. If the full Financial Loss cannot yet be determined at the end of a Payment Period in which the Contractor has incurred the Financial Loss for the first time, then the part of the compensation that can be determined shall be paid (or the periodic payment will start) in the Payment Period following the Payment Period in which the Financial Loss was incurred for the first time.

#### 2.4 FINANCIAL BENEFIT DUE TO A CONTRACTING AUTHORITY CHANGE

- (a) In case of a Contracting Authority Change, if the Financial Loss, defined in accordance with section 2.1 of this Schedule, is negative hence there is a financial benefit for the Contractor, the Contractor should compensate the Contracting Authority for this financial benefit.
- (b) The Contracting Authority should be compensated for the financial benefit under a payment scheme that is defined based on the expected actual realization of said benefit, given unchanged circumstances.

### 3. Force Majeure Event

#### 3.1 COMPENSATION

- (a) In the event of a Force Majeure Event the Contracting Authority must pay the Contractor all the amounts that the Contracting Authority owes the Contractor in that period pursuant to the Agreement, subject to the understanding that the Gross Availability Payment (GAP) shall be reduced, in reasonableness, during the Payment Periods by the maintenance costs the Contractor saves for that part of the Infrastructure in which, as a result of the Force Majeure Event, the Contractor is unable to continue to fulfil his obligations or can fulfil those obligations only with a Financial Loss.
- (b) In the event of a Force Majeure Event that constitutes a Delay Event, the Contracting Authority must pay the Contractor compensation in accordance with paragraph 1 (*Delay Event*) in this Schedule.
- (c) In the event of a Force Majeure Event that constitutes a Delayed Completion Event the Contracting Authority must pay the Contractor compensation in accordance with paragraph 4 (*Delayed Completion Event*) in this Schedule.
- (d) the Contracting Authority must, should it be decided to continue the Agreement after the Force Majeure Event, compensate the Contractor for the Financial Loss (as determined according to paragraph 2 of this Schedule) incurred on rectifying the damage to the Infrastructure caused by the Force Majeure Event.

#### 3.2 PAYMENT

Schedule 2 (*Payment Mechanism*), paragraph 5 (*Invoicing and payment*) is applicable to the extent relevant.

### 4. Delayed Completion Event

#### 4.1 COMPENSATION

In the event of a Delayed Completion Event (that is not a Force Majeure Event), the Contracting Authority must pay the Contractor compensation equal to:

- (a) the market conforming interest due on the outstanding principal amounts that can be attributed to the relevant Critical Completion Delay (including the interest added to the capital sum) pursuant to the Financing Agreements that would have been repaid with the Lump-Sum Completion Payment if the Delayed Completion Event had not occurred;

plus

- (b) that which is owed to the Contractor under the Financing

Agreements with regard to changes in the dates on which the Contractor shall pay the outstanding amounts there under, to the extent that those changes arise from the relevant Critical Delay in Completion and insofar as this amount is market conforming

#### **4.2** PAYMENT OF COMPENSATION

The compensation should be paid in the Payment period after the Payment period in which the duration of the Critical Delay in Completion has been determined. If the full duration of the Critical Delay in Completion cannot yet be determined at the end of a Payment Period in which the Critical Delay in Completion occurred for the first time, the compensation must be paid per Payment Period in proportion to the number of Calendar Days in the preceding Payment Period on which the Critical Delay in Completion occurred. Schedule 2 (*Payment Mechanism*), paragraph 5 (*Invoicing and payment*) is applicable to the extent relevant.

## SCHEDULE 4: COMPENSATION DUE TO PREMATURE TERMINATION

### 1. Termination due to an Immediate Termination Event or Termination due to a Contractor Default

#### 1.1 COMPENSATION IN THE EVENT OF TERMINATION PRIOR TO FINANCIAL CLOSE

On Termination due to an Immediate Termination Event or Contractor Default before the Financial Close has been attained then the Contractor must pay the Contracting Authority compensation equal to € [**amount of the Financial Close Guarantee**].

#### 1.2 COMPENSATION IN THE EVENT OF TERMINATION AFTER FINANCIAL CLOSE

In the case of Termination due to an Immediate Termination Event or Termination due to a Contractor Default after Financial Close has been achieved, the Contracting Authority must pay the Contractor or, should the compensation be negative, the Contractor must pay the Contracting Authority compensation (**V**) equal to:

(a) the value (**V**) of the Work already performed by the Contractor, of which the value shall be determined as follows:

(i) the present value (calculated using the Weighted Average Cost of Capital) of the payments that the Contracting Authority would have been expected to make on the continuation of this Agreement from the date on which the Agreement is terminated to the Expiry Date (as these would have occurred in the event of full performance of this Agreement in accordance with the Project Planning), whereby the Availability Adjustments and Performance Correction will not be taken into account in the calculation of the expected Net Availability Payments;

less

(ii) the present value (calculated using the Weighted Average Cost of Capital) of the payments that the Contractor would have been expected to make to the Contracting Authority on the continuation of this Agreement from the date on which the Agreement is terminated to the Expiry Date, (as these would have occurred in the event of full performance of this Agreement in accordance with the Project Planning);

less

- (iii) the present value (calculated using the Weighted Average Cost of Capital) of the payments the Contracting Authority would have been expected to make (whereby the Availability Adjustments and Performance Correction is not taken into account) to a replacement contractor assuming the obligations of the Contractor under the terms of this Agreement, to the extent that the obligations must be fulfilled from the day on which this Agreement ends up to and including the Expiry Date (as these would have occurred in the event of full performance of this Agreement in accordance with the Project Planning), at a market conforming price ;

less

- (b) fixed compensation for extra costs (**EC**) equal to:

- (i) € [●] if the date on which this Agreement ends is prior to the Availability Date; and
- (ii) € [●] if the date on which this Agreement ends is the same as or after the Availability Date.

less

- (c) a sum equalling 50% of the amount of the Performance Bond (**A**), if the Contractor Default resulting in termination consists of failure to rectify damage to Infrastructure and the amounts paid by the insurer not used to rectify this damage (this without prejudice to the provisions of articles 14.7 and 14.8 of the Direct Agreement, pursuant to which provisions the balance of the Insurance Account shall be paid);

$$C = V - EC - A$$

The C and V amounts can be negative. The amounts of EC and A cannot be negative.

The present value referred to in (c) of this paragraph 1.2 must be determined by an Dispute Resolution Board consists of three members. The procedure for the appointment of the Dispute Resolution Board and the formation of the opinion of this Dispute Resolution Board is the procedure of Article 21.2 (*Expert Opinion*), in which all the periods referred to Article 21.2 are to be doubled. In accordance with Article 22.1 paragraph (i), the opinion of the Dispute Resolution Board is a binding opinion, unless one Party informs the other Party that it cannot concur with

the opinion within 8 weeks of the issue of the opinion and has submitted the dispute to the civil court within this period. In this case, the opinion does not have to be adopted.

For the avoidance of doubt, it should be noted that the Contractor does not owe the Contracting Authority the amounts included in the calculation of compensation (C) in addition to compensation (C) to the Contracting Authority.

### **1.3** PAYMENT OF COMPENSATION

- (a) The compensation must be paid within 30 Calendar Days after receipt of the invoice for the definitive compensation.
- (b) In addition to the compensation, interest must be compensated equal to the penalty interest due on the basis of the Financing Agreements (to the extent this penalty interest is market conforming) over the period starting on the date the Agreement ends until the date of the invoice.



## 2. Termination due to a Contracting Authority Default or Voluntary Termination by the Contracting Authority

### 2.1 COMPENSATION

In case of termination due to a Contracting Authority Default or voluntary termination by the Contracting Authority, the Contracting Authority must pay the Contractor compensation (**C**) equal to:

- (a) the principal amounts outstanding in terms of the Financing Agreements plus the interest and commitment fees due but not yet paid on these principal amounts, insofar as these are market conforming (**PA**);

plus

- (b) the costs that are charged to the Contractor, pursuant to the Financing Arrangements, as a result of the termination of this Agreement including the Break Costs (where it concerns closing out the swap in accordance with the method laid down in ISDA 2002 – “CLOSE OUT AMOUNT”), to the extent that this is market conforming (**CFA**);

plus

- (c) the principal amounts outstanding pursuant to the Shareholder Loan Agreements (**SL**);

plus

- (d) The paid-up and outstanding shares in the capital of the Contractor plus any agreed and paid premium (**Shrs**);

plus

- (e) return compensation (**RC1**) resulting in a return percentage after tax on the amounts referred to in (c) and (d) over the period starting on the Contract Date, or later if the actual investments were made later, and continuing to the date on which this Agreement expires, this equal to the weighted average percentage of the return requirements after tax used in the Updated Financial Model on the amounts referred to in (c) and (d) relating to this period, whereby account must be taken of the following when determining this amount:

- (i) the interest payments already made pursuant to the Shareholder Loan Agreements;

- (ii) the payments already made on shares and the entered reserves excluding premiums; and
- (iii) the net working capital stemming from the Contractor's balance sheet on the date on which this Agreement ends, excluding the inventory and work in progress and corrected for the amounts that the Contractor owes Subcontractors for work carried out but not yet invoiced and for compensation owed by Subcontractors to third parties due to the cancellation of orders already placed, this to the extent that the compensation market conforming and the times when the orders were placed were reasonably in line with the Project Planning.

In derogation of the preceding, if the return actually realised after tax on the amounts under (c) and (d) for this period exceeded the weighted average percentage of the return requirements in the Updated Financial Model after tax (blended equity IRR post tax), then this amount shall be equal to zero;

plus

- (f) the termination costs (**TC**) of subcontracting agreements and agreements with suppliers or advisors the Contractor concluded in connection with the performance of the Work, which result from the termination of this Agreement, insofar as not already comprised under (b) and insofar these are market conforming and at most 5% of the remaining part of the price determined in the (subcontracting) agreement that the Contractor would have had to pay in the event of the complete performance of the work;

plus

- (g) return compensation (**RC2**) over the period from the date on which the Agreement was terminated to the date on which the Agreement would have expired if it had not been terminated equal to the amount resulting in a return percentage after tax on the amounts stated under (c) and (d) equal to the weighted average percentage of the return requirements after tax used in the Updated Financial Model on the amounts stated under (c) and (d) relating to this period;

less

- (h) the return after taxes that the Contractor can achieve by means of an alternative investment of the amounts named under (c) and (d), (**AltR**):
  - (i) during the period from the date on which this Agreement ends up to and including the Expiry Date (as these would have existed in the event of the complete performance of this Agreement in accordance with the Project Planning);
  - (ii) for investment in investment opportunities that exist at the time this Agreement is terminated; and

- (iii) for investment opportunities with characteristics (including the risk profile) that are comparable with the performance of this Agreement;

less

- (i) the total amounts (**Insr**) the insurer pays pursuant to the insurance policies referred to in Article 14.1 paragraph (a) to the extent that the amounts paid by the insurer are not allocated to the rectification of damage to the Infrastructure (this without prejudice to the provisions of articles 14.7 and 14.8 of the Direct Agreement, pursuant to which provisions the balance of the Insurance Account shall be paid);

plus

- (j) the amount in taxes (**Tax**) that the Contractor must pay in the Netherlands as a consequence of the payment of the termination compensation (C). The Contracting Authority may pay this amount directly to the tax authorities.

$$C = PA + CFA + AL + Shrs + RC1 + TC + RC2 - AltR - Insr + Tax$$

The C and CFA amounts can be negative. If PA, AL, Shrs, RC1, RC2, AltR, Insr and Tax and the total of (RC2-AltR) are negative amounts, they are set to zero.

## 2.2 PAYMENT OF COMPENSATION

- (a) The compensation must be paid within 30 Calendar Days after receipt of the invoice for the definitive compensation.
- (b) Interest must also be paid on the compensation equal to the weighted average project return over the period from the date on which the Agreement ends until the date of the invoice.
- (c) Schedule 2, paragraph 5 (*Invoicing and payment*) shall be applicable to the extent that this is relevant.
- (d) The Contracting Authority may set-off the (sum of the) amount(s) payable to the Contractor pursuant to the provisions of paragraph 2.1 under (c) up to and including (j), with the amounts receivable from the Contractor pursuant to this Agreement.

### 3. Termination due to a prolonged Delay Event

#### 3.1 COMPENSATION

In the event of termination due to a prolonged Delay Event then the Contracting Authority must pay the Contractor compensation (**C**) equal to:

- (a) the principal amounts outstanding in terms of the Financing Agreements (**PA**) plus the interest and commitment fees due but not yet paid on these principal amounts, insofar as these market conforming;

plus

- (b) the costs that are charged to the Contractor, pursuant to the Financing Arrangements, as a result of the termination of this Agreement including the Break Costs (where it concerns closing out the swap in accordance with the method laid down in ISDA 2002 – “CLOSE OUT AMOUNT”), to the extent that this is market conforming (**CFA**);

plus

- (c) the principal amounts outstanding pursuant to the Shareholder Loan Agreements (**SL**);

plus

- (d) The paid-up and outstanding shares in the capital of the Contractor plus any agreed and paid premium (**Shrs**);

plus

- (e) return compensation (**RC1\***) equal to the amount resulting in a return percentage after tax on the amounts referred to in (c) and (d) for the period from the Contract Date to the date on which this Agreement ends, which is equal to the average return percentage on ten-year Netherlands State bonds (as published by payment dates), whereby account must be taken of the following when determining this amount:

- (i) the interest payments already made pursuant to the Shareholder Loan Agreements;
- (ii) the payments already made on shares and the entered reserves excluding premiums; and

- (iii) the net working capital stemming from the Contractor's balance sheet on the date on which this Agreement ends, excluding the inventory and work in progress and corrected for the amounts that the Contractor owes Subcontractors for work carried out but not yet invoiced and for compensation owed by Subcontractors to third parties due to the cancellation of orders already placed, this to the extent that the compensation is market conforming and the times when the orders were placed were reasonably in line with the Project Planning.

In derogation of the above, the amount is set to zero if the return actually realised after tax on the amounts referred to in (c) and (d) for this period exceeded the average return on ten-year Netherlands State bonds.

plus

- (f) the termination costs (**TC**) of subcontracting agreements and agreements with suppliers or advisors the Contractor concluded in connection with the performance of the Work, which result from the termination of this Agreement, insofar as not already comprised under (b) and insofar these are market conforming and at most 5% of the remaining part of the price determined in the (subcontracting) agreement that the Contractor would have had to pay in the event of the complete performance of the work;

plus

- (g) return compensation (**RC2\***) equal to the amount resulting in a return percentage after tax on the amounts named under (c) and (d) for the period of five years from the date on which the Agreement ends, equal to the average return on ten-year Netherlands State bonds for this period (as published on the date on which this Agreement ends);

less

- (h) the total amounts (**Insr**) the insurer pays pursuant to the insurance policies referred to in Article 14.1 paragraph (a) to the extent that the amounts paid by the insurer are not allocated to the rectification of damage to the Infrastructure (this without prejudice to the provisions of articles 14.7 and 14.8 of the Direct Agreement, pursuant to which provisions the balance of the Insurance Account shall be paid);

plus

- (i) the amount in taxes (**Tax**) that the Contractor must pay in the Netherlands as a consequence of the payment of the termination compensation (C). The Contracting Authority may pay this amount directly to the tax authorities.

$$C = PA + CFA + AL + Shrs + RC1^* + TC + RC2^* - Insr + Tax$$

The C and CFA amounts can be negative. PA, AL, Shrs, RC1\*, TC, RC2\*, Insr and Tax cannot be negative and, should they be negative, are set to zero.

### 3.2 PAYMENT OF COMPENSATION

- (a) The compensation must be paid within 30 Calendar Days after receipt of the invoice for the definitive compensation.
- (b) Interest must also be paid on the compensation equal to the weighted average project return over the period from the date on which the Agreement ends until the date of the invoice.
- (c) Schedule 2, paragraph 5 (*Invoicing and payment*) shall be applicable to the extent that this is relevant.
- (d) The Contracting Authority may set-off the (sum of the) amount(s) payable to the Contractor pursuant to the provisions of paragraph 3.1 under (c) up to and including (i), with the amounts receivable from the Contractor pursuant to this Agreement.

**4. Termination due to a Force Majeure Event**

**4.1 COMPENSATION IN THE EVENT OF TERMINATION PRIOR TO FINANCIAL CLOSE**

In the event of termination due to a Force Majeure Event after Financial Close, the Contracting Authority must pay the Contractor compensation (C) equal to: € [**amount equal to tendered compensation for design costs**]

**4.2 COMPENSATION IN THE EVENT OF TERMINATION AFTER FINANCIAL CLOSE**

In the event of termination due to a Force Majeure Event after Financial Close, the Contracting Authority must pay the Contractor compensation (C) equal to:

- (a) the principal amounts outstanding in terms of the Financing Agreements plus the interest and commitment fees due but not yet paid on these principal amounts, insofar as these are market conforming (**PA**);

plus

- (b) the costs that are charged to the Contractor, pursuant to the Financing Arrangements, as a result of the termination of this Agreement including the Break Costs (where it concerns closing out the swap in accordance with the method laid down in ISDA 2002 – “CLOSE OUT AMOUNT”), to the extent that this is market conforming (**CFA**);

plus

- (c) the principle amounts outstanding pursuant to the Shareholder Loan Agreements less the interest payments already made pursuant to the Shareholder Loan Agreements (**AL\***);

plus

- (d) the paid-up shares in the capital of the Contractor plus any agreed and paid premium, minus the payments already made on shares (**Shrs\***);

less

- (e) the total amounts (**Insr**) the insurer pays pursuant to the

insurance policies referred to in Article 14.1 paragraph (a) to the extent that the amounts paid by the insurer are not allocated to the rectification of damage to the Object (this without prejudice to the provisions of articles 14.7 and 14.8 of the Direct Agreement, pursuant to which provisions the balance of the Insurance Account shall be paid);

plus

- (f) the amount in taxes (**Tax**) that the Contractor must pay in the Netherlands as a consequence of the payment of the termination compensation (C). The Contracting Authority can pay this amount directly to the tax authorities.

less

- (g) the net working capital (**NWC**) resulting from the Contractor's balance sheet on the date on which the Agreement ends, excluding the inventory and work in progress and corrected for the amounts the Contractor owes the Subcontractors for work they have carried out but not yet invoiced and for compensation the Subcontractors owe third parties due to the cancellation of orders that had already been placed, this to the extent that the compensation is market conforming and the times at which the orders were placed were reasonably in line with the Project Planning.

$$C = PA + CFA + SL^* + Shrs^* - Insr + Tax - NWC$$

The C and CFA amounts can be negative. PA, AL\*, Shrs\*, Insr, Tax and NWC cannot be negative and, should they be negative, are set to zero.

### 4.3 PAYMENT OF COMPENSATION

- (a) The compensation must be paid within 30 Calendar Days after receipt of the invoice for the definitive compensation.
- (b) In addition to the compensation, interest must be compensated equal to the penalty interest due on the basis of the Financing Agreements (to the extent this penalty interest is market-based) over the period starting on the date the Agreement ends until the date of the invoice.
- (c) Schedule 2, paragraph 5 (*Invoicing and payment*) shall be applicable to the extent that this is relevant.
- (d) The Contracting Authority may set-off the (sum of the) amount(s) payable to the Contractor pursuant to the provisions of paragraph 4.2 under (c) up to and including (g), with the amounts receivable



from the Contractor pursuant to this Agreement.

## SCHEDULE 5: CHANGES

### 1. Small Changes

#### 1.1 PROCEDURE FOR SMALL CHANGES

- (a) The Contracting Authority may make a request for a Small Change at any time. This request must include:
- (i) a statement that the proposal relates to a Small Change; and
  - (ii) a description of the Small Change.
- The Contractor must detail this request to obtain a proposal for a Small Change as referred to under (c) within [10] Working Days after receiving the request unless the Contractor can demonstrate that the change is not a Small Change.
- (b) The Contractor may make a request for a Small Change as referred under (c) at any time.
- (c) The proposal for a Small Change must include:
- (i) a statement that the proposal relates to a Small Change;
  - (ii) a description of the Small Change; and
  - (iii) a description of the measures and Work required for and/or arising from the Small Change.
- (d) On receiving the proposal for a Small Change as referred to in subparagraph (c) the Contracting Authority must notify the Contractor as soon as possible that:
- (i) the Contracting Authority agrees with the proposal for a Small Change;
  - (ii) the Contracting Authority does not agree with the proposal for a Small Change or
  - (iii) the change does not refer to a Small Change.
- (e) Once the Contracting Authority has agreed to the Small Change the Small Change is part of the Agreement.
- (f) If the Contracting Authority has reported that the change is not a Small Change then the Contractor may submit the proposal as another Contractor Change.

