

**Annexure A – Design,  
Construction and  
Commissioning of the M5  
West Widening**

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# Annexure A – Design, Construction and Commissioning of the M5 West Widening

## 1. DEFINITIONS AND INTERPRETATION

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### 1.1 Definitions

In this annexure A:

**Approval** means any licence, permit, consent, approval (including the M5 West Widening Project Approval), determination, certificate or permission from any Authority or under any Law, or any requirement made under any Law which must be obtained or satisfied (as the case may be):

- (a) to perform the Company's Work;
- (b) in connection with the M5 West Widening Site and any Extra Land; or
- (c) for the use of the M5 West Widening, the Tollroad and the M5 Western Link.

**Artefacts** means any fossils, bones, artefacts, coins, articles of antiquity, structures or other remains or things of scientific, geological, historical, archaeological or aboriginal interest or things otherwise of value.

**Authority** means:

- (a) any governmental or semi-governmental or local government authority, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality;
- (b) any other person having a right to impose a requirement, or whose consent is required, under Law with respect to any part of the Company's Work; or
- (c) any other person having jurisdiction over, or ownership of, the Services, the Service Works, the M5 West Widening Local Roads or the M5 West Widening Local Road Works.

**Business Day** means any day on which banks are generally open for business in Sydney (other than Saturdays, Sundays and public holidays).

**Certificate of Construction Completion** means a certificate substantially in the form of Schedule 8 to the Certification Schedule certifying that Construction Completion has occurred.

**Certificate of Final Completion** means a certificate substantially in the form of Schedule 8 to the Certification Schedule certifying that Final Completion has occurred.

**Certification Schedule** means Appendix 25 to the Scope of Works and Technical Criteria.

**Change** means any variation or change to the M5 West Widening Works or the M5 West Widening Temporary Works and includes any addition, increase, decrease, omission, deletion, demolition or removal to or from the M5 West Widening Works or the M5 West Widening Temporary Works.

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**Change Costs** means:

- (a) where a Change directed by RMS under clause 8.1(a) (or deemed to have been so directed under clauses 4.1(e) or 4.2(b)) increases:
  - (i) the scope or the cost of the Company's Work; or
  - (ii) the operating and maintenance costs under the F-5 Tollroad Project Deed or the M5 Western Link Project Deed,

the reasonable costs incurred by the Company arising out of or in connection with the Change (including any increased construction costs, operating costs, maintenance costs or financing costs, whether in relation to the Tollroad, the M5 Western Link or the M5 West Widening Project Works together with a reasonable amount, which is agreed to be at 6%, for the Company's overhead and profit associated with the Change);
- (b) if clause 4.2(b) applies and the Change prevents the Company from achieving Construction Completion by the Date for Construction Completion:
  - (i) delay costs incurred by the Company; and
  - (ii) loss and delay of receipt of revenue suffered by the Company,

in carrying out the Change; and
- (c) delay costs incurred by the Company in carrying out the Change directed by RMS under clause 8.1(a), if it prevents the Company from achieving Construction Completion by the Date for Construction Completion, except to the extent that the Company and its Subcontractors have not taken all reasonable steps to mitigate the delay,

on the basis that:

- (d) reasonable costs incurred by the Company (including delay costs) in paragraphs (a), (b) and (c) will include:
  - (i) the reasonable direct costs of the Contractor arising out of or in connection with the Change which are invoiced to the Company; plus
  - (ii) a margin of 27% on those reasonable direct costs (on account of the overheads and profit of the Contractor); and
- (e) for the avoidance of doubt, no margin will apply in respect of any loss or delay of receipt of revenue referred to in paragraph (b)(ii).

**Change Order** means a change order directed by RMS under clause 8.1(a) or deemed to have been so directed under clauses 4.1(e) or 4.2(b).

**Change Savings** means where the Change decreases the scope or the cost of the Company's Work, the savings arising out of or in connection with the Change (including any savings in relation to construction costs, operating costs, maintenance costs, financing costs and acceleration savings, whether in relation to the Tollroad, the M5 Western Link or the M5 West Widening Works). For the purposes of valuing Change Savings applicable to the construction costs, the amount shall be equal to the reasonable costs of the construction work plus an amount of 10%, being the total margin for overhead and profit applicable to the reasonable cost of the construction work.

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**Claim** includes any claim, action, demand or proceeding:

- (a) under, arising out of, or in any way in connection with, the M5 West Widening Deed;
- (b) arising out of, or in any way in connection with, the M5 West Widening Works or any Party's conduct prior to the date of the M5 West Widening Deed; or
- (c) otherwise at law or in equity including:
  - (i) by statute;
  - (ii) in tort for negligence or otherwise, including negligent misrepresentation; or
  - (iii) for restitution, including restitution based on unjust enrichment.