- 1.2 DETERMINING THE FINANCIAL LOSS INCURRED DUE TO SMALL CHANGES**
- (a) In case of a Small Change, the Financial Loss is determined by the Parties in accordance with the provisions in paragraph 2.10.
  - (b) If the Parties are unable to reach agreement on the Financial Loss involved in a Small Change, the Financial Loss is then determined by the application of Article 21.2 (*Expert Opinion*), whereby the Dispute Resolution Board shall consist only of one member.

**2. Other Changes**

**2.1 OTHER CONTRACTING AUTHORITY CHANGE**

- (a) Within 20 Working Days after:
  - (i) the Contracting Authority has requested a Contracting Authority Change that is not a request for a Small Change as referred to in paragraph 1.1 under (a); or
  - (ii) it has become clear that a Change needs to be made in the form of a Contracting Authority Change;

the Contractor must provide the Contracting Authority with the preliminary information referred to under (c) of this paragraph, unless the Contractor believes that there are grounds for refusing to implement the Contracting Authority Change as referred to under (b). If the Contractor believes that there is a ground for refusing to implement the Contracting Authority Change as referred to under (b), then the Contractor must inform the Contracting Authority accordingly, support by reasons, within the abovementioned period of 20 Working Days.

- (b) The Contractor can only refuse to implement a Contracting Authority Change if the Contracting Authority Change:
  - (i) is incompatible with working methods customarily applied;
  - (ii) jeopardises the safety of the Infrastructure or persons; or
  - (iii) substantially prejudices the ability of the Contractor to fulfil its obligations pursuant to this Agreement.
- (c) The Contractor must provide the Contracting Authority the following provisional information for a Contracting Authority Change:
  - (i) Its opinion on the extent to which the Change shall result in a Critical Delay or a Critical Delay in Completion;
  - (ii) an estimate of whether the change constitutes a Small Change or another Change; and
  - (iii) the order of magnitude of the financial consequences of the proposed change (including an estimate of the costs of

preparing and detailing the Change Proposal) for which the Contracting Authority must provide compensation (assuming that this compensation shall be paid in the form of a lump-sum payment), as determined by the application of paragraph 2.10 of this Schedule (*Determining Financial Loss in the case of other Changes*); and

- (iv) an estimate of the anticipated Availability Deductions and Performance Corrections that could be imposed on the Contractor as a consequence of a Contracting Authority Change, in the absence of a Supervening Event.
- (d) After the receipt of the information provided pursuant to the provisions under (c), the Contracting Authority may:
- (i) request the Contractor to submit a Change Proposal, whereupon the Contractor must submit a proposal for a Contracting Authority Change to the Contracting Authority as referred to in paragraph 2.3 within 20 Working Days of receiving the request; or
  - (ii) when the Contracting Authority has estimated that the change is a Small Change request the Contractor to submit a proposal for a Small Change as referred to in paragraph 1.1 under (a), after which the Parties shall deal with the change as a Small Change.

## 2.2 OTHER CONTRACTOR CHANGES

- (a) If the Contractor submits a proposal for a Contractor Change that is not a request for a Small Change as referred to in paragraph 1.1 under (b), then the Contractor's request for a Change must pay due regard to the provisions of paragraph 2.3 (*Change Proposal*).

## 2.3 CHANGE PROPOSAL

- (a) A change proposal must contain at least:
  - (i) A description of the change(s) to be made to this Agreement;
  - (ii) a description of the manner in which the Contractor intends to introduce the Change;
  - (iii) Its opinion on the extent to which the Change shall result in a Critical Delay or a Critical Delay in Completion;
  - (iv) a proposal to handle the Change as a Small Change;
  - (v) (in the case of a Contracting Authority Change) a preliminary summary of the Financial Loss incurred as a result of the proposed Changes as drawn up by the application of paragraph 2.10 (*Determining Financial Loss in*

*the case of other Changes*) of this Schedule (including an estimate of the costs of preparing and detailing the change proposal), for which the Contracting Authority must provide compensation (assuming that this compensation shall be made in the form of a lump-sum payment) or of the financial benefit resulting from the proposed Change, for which the Contractor must provide the Contracting Authority compensation; and

- (vi) (in the case of a Contractor Change) a proposal for sharing the financial benefit resulting from the Change with the Contracting Authority.
- (b) The Contracting Authority may ask the Contractor to provide additional information within 20 Working Days after receiving the Change Proposal.

#### **2.4** RESPONSE OF THE CONTRACTING AUTHORITY

- (a) The Contracting Authority must notify the Contractor whether it agrees with the Change Proposal referred to in paragraph 2.3 (*Change Proposal*) within 20 Working Days of receiving the proposal (or the supplementary information).
- (b) When the Change is a Contracting Authority Change, the Contracting Authority may give consent subject to the right to have the scope of the compensation to be paid to the Contractor determined by the application of Article 21 (*Dispute Resolution*). The Contracting Authority must submit the dispute within 10 Working Days.
- (c) The Contracting Authority may attach conditions to its consent to a Contractor Change (such as the apportionment of the financial benefit of the Change). The Contractor may withdraw a Contractor Change after perusing the Contracting Authority's conditions.

#### **2.5** FURTHER DETAILING

- (a) The Contractor may, on the basis of appropriate grounds, agree to the proposal subject to the further detailing of the proposal in a form that is acceptable to the Contracting Authority. In that case, the Contractor must elaborate the proposal in further detail.
- (b) The Contracting Authority may request additional information from the Contractor within 20 Working Days of receiving the detailed proposal.
- (c) The Contracting Authority must notify the Contractor whether the Contracting Authority agrees with the detailed Change Proposal within 20 Working Days of receiving the detailed proposal (or the supplementary information).
- (d) If the Contracting Authority does not agree with the detailed proposal, then the Parties must enter into consultation. If these consultations do not result in agreement within 40 Working Days,

then the manner in which the Change shall be introduced must be determined by the application of Article 21 (*Dispute Resolution*). The Contracting Authority must submit the dispute within 10 Working Days.

- (e) When the Change is a Contracting Authority Change, the Contracting Authority may give consent subject to the right to have the scope of the compensation to be paid to the Contractor determined by the application of Article 21 (*Dispute Resolution*).

## 2.6 PROPOSED CHANGE AS PART OF THIS AGREEMENT

A proposed Change forms part of this Agreement when the Contracting Authority:

- (a) agrees with the proposal as referred to in paragraph 2.3 (*Change Proposal*), where relevant (in the case of a Contracting Authority Change) subject to the Contracting Authority's right to have the amount of compensation to be paid to the Contractor determined by the application of Article 21 (*Dispute Resolution*);
- (b) agrees with the detailed proposal as referred to under (c) of paragraph 2.5, where relevant (in the case of a Contracting Authority Change) subject to the Contracting Authority's right to have the amount of compensation to be paid to the Contractor determined by the application of article 21 (*Dispute Resolution*); or
- (c) the manner in which the Change shall be introduced and the amount of the compensation the Contracting Authority will pay the Contractor are determined by the application of Article 21 (*Dispute Resolution*).

## 2.7 WITHDRAWAL OF PROPOSED CHANGE

- (a) The Contracting Authority may withdraw a proposed Contracting Authority Change at any time until the Change becomes part of this Agreement pursuant to paragraph 2.6 (*Proposed Change as part of this Agreement*). This is not applicable to Contracting Authority Changes that must be implemented pursuant to Article 13.1 (b) (*Contracting Authority Change*) and Article 13.2 (b) (*Contractor Change*).
- (b) The Contractor may withdraw a proposed Contractor Authority Change at any time until the Change becomes part of this Agreement pursuant to paragraph 2.6 (*Proposed Change as part of this Agreement*).

## 2.8 COSTS

- (a) The costs to be borne by the Contractor in processing a proposal for a Contracting Authority Change:
  - (i) form part of the Financial Loss when the Contracting Authority Change becomes part of this Agreement; or

- (ii) must be compensated by the Contracting Authority in the form of a lump-sum payment when the Contracting Authority Change does not come to form part of the Agreement.
- (b) The costs that have to be borne by the Contracting Authority with regard to dealing with a proposal for a Contractor Change must be compensated to the Contracting Authority by the Contractor. In the event of any question of the Parties sharing the financial benefit of the Change, the costs shall be deducted from this benefit before distribution thereof takes place.

## 2.9 MISCELLANEOUS PROVISIONS

- (a) If a Party anticipates that a period stated in this Schedule is not long enough in order for it to complete what it must do in such period, due to the extent or complexity of a proposed Change, the Parties must agree upon an extension that is reasonably long enough. The Party requiring the extension must advise the other Party thereof as soon as possible as (and, no later than before half of the original period has elapsed).
- (b) When a Relevant Change in Law necessitates a Contracting Authority Change then the periods referred to in paragraphs 2.5 (*Further detailing*) and 2.6 (*Proposed Change as part of this Agreement*) shall be reduced as much as is necessary to ensure the Contracting Authority Change can be implemented before the Relevant Change in Law comes into force.
- (c) On the application of a procedure as laid down in this Schedule the Parties must remain available for the interim consultations required to implement a Change as quickly and efficiently as possible.
- (d) The Contracting Authority may not propose a previously rejected Contractor Change in the form of an identical or largely identical Contracting Authority Change.
- (e) The Contractor may not suspend the implementation of a Contracting Authority Change because the Contracting Authority has given its consent subject to the right to have the amount of the compensation to be paid to the Contractor determined by the application of Article 21 (*Dispute Resolution*).

## 2.10 DETERMINATION OF THE FINANCIAL LOSS

The Financial Loss incurred as a result of a Change is determined in accordance with the provisions of Schedule 3 (*Compensation for Supervening Events*), paragraph 2 (*Compensation Event*).

**SCHEDULE 6 DIRECT AGREEMENT**

**DIRECT AGREEMENT**

between

**The State of the Netherlands**

**Ministry of Infrastructure and the Environment**

**Directorate-General Public Works and Water Management**

and

**[Contractor]**

and

**[Security Agent]**

and

**Step-In Entity**

(following entry)



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**Geen inhoudsopgavegegevens gevonden.**

This Agreement is dated **[date]**

**THE STATE OF THE NETHERLANDS**, with its seat in The Hague, Ministry of Infrastructure and the Environment, Directorate-General Public Works and Water Management, represented herein by [●] (Contracting Authority);

[●], with its registered office at [●], represented by [●] **[the Existing Contractor]**;

[●●] acting on behalf of the financiers of the Existing Contractor **[the Security Agent]**; and

**[step-in entity]** (following incorporation and entry pursuant to Article 21) **[the Step-in Entity]**;

jointly referred to as: **the Parties**

HAVE AGREED TO THE FOLLOWING:

## 1. DEFINITIONS

- (a) The definitions are set out in Annex 1 (*Definitions*).
- (b) Any capitalised term in this agreement, not defined in Annex 1 (*Definitions*), is defined as set out in the DBFM Agreement.

## 2. RELATIONSHIP BETWEEN THIS AGREEMENT AND THE DBFM AGREEMENT

- 2.1 The rights and obligations of the Contracting Authority and the Contractor as set out in the DBFM Agreement shall remain valid, insofar as this Agreement does not provide otherwise.
- 2.2 In the event of inconsistency or conflict between the provisions of this Agreement and the DBFM Agreement then this Agreement shall prevail.

## 3. NO TERMINATION WITHOUT NOTIFICATION OF TERMINATION AND INTERIM PERIOD

- 3.1 The Contracting Authority may not:
  - (a) Terminate the DBFM Agreement on the grounds of Articles 10.1 (*Termination due to an Immediate Termination Event*) or 10.2 (*Termination due to a Contractor Default*) of said Agreement or notice to that effect;
  - (b) petition for the liquidation of the Contractor; or
  - (c) Make a claim on the basis of the Performance Bond or the Transfer Bank Guarantee,

Without notifying the Security Agent and the Contractor of its intention to do so (a **Notification of Termination**).

- 3.2 Notice of Termination must state the date on which the Contracting Authority requires termination or the date on which the Contracting Authority wishes to make a petition for the liquidation of the Contractor or wishes to make the claim referred to in Article 3.1 under c.
- 3.3 The Security Agent must notify the Contracting Authority as soon as possible if it becomes aware that an accelerated repayment is demanded for one of the Contractor's payment obligations pursuant to a Financing Document (Acceleration Notice). The Security Agent may, if he becomes aware of a default event on the basis of a Financing Agreement, notify the Contracting Authority thereof (Event of Default Notice).
- 3.4 The Interim Period shall commence on the earlier of the following times:
- (a) The date of a Termination Notice referred to in Article 3.1; or
  - (b) The date of an Acceleration Notice or a Event of Default Notice as defined in Article 3.3; and
  - (c) The date of Insolvency.
- 3.5 An Acceleration Notice or a Event of Default Notice issued on the basis of a Termination Notice and a Termination Notice, issued on the basis of an Acceleration Notice or an Event of Default Notice do not cause a new Interim Period to commence.
- 3.6 During the Interim Period the Contracting Authority may not:
- (a) terminate the DBFM Agreement on the basis of Articles 10.1(*Termination due to an Immediate Termination Event*) or 10.2 (*Termination due to a Contractor Default*) thereof;
  - (b) petition for the liquidation of the Contractor; or
  - (c) submit a claim on the basis of the Performance Bond or the Transfer Guarantee.
- 3.7 The Contracting Authority shall, no earlier than 5 Working Days and no later than 15 Working Days after the commencement of the Interim Period, submit a detailed list to the Security Agent of all Antecedent Obligations of which it is aware at that time and, if the Interim Period commences with a Termination Notice, of the events or circumstances that led to that notice. This detailed list must be accompanied by an estimate of the Continuation Costs that the Contracting Authority has incurred or shall incur in connection with the implementation of the Work during the Interim Period, if the Contracting Authority implements the Work or expects to implement the Work on the basis of the provisions of article 3.10 or 3.11.
- 3.8 In the event that the Contractor initiates proceedings against the Contracting Authority in accordance with article 17.2 et seq. to establish

the lawfulness of a Termination Notice then the period of 15 Working Days as provided for in article 3.7 shall only commence on the first Working Day following the day that the ruling was delivered in the proceedings that the Termination Notice was lawful.

- 3.9 The Contracting Authority is entitled to withdraw a Termination Notice. This terminates the Interim Period, unless an Acceleration Notice or an Event of Default Notice has been issued and not withdrawn. The Interim Period or the Step-In Period does not come to an end as a result of the withdrawal of an Acceleration Notice or an Event of Default Notice.
- 3.10 During the Interim Period the Contracting Authority is not required to wait for the Contractor to remedy a Contractor Default within a reasonable time period before it enforces its right in terms of Article 11.1(c) (Contractor Default) under (ii) of the DBFM Agreement in order to remedy the Contractor Default itself or have it remedied by a third party. The Contractor is no longer permitted to rectify a Contractor Default once the Contracting Authority has notified him that the relevant default is to be rectified by or on order of the Contracting Authority.

#### **4. RECTIFICATION NOTICE**

- 4.1 The Security Agent may submit a Rectification Notice during the Interim Period.
- 4.2 The Security Agent may withdraw the Rectification Notice before the Step-In Date as referred to in Article 7.1.

#### **5. RECTIFICATION REPORT**

- 5.1 The Contracting Authority must send an updated summary of the Antecedent Obligations and an updated estimate of the Continuation Costs to the Security Agent within 5 Working Days after the Security Agent has submitted a Rectification Notice.
- 5.2 The Security Agent must submit a first draft of the Rectification Report to the Contracting Authority within 60 Working Days of receiving the summary as referred to in article 5.1.
- 5.3 The Rectification Report must include the following:
- (a) all Agreed Antecedent Obligations and the Continuation Costs;
  - (b) the Rectification Programme that must be implemented to comply with the Agreed Antecedent Obligations and/or to respectively remove the causes or to limit the consequences of the event that led to the Termination Notice, Acceleration Notice, Event of Default Notice or Insolvency, along with an estimate of technical aspects of the Work;
  - (c) a summary of the estimated financing required to implement the Rectification Programme (and the manner in which this shall be provided) and to comply with the current obligations on the basis of

the DBFM Agreement;

- (d) details of all claimable amounts the Contracting Authority owes the Contractor and all other unfulfilled obligations on the part of the Contracting Authority on the basis of the DBFM Agreement (as of the date of the Rectification Report);
- (e) all other matters that the Contracting Authority and the Security Agent shall agree to be included in the Rectification Report; and
- (f) the duration of the Rectification Period.

5.4 Within 6 Working Days of submitting the draft referred to in article 5.2 the Contracting Authority must enter into consultations with the Security Agent on:

- (a) the draft;
- (b) all other matters which the Contracting Authority or the Security Agent believe still have to be included in the Rectification Report; and
- (c) where relevant, the appointment of experts to assist them in preparing the Rectification Report.

These consultations must be completed within 25 Working Days.

5.5 If the Step-In Period commences before the Completion Date, the Rectification Period must in all cases continue until the Completion Date or, if earlier, until the date on which the Restructuring is completed. If the Step-In Period commences after the Completion Date, the Rectification Period may not last for longer than 6 months, unless the Security Agent can demonstrate that a period of 6 months is unreasonably short in order to complete the Rectification Programme.

5.6 The Contracting Authority and the Security Agent must jointly take all necessary measures to carry out inspections and, if necessary, jointly appoint experts to assist them in drawing up the Rectification Report. From the date of the Restructuring Notice, the Contracting Authority and the Security Agent must make themselves available for mutual deliberations and exchange of information, as soon as one of them considers this necessary or desirable, so as to prepare the Remedial Report in due time.

5.7 The Contractor shall, when requested, co-operate fully in preparing and completing the Rectification Report.

5.8 Within 20 Working Days after finalising the consultations as referred to in article 5.4, the Security Agent must submit the Rectification Report for approval to the Contracting Authority.

5.9 The Contracting Authority shall inform the Security Agent whether it has approved the Rectification Report within 20 Working Days of receipt. The Contracting Authority may only withhold approval if the Rectification

Report is factually inaccurate or the Contracting Authority has reasonable grounds to believe that the Contractor does not have sufficient financial, technical, logistical and/or organisational resources at his disposal to complete the Work or have the Work completed and to fulfil his obligations pursuant to the DBFM Agreement. The Rectification Report is, once approved, deemed to have been adopted on such approval date.

- 5.10 If the Contracting Authority does not inform the Security Agent whether it has approved the Rectification Report within the time limit stipulated in article 5.9, then it shall be deemed that it has approved it. If a binding opinion pursuant to article 17.2 determines that the Contracting Authority has unjustifiably refused approval of the Rectification Report then the Contracting Authority must approve the Rectification Report within 5 Working Days after receiving the binding opinion.
- 5.11 Approval by the Contracting Authority of the Rectification Report:
- (a) does not constitute any liability on the part of the Contracting Authority; and
  - (b) does not affect the obligations of the Contractor on the basis of the DBFM Agreement and/or this Agreement, unless the Rectification Report deviates from the DBFM Agreement in so many words, the foregoing to be determined in detail according to the provisions in Article 13 (*Changes*) in the DBFM Agreement.
- 5.12 If, after approval of the Rectification Report, but before the date on which a Restructuring is completed as referred to in article 8, the Contracting Authority or the Security Agent becomes aware of an Additional Antecedent Obligation, then the other Party must be informed accordingly. The Contracting Authority and the Security Agent must then do everything reasonably within their power to reach agreement within 10 Working Days on the incorporation of the Additional Antecedent Obligation in the Rectification Report.
- 5.13 The costs of the Rectification Report (including the costs of the experts as defined in article 5.6) are for the account of the Contractor.
- 5.14 The Contractor is discharged from the Agreed Antecedent Obligations and the Agreed Additional Antecedent Obligations on the approval of the Rectification Report and the appropriate completion of the Rectification Programme specified in the Report. The approval and completion do however not detract from the Contracting Authority's rights in the event that the Contractor fails to comply with its other obligations on the basis of the DBFM Agreement.
- 5.15 In the event of inconsistencies between the Rectification Programme and one or more provisions in the DBFM Agreement, the provisions in the DBFM Agreement shall prevail over the Rectification Programme, unless the Rectification Programme deviates from those stipulations. In which case the Rectification Programme shall prevail.

## **6. TERMINATION OF THE INTERIM PERIOD**

- 6.1 The Interim Period ends (unless the Contracting Authority and the Security Agent agree to extend it) at the earliest of the following times:
- (a) 10 Working Days after the statement referred to in article 3.7 has been submitted unless the Security Agent has submitted a Rectification Notice as referred to in article 4.1;
  - (b) the day on which the Security Agent withdraws the Rectification Notice as referred to in article 4.2;
  - (c) (in the event that the Contracting Authority has refused the approval referred to in article 5.9 or is deemed to have refused it according to article 5.10) the expiry of the time limit referred to in article 17.2 without the Contractor or the Security Agent submitting a dispute on the issue or submitting a revised Rectification Report;
  - (d) (if the Contractor or the Security Agent has submitted a dispute as referred to in article 17.2 subparagraph (b)) 10 Working Days after the issue of a binding opinion stating that the refusal to grant approval was well-founded without the Security Agent submitting a revised Rectification Report;
  - (e) the day on which the Contracting Authority withdraws the relevant Termination Notice as referred to in article 3.9;
  - (f) the Step-In Date as a result of which the Step-In Period as referred to in article 7.1 commences;
  - (g) the first Working Day after the day on which the binding opinion, pursuant to article 17.2 (a), states that the relevant Termination Notice was unfounded; or
  - (h) termination of the DBFM Agreement in accordance with article 10.1.
- 6.2 The Contracting Authority and the Security Agent can agree that the Interim Period is to end at a time other than the time stated in article 6.1.
- 6.3 If the Interim Period expires before the Step-In Period commences and the Contracting Authority has not withdrawn the Termination Notice,
- (a) then the DBFM Agreement shall come to an end with due regard for the provisions of the Agreement and without further notification to the Security Agent;
  - (b) the Contracting Authority may petition for the liquidation of the Contractor; and
  - (c) the Contracting Authority may submit a claim on the grounds of the Performance Bond or the Transfer Guarantee,
- but in all instances not earlier than the date stated in the Termination Notice.

## **7. STEP-IN PERIOD**

- 7.1 The Step-In Period commences on the Step-In Date, the day 5 Working Days after the adoption of the Rectification Report (the Step-In Date).
- 7.2 The Contracting Authority's rights referred to in articles 3.10 end on the Step-In Date.
- 7.3 During the Step-In Period:
- (a) the Contracting Authority and the Contractor must submit the Security Agent a copy of all notices and inform the Security Agent of all payments between the Contracting Authority and the Contractor; and
  - (b) the Security Agent must keep the Contracting Authority informed of matters relating to the manner in which the Contractor is to fulfil its financing requirements.
- 7.4 During the Step-In Period the Contracting Authority may not:
- (a) Terminate the DBFM Agreement on the basis of Articles 10.1 (*Termination due to an Immediate Termination Event*) or 10.2 (*Termination due to a Contractor Default*) thereof;
  - (b) petition for the liquidation of the Contractor; or
  - (c) submit a claim on the basis of the Performance Bond or the Transfer Guarantee.
- 7.5 The Contractor hereby gives the Security Agent an irrevocable mandate and power of attorney, with right of substitution, to represent the Contractor during the Step-In Period towards the other parties in this Agreement and third parties. During this period the Contractor must refrain from all legal acts for which the Security Agent has not given advance written permission. The other Parties to this Agreement may and must regard the Security Agent as the sole representative of the Contractor during the Step-In Period.
- 7.6 The Contracting Authority may not institute any claims for the fulfilment of the Contractor's obligations pursuant to the DBFM Agreement or the Rectification Programme before the completion of the Rectification Programme.

## **8. IMPLEMENTATION OF RESTRUCTURING**

- 8.1 At any time during the Step-In Period the Security Agent may:
- (a) transfer the Contractor's rights and obligations (or have them transferred) pursuant to the DBFM Agreement to a Suitable Substitute Contractor by means of the transfer of the contract referred to in article 6:159 of the Dutch Civil Code; or
  - (b) make changes to the contractual structure and/or company structure, management structure or the control structure and/or



relating to the Contractor (including changing and/or terminating Financing Agreements and/or contracts with subcontractors) such that in the reasonable opinion of the Contracting Authority the Contractor can be deemed to be adequately equipped to carry out the Work in an appropriate manner during the remaining term of the DBFM Agreement.

(both constitute **Restructuring**).

- 8.2 The Security Agent must give the Contracting Authority timely and complete information about the reasons for a proposed Suitable Substitute Contractor and the manner in which the latter is to be financed.
- 8.3 The Contracting Authority must, within 10 Working Days after receiving the information the Contracting Authority requires to arrive at the relevant opinion, announce whether Contracting Authority agrees to the proposed Restructuring and, in the event of a Restructuring as referred to in article 8.1 (a), whether the Contracting Authority is prepared to cooperate with the Restructuring .
- 8.4 The Contracting Authority may, with a statement of the reasons, refuse its consent and cooperation as referred to in article 8.3 only when the following have been insufficiently demonstrated:
  - (a) the person to whom the Security Agent wishes to assign the rights and obligations of the Contractor, or have them assigned, is a Suitable Substitute Contractor pursuant to the DBFM Agreement;

or

  - (b) the changes referred to in article 8.1(b) result in an adequate guarantee that the defaults which gave rise to the Termination Notice have been removed and shall not occur again in the future and that the Contractor is sufficiently equipped to perform the Work in a satisfactory manner for the remainder of the term of the DBFM Agreement.

- 8.5 If the Contracting Authority refuses to give its consent or to cooperate as referred to in article 8.3 then the Security Agent must, without prejudice to the time limits stipulated elsewhere in this Agreement, be given an opportunity to amend its proposals and resubmit them to the Contracting Authority.
- 8.6 In the event of a Restructuring as referred to in article 8.1 (a), the Contracting Authority, the Suitable Substitute Contractor, and the Security Agent must enter into a new direct agreement. The new direct agreement must be identical to this Agreement.
- 8.7 When so requested by the Security Agent or the Contractor the Contracting Authority must, when the Contracting Authority is of the reasonable opinion that the implementation of the Rectification Programme has been completed, confirm this in writing to the Security Agent and the Contractor.

## **9. TERMINATION OF THE STEP-IN PERIOD**

- 9.1 The Step-In Period ends (unless the Contracting Authority and the Security Agent agree to an extension) at the earliest of the following times:
- (a) termination by the Contracting Authority pursuant to article 9.2;
  - (b) the Step-Out Date referred to in article 9.3;
  - (c) the date on which a Restructuring is effected as referred to in article 8;
  - (d) the Expiry Date;
  - (e) the date on which the Rectification Period expires without the Rectification Programme having been completed and Restructuring having been implemented; or
  - (f) the termination of the original DBFM Agreement pursuant to article 10.1.
- 9.2 The Contracting Authority may:
- (a) terminate the Step-In Period with immediate effect;
- or
- (b) terminate the DBFM Agreement with immediate effect following the expiry of the Step-In Period but before the completion of the Rectification Programme,
- (in both instances without a new Interim Period commencing) if the Contractor:
- (i) does not fulfil the payment obligations relating to the Agreed Antecedent Obligations, the Agreed Additional Antecedent

Obligations, or the Continuation Costs within 10 Working Days after (a) the Step-In Date or (if later) (b) the date on which they become due; or

- (ii) (following notice of default taking into account a reasonable time limit) continues to be in default:
  - (A) in taking all substantive measures to implement the Rectification Programme; or
  - (B) in fulfilling his other obligations pursuant to the DBFM Agreement (insofar as no divergences have been agreed in the Rectification Report, irrespective of whether these are temporary).

9.3 During the Step-In Period, the Security Agent may at any time give notice of termination of the Step-In Period to the Contracting Authority by a certain date (the Step-Out Date), with due observance of a notice period of not longer than 10 Working Days. Such notice of termination shall not detract from the Contractor's obligations that have arisen up to the Step-Out Date.

9.4 At the time the Step-In Period terminates on the grounds of article 9.1 under (a), (b) or (d) or (e):

- (a) the Contracting Authority may terminate the DBFM Agreement with due regard for the provisions of the Agreement and without further notification to the Security Agent;
- (b) the Contracting Authority may petition for the liquidation of the Existing Contractor; and
- (c) the Contracting Authority may make a claim on the grounds of the Performance Bond or the Transfer Guarantee,

but in all instances not earlier than the date stated in the Termination Notice. The Contracting Authority must inform the Security Agent of his intention to make use of the above-mentioned options.

## **10. BANKRUPTCY OF THE EXISTING CONTRACTOR: AUTOMATIC TERMINATION AND REPLACEMENT**

- 10.1 The Original DBFM Agreement shall terminate automatically at the time of Insolvency (and irrespective of whether Notice of Termination has been issued).
- 10.2 From the time referred to in Article 10.1, the Existing Contractor and the Contracting Authority shall be discharged from their obligations on the basis of the Original DBFM Agreement, with the exception of the obligations as referred to in Article 24.6 (Continuous obligations) thereof.
- 10.3 From the time referred to in article 10.1, the Replacement DBFM Agreement enters into force and the Step-In Entity becomes the "Contractor" as defined in this Agreement.
- 10.4 The Security Agent may, until no later than the 13th day following the day on which the extent of the Contracting Authority payment is determined on the basis of Article 11.2, terminate the Replacement DBFM Agreement by notifying the Contracting Authority in writing. The Contracting Authority and the Step-In Entity shall then be discharged from all their obligations towards each other pursuant to the Replacement DBFM Agreement and the Contracting Authority must, on the basis of article 11.1 (a) make the Contracting Authority Payment in a single lump-sum amount to the Existing Contractor, such on the understanding that if the Contracting Authority Payment is a negative amount then the Existing Contractor shall make this payment to the Contracting Authority. In that case, Articles 11.2 to 11.7 inclusive and 11.9 shall not apply.
- 10.5 The Contracting Authority, the Step-In Entity, and the Security Agent must enter into a new direct agreement as soon as possible after the time referred to in article 10.1. The new direct agreement must be identical to this Agreement.

## **11. BANKRUPTCY OF THE EXISTING CONTRACTOR: PAYMENTS**

- 11.1 In the event of automatic termination of the Original DBFM Agreement pursuant to Article 10.1:
- (a) the Contracting Authority must pay the Existing Contractor an amount (the Contracting Authority Payment); and
  - (b) the Step-In Entity must, in return for the Contracting Authority's willingness to conclude the Replacement DBFM Agreement, pay the Contracting Authority an amount equal to the Contracting Authority Payment, such in the same instalments and at the same times as the Contracting Authority must make the Contracting Authority Payment to the Existing Contractor pursuant to Article 11.4.
  - (c) the Step-In Entity must pay the Contracting Authority an amount equal to the Continuation Costs.

- 11.2 The Contracting Authority Payment is equal to the amount that the Contracting Authority would have had to pay to the Existing Contractor on the basis of Article 10.1, paragraph (b) (*Termination due to an Immediate Termination Event*) of the Original DBFM Agreement, should this Agreement not have been applicable.
- 11.3 The Contracting Authority's obligation to make the Contracting Authority Payment to the Existing Contractor exists solely to the extent that the Contracting Authority receives payments from the Step-In Entity (irrespective of whether this is due to set-off) pursuant to article 11.1 (b).
- 11.4 The Contracting Authority Payment must, with due observance of article 11.5, be paid in instalments to a value equal to 65 per cent of the sum of the payments that are paid periodically to the Step-In Entity on the basis of the Replacement DBFM Agreement.
- 11.5 If, after the time referred to in article 10.1, the Interim Period terminates other than due to the commencement of the Step-In Period, or the Step-In Period terminates then any remaining part of the Contracting Authority Payment must:
- (a) be paid by the Contracting Authority to the Existing Contractor in a single lump-sum amount; or
  - (b) be paid by the Step-In Entity to the Contracting Authority, but only if:
    - (i) the Step-In Period is terminated by the Step-In Entity implementing the Restructuring; or
    - (ii) the Contracting Authority is making a payment to the Step-In Entity pursuant to Article 10 (*Compensation for premature termination*) of the Replacement DBFM Agreement.

on the understanding that the Contracting Authority's payment obligation towards the Existing Contractor in the circumstances referred to in sub (a) exists solely to the extent that the Contracting Authority has received the same amount from the Step-In Entity (irrespective of whether this is due to set-off).

- 11.6 If the Contracting Authority Payment is a negative amount then, in derogation from articles 11.1 to 11.5 inclusive, the following shall be applicable:
- (a) the Existing Contractor must pay the Contracting Authority Payment to the Contracting Authority; and
  - (b) the Contracting Authority must pay the Contracting Authority Payment to the Step-In Entity, on the understanding that the Contracting Authority's payment obligation exists solely to the extent that the Contracting Authority receives one or more amounts from the Existing Contractor pursuant to paragraph (a).

- 11.7 If the Step-In Entity implements a Restructuring referred to in article 8.1 under (a) then the Step-In Entity must pay the Contracting Authority an amount equal to the Additional Compensation and the Continuation Costs.
- 11.8 After receiving the amount referred to in article 11.7 (irrespective of whether by set-off), the Contracting Authority must pay the same amount to the Existing Contractor. The Contracting Authority's payment obligation towards the Existing Contractor therefore exists only to the extent that the Contracting Authority has received the same amount from the Step-In Entity.
- 11.9 The amounts owed by the Contracting Authority to the Step-In Entity pursuant to the Replacement DBFM Agreement and/or this Agreement must be set off against the amounts owed by the Step-In Entity to the Contracting Authority and vice versa pursuant to this Article 11.

## **12. GENERAL**

- 12.1 The Contracting Authority agrees that the Security Agent's technical adviser can attend inspections, tests, and meetings between the Contracting Authority and the Contractor during the Interim Period and the Step-In Period. The previous paragraph does not oblige the Contracting Authority to carry out inspections and tests or to hold meetings with the Existing Contractor.
- 12.2 If on the basis of this Agreement the Contracting Authority at a given time may not make a claim on the basis of a bank guarantee and the time limit (as originally extended under this article) of that bank guarantee ends during this period, the Contracting Authority may nevertheless make such a claim if the time limit of the bank guarantee is not extended by at least 1 month not later than on the third Working Day before the day on which it would expire.
- 12.3 If the Contracting Authority is entitled to terminate the DBFM Agreement on the basis of article 10.5 (Termination due to a prolonged Delay Event) thereof, the Security Agent shall then have the same right. The Security Agent may exercise that right by notifying the Contracting Authority and the Contractor.
- 12.4 Paragraph (d) et seq. of Article 3.5 (Refinancing) of the DBFM Agreement are not applicable to Refinancing carried out in connection with a Restructuring or after an Insolvency.

## **13. SECURITIES AND PAYMENTS**

- 13.1 The Contracting Authority takes cognisance of and grants, for far as is required, consent to the establishment of security rights as referred to in the Financing Agreements on the date of Financial Close for the benefit of the LENDERS on (of):
- (a) the rights of the Existing Contractor towards the Contracting Authority on the basis of the DBFM Agreement and this Agreement; and

- (b) the rights of the Existing Contractor on the basis of insurance policies taken out in connection with the performance of the Work;
- (c) **[(to be completed after the designation of the preferred bidder) other securities to which the Contracting Authority has agreed];** and
- (d) [•].

13.2 The Contracting Authority confirms that, on the date of this Agreement, he has not been notified that the rights of the Existing Contractor pursuant to the DBFM Agreement, insurance policies and/or this Agreement:

- (a) have been encumbered with limited rights (as referred to in article 3:8 of the Dutch Civil Code) in favour of parties other than the Lenders; or
- (b) have been transferred to parties other than the Lenders.

13.3 On the basis of the pledge referred to in article 13.1, the Contracting Authority must, starting from the date of Financial Close, pay the Contractor all that is owing to it on the basis of and/or in connection with the DBFM Agreement and/or this Agreement into one or more bank accounts as designated in writing by the Security Agent. Payments made by the Contracting Authority into such an account shall release the Contracting Authority from its payment obligation. By signing this Agreement, the Existing Contractor grants an unconditional and irrevocable power of attorney to the Security Agent to give the instruction(s) referred to in the previous paragraph and, if the Security Agent considers it necessary, to alter this instruction in writing. The Existing Contractor declares that the Contracting Authority shall only be released from its payment obligation by making payment into the designated bank account(s).

#### **14. PAYMENTS FOR MATERIAL-DAMAGE INSURANCE**

- 14.1 The provisions in this article 14 apply with regard to the insurance coverage that the Contractor has purchased or shall purchase with regard to the repair costs of material damage to the Infrastructure.
- 14.2 At the latest on the commencement date of insurance coverage as meant in article 14.1, the Contractor shall open an account with the Security Agent (the "Insurance Account"). The contractor must ensure that all payments made to the policyholder based on an insurance policy as envisaged in article 14.1, are made to the Insurance Account. The Security Agent hereby waives its lien on the Insurance Account balance and declares that no lien or attachments relate to the Insurance Account balance
- 14.3 To provide security for the fulfilment of his obligations pursuant to articles 14.5 and 14.8, the Contractor establishes or undertakes to establish, respectively, a first lien in favour of the Contracting Authority prior to the commencement date of the insurance coverage referred to in article 14.1, on:
- (a) the rights of the policyholder based on this insurance policy; and
  - (b) the rights of the Contractor towards the Security Agent to the payment of the balance of the Insurance Account.
- 14.4 The Contractor must notify the insurer of the first lien referred to in article 14.3 (a) and provide the Contracting Authority with proof of this notification by means of an acknowledgement of receipt. The Contracting Authority hereby gives the Security Agent notification of the first lien as referred to in article 14.3 (b). The Security Agent recognises that its lien on the Contractor's rights based on the insurance cover as referred to in article 14.1 and to the balance on the Insurance Account shall rank below a first lien established or to be established in favour of the Contracting Authority pursuant to article 14.3. The Security Agent waives any potential (existing or future) right to set-off or suspend and any potential (existing or future) right to rely on creditor negligence, force majeure or unforeseen circumstances that it has in connection with the Insurance Account, insofar as the rights of the Contracting Authority based on its lien pursuant to article 14.3 (b) would be diminished by those rights.
- 14.5 The Contractor may only dispose of an amount received on the Insurance Account insofar as the Contractor demonstrates in advance that the amount in question shall effectively be used in a reasonable manner to repair damage to the Infrastructure. The Contracting Authority and the Security Agent shall in that instance waive their liens on the amount in question.
- 14.6 If an amount received on the Insurance Account remains according to a joint written determination by the Contracting Authority and the Contractor following repair of the entire damage to the Infrastructure then the Contracting Authority shall waive its lien on that amount.
- 14.7 If at the time that the DBFM Agreement ends prematurely an amount is retained on the Insurance Account and the Contracting Authority is required to pay compensation to the Contractor on the grounds of the



DBFM Agreement because of the termination, the balance on the Insurance Account must be paid to the Contractor up to a maximum of the amount of the termination compensation as soon as possible after the size of the termination compensation has been determined. The Contracting Authority shall in that case waive its lien on the balance to that extent.

- 14.8 If at the time that the DBFM Agreement ends prematurely an amount is retained on the Insurance Account and the Contracting Authority is required to pay compensation to the Contractor on the grounds of the DBFM Agreement because of the termination, the balance on the Insurance Account must be paid to the Contractor up to a maximum of the amount of the termination compensation as soon as possible after the size of the termination compensation has been determined. The Security Agent shall then waive its lien on that balance.

## **15. ASSIGNMENT OF RIGHTS AND OBLIGATIONS**

- 15.1 If not expressly permitted in this Agreement none of the Parties can or may assign the rights and/or obligations arising from this Agreement to a third party without the prior written consent of the other Parties.
- 15.2 The Security Agent may not assign its rights and obligations arising from this Agreement to a subsequent security agent, unless this assignment is permitted based on a Financing Agreement or prior consent is obtained for this purpose from the Contracting Authority. The Contracting Authority cannot withhold this consent on unreasonable grounds nor shall it delay granting its consent.
- 15.3 The Contracting Authority must assign its rights and obligations in terms of this Agreement to a third party, to whom, in accordance with paragraph (b) of Article 24.3 (Assignment of rights) of the DBFM Agreement, the Contracting Authority's legal relationship towards the Contractor has been assigned under the terms of the DBFM Agreement. The other Parties must cooperate with this assignment.