**Community Involvement Plan** means the M5 West Widening Project Plan of that name referred to in Appendix 14 to the Scope of Works and Technical Criteria, the initial one of which appears as Appendix 40 to the Scope of Works and Technical Criteria.

**Community Relations Manager** means the person appointed to that position under clause 5.3(b) as at the date of the M5 West Widening Deed or any person appointed as a replacement under clause 5.3(b).

**Company Documentation Schedule** means Appendix 24 to the Scope of Works and Technical Criteria.

**Company's Representative** means Ian Sinclair or any other persons appointed from time to time by the Company under clause 5.2.

**Company's Work** means all things and tasks which the Company is, or may be, required to carry out or do, to comply with its obligations under the M5 West Widening Deed, including all things and tasks necessary to plan, design, construct, commission and complete the M5 West Widening Works and the M5 West Widening Temporary Works whether undertaken before, on or after the date of the M5 West Widening Deed, including under the Interim Design and Independent Verification Deed.

**Concept Design** means the documents which appear as Appendix 30, Appendix 39, Appendix 42, Appendix 46, Appendix 48 and Appendix 52 to the Scope of Works and Technical Criteria.

**Construction Completion** means when:

- (a) the M5 West Widening Works have been completed in accordance with the M5 West Widening Deed except for minor Defects which:
  - (i) do not prevent the Tollroad, the M5 Western Link and the M5 West Widening from being reasonably capable of being used for the safe, efficient and continuous passage of motor vehicles;
  - (ii) the Independent Verifier determines that the Company has reasonable grounds for not promptly rectifying; and
  - (iii) can be rectified without prejudicing the safe, efficient and continuous passage of vehicles on the Tollroad, the M5 Western Link and the M5 West Widening; and



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- (b) the Company has done everything which the M5 West Widening Deed requires the Company to do as a condition precedent to Construction Completion, including those things set out in part 1 of Schedule 2.

**Construction Manager** means the person appointed to that position under clause 5.3(b) as at the date of the M5 West Widening Deed or any person appointed as a replacement under clause 5.3(b).

**Construction Plan** means the M5 West Widening Project Plan of that name referred to in Appendix 14 to the Scope of Works and Technical Criteria, the initial one of which appears as Appendix 38 to the Scope of Works and Technical Criteria.

**Contamination:**

- (a) means any waste, Pollution, hazardous substance, toxic substance, dangerous goods, hazardous waste or special waste, or any constituent of any such substance or waste in any water, soil or in the air including acid sulphate soils; and
- (b) without limiting paragraph (a), has the meaning given to Contamination in the *Contaminated Land Management Act 1997 (NSW)*.

**Contractor** means Abigroup Contractors Pty Ltd (ABN 40 000 201 516).

**Contractor Guarantor** means Lend Lease Corporation Ltd ABN 32 000 226 228.

**Corporations Act** means the *Corporations Act 2001 (Cth)*.

**Date for Construction Completion** means 24 December 2014, provided that where the Satisfaction Date occurs later than 30 June 2012, 24 December 2014 shall be extended by the number of days between 30 June 2012 and the Satisfaction Date.

**Date for Final Completion** means 24 March 2015, provided that where the Satisfaction Date occurs later than 30 June 2012, 24 March 2015 shall be extended by the number of days between 30 June 2012 and the Satisfaction Date.

**Date of Construction Completion** means the date of Construction Completion certified in the Certificate of Construction Completion in accordance with clause 10.2.

**Date of Final Completion** means the date of Final Completion certified in the Certificate of Final Completion in accordance with clause 10.2.

**Deed of Appointment of Environmental Representative** means the deed so titled between the Company, RMS and the Environmental Representative dated on or about the date of the M5 West Widening Deed.

**Deed of Appointment of Independent Verifier** means the deed so titled between the Company, RMS and the Independent Verifier dated on or about the Satisfaction Date.

**Deed of Engagement of Principal Contractor** means the deed so titled between the Company, RMS and the Contractor dated on or about the date of the M5 West Widening Deed.

**Defect** means any:

- (a) defect, shrinkage, movement, deficiency, subsidence, fault or omission in the M5 West Widening Works or the M5 West Widening Temporary Works; or
- (b) other aspect of the M5 West Widening Works or the M5 West Widening Temporary Works,

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which is not in accordance with the requirements of the M5 West Widening Deed.

**Defects Correction Period** means a period referred to in clauses 11.4, 11.5, 11.6 or 11.7.

**Design Documentation** means all design documentation (including design standards, design reports, durability reports, specifications, models, samples, calculations and drawings and all drafts, editions, alterations and adaptations) in computer readable and written forms, or stored by other means, which the Company or any other person creates in performing the Company's Work (including the design of the M5 West Widening Temporary Works) which, for the avoidance of doubt, includes the Concept Design and Early Design Documentation.

**Design Manager** means the person appointed to that position under clause 5.3(b) as at the date of the M5 West Widening Deed or any person appointed as a replacement under clause 5.3(b).

**Design Plan** means the M5 West Widening Project Plan of that name referred to in Appendix 14 to the Scope of Works and Technical Criteria, the initial one of which appears as Appendix 37 to the Scope of Works and Technical Criteria.

**Early Design Documentation** means the design prepared by the Company prior to the date of the M5 West Widening Deed, including the design referred to in annexure I to the M5 West Widening Deed.

**Environment** includes all aspects of the surroundings of human beings including:

- (a) the physical characteristics of those surroundings such as the land, the waters and the atmosphere;
- (b) the biological characteristics of those surroundings such as the animals, plants and other forms of life; and
- (c) the aesthetic characteristics of those surroundings such as their appearance, sounds, smells, tastes and textures.

**Environmental Documents** means:

- (a) the M5 West Widening Project Approval; and
- (b) Appendix 4 to the Scope of Works and Technical Criteria.

**Environmental Management Plans** means the M5 West Widening Project Plans of that name referred to in Appendix 14 to the Scope of Works and Technical Criteria, the initial one of which appears as Appendix 36 to the Scope of Works and Technical Criteria.

**Environmental Representative** or **ER** means Vantage Environmental Management Pty Ltd ACN 124 916 605 or such other persons as may be engaged by RMS and the Company in accordance with the Deed of Appointment of Environmental Representative.

**Environmental Manager** means the person appointed to that position under clause 5.3(b) as at the date of the M5 West Widening Deed or any person appointed as a replacement under clause 5.3(b).

**EP&A Act** means the *Environmental Planning and Assessment Act 1979* (NSW) and Regulations.

**Existing Operations** means all of the obligations of the Company under the F-5 Tollroad Project Deed and the M5 Western Link Project Deed.

**Extra Land** means the land referred to in clause 2.3(a)(i).

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**Final Completion** means:

- (a) the provision to RMS (in a form satisfactory to RMS, acting reasonably) of all of the documents and other information described in part 2 of Schedule 2;
- (b) the Company has done everything else which the M5 West Widening Deed requires the Company to do as a condition precedent to Final Completion, including the satisfaction of all other requirements described in part 2 of Schedule 2.

**Hold Point** has the meaning given to that term in the Scope of Works and Technical Criteria.

**Independent Verifier** means Parsons Brinckerhoff Australia Pty Ltd ABN 80 078 004 798 or such other person as may be agreed in writing by RMS and the Company.

**Information Document** means the following documents in any format or medium including any electronic form:

- (a) the documents specified in Schedule 6;
- (b) any other information or document provided to the Company before, on or after the date of the M5 West Widening Deed and which was or is expressly stated to be an Information Document; and
- (c) any other information or document which is referred to or incorporated by reference in information or a document referred to in paragraph (a) or (b), unless such information or document is otherwise expressly stated to form part of the M5 West Widening Deed.

**Intellectual Property Rights** means all present and future rights throughout the world conferred by law or in relation to any copyright, patent, invention, trade secret, know how, registered and unregistered design, circuit layouts, trademarks or name or other protected right whether or not registrable, registered or patentable. These rights include:

- (a) all rights in all applications to register these rights;
- (b) all renewals and extensions of these rights; and
- (c) all rights in the nature of these rights, excluding Moral Rights.

**Interim Design and Independent Verification Deed** means the document so titled between RMS, the Company and the Independent Verifier dated 9 May 2012.

**Law** means:

- (a) Commonwealth, New South Wales or local government legislation including regulations, by-laws and other subordinate legislation;
- (b) those principles of law established by decisions of courts; and
- (c) lawful requirements of an Authority and Approvals (including any condition or requirement under them).

**Loss** includes:

- (a) any cost, expense, loss, damage or liability whether direct, indirect or consequential (including pure economic loss), present or future, fixed or unascertained, actual or contingent; and

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- (b) without being limited by paragraph (a) and only to the extent not prohibited by Law, any fine or penalty.

**Maintenance Manual** means the operation, maintenance and repair manual prepared in accordance with the requirements of the F-5 Tollroad Project Deed and further developed to incorporate the Maintenance Work associated with the M5 West Widening.

**Maintenance Work** means the work which the Company is or may be required to carry out under the F-5 Tollroad Project Deed in order to operate, maintain and repair the M5 West Widening.

**Manifest Error** means any error of law or fact or both (whether on the face of the determination of the Independent Verifier or otherwise) which, having regard to all of the circumstances, is evident or obvious.