## **16. NOTICE, TERMINATION AND WAIVER**

- 16.1 This Agreement shall remain in force until the rights and obligations arising from it have been fully discharged and may not be prematurely terminated.
- 16.2 As far as this is possible, Parties relinquish their right to rely on this Agreement being or becoming null and void. Parties may not claim any rescission of this Agreement.

## **17. APPLICABLE LAW AND DISPUTE RESOLUTION**

- 17.1 Dutch law governs this Agreement.
- 17.2 A dispute concerning:
- (a) the validity of a Termination Notice as referred to in article 3.1; or

- (b) the validity of the Contracting Authority's refusal to grant approval as referred to in Article 5.9 or 5.11,

must be settled by a binding opinion (a determination given by a third party as defined in Article 7:900, paragraph 2 of the Dutch Civil Code). Where applicable, the person giving the binding opinion must adopt the Rectification Report as part of his binding advice.

- 17.3 The Contractor and the Security Agent can submit a dispute pursuant to the procedure as referred to in article 17.2 by means of a notification to the Contracting Authority that must be submitted within 10 Working Days after receiving the Notification of Termination or the Notification from the Contracting Authority that the approval as referred to in article 5.9 has been refused.
- 17.4 The Contracting Authority and the Contractor or the Security Agent must jointly appoint the binding adviser. In the absence of agreement on the appointment then within 5 Working Days after the Contractor or the Security Agent has given the Contracting Authority the notice referred to in article 17.3 the binding adviser must, on the request of the Contracting Authority and/or the Contractor or the Security Agent, be appointed by the Chairman of the Chamber of Commerce in The Hague.
- 17.5 The binding adviser must settle the dispute by the issue of a binding opinion within 20 Working Days of his appointed and, where applicable, adopt the Rectification Report.
- 17.6 The costs of the binding adviser (and any advisers he engages) are borne by the Contracting Authority and/or Contractor or the Security Agent as apportioned by the binding adviser.
- 17.7 If the binding adviser does not adopt the Rectification Report in accordance with the provisions of article 17.5 then the Parties shall enter into consultations with each other to limit the consequences.
- 17.8 All other disputes that arise on the basis of this Agreement, or on the basis of other agreements that may arise here from, shall be settled in accordance with Article 21 (Dispute Resolution) of the DBFM Agreement.

## **18. COMMUNICATION**

- 18.1 The Existing Contractor, the Security Agent, and the Contracting Authority must inform each other, as soon as is reasonably possible, of any (threat of) Insolvency that comes to their attention.
- 18.2 The Security Agent must inform the Contracting Authority as soon as is reasonably possible if he becomes aware of the occurrence of any circumstance that could reasonably be expected to result in the occurrence of a default event pursuant to a Financing Agreement.
- 18.3 The Contracting Authority must send the Security Agent a copy of all notices of default and notifications that it issues as referred to in paragraph (a) of Article 10.1 (Termination due to an Immediate

Termination Event) or 10.2 (Termination due to a Contractor Default) of the DBFM Agreement.

- 18.4 All correspondence, declarations, and notices for the Contracting Authority relating to this Agreement must be directed to the:

Ministry of Infrastructure and the Environment

[●]

- 18.5 All correspondence, declarations, and notices for the Security Agent relating to this Agreement must be directed to the:

[●●]

- 18.6 All correspondence, declarations, and notices for the Existing Contractor relating to this Agreement must be directed to the:

[●]

- 18.7 All correspondence, declarations, and notices for the Step-In Entity relating to this Agreement must be directed to the:

**[address follows on accession pursuant to article 21]**

- 18.8 All notifications, announcements, requests, and other communications arising from this Agreement must be in writing. It is the responsibility of the sender to demonstrate that the other Party has received the communication.

- 18.9 All approvals and consent by a Party required on the grounds of this Agreement must be received in advance and in writing.

## **19. CONFIDENTIALITY**

The Parties must treat this Agreement and all information relating thereto as confidential and shall not disclose the contents thereof known to third parties, unless:

- (a) this is necessary to perform this Agreement, including the provision of information to the parties settling a dispute;
- (b) one of the Parties is under the obligation to disclose the information pursuant to statutory regulations or the Financing Agreement; or
- (c) the third party is obliged to maintain confidentiality pursuant to the third party's position or professional code of conduct.

## **20. POWERS RELATING TO THIS AGREEMENT AND CHANGES TO THIS AGREEMENT**

- 20.1 The Contracting Authority declares and guarantees that he is fully

authorised to conclude and sign this Agreement and that his obligations in arising from this Agreement are lawful and binding.

20.2 The Security Agent declares and guarantees that he is fully authorised to conclude and sign this Agreement and that his obligations arising from this Agreement are lawful and binding.

20.3 The Existing Contractor declares and guarantees that he is fully authorised to conclude and sign this Agreement and that his obligations arising from this Agreement are lawful and binding.

20.4 The Step-In Entity declares and guarantees that he is fully authorised to conclude and sign this Agreement and that his obligations arising from this Agreement are lawful and binding.

20.5 Amendments to this Agreement are valid solely when they have been laid down in writing by the Contracting Authority, Existing Contractor and Security Agent.

**21. ACCESSION OF STEP-IN ENTITY**

21.1 The Security Agent is entitled to permit a legal entity under Dutch law (the Step-In Entity) to enter into this Agreement. This legal entity assumes all the resulting rights and obligations of the Step-In Entity under this Agreement (including those from the Replacement DBFM Agreement).

21.2 No Grounds for Exclusion or Grounds for Refusal may be applicable to the Step-In Entity at the time of entry to the Agreement.

21.3 In the event that the Step-In Entity has not entered this Agreement at the time of Insolvency then articles 10 and 11 shall not be applicable and article 6.3 shall apply as though the Interim Period had expired without a Restructuring Notice having been issued.

Signed at .....

Signed at .....

Dated .....

Dated .....

On behalf of the Contracting Authority,  
Contractor,

On behalf of the

[●]

[●●]

Signed at .....

Dated .....

On behalf of the Security Agent,

[●●]

## ANNEX 1. DEFINITIONS

<b>Additional Payment</b>	The amount that remains after the payment received by the Contractor from or on behalf of a Suitable Substitute Contractor for the assignment of the DBFM Contract is used in order to repay all the claims of the Lenders of the Existing Contract and/or the Step-In Entity.
<b>Contracting Authority Payment</b>	See article 11.2.
<b>Additional Antecedent Obligations</b>	All the Antecedent Obligations that have not (yet) been mentioned in the Rectification Report.
<b>Continuation Costs</b>	The costs incurred by or on behalf of the Contracting Authority for the account of the Contractor during the performance of the Work as referred to in article 3.10.
<b>DBFM Contract</b>	The Original DBFM Agreement or, following Insolvency Proceedings, the Replacement DBFM Agreement coming into force pursuant to article 10.3, the Replacement DBFM Agreement.
<b>Event of Default</b>	An event of default as defined in the Financing Agreement.
<b>Suitable Substitute Contractor</b>	<p>A potential substitute contractor whom the Contracting Authority, on the basis of reasonable and objective criteria, has in its opinion that the following have been demonstrated:</p> <ul style="list-style-type: none"> <li>(a) he is authorised to become a party to and to comply with the obligations of the Contractor pursuant to the DBFM Agreement;</li> <li>(b) he shall be able to comply with the obligations of the Contractor pursuant to the DBFM Agreement;</li> <li>(c) it does not have the same management team as the team of the Existing Contractor on the date of the Termination Notice, the Acceleration Notice, the Event of Default Notice or the Insolvency Proceedings;</li> <li>(d) any providers of equity capital of the Existing Contractor, whose imputable default (in their capacity as shareholder, sub-contractor, partner of a sub-contractor or otherwise) led to the Termination Notice in the Existing Contract are not a party to the Contract or involved in the Existing Contract unless the providers of equity capital demonstrate that they shall in the future be able to perform to the required level; and</li> <li>(e) no Ground for Exclusion or Ground for Refusal of Assignment is applicable.</li> </ul>

<b>Rectification Period</b>	The permitted duration of the Rectification Programme agreed between the Contracting Authority and the Sec Agent with due regard for article 5.5 within the context of adopting the Rectification Report.
<b>Rectification Programme</b>	The Rectification Programme as included in the Rectification Report.
<b>Rectification Report</b>	The report referred to in article 5.
<b>Restructuring</b>	See article 8.1.
<b>Insolvency</b>	The situation in which the Existing Contractor: <ul style="list-style-type: none"> <li>(a) petitions for voluntary liquidation or is placed in liquidation;</li> <li>(b) applies for a suspension of payments order; or</li> <li>(c) is dissolved.</li> </ul>
<b>Step-In Date</b>	See article 7.1.
<b>Step-In Entity</b>	See article 21.1.
<b>Step-In Period</b>	The period that commences as stipulated in article 7.1 and terminates as stipulated in article 9.1.
<b>Insurance Account</b>	See article 14.2.
<b>Interim Period</b>	The period that commences as stipulated in article 3.4 and terminates as stipulated in article 6.1.
<b>Termination Notice</b>	See article 3.1.
<b>Event of Default Notice</b>	See article 3.3.
<b>Acceleration Notice</b>	See article 3.3.
<b>Rectification Notice</b>	Notice (following the model supplied in Annex 2) of the Contracting Authority to proceed with the elaboration of a Rectification Report and to carry out a Restructuring.
<b>Original DBFM Agreement</b>	The DBFM Agreement of [●] between the Contracting Authority and the Existing Contractor and the agreed changes thereto.
<b>Contractor</b>	<ul style="list-style-type: none"> <li>(a) the Existing Contractor;</li> <li>(b) following an Insolvency and Replacement DBFM Agreement coming into force pursuant to Article 21.1.</li> </ul>

	<p>the Step-In Entity; or</p> <p>(c) after a Restructuring referred to in article 8.1 Suitable Substitute Contractor.</p>
<b>Antecedent Obligations</b>	All the Contractor's obligations arising from the DBFM Agreement that have not been fulfilled at the relevant
<b>Agreed Antecedent Obligations</b>	The Antecedent Obligations as included in the Rectification Report before or on the date the Report is adopted.
<b>Agreed Additional Antecedent Obligations</b>	The Additional Antecedent Obligations as included, in accordance with article 5.12, in the Rectification Report after the Report adoption date.
<b>Agreement</b>	This direct agreement.
<b>Party</b>	The Contracting Authority and/or the Existing Contractor, the Security Agent and/or the Step-In Entity (but only in the event of a Step-In entry).
<b>Step-Out Date</b>	See article 9.3.
<b>Replacement DBFM Agreement</b>	The DBFM Agreement that is deemed to have been concluded between the Contracting Authority and the Step-In Entity on the date of the Step-In Entity entry to this Agreement, under the condition precedent of an Insolvency taking place and under the same conditions as the Original DBFM Agreement, insofar as not expressly stipulated otherwise or required in connection with this Agreement. The Replacement DBFM Agreement shall be considered to have been changed whenever the Original DBFM Agreement is changed, so that the effect of the changes are deemed to have been included therein.



## ANNEX 2. RECTIFICATION NOTICE

To: Ministry of Infrastructure and the Environment  
Directorate-General Public Works and Water Management  
[●];

Copy to: [●]

(address shall be provided upon entry as per Article 21)

(the Step-in Entity)

Reference is made to the Direct Agreement between the Contracting Authority, the Existing Contractor, the Step-In Entity and the Security Agent, dated [●●]. The terms in this Notice shall have the same meaning as the terms in the aforementioned Direct Agreement.

In conformity with article 4.1 of the Direct Agreement, we hereby notify of our intention to proceed with the elaboration of a Rectification Report or to carry out a Restructuring. You are requested to consider this notification as a Rectification Notice.

On behalf of the Security Agent,

[●]

## SCHEDULE 7 MODELS

### DEEL 1

#### PERFORMANCE BOND

**[Name and other details of the bank or financial institution]**

Guarantee number ([●])

THE UNDERSIGNED,

**[Name of bank or financial institution]**, with its registered office at **[place]**, hereinafter referred to as the Bank.

WHEREAS:

**[Contractor]**, with its registered office and principal place of business at **[address] [postal code] [place]**, hereinafter to be referred to as the "Contractor"

and

The State of the Netherlands, with its seat in The Hague, Ministry of Infrastructure and the Environment, Directorate-General Public Works and Water Management, represented herein by [●] hereinafter referred to as the "Contracting Authority",

entered into a "DBFM Agreement" number [●], on **[contract date]** hereinafter to be referred to as the "Agreement";

the Contractor is obliged pursuant to Article 3.3 (*Performance Bond*) of the Agreement to provide a bank guarantee in favour of the Contracting Authority as security for the fulfilment of its obligations towards the Contracting Authority arising from the Agreement;

The Bank is prepared to issue such a guarantee in favour of the Contracting Authority on the conditions as stated below;

DECLARES AS FOLLOWS:

1. By way of an independent obligation towards the Contracting Authority, the Bank hereby irrevocably and unconditionally stands guarantor for all that the Contracting Authority may claim from the Contractor under the Agreement, subject to a cumulative maximum amount of [●] euro (€ [●]).
2. This bank guarantee is an abstract first demand guarantee. The Bank may not under any circumstances rely on the underlying legal relationship

between the Contracting Authority and the Contractor as set out in the Agreement.

3. The Bank must, on the Contracting Authority's first written demand, without requiring a statement of the reasons or requesting further proof, proceed to pay all that the Contracting Authority declares that the Contractor owes the Contracting Authority pursuant to the Agreement, unless and to the extent that the amount of the payment increased by any other payments by the Bank on the grounds of this Article would exceed the maximum amount as referred to in Article 1.
4. This bank guarantee shall lapse on the first of the following dates:
  - (a) one months after **[fill in: scheduled availability date]**; or
  - (b) upon receipt by the Bank of a declaration from the Contracting Authority that this bank guarantee may expire.
5. This bank guarantee is governed by the laws of the Netherlands. The Court at The Hague shall hold jurisdiction to settle any disputes that may arise in relation to this bank guarantee.
6. This bank guarantee must be returned no later than the date referred to in Article 5 to the signatory at the following address: **[address]**.

[place], [date]

**[name of bank]**

**DEEL 2**

**TRANSFER GUARANTEE**

**[Name and other details of the bank or financial institution]**

Guarantee number ([●])

THE UNDERSIGNED,

**[Name of bank or financial institution]**, with its registered office at **[place]**, hereinafter referred to as the Bank.

WHEREAS:

**[Contractor]**, with its registered office and principal place of business at **[address] [postal code] [place]**, hereinafter to be referred to as the "Contractor"

and

The State of the Netherlands, with its seat in The Hague, Ministry of Infrastructure and the Environment, Directorate-General Public Works and Water Management, represented herein by [●] hereinafter referred to as the "Contracting Authority",

entered into a "DBFM Agreement" number [●], on **[contract date]** hereinafter to be referred to as the "Agreement";

the Contractor is obliged pursuant to Article 7.3 (*Transfer Guarantee*) of the Agreement to provide a bank guarantee in favour of the Contracting Authority as security for the fulfilment of its obligations towards the Contracting Authority arising from the Agreement;

The Bank is prepared to issue such a guarantee in favour of the Contracting Authority on the conditions as stated below;

DECLARES AS FOLLOWS:

1. By way of an independent obligation towards the Contracting Authority, the Bank hereby irrevocably and unconditionally stands guarantor for all that the Contracting Authority may claim from the Contractor pursuant to the Agreement, subject to a cumulative maximum amount of [●●]<sup>6</sup>.
2. This bank guarantee is an abstract first demand guarantee. The Bank may not under any circumstances rely on the underlying legal relationship between the Contracting Authority and the Contractor as set out in the Agreement.

<sup>6</sup> Fill in indexed amount from Article 7.3 sub (a).

3. The Bank must, on the Contracting Authority's first written demand and without calling for reasons or further proof, proceed to pay all that the Contracting Authority declares the Contractor owes it under the Agreement, except if the amount of the payment augmented with possible earlier payments made by the bank pursuant to this article would exceed the maximum amount as stipulated in Article 1.
4. This bank guarantee shall lapse on the first of the following dates:
  - (a) **[fill in: the term as specified in article 7.3 paragraph (b) of the DBFM Agreement]** months after **[fill in: the Expiry Date]**; or
  - (b) upon receipt by the Bank of a declaration from the Contracting Authority that this bank guarantee may expire.
5. This bank guarantee is governed by the laws of the Netherlands. The Court at The Hague shall hold jurisdiction to settle any disputes that may arise in relation to this bank guarantee.
6. This bank guarantee must be returned, after the expiry date as referred to in article 4, to the signatory at the following address: **[address]**.

**[place], [date]**

**[name of bank]**

**DEEL 3**

**CONFIRMATION OF FINANCIAL CLOSE**

**[LETTERHEAD OF THE FACILITY AGENT/ INTERCREDITOR AGENT]**

To:

The State of the Netherlands, with its seat in The Hague, Ministry of Infrastructure and the Environment, Directorate-General Public Works and Water Management, represented herein by [●] hereinafter referred to as the "Contracting Authority",

**[contractor]**, with registered address and regular place of business in **[postal code] [town/city] at [address]**, hereinafter referred to as the "Contractor"

**[Security Agent]**

[place], [date]

Dear [●],

With reference to the Financing Agreements concluded with **[name of Contractor]** for a total amount of € **[amount] [amount in words]** dated **[date]**, with reference [●], hereinafter to be referred to as the "Financing Agreements",

We hereby declare, that we have duly received the documents and supporting vouchers set out in the summary below to our full satisfaction and that "Financial Close" in respect of the "DBFM Agreement" with number [●] has accordingly been achieved on [●].

Yours sincerely,

**[name of Facility Agent/ Intercreditor Agent]**

**DEEL 4**

**DETERMINING GAP AND WEIGHTED AVERAGE COST OF CAPITAL**

THE UNDERSIGNED,

The State of the Netherlands, with its seat in The Hague, Ministry of Infrastructure and the Environment, Directorate-General Public Works and Water Management, represented herein by [●] hereinafter referred to as the "Contracting Authority",

and

**[contractor]**, with registered address and regular place of business in **[postal code] [town/city] at [address]**, hereinafter referred to as the "Contractor"

WHEREAS:

the Contracting Authority and the Contractor have entered into a "DBFM Agreement" number [●], on **[contract date]** hereinafter to be referred to as the "Agreement";

DECLARE AS FOLLOWS:

the Contracting Authority and the Contractor have, with reference to the Agreement and for the purpose of attaining Financial Close, jointly determined the Gross Availability Payment (GAP) on the basis of the Financial Model at [●].

the Contracting Authority and the Contractor have further jointly determined the weighted average cost of capital on the basis of the Financial Model at [●].

[place], [date]

[place], [date]

On behalf of the Contracting Authority,  
Contractor,

On behalf of the

[●]

[●]

## DEEL 5

### ESCROW AGREEMENT

## Escrow Agreement

### *THE UNDERSIGNED*

- (1) the State of the Netherlands (Ministry of Infrastructure and the Environment), with its seat in The Hague, represented herein by [●] (hereinafter referred to as the Contracting Authority) and
  - (2) [●], with its registered office and principal place of business at [●], represented by [●] (hereinafter referred to as the Contractor)
- and
- (3) [●●], with its registered office and principal place of business at [●], represented by [●] (hereinafter referred to as the Escrow Agent);

### **DECLARE THAT THEY HAVE AGREED AS FOLLOWS:**

#### **1 Definitions**

Terms that are capitalised in this Escrow Agreement have the meanings set forth below. Terms that are capitalised and are not defined below have the meaning as specified in the DBFM Agreement.

**DBFM Agreement:** The Agreement concluded between the Contracting Authority and Contractor on [●] and with reference [●].