**Migratory Contamination** means Contamination which originates from outside the Land and migrates to the Land during the period from the date of the M5 West Widening Deed to the Date of Construction Completion, except to the extent that it:

- (a) is caused by the default of the Company, the Contractor or any of their Subcontractors; or
- (b) could have been prevented or minimised by the Company, the Contractor or any of their Subcontractors, by the implementation of measures that would have been taken by a competent and experienced contractor to prevent or minimise such migration.

**M5 Leases** means each of the Lease (excluding the Moorebank Avenue Lease), the Moorebank Avenue Lease, the Western Link Lease and the Bridge Works Lease.

**M5 Resurfacing (Existing Tollroad) Works** means the resurfacing of the existing pavement of the Tollroad and the M5 Western Link as identified in Appendix 8.2 of the Scope of Works and Technical Criteria (pavement type 2).

**M5 West Widening** means the road and other physical works, facilities, systems and Services described in section 2 of the Scope of Works and Technical Criteria including all plant, machinery, equipment, fixtures, furniture, fittings, landscaping, spare parts and other improvements on or in the M5 West Widening Site but which excludes:

- (a) the Tollroad (as defined in the F-5 Tollroad Project Deed immediately prior to the Date of Construction Completion);
- (b) any Plant (as defined in the F-5 Tollroad Project Deed immediately prior to the Date of Construction Completion); and
- (c) the M5 Western Link.

**M5 West Widening Deed** means the deed to which this Annexure A is attached and forms part, together with all annexures to it.

**M5 West Widening Industrial Relations Plan** means the plan of that name to be prepared by the Company in accordance with clause 5.25.

**M5 West Widening Local Road** means any road or road reserve other than the Tollroad or the M5 Western Link which:

- (a) crosses;
- (b) is adjacent to; or

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(c) is in any way affected by,

the M5 West Widening Works or the M5 West Widening Temporary Works.

**M5 West Widening Local Road Works** means the modification, reinstatement and improvement of a M5 West Widening Local Road which the Company must design and construct and hand over to RMS or the relevant Authority in accordance with the M5 West Widening Deed and as specified in sections 2.3.1(c) and 6.2 of the Scope of Works and Technical Criteria.

**M5 West Widening Project Approval** means the approval dated 9 November 2011 issued by the Honourable Brad Hazzard, Minister for Planning and Infrastructure pursuant to Part 3A of the EP&A Act in respect of the M5 West Widening Works and the M5 West Widening Temporary Works and all conditions to it, all of which appears as Part A of Schedule 4 and includes all documents incorporated by reference.

**M5 West Widening Project Control Group** means the group referred to in clause 5.7.

**M5 West Widening Project Management Plan** means the M5 West Widening Project Plan of that name referred to in Appendix 14 to the Scope of Works and Technical Criteria, the initial one of which appears as Appendix 35 to the Scope of Works and Technical Criteria.

**M5 West Widening Project Manager** means the person appointed to that position under clause 5.3(b) as at the date of the M5 West Widening Deed or any person appointed as a replacement under clause 5.3(b).

**M5 West Widening Project Plan** means each of the:

- (a) Quality Plan;
- (b) M5 West Widening Project Management Plan;
- (c) Design Plan;
- (d) Construction Plan;
- (e) Community Involvement Plan;
- (f) Traffic Management and Safety Plan;
- (g) Occupational Health, Safety and Rehabilitation Management Plan;
- (h) M5 West Widening Training Plan; and
- (i) Environmental Management Plans,

as each such plan may be updated, amended and developed under clause 5.13.

**M5 West Widening Project Review Group** means the group referred to in clause 5.8.

**M5 West Widening Proprietary Documentation** means:

- (a) anything (including software and source code) which the Company uses in undertaking the Company's Work (whether in documentary form or not), which is the subject of any Intellectual Property Rights; and
- (b) the Design Documentation,

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and includes Intellectual Property Rights embodied in or attaching to the M5 West Widening Works or the M5 West Widening Temporary Works to which the M5 West Widening Proprietary Documentation relates, but excludes software or source code that is:

- (c) related to the electronic tolling of vehicles using the M5 West Widening; or
- (d) "commercial off the shelf" software.

**M5 West Widening Side Deed** means the deed titled "M5 West Widening Side Deed" entered into between RMS, the Company, the Contractor and the Contractor Guarantor dated on or about the date of the M5 West Widening Deed.

**M5 West Widening Site** means each of the following:

- (a) the land and airspace more particularly described in the Site Access Schedule; and
- (b) the land and airspace included in the M5 Leases which is required for the Company to carry out the Company's Work.