**EDP auditor:** an EDP auditor registered with the NOREA;

**Material:** all designs, software (including source codes), documents and other information on which Intellectual Property Rights are vested and which the Contractor must issue a licence to the Contracting Authority pursuant to the DBFM Agreement;

**Medium:** The data carrier(s) on which the Material is provided;

**Agreement:** The present Agreement between the Contracting Authority, the Contractor, and the Escrow Agent;



## **2 Depositing**

- 2.1 The Contractor must transfer the Medium, containing the Material available at that moment, to the ownership of the Escrow Agent at the latest on the Commencement Date.
- 2.2 During the Development Phase, the Contractor must deposit with the Escrow Agent any Material it uses that has been modified from the original Material deposited with the Escrow Agent on the first Working Day of each Quarter. During the Operational Phase, the Contractor must continue to make such deposits on the first Working Day of October each year. If the Material has not been modified, then the Contractor must inform the Contracting Authority and Escrow Agent accordingly, in writing, on this same date.
- 2.3 The Escrow Agent shall confirm the deposit of the Material in writing to the Contracting Authority.
- 2.4 The Escrow Agent shall store all deposits of the Material, unless replaced by new versions or nullified, for the duration of the Agreement. Old or nullified deposits shall be destroyed, unless stipulated otherwise in this Agreement.
- 2.5** If the Material is damaged or lost despite the security measures and other precautionary measures of the Escrow Agent, then the Escrow Agent shall inform the Contractor accordingly as soon as possible. If applicable, the Contractor must provide a new copy of the concerned Material to the Escrow Agent for deposit as described in article 2. The related costs shall be at the expense of the Escrow Agent, except if and to the extent that the Contractor did not fulfil its back-up obligations described in article 4.
- 2.6 On delivery, the full ownership of the information carriers carrying the Material must be transferred to the Escrow Agent. This transfer of ownership emphatically does not imply the transfer of the Intellectual Property Rights on the Material. The Escrow Agent may make use of the (ownership rights on the) information carriers solely for the performance of this Agreement.
- 2.7 Concerning the Material, the Contractor authorises the Escrow Agent:
  - (a) To make a spare copy if necessary;
  - (b) To load the Material on a computer system to perform the verification;
  - (c) To issue the Material to the Contracting Authority in the cases stipulated in article 6 (Issue).

## **3 Back-up**

- 3.1 For the duration of the Agreement, the Contractor must keep a copy of the Material available as a back-up under own management.

## **4 Verification and auditing**

- 4.1 Every deposit of Material by the Contractor at the Escrow Agent must be accompanied by a deposit form in conformity with the model included in Schedule 1 containing a list of the Material that is being deposited for the benefit of the Contracting Authority. The Contractor guarantees that the deposit constitutes a fair and complete representation of the available Material and that, as far as the available Material is concerned, it is sufficient for the Contracting Authority to continue the Work as described in the DBFM Agreement.
- 4.2 The Escrow Agent must verify the deposited Material (Integrity Test) for presence and legibility of the components as specified on the deposit form (see annex 1) and inform the Contractor and the Contracting Authority about the findings of the verification.
- 4.3 The Contracting Authority has the right to request an additional verification from the Escrow Agent (any form of further verification by the Escrow Agent) at any time. If the Escrow Agent needs to make use of the services of an expert perform this verification, then the Contracting Authority must reimburse the Escrow Agent the costs incurred in obtaining expert advice. If the expert's opinion reveals that the correct and complete material has not been deposited, then the Contractor must reimburse the Contracting Authority the costs incurred in obtaining expert advice. If further verification is requested, then the Contractor must render assistance to the extent that this is reasonable and necessary.
- 4.4 The costs incurred by the Escrow Agent, Contractor, and Contracting Authority, as a result of a further verification pursuant to Art. 4.3, are at the expense of the Contracting Authority, unless the verification reveals that the Contractor has not fulfilled its obligations under the Agreement. In that case, the costs are at the expense of the Contractor.
- 4.5 If verification reveals that the Material deposited at the Escrow Agent does not constitute a fair and complete representation of the available Material necessary to continue the Work as described in the DBFM Agreement, then the Escrow Agent shall inform the Contractor accordingly in writing. The Contractor must remedy this discrepancy at its expense within 14 days after the written notification.
- 4.6 The Contracting Authority may at all times – after the issue of written notification to that effect to the Escrow Agent and to the Contractor – arrange for an audit of the Material (used by the Contractor and held in deposit) by an EDP auditor.

## **5 Storage**

- 5.1 The Escrow Agent must store all deposited Material in its vaults for the duration of the Agreement. The Escrow Agent must observe all reasonable care to prevent unauthorised persons from accessing the vaults.
- 5.2 The Escrow Agent must, when first requested by the Contracting Authority or Contractor, submit a declaration from an accountant or auditor relating to the reliability, confidentiality and continuity of the Escrow Agent's

organisation and relating to the procedures and measures implemented by the Escrow Agent. If such declaration is already available at the Escrow Agent, then no costs will be charged.

## **6 Issue**

- 6.1 The Contractor hereby grants the Escrow Agent the right to issue the Material to the Contracting Authority at some time in the future on the grounds specified in this Article.
- 6.2 The Contracting Authority is entitled to the issue of the Material in the event of one of the following occurrences:
- (a) the DBFM Agreement is terminated (on expiry or prematurely) in a manner specified in the DBFM Agreement;
  - (b) an Immediate Termination Event occurs; or
  - (c) the maintenance of the Material for which the Contracting Authority has been granted right of use is stopped or is no longer available on the customary conditions.
- 6.3 A request by the Contracting Authority to the Escrow Agent for issue of the Material must be performed by registered letter with confirmation of receipt, with a copy of the request sent by registered letter with confirmation of receipt to the Contractor. If possible, the concerned letter must include accompanying documents that the Contracting Authority has available to substantiate its opinion.
- 6.4 The Escrow Agent must immediately notify the Contractor of any request for issue from the Contracting Authority.
- 6.5 The Contractor can lodge a written notification of objection to the issue to the Contracting Authority with the Escrow Agent and the Contracting Authority by registered letter with receipt of confirmation within seven (7) Working Days of the receipt of the copy from the Contracting Authority to the Contractor as referred to in Article 6.3. Any such objection must state the reasons why the Contractor is of the opinion that none of the grounds for issue as referred to in article 6.2 is applicable. If possible, the concerned letter must include accompanying documents that the Contractor has available to substantiate its opinion.
- 6.6 If the Contractor has not lodged an objection within the period specified in Article 6.5 and in the manner prescribed in Article 6.4, then the Escrow Agent has the right to issue the Material immediately to the Contracting Authority. If the Contractor has lodged an objection against the issue by the Escrow Agent in the correct manner then any party arrange for the assessment of the request for issue in accordance with the provisions of article 13.2 of this Agreement.

- 6.6 If the Contractor is declared to be in liquidation, then the Contractor does not have the right to invoke the procedure for lodging an objection as stipulated in Article 6.5.

## **7 Guarantees**

- 7.1 The Contractor indemnifies the Contracting Authority and the Escrow Agent against all claims from third parties, for whatever reason and in any capacity whatsoever, relating to the exercising of the powers concerning the Material granted in this Agreement. The Contracting Authority and Escrow Agent must issue the Contractor immediate written notification of any claim as referred to in this Article 7.1.
- 7.2 The Contractor guarantees that the Material deposited with the Escrow Agent from time to time is suitable for the agreement objective as laid down in the DBFM Agreement.
- 7.3 The Contractor guarantees that Material deposited with the Escrow Agent which becomes damaged shall be replaced by depositing identical Material within fourteen (14) days of the notification of the damage.

## **8 Confidentiality**

- 8.1 Each party must treat all information and knowledge about the affairs of other parties of which the relevant party takes cognisance during the conclusion and performance of this Agreement as confidential.
- 8.2 The Contracting Authority guarantees that Material that has been issued to the Contracting Authority shall be used solely to reach the situation that would have been reached if the DBFM Agreement had been fulfilled in full and to maintain the existing situation. The Contracting Authority may call on the services of one or more third parties to do so.

## **9 Liability and indemnity**

- 9.1 The Escrow Agent is liable towards the Contractor and/or the Contracting Authority for direct damage to the Material or any other direct damage ensuing from or related to the performance of the Agreement, if that damage is the consequence of the Escrow Agent's own negligence, in which case its obligation to indemnify shall never exceed an amount of EUR 500,000 in total.
- 9.2 Liability for consequential damage, such as, but not limited to, consequential loss, loss of profits and other indirect loss, is excluded.
- 9.3 The Escrow Agent is responsible for the careful performance of the verifications. However, the Escrow Agent is not responsible for the completeness, accuracy, functionality, and/or effectiveness of the Material.
- 9.4 The party that requests the issue of Material by the Escrow Agent must indemnify the Escrow Agent against claims from the other party or third

parties with the exception of gross negligence or intent on the part of the Escrow Agent.

- 9.5 The Contractor and Escrow Agent declare that they shall, to the extent that is possible, take out adequate insurance for the liability borne by one of these Parties.

## **10 Fee, invoicing and payment**

- 10.1 The Contractor shall pay the Escrow Agent an annual fee for the deposit and storage of the Material as specified in annex 2 (specification of the fees). This fee must be paid each year in advance. The Escrow Agent is entitled to increase this fee at yearly intervals on the basis of the Consumer Price Index as published by the Statistics Netherlands, CBS.
- 10.2 The initial fee payable by the Contractor shall be charged by the Escrow Agent after the finalisation of the Agreement. Every year, the Escrow Agent shall invoice the annual fee in advance to the Contractor, and for the first time the day after the signing of the Agreement.
- 10.3 The payment of the fees owed by the Contractor must be performed within thirty (30) days after the invoice date. In the absence of timely payment, the statutory interest is due.
- 10.4 If the Contractor is negligent in its payment obligations, the Contracting Authority must assume the payment obligations. If the Contracting Authority is also negligent in its payment obligations, then the Contracting Authority does not have the right to invoke the provisions in article 5, and the Escrow Agent shall consequently not be obliged to issue the Material to the Contracting Authority.
- 10.5 Upon termination of the Agreement, the Escrow Agent is not obliged to any restitution of fees charged and/or paid.

## **11 Duration and termination**

- 11.1 This Agreement takes effect on the day of the signing by the parties and is concluded for an indefinite period.
- 11.2 This Agreement can be terminated with immediate effect, without notice of default, and without judicial intervention, with a notice period of 3 months:
- a) by the Contracting Authority and Contractor jointly, by means of a registered letter to the Escrow Agent in which they jointly declare that they wish to terminate the Agreement;
  - b) by the Escrow Agent, if the costs as referred to in article 10 are not paid or are not paid in time after the Contractor fails to pay these costs following a written notice of default from the Escrow Agent (with a copy to the Contracting Authority) that states a period of at least ninety days during which the payment was not made; or

c) by the Contracting Authority, by means of a registered letter to the other parties.

11.3 The Contractor has the right to terminate the Agreement with immediate effect and without judicial intervention if the Escrow Agent is declared to be in liquidation or does not fully and/or timely fulfil its obligations ensuing from the Agreement, and continues to default in the performance of its concerned obligation after having been put into default by a written warning from the Contractor.

The Contractor is in that case obliged to redeposit the Material with another escrow agent, for the benefit of the Contracting Authority and in consultation with the Contracting Authority.

11.4 In that case, the Escrow Agent must transfer the Material, at the first request of the Contractor, either to the other escrow agent or to the Contractor if the Contracting Authority has indicated that it is waiving the deposit.

11.5 This Agreement is also terminated on the Escrow Agent's issue of the Material to the Contracting Authority in accordance with the provisions of this Agreement.

11.6 The provisions governing confidentiality (and, in the event of issue to the Contracting Authority) the use of the Material remain in force after the termination of the Agreement.

## **12 Final provisions**

12.1 The Contractor may transfer his Material rights to a third party solely If he also transfers his rights and obligations pursuant to this Agreement and the DBFM Agreement to the relevant third party and has received explicit written advance permission from the Contracting Authority to do so. On a breach of the provisions of this article 12.1 the Contractor shall owe the Contracting Authority an immediately payable penalty of EUR 100,000, which may not be set off. This provision is without prejudice to the other rights of the Contracting Authority and the Escrow Agent. For the rest, none of the parties are entitled to transfer their rights and obligations pursuant to this Agreement to a third party without the agreement of the other parties.

12.2 This Agreement can be amended solely after advance written permission from all parties.

12.3 All notifications to parties pursuant to this Agreement must be in the form of written notifications.

## **13 Applicable Law and Dispute Resolution**

13.1 This Agreement is governed by the laws of the Netherlands.

13.2 Disputes that arise from this Agreement shall be settled by the competent court in The Hague.

***THUS AGREED AND SIGNED IN TRIPLICATE BY:***

Contracting Authority,  
represented by  
[●]

date:

Escrow Agent,  
represented by  
[●]

date:

Contractor,  
represented by  
[●]

date:

## DEEL 6

### INTELLECTUAL PROPERTY RIGHTS AGREEMENT

This Agreement is dated [●●].

- (1) [ - name of subcontractor - ], with his registered office and principal place of business at [ - address - ] [- postcode -] [ - place -] (the **Subcontractor**); and
- (2) [ - name of Contractor - ], with his registered office and principal place of business at [ - address - ] [- postcode -] [ - place -] (the **Contractor**)

(jointly: the **Parties**)

WHEREAS:

The Contractor and the State of the Netherlands, Ministry of Infrastructure and the Environment, Directorate-General Public Works and Water Management, with its registered office at Koningskade 4, 2596 AA, The Hague (the **Contracting Authority**) on [date] have concluded a DBFM Agreement under number [number], encompassing the design, construction, financing, and maintenance of [description of the Project Road] (the **Agreement**);

The Contractor must sign a written agreement with the Subcontractor pursuant to article 17.2 of the Agreement as regards the use of the Intellectual Property Rights of the Subcontractor and the use thereof.

HAVE AGREED TO THE FOLLOWING:

#### **Definitions:**

Any word written with a capital letter has the meaning stated below and, if it is not mentioned below, the meaning that it has in the Agreement.

**Area** signifies the world.

**Use** means (a) the use for the management and maintenance of works (including their partial or entire change and/or destruction); (b) the use of images of the work; and (c) all actions involved in publication and reproduction, irrespective of the use or the manner of presentation and irrespective of whether this method of presentation is already known at the time this agreement comes into force.

**Intellectual Property Rights** means all current and future rights to intellectual property in the broadest possible sense (including but not restricted to copyright,



patens, trademark rights, model rights, domain names, databank rights and know-how) that have been created or shall be created as a result of carrying out the activities.

**Works** signifies all the Works to be carried out by the Subcontractor for the Contractor for the purpose of the execution of the Works by the Contractor.

**Activities** (or **Work**) means the activities the Contractor must carry out and the services that the Contractor must supply pursuant to the Agreement and which have been or shall be carried out by the Subcontractor.

**Provisions:**

1. The Subcontractor hereby grants the Contractor an unconditional, unlimited (in duration), irrevocable, interminable, assignable, and royalty-free licence, with the right to grant sub-licences to third parties, to Use the Intellectual Property Rights.
2. The Subcontractor is cognisant of Article 17 of the Agreement and agrees in advance that the Contractor shall, on the grounds of this Article, grant a sub-licence to the Kingdom of the Netherlands to Use all Intellectual Property Rights. The Subcontractor agrees in advance to the Use of the Intellectual Property Rights by the State of the Netherlands and the Contractor of the Intellectual Property Rights in accordance with the DBFM Agreement.
3. The Subcontractor guarantees that he is the entitled party to the Intellectual Property Rights and is authorised to enter into this agreement.
4. The Subcontractor must cooperate with the Contractor in placing the designs, software and documents covered by the Intellectual Property Rights in Escrow in accordance with article 17.1, paragraph (c) of the Agreement.
5. The Subcontractor expressly guarantees that no liens or attachments relate to the Intellectual Property Rights.
6. The Subcontractor indemnifies the Contractor against all third-party claims for the use of the licences regarding Intellectual Property Rights.
7. The Parties shall immediately notify each other if they become aware of any infringement of the Intellectual Property Rights or if a third party claims stronger rights to the work incorporated therein or the designs or work arising therefrom.
8. The Contractor is entitled to act against third parties that infringe the Intellectual Property Rights, the work incorporated therein or the designs or work arising therefrom at its own expense. The Subcontractor hereby grants the Contractor an irrevocable power of attorney to act in the Subcontractor's

name, both in and out of court, against these infringements at his own expense. Compensation for the damage suffered and loss of profits as a result of this conduct shall accrue to the Contractor.

9. The Subcontractor hereby waives the right as referred to in Article 25, paragraph 1, subparagraphs a, b and c of the Copyright Act relating to the documents, a work embodied therein, or a design or work arising therefrom. In addition, the Subcontractor shall not offer resistance to a complete or partial alteration or destruction of the documents, a work incorporated therein or a design or work arising there from. To the extent that the waiver of the moral rights referred to in this paragraph is not permitted, the Subcontractor shall not exercise these rights other than after prior consultation about these rights with the Contractor.
10. On the Subcontractor's request the Contractor must exercise his rights pursuant to article 23 of the Agreement against the Contracting Authority relating to Confidential Information (as defined in the Agreement) that originates from the Subcontractor.
11. This agreement is concluded for an indefinite period.
12. The Parties hereby waive their right to rescind or terminate this agreement.
13. This agreement is governed by the laws of the Netherlands. All disputes that may arise in relation to this agreement or further agreements arising there from shall be settled by The Hague District Court.

This agreement was signed in duplicate at **[place]** on **[date]**.

[ - name of Contractor - ]

[ - name of Subcontractor - ]

**DEEL 7 DECLARATION REGARDING THE  
SIGNING OF THE FINANCING AGREEMENTS**

**Declaration regarding the signing of the Financing  
Agreements**

**The State of the Netherlands**  
**[State representative]**  
**[address]**

Date: **[Financial Close date]**

Subject: Finance Agreements / Shareholder Loan Agreements

Dear **[State representative]**,

Reference is made to Article 22.5 (c) of the "DBFM Agreement [•]" of **[date]** (the "**DBFM Agreement**"). Capitalised terms used in this letter have the meaning ascribed to them or to the equivalent term in the Dutch language as defined in the DBFM Agreement.

The Contractor hereby declares that it has signed the Financing Agreements and the Shareholder Loan Agreements in accordance with the drafts submitted to the Contracting Authority as specified in Annex 1 to this letter, column "first draft sent to Authority", or as amended with respect to these drafts with the consent of the Contracting Authority.

Yours faithfully,  
**[Contractor]**

**[Contractor representative]**

**SCHEDULE 1**

**Specification of Finance Agreements**

<b>Finance Agreements</b>	<b>First draft sent to Authority</b>
[finance agreement name] [document reference]	[date]
...	...

**DEEL 8**

**DECLARATION OF MARKET CONFORMITY**

**Declaration of Market Conformity**

**[Contractor]**  
**[address]**

Date: **[Financial Close date]**

Subject: Finance Agreement market conformity

Dear **[representative Contractor]**,

Reference is made to Article 22.5 (c) of the "DBFM Agreement [•]" of **[date]** (the "**DBFM Agreement**"). Capitalised terms used in this letter have the meaning ascribed to them or to the equivalent term in the Dutch language as defined in the DBFM Agreement.

The Authority confirms that it has found no provisions in the Finance Agreements (as specified in Annex 1 to this letter) that the Authority considers not to be market conforming for the purposes of the market conformity clauses in the DBFM Agreement.

Yours faithfully,

The State of the Netherlands

**[State representative]**

**SCHEDULE 1**

**Specification of Finance Agreements**

<b>Finance Agreements</b>	<b>Date sent to Authority</b>
[finance agreement name] [document reference]	[date]
...	...
...	...

**DEEL 9**

**CONFIRMATION OF RECEIPT UPDATED FINANCIAL MODEL**

**Confirmation of receipt of the Updated Financial Model**

**[Contractor]**  
**[representative Contractor]**  
**[address]**

Date: **[Financial Close date]**

Subject: confirmation of receipt of the Updated Financial Model

Dear **[representative Contractor]**,

Reference is made to Article 3.5 (a) of the "DBFM Agreement [•]" of **[date]** (the "**DBFM Agreement**"). Capitalised terms used in this letter have the meaning ascribed to them or to the equivalent term in the Dutch language as defined in the DBFM Agreement.

The Authority hereby confirms that it has received the Updated Financial Model as referred to in clause 3.5 (a) of the DBFM Agreement.

Yours faithfully,  
The State of the Netherlands

**[State representative]**

**DEEL 10**

**CONFIRMATION TERMINATION FINANCIAL CLOSE BOND**

**Confirmation of Financial Close Bond termination**

**[bank]**  
**[address]**

Date: **[Financial Close date]**

Subject: confirmation of Financial Close Bond termination

Dear **[representative bank]**,

Reference is made to Article 3.1 (a) of the "DBFM Agreement [•]" of **[date]** (the "**DBFM Agreement**"). Capitalised terms used in this letter have the meaning ascribed to them or to the equivalent term in the Dutch language as defined in the DBFM Agreement.

The Authority hereby confirms that the Financial Close Bond (Financial Close Guarantee) **[number/reference]** of **[date]** is no longer valid as from today and that the original of the Financial Close Bond has been returned to the Contractor.

Yours faithfully,  
The State of the Netherlands

**[State representative]**



**DEEL 11**

**CONFIRMATION RECEIPT FINANCIAL CLOSE BOND**

**Confirmation of Financial Close Bond receipt**

**The State of the Netherlands**  
**[State representative]**  
**[address]**

Date: **[Financial Close date]**

Subject: confirmation of Financial Close Bond termination

Dear **[State representative]**,

Reference is made to Article 3.1 (a) of the "DBFM Agreement [•]" of **[date]** (the "**DBFM Agreement**"). Capitalised terms used in this letter have the meaning ascribed to them or to the equivalent term in the Dutch language as defined in the DBFM Agreement.

The Contractor hereby confirms that the Financial Close Bond (Financial Close Guarantee) **[number/reference]** of **[date]** has been received by the Contractor on **[date]**.

Yours faithfully,  
**[Contractor]**

**[Contractor's representative]**

**DEEL 12**

**CONFIRMATION RECEIPT PERFORMANCE BOND**

**Confirmation of Performance Bond receipt**

**[Contractor]**  
**[Contractor representative]**  
**[address]**

Date: **[Financial Close date]**

Subject: receipt of Performance Bond

Dear **[representative Contractor]**,

Reference is made to Article 3.3 (a) of the "DBFM Agreement [•]" of **[date]** (the "**DBFM Agreement**"). Capitalised terms used in this letter have the meaning ascribed to them or to the equivalent term in the Dutch language as defined in the DBFM Agreement.

The Authority hereby confirms that it has received the Performance Bond for an amount of EUR 40,000,000 as referred to in clause 3.3 of the DBFM Agreement.

Yours faithfully,  
The State of the Netherlands

**[State representative]**

**DEEL 13**

**DECLARATION REGARDING SECURITIES**

**Declaration regarding securities**

**The State of the Netherlands**  
**[State representative]**  
**[address]**

Date: **[Financial Close date]**

Subject: declaration regarding securities

Dear **[representative Contractor]**,

Reference is made to Article 22.5 (e) of the "DBFM Agreement [•]  
" of **[date]** (the "**DBFM Agreement**"). Capitalised terms used in this letter have  
the meaning ascribed to them or to the equivalent term in the Dutch language as  
defined in the DBFM Agreement.

The Contractor hereby declares that it has provided no other securities for rights of  
the Contractor vis-à-vis the Contracting Authority based on the DBFM Agreement  
than those stipulated in the Financing Agreements.

Yours faithfully,  
**[Contractor]**

**[Contractor's representative]**

**DEEL 14**

**DECLARATION REGARDING SUBCONTRACTORS**

**Declaration regarding subcontractors**

**The State of the Netherlands**  
**[State representative]**  
**[address]**

Date: **[Financial Close date]**

Subject: declaration regarding subcontractors

Dear **[State representative]**,

Reference is made to Article 22.5 (f) of the "DBFM Agreement [•]  
" of **[date]** (the "**DBFM Agreement**"). Capitalised terms used in this letter have the meaning ascribed to them or to the equivalent term in the Dutch language as defined in the DBFM Agreement.

The Contractor hereby declares that the Subcontractors (to the extent known at this moment) that will be engaged by the Contractor in the performance of the Work, have entered into agreements as referred to in Article 17.2 (Agreements with Subcontractors) of the DBFM Agreement, that these agreements have been legally signed by the relevant Parties, and that these agreements have all been submitted to the Contracting Authority.

Yours faithfully,  
**[Contractor]**

**[Contractor's representative]**

**SCHEDULE 8 (*QUALITATIVE PART OF SUBMISSION*)**

[•]

**SCHEDULE 9 SCHEDULE OF REQUIREMENTS**

**DEEL 1**

**SYSTEM DEFINITIONS**

**1. AREAS**

**1.1 RWS AREA**

[Drawings of the RWS Area]

**1.2 THIRD PARTY AREA**

[Drawings of the Third-Party Area]

**1.3 VERTICAL DEMARCATIONS AT INTERSECTIONS**

[Drawings (descriptions) of intersections in the RWS Area and the Third-Party Area]

**2. RWS INFRASTRUCTURE**

**2.1 Object RWS Infrastructure**

Object RWS Infrastructure					
	Decomposition	Commencement Date	Availability Date	Completion Date	Expiry Date
RWS Infrastructure	Object 1		√	√	√
	Object 2	√			
	(...)				

**2.2 RWS objects outside the RWS Area**

[Overview of (clearly described) objects located outside the RWS Area but belonging to the RWS Infrastructure]

### **2.3 RWS CONTEXT OBJECTS**

[Overview of (clearly describe) objects within the RWS Area that are excluded from the RWS Infrastructure and are not a part of the Third-Party Infrastructure]

## **3. THIRD PARTY INFRASTRUCTURE**

### **3.1 Third Party objects outside the Third Party Area**

[Overview of (clearly described) objects located outside the Third-Party Area but belonging to the Third-Party Infrastructure]

### **3.2 Third Party Context Objects**

[Overview of (clearly describe) objects within the Third-Party Area that are excluded from the RWS Infrastructure and are not a part of the RWS Infrastructure]

**DEEL 2**

**OUTPUT SPECIFICATIONS**

**1.1. System Specifications**

[•]

**1.2 Relevant Policy Rules**

<b>Document number</b>	<b>Document name / component</b>
[...]	RWS Incident Management Policy Rules (Government Gazette 1999, 89);
[...]	[...]

**1.3 Binding standards and guidelines**

<b>Document number</b>	<b>Document name / component</b>	<b>Date / Version number</b>
[ ]	[...]	[ ]
[...]	[...]	[...]

**DEEL 3**

**MANAGEMENT SPECIFICATIONS**

[The requirements that the Contractor’s Management System must fulfil and the descriptions of the procedures that are to be followed.]



## **CERTIFICATE PLAN**

### **1. COMMENCEMENT CERTIFICATE**

[The conditions for the issue of the Commencement Certificate and the identification of the documents with which the Contractor can demonstrate that the conditions for issuing the Commencement Certificate have been met.]

### **2. AVAILABILITY CERTIFICATE**

[The conditions for the issue of the Availability Certificate and the identification of the documents with which the Contractor can demonstrate that the conditions for issuing the Availability Certificate have been met.]

### **3. COMPLETION CERTIFICATE**

[The conditions for the issue of the Completion Certificate and the identification of the documents with which the Contractor can demonstrate that the conditions for issuing the Completion Certificate have been met.]

### **4. PARTIAL COMPLETION CERTIFICATE**

[The conditions for the issue of the Partial Completion Certificate and the identification of the documents with which the Contractor can demonstrate that the conditions for issuing the Partial Completion Certificate have been met.]

### **5. TRANSFER CERTIFICATE**

[The conditions for the issue of the Transfer Certificate and the identification of the documents with which the Contractor can demonstrate that the RWS Infrastructure shall, on the Expiry Date, fulfil the conditions for issuing the Transfer Certificate.]

**DEEL 5**

**IMPLEMENTATION AGREEMENTS**

**PROVISIONS IN SQUARE BRACKETS [ ] ARE OPTIONAL**

**[●] : TO BE COMPLETED FOR EACH PROJECT**

**STANDARD AGREEMENT Version 1.0**

**(project [●])**

**RWS - Stakeholder**

**Annexes:**

Annex UVO1	Technical terms and abbreviations
Annex UVO2	Third-Party Infrastructure Area
Annex UVO3	Third-Party Infrastructure Objects
Annex UVO4	Third Party Infrastructure Output Specifications
Annex UVO5	Third Party Infrastructure Management Specifications
Annex UVO6	Transfer Procedure
Annex UVO7	Demarcation of Ownership, Management and Maintenance

**The Parties:**

1. The **State of the Netherlands**, Ministry of Infrastructure and the Environment, Directorate-General Public Works and Water Management, with its registered office in The Hague, represented herein by [●], hereinafter referred to as the "**RWS**";

and

2. the **Stakeholder**, with its registered office in..., represented herein by [●], hereinafter referred to as the "Stakeholder";

**considering that:**

- a. RWS has taken the initiative to [●] *[improve traffic flow on the [●] by widening and partly relocating [●] (the Project [●])]*.
- b. the Project [●] (hereinafter: Project [●]) includes the following content:  
[●]

- c. RWS intends to contract out performance of the work associated with the construction of Project [●] under a DBFM Agreement;
- d. **[if relevant: reference to previously concluded management agreement with indication that this implementation agreement is a further elaboration of the management agreement];**
- e. Project [●] interfaces with infrastructure managed and maintained by the Stakeholder at the following points:
  - [●] .....
- f. during construction of Project [●], the infrastructure of the Stakeholder indicated in (e) will also have to be modified;
- g. the Parties wish to specify how the modifications mentioned in (f) must be implemented in this Implementation Agreement (hereinafter: the Implementation Agreement);
- h. the modifications referred to in (f) (further described below in Part I of this Implementation Agreement) shall be implemented on behalf of RWS by the DBFM Contractor with which RWS will conclude the DBFM Agreement; the RWS obligations included in Part II of these Implementation Agreements will not be fulfilled by the DBFM Contractor (on behalf of RWS).

**agree as follows:**

Article 1: Definitions

1. Terms that are capitalised in this Implementation Agreement have the meanings set forth below.
  - a) Tender Procedure: The Tender Procedure for the DBFM Agreement for Project [●] based on a competitive dialogue.
  - b) Commencement Date: The date defined in the DBFM Agreement as such (see Article 3 paragraph 1 of this Implementation Agreement).
  - c) DBFM Contractor: The private party or consortium of private parties with which RWS shall contract the execution of Project [●] by concluding a DBFM Agreement.
  - d) DBFM Agreement: The DBFM (Design, Build, Finance en Maintain) Agreement concluded between RWS and the DBFM Contractor for the execution of Project [●].
  - e) Third-Party Infrastructure: All infrastructural objects (and the sites constituting a part thereof) found in the area defined on the map in **Annex UVO2** (*Third-Party Infrastructure Area*).
  - f) Transfer Date The date on which the Third-Party Infrastructure is transferred to the Stakeholder as indicated in Article 6.

- g) The Parties: The Stakeholder and RWS.
  - h) Implementation agreement: This agreement.
2. Technical terms in this Implementation Agreement that begin with a capital have the meaning set forth in **Annex UVO1** (*Technical terms and abbreviations*)
  3. Abbreviations used in this Implementation Agreement have the meaning set forth in **Annex UVO1** (*Technical terms and abbreviations*), paragraph 1.2.

Article 2: Purpose of the Agreement

1. The purpose of the Implementation Agreement is to establish the mutual obligations of the Parties in relation to the modification of the Third-Party Infrastructure as part of or in association with Project [●].

**Part I**

Article 3: RWS obligations

1. RWS (the DBFM Contractor on behalf of RWS) must notify the Stakeholder of the Commencement Date established on the basis of the DBFM Agreement. This notification must occur in writing no later than [●] Working Days prior to the Commencement Date.
2. RWS (the DBFM Contractor on behalf of RWS) must design and construct the Third-Party Infrastructure so that, on the Transfer Date, the Third-Party Infrastructure:
  - a. consists of at least the objects that, prior to the Transfer Date (TD) are listed in Annex UVO3 (*Third-Party Infrastructure Objects*);
  - b. complies with applicable law and regulation; and
  - c. satisfies the requirements, Binding Standards and Guidelines listed in **Annex UVO4** (*Output Specifications*), paragraph 4.1 that are valid on the Transfer Date [**and meets the requirements elaborated to an objectively verifiable level in accordance with Annex UVO5 (Third-Party Infrastructure Management Specifications)**].
3. RWS (the DBFM Contractor on behalf of RWS) must maintain the Third-Party Infrastructure during the period beginning on the Commencement Date and ending on the Transfer Date so that, in this period, the Third-Party Infrastructure:
  - a. consists of at least the objects listed in **Annex UVO3** (*Third-Party Infrastructure Objects*) prior to the Commencement Date, except if an object must be removed on the basis of a requirement in **Annex UVO4** (*Third-Party Infrastructure Output Specifications*);
  - b. complies with applicable law and regulation; and

- c. satisfies the requirements, Binding Standards and Guidelines in **Annex UVO4** (*Third-Party Infrastructure Output Specifications*) that are valid from the Commencement Date through the Transfer Date.
4. RWS (the DBFM Contractor on behalf of RWS) must, in performing the Work, observe valid law and regulation, along with the requirements listed in **Annex UVO5** (*Third-party Infrastructure Management Specifications*).
5. RWS (the DBFM Contractor on behalf of RWS) must take care of all required permits.

Article 4: Stakeholder's obligations

1. During the period beginning on the Commencement Date and ending on the Transfer Date, the Stakeholder must grant the DBFM Contractor access to the Third-Party Infrastructure, whereby:
  - a. the DBFM Contractor must take the rights of third parties to access Third Party Infrastructure into consideration; and
  - b. insofar as the Third Party Infrastructure is part of the public road, waterway, bus lane or railway infrastructure, access is only to be granted once the DBFM Contractor has obtained permission from the respective infrastructure manager.
2. During the period beginning on the Commencement Date and ending on the Transfer Date, the Stakeholder will not perform any maintenance tasks on the Third-Party Infrastructure itself.

Article 5a: Changes at the initiative of RWS

1. If, after completion of the Tender Procedure, RWS deems it desirable to adopt a change proposal that has an impact on the obligations of RWS under this Implementation Agreement, RWS shall enter into consultation with the Stakeholder on this matter.
2. If RWS and the Stakeholder reach agreement on a change proposal as referred to in paragraph 1, they shall set down the proposed change to this Implementation Agreement in written form, and RWS shall ensure that the DBFM Contractor implements the agreed change on its behalf.
3. The financial consequences of a change undertaken at the initiative of RWS, including the reasonable costs incurred by the Stakeholder in assessing and preparing a change at the initiative of RWS, shall not be borne by the Stakeholder, unless otherwise agreed.

Article 5b: Changes at the initiative of the DBFM Contractor

1. If, after completion of the Tender Procedure, the DBFM Contractor deems it desirable to adopt a change proposal that has an impact on the obligations of RWS under this Implementation Agreement, the DBFM

Contractor shall enter into consultation with the Stakeholder on this matter.

2. If the DBFM Contractor and the Stakeholder have reached agreement on a change proposal as referred on in paragraph 1, they shall submit this change proposal in writing to RWS for approval and signature. RWS shall only withhold approval and signature if the change has a negative effect on:
  - a. the position of RWS (including the circumstance that RWS must bear the financial consequences of the change); or
  - b. the position of other stakeholders (including the interfaces with objects of other stakeholders).
3. The financial consequences of a change undertaken at the initiative of the DBFM Contractor, including the reasonable costs incurred by the Stakeholder in assessing and preparing a change at the initiative of the DBFM Contractor, shall not be borne by the Stakeholder, unless otherwise agreed.

#### Article 5c: Changes on the initiative of the Stakeholder

1. If, after completion of the Tender Procedure, the Stakeholder deems it desirable to adopt a change proposal that has an impact on the obligations of RWS under this agreement, the Stakeholder shall enter into consultation with RWS on this matter.
2. If RWS and the Stakeholder reach agreement on a change proposal as referred to in paragraph 1, they shall set down the proposed change to this Implementation Agreement in written form, and RWS shall ensure that the DBFM Contractor implements the agreed change on its behalf.
3. The financial consequences of a change undertaken at the initiative of the Stakeholder, including the reasonable costs incurred by RWS and the DBFM Contractor in assessing and preparing a change at the initiative of the Stakeholder, shall be borne by the Stakeholder, unless otherwise agreed.

#### Article 6: Verification and transfer

1. If RWS (the DBFM Contractor on behalf of RWS) is of the opinion that the Third-Party Infrastructure is ready for transfer, it must notify the Stakeholder of this fact. The Stakeholder must verify if the Third-Party Infrastructure satisfies the requirements indicated in Article 3 paragraph 2. In undertaking this verification, the Parties must follow the procedure described in paragraph 6.1 of the **Annex UVO6** (*Transfer Procedure*).
2. Transfer of the Third-Party Infrastructure to the Stakeholder must be recorded in a Transfer report in accordance with the model included in paragraph 6.2 of **Annex UVO6** (*Transfer Procedure*), in which the Stakeholder declares that the Third-Party Infrastructure meets the

requirements imposed on it in Article 3 paragraph 2.

3. If, within a period of 6 months following transfer as referred to in Article 6 paragraph 2, it is demonstrated that the Third-Party Infrastructure does not satisfy the requirements indicated in Article 2 paragraph 2 as a result of a default in the performance of this Implementation Agreement attributable to RWS (the DBFM Contractor on behalf of RWS) and the Stakeholder has so requested in writing, RWS (the DBFM Contractor on behalf of RWS) must ensure that the Third-Party Infrastructure shall then comply with these requirements.
4. On Transfer of the Infrastructure, RWS (the DBFM Contractor on behalf of RWS) must handover a Transfer dossier that complies with the requirements specified in **Annex UVO6** (*Transfer Procedure*).

#### Article 7: Removal of surplus and released material

Materials released from the RWS Infrastructure during the performance of the Work and that are not reused in the performance of the Work shall, analogous to the provisions of the DBFM Agreement, become the property of the DBFM Contractor.

#### Article 8: Contact persons

1. During the performance of this agreement, [●] shall act on behalf of the Stakeholder as representative and contact person for both RWS and the DBFM Contractor.
2. During the performance of this agreement, [●] shall act on behalf of RWS as representative and contact person for the Stakeholder.
3. After completion of the Tender Procedure, the DBFM Contractor shall notify the Stakeholder in writing of the person who will act as the representative for the DBFM Contractor during the performance of this agreement.

### **Part II**

#### Article 9: Changes during the Tender Procedure

1. During the Tender Procedure, RWS may make a proposal for a change to the Implementation Agreement and submit this proposal to the Stakeholder for assessment and approval.
2. The Stakeholder will evaluate this change proposal within 15 Working Days following receipt and notify RWS about its judgment in writing.
3. Any reasonable costs incurred by the Stakeholder in evaluating such a change proposal shall be borne by RWS.
4. If RWS and the Stakeholder have reached agreement about a proposed change, the Parties shall set down this change in writing and this Implementation Agreement shall be changed accordingly.
5. In recording the change, the Parties must also make an agreement about

the amount of the costs for the change and about how these costs shall be shared by the Parties.

6. The Stakeholder must observe strict confidentiality and secrecy with regard to the information provided to the Stakeholder by RWS in connection with a change proposal. The Stakeholder shall require its employees to comply with the confidentiality provision.
7. The provisions in paragraph 6 do not affect any legal obligation by either of the Parties to make information publicly known. If the Stakeholder receives a request for public disclosure of information, it must inform RWS of this fact. The Stakeholder may only make a decision about such a request for public disclosure after consultation with RWS.

Article 10: Costs and payment

1. **[The Stakeholder shall pay RWS a lump sum of [ ] for the performance of the obligations described in Article 3].**
2. **[Details about payment and indexing are included here.]**

Article 11: Demarcation of Ownership, Management and Maintenance

1. After the Transfer Date, the Parties must set down in writing the limits of ownership, management and maintenance with regard to the Third-Party Infrastructure. The Parties must thereby observe the provisions in **Annex UVO7** (*Demarcation of ownership, management and maintenance*).