**M5 West Widening Temporary Works** means any temporary physical works performed for the purpose of carrying out the Company's Work, but which do not form part of the M5 West Widening Works.

**M5 West Widening Training Plan** means the M5 West Widening Project Plan of that name referred to in Appendix 14 to the Scope of Works and Technical Criteria, the initial one of which appears as Appendix 44 to the Scope of Works and Technical Criteria.

**M5 West Widening Works** means the physical works which the Company must plan, design, construct, commission and complete under the M5 West Widening Deed, including:

- (a) the M5 West Widening;
- (b) the M5 Resurfacing (Existing Tollroad) Works;
- (c) the Service Works;
- (d) the M5 West Widening Local Road Works; and
- (e) the Property Works,

but excluding the M5 West Widening Temporary Works. For the avoidance of doubt and in light of the operation of clause 2A of the M5 West Widening Deed, references to the M5 West Widening Works includes the Agency Works.

**M5 Western Link** has the meaning given to that term in the M5 Western Link Project Deed.

**M5/M7 Interface Deed** means the document titled "M5/M7 Interface Deed" between RMS, the Company, WestLink Motorway Limited and WSO Co Pty Limited dated on or about the date of the M5 West Widening Deed.

**Moral Rights** means rights of integrity of authorship, rights of attribution of authorship, rights not to have authorship falsely attributed, and rights of a similar nature that exist, or that may come to exist, anywhere in the world.

**Native Title Application** means any claim or application under any Law or future Law relating to native title, including any application under section 61 of the *Native Title Act* 1993 (Cth), except for any such claim or application which is in any way materially based or reliant upon the existence of Artefacts on, under, near or around the M5 West Widening Site or the Temporary Areas.

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**Occupational Health, Safety and Rehabilitation Management Plan** means the M5 West Widening Project Plan of that name prepared by the Company referred to in Appendix 14 to the Scope of Works and Technical Criteria, the initial one of which appears as Appendix 41 to the Scope of Works and Technical Criteria.

**Overall D&C Program** means the overall program for design and construction activities which is annexure J to the M5 West Widening Deed and updated in accordance with clause 5.12.

**Parcel** means a parcel of land and property of which RMS is not the registered proprietor and in relation to which, or upon which, Property Works are to be undertaken.

**Party** means each of the Minister, RMS and the Company and **Parties** means each of them.

**Personal Information** has the meaning given to that term in:

- (a) the *Privacy and Personal Information Protection Act 1998 (NSW)*; and
- (b) the *Health Records and Information Privacy Act 2002 (NSW)*.

**Pollution** includes any solid, liquid, gas, odour, heat, sound, vibration, radiation or substance which makes or may make the Environment:

- (a) unsafe or unfit for habitation or occupation by persons or animals;
- (b) degraded in its capacity to support plant life;
- (c) contaminated; or
- (d) otherwise environmentally degraded.

**Privacy Acts** means:

- (a) the *Privacy and Personal Information Protection Act 1998 (NSW)*; and
- (b) the *Health Records and Information Privacy Act 2002 (NSW)*.

**Property Works** means:

- (a) those works described in section 2.3.1(b) and section 6.1 of the Scope of Works and Technical Criteria; and
- (b) all other works necessary to ensure that:
  - (i) the amenity of;
  - (ii) access to and egress from; or
  - (iii) the functionality of,

any property (including any structure thereon), including such property located outside of the M5 West Widening Site, which is affected by the Company's Work is maintained to at least the standard that it was in immediately prior to the date of the M5 West Widening Deed including:

- (iv) fences to separate the property located outside of the M5 West Widening Site from property located within the M5 West Widening Site;
- (v) access routes;

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- (vi) drainage structures; and
  - (vii) landscaping and reinstatement works.

**Quality Manager** means the person appointed to that position under clause 5.3(b) as at the date of the M5 West Widening Deed or any person appointed as a replacement under clause 5.3(b).

**Quality Plan** means the M5 West Widening Project Plan of that name referred to in Appendix 14 to the Scope of Works and Technical Criteria, the initial one of which appears as Appendix 34 to the Scope of Works and Technical Criteria.

**Recognised Insurance Market** means the Australian and London Insurance Markets.

**Related Body Corporate** has the same meaning as in the Corporations Act.

**Related Entity** has the same meaning as in the Corporations Act.

**Relevant Insurer** means an insurer with a claims paying ability rating of at least "A –" by S&P or an equivalent rating by another recognised insurance rating agency.

**Roads Act** means the *Roads Act* 1993 (NSW).

**Road Occupancy Licence** is a licence issued by RMS that authorises the occupation of a section of the road network that would normally be available for traffic.

**RMS Assistant Representative** has the meaning given in clause 5.1(b).

**RMS Surveillance Officer** has the meaning given in clause 5.1(c).

**RMS' Representative** means:

- (a) the person appointed by RMS under clause 5.1(a)(i); or
- (b) any other person appointed from time to time by RMS under clause 5.1(a)(ii).

**S&P** means Standard & Poor's (Australia) Pty Ltd ACN 007 324 852 and its successors and assigns.

**Scope of Works and Technical Criteria** means the documents and drawings set out in annexure H to the M5 West Widening Deed.

**Security Bond** means the unconditional and irrevocable undertaking referred to in clause 12.1.

**Service** means any service or item of infrastructure, including water, electricity, gas, fuel, telephone, existing drainage, sewerage, railway and electronic communications services (except those communication systems provided as part of the Company's Work as generally described in Appendix 51 to the Scope of Works and Technical Criteria).

**Service Works** means the construction, modification or relocation of Services, all of which are to be designed and constructed by the Company and handed over to RMS, an Authority or another person in accordance with the M5 West Widening Deed.

**Site Access Schedule** means annexure L to the M5 West Widening Deed.

**Subcontract** includes an agreement for supply of goods or services (including plant hire) or a consultant (including a designer) or any of them.

**Subcontractor** includes a subcontractor, a supplier of goods or services (including plant hire) or a consultant (including a designer) or any of them.



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**Subsidiary D&C Programs** means the subsidiary programs referred to in clause 5.12(a).

**Taxes** means all income tax, stamp duty, and other taxes, levies, imposts, duties, deductions, charges and withholdings plus any interest, penalties, charges, fees or other amounts payable in respect thereof.

**Temporary Areas** means the land described as such in the Site Access Schedule.

**Term** has the meaning given in the F-5 Tollroad Project Deed.

**Tollroad** has the meaning given to that term in the F-5 Tollroad Project Deed.

**Traffic Management and Safety Plan** means the M5 West Widening Project Plan of that name referred to in Appendix 14 to the Scope of Works and Technical Criteria, the initial one of which appears as Appendix 43 to the Scope of Works and Technical Criteria.

**Traffic Management Plan** means the plan or plans of that name referred to in section 8.17 of the Scope of Works and Technical Criteria.

## 1.2 Definitions in the M5 West Widening Deed

Except as otherwise defined in clause 1.1, terms used in this annexure A that are defined in the M5 West Widening Deed have the same meaning where used in this annexure A.

## 1.3 Interpretation

In this annexure A unless the context indicates a contrary intention:

- (a) a reference to a clause, schedule or exhibit is a reference to a clause of, or a schedule or exhibit to, this annexure A;
- (b) a reference to this annexure A includes all schedules and exhibits to this annexure A; and
- (c) a reference to "fit for purpose", "fit for its intended purposes", "fit for their intended purposes" or "intended purpose" means the purpose or purposes as stated in, implied from, or contemplated by, this annexure A or other parts of the M5 West Widening Deed.

## 2. LOCATION OF THE M5 WEST WIDENING WORKS

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### 2.1 Access

Subject to any other provisions of the M5 West Widening Deed affecting access, RMS must give, or ensure that the Company, the Contractor and its Subcontractors have, sufficient access to that part of the M5 West Widening Site and the Temporary Areas described in the Site Access Schedule, by the dates set out in the Site Access Schedule to allow them to carry out the Company's Work (including the correction of Defects).

### 2.2 Company accepts risk

Except as otherwise expressly provided in the M5 West Widening Deed, the Company agrees that the Company's use and occupation of the M5 West Widening Site and the Temporary Areas from the date on which the Company is granted access by RMS in accordance with this clause 2 will at all times be at the risk of the Company.

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## 2.3 Extra Land

- (a) The Company must:
  - (i) procure for itself and at its own cost the occupation or use of or relevant rights over any land in addition to the M5 West Widening Site and the Temporary Areas which is necessary or which it may deem requisite or necessary for the Company's Work including land required for the M5 West Widening Local Road Works, the M5 Resurfacing (Existing Tollroad) Works, the Property Works and the Service Works; and
  - (ii) without limiting the Company's obligations under clause 15.3, provide to RMS:
    - (A) a properly executed release, which the Company must use its best endeavours to obtain, on terms satisfactory to RMS from all claims or demands (whether for damages or otherwise howsoever arising) from the owner or occupier of, and from other persons having an interest in, such land; or
    - (B) a statement signed by the Company to the effect that, despite the best endeavours of the Company, such owner or occupier has failed or refused to sign such a release.
- (b) The Company acknowledges that:
  - (i) integration of the requirements for access to Extra Land is at the sole risk of the Company; and
  - (ii) RMS will not be liable upon any Claim (insofar as is permitted by Law) by the Company arising out of or in any way in connection with:
    - (A) identifying and obtaining access to Extra Land; or
    - (B) any delay, additional costs or other effects on the Company's Work related to the ability of the Company or the Contractor to obtain access to Extra Land.
- (c) The Company must ensure that:
  - (i) the use; and
  - (ii) the rehabilitation,

of Extra Land is to the satisfaction of the owner of the land, any lessee of the land, RMS and all relevant Authorities.