**[Article [] Recording other relevant agreements between RWS and the Stakeholder]**

Article 12: Unforeseen circumstances

1. The Parties shall enter into mutual consultation if any circumstances arise of such nature that, in accordance with the principles of reasonableness and fairness, the unaltered continuation of this Implementation Agreement cannot be expected. If necessary, the Parties shall establish new (revised) agreements that are, as far as possible, compatible with the contents of this Implementation Agreement.

Article 13: Applicable law and dispute resolution

1. This Implementation Agreement and any other agreements deriving from this Agreement are governed by the law of the Netherlands.
2. If a dispute arises between the Parties in connection with or pursuant to this Implementation Agreement then the Parties must confer on the issue.
3. All disputes that arise pursuant to this Implementation Agreement of other agreements deriving therefrom shall be settled by the competent court in The Hague.



**Thus agreed, drawn up and signed in duplicate in [ ], on [ ],**

**On behalf of the State**

**On behalf of the Stakeholder**

[●]

[●]

**Annexes:**

- Annex **UVO1** Technical terms and abbreviations
- Annex **UVO2** Third-Party Infrastructure Area
- Annex **UVO3** Third-Party Infrastructure Objects
- Annex **UVO4** Third Party Infrastructure Output Specifications
- Annex **UVO5** Third Party Infrastructure Management Specifications
- Annex **UVO6** Transfer Procedure
- Annex **UVO7** Demarcation of Ownership, Management and Maintenance

**Annex UVO1 Technical terms and abbreviations**

*(Only include the terms and abbreviations that are actually used)*

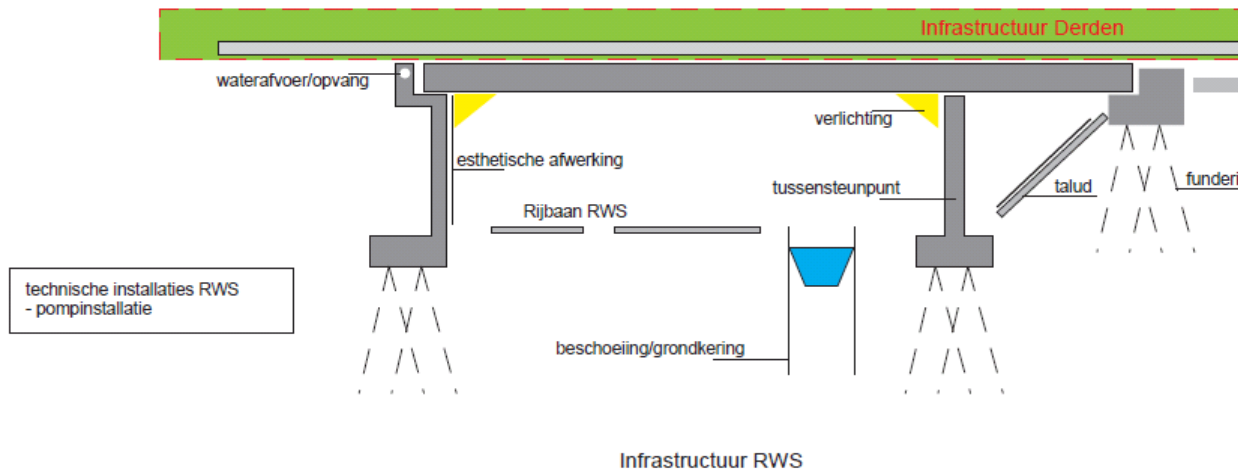
**1.1 Technical terms**

**1.2 Abbreviations**

**Annex UVO2 Third-Party Infrastructure Area**

*(include a map of the area in which the Third-Party Infrastructure is located (and the area that the Contractor must therefore maintain). Include both a map indicating the horizontal boundaries and a map on which the vertical boundaries are indicated in the case of intersecting infrastructure: for the latter, see the example below)*

Systemdefinitie Realisatiefase - Kruising Gebied Derden over G



**Annex UV03 Third-Party Infrastructure Objects**

STAKEHOLDER	Table 2: Third-Party Infrastructure Objects		
		CD	TD
<b>UNDERLYING ROAD NETWORK</b>			
	[●]		
	[●]		√
	[●]		√
	[●]	√	√
	[●]	√	
	[●]	√	√
	[●]	√	√
<b>DTM/EM PROVISION</b>			
	[●]		
	[●]		√
<b>INTEGRATION FACILITY</b>			
	[●]		
	[●]	√	√

CD = Commencement Date

TD = Transfer Date

**Annex UVO4 Third-Party Infrastructure Output Specifications**

**4.1 Requirements on Transfer Date**

<b>ID</b>	[●]	<b>Superordinate</b>	<b>Subordinate</b>
[●]	[●]		[●]
<b>Verification Instruction</b>		<b>Description of Verification Instruction</b>	
<b>Requirement applies to</b>			
<b>Transfer Date</b>			

**Binding Standards and Guidelines on the Transfer Date**

<b>Reference of the publishing organisation</b>	<b>Document name</b>	<b>Document version</b>	<b>Version date</b>
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]

**4.2 Requirements from the Commencement Date through the Delivery Date**

<b>ID</b>	[●]	<b>Superordinate</b>	<b>Sub</b>
[●]	[●]		[●]
<b>Verification Instruction</b>	<b>Description of Verification Instruction</b>		
<b>Requirement valid from</b>	<b>Requirement valid up to and including</b>		
<b>Commencement Date</b>	<b>Transfer Date</b>		

**Binding Standards and Guidelines from the Commencement Date through the Delivery Date**

<b>Reference of the publishing organisation</b>	<b>Document name</b>	<b>Document version</b>	<b>Version date</b>
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]

**Annex UVO5 Third-Party Infrastructure Management Specifications**

ID	...[●].....	Super
[●]	<p><b>[*On behalf of RWS and subject to approval by RWS, the DBFM Contractor must reach agreement with the Stakeholder about the elaboration of the requirements to an objectively verifiable level. This elaboration must be set down in an elaboration agreement that is agreed with the Stakeholder and submitted to RWS for signing. RWS must sign the elaboration agreement within 20 Working Days of receipt, except if the elaboration agreement has a negative impact on the position of RWS or on the position of other stakeholders.]</b></p>	
<b>Requirement valid from</b>		<b>Requirement valid up to and including</b>
Commencement Date		Transfer Date

***[\*Insert this option if the requirements in Annex UVO4 paragraph 4.1 are not elaborated to an objectively verifiable level. In this case, insert the option provision in Article 3.2 paragraph (c) as well.***

## Annex UVO6                      Transfer Procedure

### 6.1      Verification procedure

- 1            If RWS (the DBFM Contractor on behalf of RWS) is of the opinion that the Work on the Third-Party Infrastructure is complete, it may send the Stakeholder a written request for acceptance of the Third-Party Infrastructure.
  
- 2            RWS (the DBFM Contractor on behalf of RWS) must enclose the Transfer dossier as referred to in Article 6.4 of the Implementation Agreement with this request.
  
- 3            a.            The Stakeholder must verify if the data in the Transfer dossier agrees with the requirements stipulated in paragraph 6.3 of **Annex UVO6**.  
               b.            The Stakeholder must provide the DBFM Contractor (as the representative of RWS) with written notification within 10 Working Days indicating if the transfer dossier is approved or rejected.  
               c.            If the Stakeholder holds the view that the Transfer dossier does not satisfy the requirements stipulated in paragraph 6.3 of **Annex UVO6** and the Stakeholder does not therefore approve the Transfer dossier, the Stakeholder must justify its decision in indicating the data and documents involved. In this case, RWS (the DBFM Contractor on behalf of RWS) must ensure that the data and documents in question and, if necessary, the Third-Party Infrastructure are adjusted so that the Transfer dossier does, in fact, comply with the requirements stipulated in paragraph 6.3 of **Annex UVO6**. After this adjustment, RWS (the DBFM Contractor on behalf of RWS) may again submit a request as indicated in paragraph 1.
  
- 4            The acceptance of the Third Party Infrastructure must occur at a time and date jointly determined by RWS (the DBFM Contractor on behalf of RWS) and the Stakeholder but, in any case, within 10 Working Days following approval of the Transfer dossier by the Stakeholder.
  
- 5            The DBFM Contractor shall draw up a report about the acceptance of the Third-Party Infrastructure, which must also be approved by the Stakeholder.
  
- 6            If the report does not indicate any deficiencies, the Third-Party Infrastructure is deemed to have satisfied the requirements indicated in Article 3.2 of this Implementation Agreement.
  
- 7            a.            If the acceptance report does indeed make mention of deficiencies, RWS (the DBFM Contractor on behalf of RWS) must rectify these deficiencies and then submit a new request for acceptance of the Third-Party Infrastructure. The acceptance of the Third-Party



- Infrastructure must, in this case, occur at a time and date to be jointly determined by the Stakeholder and the DBFM Contractor (as the representative of RWS) but, in any case, within 10 Working Days following the Stakeholder's receipt of the request for acceptance.
- b. RWS (the DBFM Contractor on behalf of RWS) can stipulate that an acceptance of only the rectified deficiencies may be sufficient.

**6.2 Transfer report**

<p><b>Transfer report</b></p> <p><b>Stakeholder</b>  <input type="checkbox"/>.....  <input type="checkbox"/>.....</p> <p><b>Rijkswaterstaat</b>  <input type="checkbox"/>.....  <input type="checkbox"/>.....</p> <p><b>DBFM Contractor</b> <input type="checkbox"/>.....                  .....  <input type="checkbox"/>.....</p> <p><b>Project [●])</b></p>
<p><b>Transfer</b>                  [●]....., in the capacity of [●], acting on behalf of the <b>Stakeholder</b>, hereby declares that the Third-Party Infrastructure satisfies the requirements therefor stipulated in Article 3.2 of this Implementation Agreement and the Transfer dossier has been received in good order, so that the Third-Party Infrastructure is transferred to the <b>Stakeholder</b> on.....[<b>enter date</b>].</p>
<p><b>1<sup>st</sup> Inspection</b>                  [●]....., in the capacity of [●], acting on behalf of the <b>Stakeholder</b>,                  [●]....., in the capacity of [●], acting on behalf of the <b>DBFM Contractor</b>, and                  [●]....., in the capacity of [●], acting on behalf of <b>RWS</b>,</p> <p>hereby declare that the Third-Party Infrastructure satisfies / does not satisfy* the requirements therefor stipulated in Article 3.2 of this Implementation Agreement and this Third-Party Infrastructure has / has not* transferred to the <b>Stakeholder</b> on..... [<b>enter date</b>], except for the following items, which will be provided / rectified* before ..... [<b>enter date</b>].                  .....                  .....</p> <p><b>(Report not yet signed)</b></p>
<p><b>2nd Inspection and final transfer</b>                  [●]....., in the capacity of [●], acting on behalf of the <b>Stakeholder</b>,                  [●]....., in the capacity of [●], acting on behalf of the <b>DBFM Contractor</b>, and                  [●]....., in the capacity of [●], acting on behalf of <b>RWS</b>,</p> <p>hereby state that the items to be provided / rectified* mentioned above in the <b>1st inspection</b> have been delivered so that the Third-Party Infrastructure now on .....[<b>enter date</b>] satisfies the requirements therefor stipulated in Article 3.2 of this Implementation Agreement.  <b>(report now signed by the Parties as agreed)</b></p>
<p><b>Thus agreed</b>                  on .....</p> <p>[●]....., in the capacity of [●], acting on behalf of the <b>Stakeholder</b>,</p> <p style="text-align: center;">Signature .....</p>

[●]....., in the capacity of [●], acting on behalf of the **DBFM Contactor**, and

Signature .....

**and**

[●]....., in the capacity of [●], acting on behalf of **RWS**,

Signature .....

.....

### 6.3 Transfer dossier requirements

RWS (the DBFM Contractor on behalf of RWS) must submit the Transfer dossier prior to transfer.

The Transfer dossier consists of:

1. Deviation Register with an overview of deviations relating to the requirements of the Implementation Agreement or the requirements further elaborated in the elaboration agreement;
2. Specifications of all requirements / objects pertaining to the Implementation Agreement, supplemented by requirements derived by RWS (the DBFM Contractor on behalf of RWS);
3. Design memoranda;
4. Interface register;
5. List of calculations;
6. List of drawings;
7. Integral as-built calculations of permanent structures;
8. Integral as-built drawings of permanent structures;
9. As-built data of the (auxiliary) structures left in the ground;
10. Clearance data;
11. Digital Topographic Data (DTD);
12. Core GIS data;
13. (updated) Integral Management & Maintenance Plan for all management objects;
14. Upkeep plans;
15. Guarantee declarations;
16. Integral manuals;
17. Survey reports;
18. Baseline measurements (for deformation) of Third-Party Infrastructure, along with reports
19. H&S dossier;
20. Inspection and test reports
21. Integral verification & validation memorandum.

#### 1. Deviation register requirements

The deviation register must, for each deviation, indicate:

- a unique serial number for the deviation;
- the description of the deviation;
- the date of detection;
- the responsible party;
- the status of the correction;
- the date when corrective measure(s) are implemented;
- the status of the corrective measures;
- the planned date for implementation of the corrective measures;
- the actual date for implementation of the corrective measures;
- the status of deviation;
- the closure date for the deviation report.

#### 2. Requirements

RWS (the DBFM Contractor on behalf of RWS) must draw up specifications for all objects in the object tree in which the requirements under the Implementation Agreement and derived requirements are specified.

The specifications for an object must at least identify and record the following:

- an unambiguous description of the object;

- a link to the object tree;
- the requirements, Binding Standards and Guidelines referred to in Article 3.2 of this Implementation Agreement that the object has to satisfy;
- the interfaces of the relevant objects with other objects and the surroundings (if necessary in separate interface specifications);
- the relevant other conditions (including terms of permits) applicable to the object in question and its construction;
- the level of elaboration of the specifications must depend on the phase in the design process.

The following information must be indicated for each requirement in the specifications:

- a unique identification number;
- a description;

- reference to the superordinate requirement;
- if there are subordinate specifications present, reference to underlying requirement;
- the initiator;
- the source.

Each requirement must be verifiable and approvable and, if relevant, provided with margins.

### **3. Design memoranda**

RWS (the DBFM Contractor on behalf of RWS) must draw up design memoranda for all identified objects in the object tree, whereby design memoranda must contain descriptions of how the requirements stipulated in the Implementation and derived requirements are to be met.

A design memorandum must identify and record the following:

1. the object or objects to which the design memorandum applies;
2. a design of the final situation referring to such items as drawings, calculations, phasing, construction method, work methods, safety measures, environmental measures, processes, work processes, risks and management measures;
3. a description of how the object must be implemented (implementation concept): with phasings and drawing, construction method, work method and work processes;
4. a description of how an object must be tested (test concept) if the object is or contains an object to be tested;
5. a description of how the object must be operated (operation concept);
6. a description of how the object must be maintained (maintenance concept);
7. the implementation concept, test concept, operation concept and maintenance concept must be sufficiently detailed that the implementability, testability, operability and maintainability can be supported;
8. the implementation principles that the design takes into account;
9. a description of the internal interfaces, including associated management measures;
10. the operation principles that the design takes into account;
11. the risk management of deformation or damage to the surrounding objects as a result of the Work;
12. the "surrounding objects deemed critical" that may possibly suffer damage due to the construction of elements of the Work and contain at least the manner in which baseline measurements and engineering surveys are performed;
13. the manner in which monitoring of deformations and engineering surveys are performed to detect the possible consequences of the Work; this needs to occur in accordance with Annex 2, Article Geo 05.
14. the management measures relating to the prevention of damage to the surrounding objects;
15. selected design options with justification;
16. management and maintenance analysis.

**4. Interface register**

RWS (the DBFM Contractor on behalf of RWS) must identify and record at least the following in the interface register:

- reference to the specifications in which interfaces are elaborated in requirements or in other documents in which the interface is managed;
- management measures for the inventoried risks associated with the interfaces.

**5. List of calculations**

RWS (the DBFM Contractor on behalf of RWS) must formulate an overview of all the calculations performed for the design memoranda.

**6. List of drawings**

RWS (the DBFM Contractor on behalf of RWS) must formulate an overview of all the drawings made for the design memoranda. Drawings must be provided in DWG or DXF format.

**7. Integral as-built calculations of permanent structures**

RWS (the DBFM Contractor on behalf of RWS) must supply all the calculations mentioned in the list of calculations in their as-built versions.

**8. Integral as-built drawings of permanent structures**

RWS (the DBFM Contractor on behalf of RWS) must supply all the drawings mentioned in the list of drawings in their as-built versions.

**9. As-built data of the (auxiliary) structures left in the ground**

RWS (the DBFM Contractor on behalf of RWS) must supply drawings of all the (auxiliary) structures left in the ground.

**10. Clearance data**

The clearances (measured clearance heights and widths) of all structures must be determined. They must comply with the "Product specifications for the clearances of structures and portals".

**11. Digital Topographic Data (DTD)**

RWS (the DBFM Contractor on behalf of RWS) must *deliver a digital version of the altered situation of the site integrated in the Digital Topographic Data (DTD) made available in accordance with the following specifications:*

- "Production specifications for Digital Topographic Data".
- "DTD Dry and DTD Wet Handbook"

*All data about the newly implemented and altered topography in connection with the Third-Party Infrastructure must be obtained. Altered topography also includes surfaces and lines that are reduced or enlarged because of the enlargement, reduction or relocation of adjacent surfaces.*

*"Production specifications for Digital Topographic Data".*

**12. Core GIS data**

RWS (the DBFM Contractor on behalf of RWS) must provide all the data required in connection with the Work for the sake of Core GIS in accordance with the following specifications:

- Product specifications for Core GIS data
- Supplementary instructions for Core GIS data

**(\* = delete that which does not apply)**

The collection of data must occur in accordance with project type "Construction projects including DTD" / "Construction projects excluding DTD"\* pursuant to § 1.3 of the "Product specifications for Core GIS data".

Delivery of Core GIS data must always occur simultaneous with or subsequent to the delivery of DTD files, since the topography in Core GIS is based on DTD.

**13. (updated) Integral Management & Maintenance Plan** for all management objects;

RWS (the DBFM Contractor on behalf of RWS) must digitally submit an updated Management & Maintenance Plan for all management objects.

**14. Upkeep plans**

RWS (the DBFM Contractor on behalf of RWS) must provide digital and updated upkeep plans for all management objects.

**15. Guarantee declarations**

RWS (the DBFM Contractor on behalf of RWS) must digitally submit guarantee declarations as indicated in the Implementation Agreement.

**16. Integral manuals**

RWS (the DBFM Contractor on behalf of RWS) must digitally submit integral manuals.

**17. Survey reports;**

RWS (the DBFM Contractor on behalf of RWS) must digitally submit survey reports.

**18. Baseline measurements (for deformation) of Third-Party Infrastructure, along with reports**

RWS (the DBFM Contractor on behalf of RWS) must digitally submit a baseline measurement (for deformation) of the Work, including reports.

**19. H&S dossier**

RWS (the DBFM Contractor on behalf of RWS) must digitally submit an H&S dossier that complies with the requirements of the Dutch Working Conditions Decree.

**Inspection and test reports**

RWS (the DBFM Contractor on behalf of RWS) must digitally submit inspection and test reports.

**Integral verification & validation memorandum.**

RWS (the DBFM Contractor on behalf of RWS) must digitally submit an integral Verification & Validation memorandum.



**Annex UVO7 Demarcation of Ownership, Management and Maintenance**

**DEEL 6**

**[AGREEMENTS WITH STAKEHOLDERS]**

[include here the agreements that RWS has concluded with third parties and under which the Contractor must comply with certain obligations stemming from these agreements but for which no Partial Completion Certificate shall be issued. See article 18.4.]