## 2.4 Access by RMS

Up to and including the Date of Final Completion and without limiting any of RMS' other rights of access including under clauses 2.11 and 7.2(a), RMS' Representative and any person authorised by RMS will:

- (a) subject to reasonable safety and security requirements, have the right of access during business hours or on reasonable notice (except in the case of an emergency, when the right of access will be immediate) to:
  - (i) the M5 West Widening Site and the Temporary Areas; and
  - (ii) all other areas relevant to the Company's Work; and

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- (b) be entitled to exercise this right of access for the purposes of:
    - (i) observing progress in the Company's Work and monitoring compliance by the Company of its obligations under the M5 West Widening Deed; and
    - (ii) exercising any right or performing any obligation which RMS has under any M5 West Widening Project Document.

## **2.5 Site Access Schedule**

The Company's rights in accordance with this clause 2 are subject to any restriction upon the access and use of the M5 West Widening Site or the Temporary Areas by the Company specified or referred to in the Site Access Schedule.

## **2.6 Access protocol**

The Company's rights under this clause 2 in respect of any part or parts of the M5 West Widening Site or the Temporary Areas commence upon the later of:

- (a) the date specified as the "Earliest Access Date" in the Site Access Schedule; and
- (b) the date which is 10 Business Days after the receipt by RMS of written notice from the Company that the Company is exercising its rights under this clause 2 in respect of such parts of the M5 West Widening Site or the Temporary Areas (as applicable).

## **2.7 Termination of access**

Without limiting the F-5 Tollroad Project Deed, the M5 Western Link Deed and the M5 Leases, on the date of correction of all Defects in the M5 West Widening Works in accordance with clause 11, the rights of the Company and its contractors, sub-contractors, servants, agents and workmen to have access to the M5 West Widening Site and the Temporary Areas (or any relevant part or parts thereof) pursuant to clause 2 will terminate.

## **2.8 Company acknowledgements**

- (a) RMS does not warrant, guarantee, assume any duty of care or other responsibility for, or make any representation about, the accuracy, adequacy, suitability or completeness of the Information Documents.
- (b) The Company acknowledges that the Information Documents do not form part of the M5 West Widening Deed and that this clause 2.8 applies to Information Documents.
- (c) To the extent permitted by Law, RMS will not be liable upon any Claim by the Company arising out of or in any way in connection with:
  - (i) the Information Documents; or
  - (ii) a failure by RMS to provide any information to the Company.
- (d) The Company:
  - (i) warrants that it did not in any way rely upon:
    - (A) any information (including the Information Documents), data, representation, statement or document made, or provided to the Company, by RMS or anyone on behalf of RMS or any other information, data, representation, statement or document for which

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RMS is responsible or may be responsible whether or not obtained from RMS or anyone on behalf of RMS; or

(B) the accuracy, adequacy, suitability or completeness of such information, data, representation, statement or document,

for the purposes of entering into the M5 West Widening Deed;

- (ii) warrants that it enters into the M5 West Widening Deed based on its own investigations, interpretations, deductions, information and determinations; and
- (iii) acknowledges that it is aware that RMS has entered into the M5 West Widening Deed relying upon the warranties, acknowledgements and agreements in clauses 2.8(d)(i) and 2.8(d)(ii).

(e) The Company releases and indemnifies RMS from and against:

- (i) any Claim against RMS by, or liability of RMS to, any person; or
- (ii) (without being limited by clause 2.8(e)(i)) any Loss suffered or incurred by RMS,

arising out of or in any way in connection with:

- (iii) the provision of, or the purported reliance upon, or use of, the information, data, representations, statements or documents referred to in clause 2.8(d)(i)(A) by the Company, the Contractor or any other person to whom that material is disclosed or made by the Company, the Contractor or any person on the Company's or the Contractor's behalf;
- (iv) any breach by the Company of this clause 2.8;
- (v) a failure by RMS to provide any information to the Company; or
- (vi) the Information Documents being relied upon or otherwise used by the Company, the Contractor or any other person to whom the Information Documents are disclosed by the Company, the Contractor or any person on the Company's or the Contractor's behalf in the preparation of any information or document, including any Information Document which is misleading or deceptive or false and misleading (within the meaning of those terms in section 18 of Schedule 2 and section 29 of Schedule 2 (respectively) of the *Competition and Consumer Act 2010* (Cth) or any equivalent provision of State or Territory legislation).