**SCHEDULE 10 FINANCIAL MODEL ADJUSTMENT GUIDELINE****DEEL 1****MISCELLANEOUS PROVISIONS****1. UPDATING THE FINANCIAL MODEL**

- (a) The Contractor must, for the purpose of supplying the Updated Financial Model upon Financial Close, update the Original Financial Model in accordance with the provisions of Part 1 and Part 2 of this Schedule.
- (b) If the Updated Financial Model is used to determine compensation to be paid pursuant to Article 9.3 (*Compensation Event*) the Contractor must update the most recent Updated Financial Model in accordance with the provisions of Part 1 and Part 3 of this Schedule.
- (c) In order to determine a compensation to be paid on the basis of Article 10 (*Premature Termination*), the Contractor must update the most recent Updated Financial Model according to the provisions of Part 1 and Part 4 of this Schedule.
- (d) In order to determine a compensation to be paid on the basis of Article 3.4 (*Refinancing*), the Contractor must update the most recent Updated Financial Model according to the provisions of Part 1 and Part 5 of this Schedule.
- (e) In order to determine a compensation to be paid on the basis of Article 20 (*Excess Profit*), the Contractor must update the most recent Updated Financial Model according to the provisions of Part 1 and Part 6 of this Schedule.
- (f) The Updated Financial Model must comply with the organisational, functional, substantial, model-engineering and model structure requirements enclosed in paragraph 2, 3, 4 and 5 to this Schedule.

**2. ORGANISATIONAL REQUIREMENTS IMPOSED ON THE UPDATED FINANCIAL MODEL**

The Updated Financial Model must comply with the organisational requirements enclosed in this paragraph.

- (a) The Updated Financial Model is comprised of a computational model together with the user's instructions, a data book and a logbook.
- (b) The Contractor must submit the Updated Financial Model in digital format. The Updated Financial Model must be accompanied by duplicate copies of the logbook and associated manual submitted in analogue form.

- (c) The Contractor must submit the Updated Financial Model together with a notice, designated as the "Update of Financial Model" notice. In this notice the Contractor must describe the adjustments to the Updated Financial Model pursuant to Article 3.5 (c).
- (d) Adjustments to the Updated Financial Model are made in mutual deliberation among Parties. The Contracting Authority has the right to verify adjustments to the Updated Financial Model, where relevant by calling in a (financial) expert.
- (e) The Contracting Authority must notify the Contractor that the adjustments made to the Updated Financial Model are approved within 30 Working Days of receiving the "Update Financial Model" notice. If the Contracting Authority agrees with the adjustments made to the Updated Financial Model, the thusly adjusted Updated Financial Model shall count as the most recent Updated Financial Model.
- (f) The Updated Financial Model must be accompanied by a declaration from an independent auditor which states that the model complies with the requirements imposed by the Contracting Authority and that the model does not contain any model-engineering errors of material importance. The Contracting Authority permits the said declaration from an independent auditor to be in English and that this declaration is made out in the name of the Candidate.

### **3. FUNCTIONAL REQUIREMENTS IMPOSED ON THE UPDATED FINANCIAL MODEL**

The Updated Functional Model must offer at least the following functionality:

- (a) the determination of the compensation for Supervening Events, compensation for Premature Termination, Surplus Profits and the Refinancing Advantages (see Article 3.5);
- (b) clear and explicitly visible calculation or determination of the Gross Availability Payment;
- (c) the unequivocal and explicit, visible calculation and specification of the Weighted Average Capital Interest Rate;
- (d) link between the Gross Availability Payment and
  - (i) the reference rates or the swap base rate; and
  - (ii) the EIB reference rate (where applicable);
- (e) the user-friendliness of at least the computational speed and the performance of the sensitivity analyses;
- (f) optimisation and re-optimisation without the use of macros (this means that it must be possible to also independently perform possible steps driven by a macro). This shall make it possible to determine in a transparent and functional manner that the same

input results in the same output.

#### 4. **SUBSTANTIVE REQUIREMENTS IMPOSED ON THE UPDATED FINANCIAL MODEL**

The Updated Financial Model must at least comply with the substantive requirements specified in this paragraph.

- (a) The Updated Financial Model must comply with generally accepted accounting principles, where the Contractor can exercise his discretion in deciding whether to make use of the Dutch standard (Volume 2, Part 9 of the Dutch Civil Code).
- (b) The Updated Financial Model must (at least) provide an insight into the following:
  - (i) the Gross Availability Payment (GAP) at the end of each Payment Period expressed in terms of the price level on 01.01.11, exclusive of VAT;
  - (ii) the Commencement Date, the Scheduled Availability Date, the Scheduled Completion Date and the Expiry Date;
  - (iii) the Indexation Formula; the parameters that are used in the Indexation formula must be specified and quantified in accordance with the system specified in Article 19 (*Indexation*);
  - (iv) the current value in accordance with the computational method used by the Contracting Authority during the Final Submission;
  - (v) all relevant assumptions such as the (economic) service life and depreciation periods (specified according to project components); this requirement is deemed to have been met when the Updated Financial Model delivers the information needed to prepare financial statements that comply with the accounting standards in accordance with the provisions of subparagraph a of this paragraph;
  - (vi) forecasts with respect to Availability Adjustments and Performance Corrections, fiscal treatment, types of capital (including margins and fees), duration(s) of loan(s), the required return on equity after tax and the capital structure as well as other financial instruments;
  - (vii) a breakdown of the cost items to at least the level of the work packages;
  - (viii) the composition of the interest rate for each financing facility;
  - (ix) a separate insight into the nature and amount of the EIB financing;

- (x) at which stages during the term of the agreement, which amounts shall be paid and/or received by the Contractor in respect of sales tax (VAT), corporate income tax and any other relevant taxes;
  - (xi) into both the minimum, legal and average cover ratios, being at least the debt service cover ratio (DSCR), the loan life cover ratio (LLCR) and the project life cover ratio (PLCR), according to the definition required by the Lenders;
  - (xii) into the internal rate of return (IRR) during the entire term of the agreement in both real and nominal terms including at least the project IRR - pre tax, project IRR - post tax, equity investor IRR, subordinated debt IRR (post tax) and blended equity IRR (post tax), according to the definition required by the Lenders;
  - (xiii) into every other financial ratio required by the financing parties or which is of relevance to the financing structure;
  - (xiv) the debt profiles of the financing facilities.
- (c) Unless explicitly specified otherwise the Updated Financial Model must reflect the situation as of the time of update.

#### **5. MODEL-ENGINEERING AND MODEL STRUCTURE REQUIREMENTS IMPOSED ON THE UPDATED FINANCIAL MODEL**

The Updated Financial Model must at least comply with the model-engineering and model structure requirements specified in this paragraph.

- (a) The Updated Financial Model shall contain at least the following summaries:
- (i) a summary of the output;
  - (ii) the data book;
  - (iii) a ratio analysis;
  - (iv) the balance sheet;
  - (v) the profit and loss account;
  - (vi) the cash flow statement;
  - (vii) the financing structure;
  - (viii) the Availability Payment phased over the time;
  - (ix) sensitivities; and
  - (x) taxes.

- (b) The Updated Financial Model must be applicable for the following software: the Dutch version of Microsoft Excel 2003 or other software used in its place and approved by the Contracting Authority.
- (c) the Updated Financial Model must be a standalone model and, consequently, must not contain links to other models or require plug-ins or other software of third parties;
- (d) All functions of the Updated Financial Model, formulae and references must be operational. No parts of the Updated Financial Model may be protected with passwords.
- (e) The Contractor must, when software developments make it impossible to use the Updated Financial Model, adapt and/or renew the software in consultation with the Contracting Authority to ensure that the Updated Financial Model continues to operate.
- (f) The Updated Financial Model must comply with the requirements governing financial models relating to transparency and the provision of an audit trail. In particular, this also requires a clear distinction between input (variable and fixed input), calculation fields and output. It must be traceable where cells refer to and/or are derived from, to the extent that this is possible with the auditing tools of the software (as stipulated under b of this paragraph);
- (g) The Updated Financial Model must be provided with a manual. This manual must contain (at least) the following information:
  - (i) a description of the assumptions;
  - (ii) the user's instructions;
  - (iii) a description of the functionality;
  - (iv) a detailed description of the operation of any macros, where relevant;
  - (v) a description of the procedure which states which components and associated algorithms of the model are adjusted for the determination of the Compensation for Supervening Events, Compensation due to Premature Termination and the Refinancing Advantages respectively. The aforementioned components and associated algorithms must be incorporated in the Updated Financial Model such that they are visible, transparent, unequivocal and recognisable to the Contracting Authority;
  - (vi) a detailed description of the method used to carry out the sensitivity analyses.
- (h) The Updated Financial Model must contain a logbook with records of the adjustments. The logbook must state the reason for the adjustments and a specification of the sequence of the adjustments

including references to the adjusted cells.

- (i) The Updated Financial Model must facilitate the performance of sensitivity analyses in components including the following:
  - (i) changes in the interest charges;
  - (ii) changes in inflation;
  - (iii) changes in corporate income tax and VAT;
  - (iv) changes in the construction costs;
  - (v) changes in the maintenance costs;
  - (vi) delays in the work; and
  - (vii) changes in the Availability Adjustment and Performance Correction.
- (j) The projections (end of period) must be presented at monthly or quarterly level for the Development Phase and at least six-monthly level for the Operational Phase;
- (k) The projections must be expressed in nominal amounts.
- (l) The results must be expressed in the price level on 01.01.11.
- (m) The projections must be displayed until at least three years after the Expiry date of this Agreement.
- (n) The terminology used in the Updated Financial Model must be compatible with the terms used in this Agreement or with their English translations.

## **6. MISCELLANEOUS**

- (a) No adjustments to the Updated Financial Model in accordance with this Schedule may result in corrections to Availability Payments that have already been paid.
- (b) The Updated Financial Model may not be adjusted for macro-economic developments, expenditure or revenue unless these are the result of the agreed financial consequences of Refinancing and a Compensation Event as determined with the aid of the Updated Financial Model.
- (c) The use of the Updated Financial Model may not yield compensation that would result in previously-determined compensation for a Supervening Event being paid again either in whole or in part.
- (d) The Updated Financial Model must, as far as necessary, be updated to reflect changes to the Scheduled Availability Date (and thereby to the Scheduled Completion Date and expected Expiry Date) in terms



of Article 9.2 (a) and the Scheduled Completion Date in terms of Article 9.5 (a).

**DEEL 2**

**SPECIAL PROVISIONS FOR FINANCIAL CLOSE**

**1. UPDATING FOR FINANCIAL CLOSE**

The Contracting Authority and Contractor shall apply the Financial Close protocol covered in Annex 1 (*Financial Close protocol*) for the achievement of the Financial Close.

**DEEL 3****SPECIAL PROVISIONS FOR COMPENSATION EVENTS****1. ADJUSTMENT TO UPDATED FINANCIAL MODEL WHEN ADJUSTING GAP**

If the Contracting Authority notifies the Contractor that it is considering the payment of a compensation on the basis of Article 9.3 (*Compensation Event*) by means of an adjustment to the Gross Availability Payment as referred to in Schedule 3 (*Compensation for Supervening Events*), paragraph 2.3, the following provisions apply.

- (a) The Contractor adjusts the most recent Updated Financial Model to reflect the applicable situation immediately prior to occurrence of the Supervening Event.
- (b) The Contractor incorporates the part of the Financial Loss the Contracting Authority does not compensate pursuant to Schedule 3 (*Compensation for Supervening Events*), paragraph 2.2, in the Updated Financial Model adjusted pursuant to the provisions of (a) in this paragraph, such whereby the Gross Availability Payment (GAP) resulting from this model remains unchanged.
- (c) The Contractor incorporates the part of the Financial Loss the Contracting Authority does compensate pursuant to Schedule 3 (*Compensation for Supervening Events*), paragraph 2.2, in the Updated Financial Model adjusted pursuant to the provisions under (b) in this paragraph. The Contractor uses these new input parameters to calculate the new GAP. The Contractor must demonstrate that no other influences can affect the GAP resulting from this step, other than the compensation of the Financial Disadvantage (including any costs and conditions for additional financing).
- (d) The Contractor must demonstrate that the new GAP calculated according to the provisions under (c) is such that the return percentage after tax on:
  - (i) paid-up and outstanding shares in the capital of the Contractor plus any agreed and paid premium; and
  - (ii) the principal amounts outstanding pursuant to the Shareholder Loan Agreements;
 remains unchanged in comparison to the situation immediately prior to the occurrence of the Supervening Event.
- (e) The Contractor must carry out the steps described under (a) to (c) inclusive within 30 Working Days after receiving the Contracting Authority's notice referred to under (a). The Updated Financial Model as referred to under (c) becomes the most recent Updated Financial

Model only once the Contracting Authority, after these steps have been carried out, notifies the Contractor that he has definitively decided to compensate the Contractor (in full or in part) by an adjustment of the Gross Availability Payment as referred to in Schedule 3 (*Compensation for Supervening Events*), paragraph 2.3 (a) under (iii).

**DEEL 4****SPECIAL PROVISIONS FOR PREMATURE TERMINATION****1. TERMINATION DUE TO AN IMMEDIATE TERMINATION EVENT OR A CONTRACTOR DEFAULT**

For the purpose of determining the present value of the expected payments the Contracting Authority would have had to make as referred to in Schedule 4 paragraph 1.2 (a), the Contractor shall adjust the most recent Updated Financial Model in such a way that this model

- (a) reflects the expected payments the Contracting Authority would have had to make to the Contractor if the Agreement had continued from the date it was terminated until the Expiry Date; and
- (b) reflects the expected payments the Contractor would have had to make to the Contracting Authority had the Agreement continued from the date on which the Agreement ends to the Expiry Date.

**2. TERMINATION DUE TO A CONTRACTING AUTHORITY DEFAULT OR VOLUNTARY TERMINATION BY THE CONTRACTING AUTHORITY**

- (a) The Contractor updates the Updated Financial Model such that it reflects the situation with respect to the principal amounts outstanding pursuant to the Shareholder Loan Agreements as referred to in the AL\* compensation component and the paid-up and outstanding share capital plus any agreed and paid premium as referred to in the Shrs compensation component in Schedule 4 paragraph 2.1(c) and (d) on the date of the termination of the Agreement.
- (b) To prepare for the determination of the RC1 compensation component as referred to in Schedule 4, paragraph 2.1 (e), the Contractor adjusts the Updated Financial Model on the termination date such that the model reflects the actual financial progression over the period from the Contract Date to the date on which the Agreement is terminated.
- (c) To prepare for the determination of the RC1 compensation component in Schedule 4, paragraph 2.1 (e), the Contractor adds a module to the Updated Financial Model, if necessary, for the calculation of the RC1 compensation component.

**3. TERMINATION DUE TO A (PROLONGED) DELAY EVENT**

- (a) The Contractor updates the Updated Financial Model such that it reflects the situation with respect to the principal amounts outstanding pursuant to the Shareholder Loan Agreements as referred to in the AL\* compensation component and the paid-up and

outstanding share capital plus any agreed and paid premium as referred to in the Shrs compensation component in Schedule 4 paragraph 3.1(c) and (d) on the date of the termination of the Agreement.

- (b) For the purpose of determining the RC1\* compensation component as referred to in Schedule 4 paragraph 3.1 (e), the Contractor shall adjust the Updated Financial Model as of the termination date in such a way that the model reflects the actual financial progression over the period from the Contract Date to the termination date.
- (c) For the purpose of determining the RC1\* compensation component in Schedule 4 paragraph 3.1 (e), the Contractor shall add a module to the Updated Financial Model where the RC1\* compensation component is calculated.

#### **4. TERMINATION DUE TO A FORCE MAJEURE EVENT**

The Contractor updates the Updated Financial Model such that it reflects the situation with respect to the principal amounts outstanding pursuant to the Shareholder Loan Agreements as referred to in the AL\* compensation component and the paid-up and outstanding share capital plus any agreed and paid premium as referred to in the Shrs\* compensation component in Schedule 4 paragraph 4.2(c) and (d) on the date of the termination of the Agreement.

**DEEL 5****SPECIAL PROVISIONS FOR REFINANCING****1. ADJUSTMENT TO FINANCIAL MODEL FOR REFINANCING (ARTICLE 3.4)**

- (a) The consultation regarding determination of the financial benefit and payment scheme as referred to in Article 3.4 must lead to agreement on the manner of adjusting the Updated Financial Model and the outcomes of these adjustments in order to arrive at the determination of the financial benefit.
- (b) The determination of the financial benefit is made on the basis of a comparison between the expected payments made to the Shareholders by the Contractor before and after the Refinancing.
- (c) Two calculations are made for this purpose – before and after Refinancing – with the use of 2 new Financial Models: (i) The pre-refinancing Updated Financial Model and (ii) the post-refinancing Updated Financial Model. With the exception of the effect of the Refinancing itself, all assumptions and formulae must be the same in these two models.
- (d) The pre-refinancing Updated Financial Model projects the Contractor's cash flows, including the expected payments made to Shareholders by the Contractor, from the intended time of Refinancing until the Expiry Date.
- (e) In order to arrive at the pre-refinancing Updated Financial Model, the Contractor must make use of the most recent Updated Financial Model. The consequences for the period between the intended time of Refinancing and the Expiry Date of Compensation Events and Contracting Authority Changes that took place between the time of Financial Close and the intended time of Refinancing must be incorporated in the pre-refinancing Financial Model. In this case, the Contractor shall index every amount expressed in Euros in this Agreement that is indexed according to the system described in Article 19 (*Indexation*). When calculating the Index figures that related wholly or partially to the period following the date of Refinancing, a growth figure shall be used for the developments in the price index figure included in the Indexation Formula that is equal to the mathematical average of that price index figure over a period of 5 calendar years prior to the year that includes the date of Refinancing.
- (f) The post-refinancing Updated Financial Model is obtained by adjusting the pre-refinancing Updated Financial Model for the financing terms applicable from the intended time of Refinancing.
- (g) The financial benefit is determined and paid as follows:

- (i) For the period from the intended time of Refinancing to the Expiry Date the expected payments to be made by the Contractor to Shareholders deriving from the pre-refinancing Updated Financial Model are deducted from the expected payments to be made by the Contractor to Shareholders deriving from the post-refinancing Updated Financial Model.
- (ii) The difference resulting from (g), under (i), of this paragraph is then broken down into a series of payments for each Payment Period from the date of Refinancing until the Expiry Date. This is the series of payments referred to in Article 3.4 (h) of the Agreement.
- (iii) Every amount from this payment series as referred to under (g) subparagraph (ii) of this paragraph is multiplied by the percentage of the financial benefit gained with a refinancing as included in Article 3.4 paragraph (h) of the Agreement. The Contractor must pay the series of amounts obtained thus to the Contracting Authority, at the Contractor's discretion as:
  - (A) payments in accordance with the series that is obtained in this way; or
  - (B) a lump-sum payment where the quarterly amounts are converted into current values at the date of Refinancing using the Weighted Average Cost of Capital resulting from the post-refinancing Updated Financial Model.
- (iv) The Contracting Authority may set off payment(s) to be received on the basis of the provisions under (iii) against all amounts due to Contracting Authority and which can be claimed from the Contractor.



## DEEL 6

### SPECIAL PROVISIONS FOR EXCESS PROFITS

#### 1. ADJUSTMENT TO FINANCIAL MODEL FOR THE DETERMINATION OF EXCESS PROFITS (ARTICLE 20.2)

The following provisions apply to updating the Updated Financial Model to be submitted by the Contractor to the Contracting Authority pursuant to Article 20.2:

- (a) The most recent Updated Financial Model is to be updated for all agreed or determined financial consequences of all Supervening Events.
- (b) The Updated Financial Model is not to be updated for costs resulting from payments to Shareholders of the Contractor that:
  - (i) were not provided for in the Original Financial Model;
  - (ii) have no connection with the expected performances within the context of the implementation of the Agreement at the time of the conclusion of the Agreement; or
  - (iii) are intended to restrict the excess profits as referred to in this Agreement.

**ANNEX 1 FINANCIAL CLOSE PROTOCOL**

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## SCHEDULE 11 INSURANCE

[●●]

## SCHEDULE 12 DISSEMINATED INFORMATION

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**SCHEDULE 13 THIRD-PARTY CABLES AND CONDUITS**

**DEEL 1**

**THIRD PARTY CABLES AND CONDUITS CATEGORY 1**

[●]

**DEEL 2**

**THIRD PARTY CABLES AND CONDUITS CATEGORY 2**

[●]

**SCHEDULE 14**

## RIGHTS OF THIRD PARTIES TO ACCESS RWS INFRASTRUCTURE

[●]

**SCHEDULE 15**



## ACCESS EXCEPTIONS TO RWS INFRASTRUCTURE

[●]