## 2.9 Physical conditions

- (a) The Company warrants that prior to the date of the M5 West Widening Deed it:
  - (i) had sufficient opportunity to review and obtain, and obtained, all necessary legal, geotechnical and other technical advice in relation to the M5 West Widening Deed, the Information Documents, the physical conditions and characteristics of the M5 West Widening Site, Extra Land and the Temporary Areas and their surroundings and any other information that was made available in writing by RMS, or any other person on RMS' behalf, to the Company for the purposes of entering into the M5 West Widening Deed as well as the risks, contingencies and other circumstances having an effect on its entry into the M5 West Widening

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Deed, the cost of performing its obligations and its potential liabilities under the M5 West Widening Deed;

- (ii) examined, and relied solely upon its own assessment, skill, expertise and enquiries in respect of, all information relevant to the risks, contingencies and other circumstances having an effect on its entry into the M5 West Widening Deed and its obligations under the M5 West Widening Deed;
  - (iii) has made adequate allowance for the costs of complying with all the obligations under the M5 West Widening Deed and of all matters and things necessary for the due and proper performance and completion of the Company's Work;
  - (iv) informed itself of all matters relevant to the employment of labour at the M5 West Widening Site and the Temporary Areas and all industrial matters relevant to the M5 West Widening Site, the Temporary Areas and the Company's Work; and
  - (v) had sufficient access to the M5 West Widening Site, Extra Land and Temporary Areas, undertook sufficient tests, enquiries and investigations, had sufficient information and obtained a sufficient understanding of the risks involved to enable it to make an informed decision about whether or not to enter into the M5 West Widening Deed and assume the obligations and potential risks and liabilities which it imposes on the Company.
- (b) Except as otherwise expressly provided in the M5 West Widening Deed, the Company is responsible for, and assumes the risk of all Loss or delay it suffers or incurs arising out of or in connection with, the physical conditions and characteristics of the M5 West Widening Site, the Temporary Areas, any Extra Land, the Environment or their surroundings including:
- (i) the existence of any Contamination;
  - (ii) the suitability or otherwise of any material on the M5 West Widening Site and the Temporary Areas for use in the Company's Work; and
  - (iii) water, atmospheric and sub-surface conditions or characteristics.

**2.10 Condition of M5 West Widening Site, Temporary Areas, Extra Land and existing structures**

- (a) RMS makes no representations and gives no warranty to the Company in respect of:
- (i) the condition of:
    - (A) the M5 West Widening Site, the Temporary Areas or any Extra Land; or
    - (B) any structure or other thing on, above or adjacent to, or under the surface of, the M5 West Widening Site, the Temporary Areas or any Extra Land; or
  - (ii) the existence, location, condition or availability of Services in respect of the M5 West Widening Site, the Temporary Areas or any Extra Land.
- (b) Except as otherwise expressly provided in the M5 West Widening Deed, the Company must accept:

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- (i) the M5 West Widening Site, the Temporary Areas and any Extra Land; and
  - (ii) any structures or other thing on, above or adjacent to, or under the surface of, the M5 West Widening Site, the Temporary Areas and any Extra Land,
- in their present condition and subject to all defects, including all sub-surface conditions.
- (c) If, as a result of a latent defect in the condition of a structure on, above or adjacent to, or under the surface of, the M5 West Widening Site, the Temporary Areas or any Extra Land:
    - (i) the Company proposes a Change in accordance with clause 8.2 in relation to alternative design solutions for achieving the functionality, durability and quality requirements of the Scope of Works and Technical Criteria requested by RMS (**Alternative Design Solutions**); and
    - (ii) in RMS' reasonable opinion, it is not feasible for the Company to carry out the M5 West Widening Works in accordance with the Scope of Works and Technical Criteria (taking into account any additional capital and operating costs to be borne by the Company as a consequence of the latent defect),

RMS must:

- (iii) consider the Change proposed by the Company, including the Company's proposed Alternative Design Solutions;
  - (iv) consider any information and supporting documentation in relation to the Alternative Design Solutions;
  - (v) cooperate with the Company in assessing the Alternative Design Solutions (taking into account total capital and operating costs); and
  - (vi) consider the proposed Change in good faith pursuant to clause 8.2.
- (d) Without limiting clause 6.3, the Company accepts all responsibility for the feasibility and fitness for purpose of the Concept Design and Early Design Documentation including, in respect of the constructability of the Concept Design and Early Design Documentation having regard to the physical conditions and characteristics of the M5 West Widening Site, the Temporary Areas and any Extra Land.

## 2.11 Artefacts

- (a) All Artefacts discovered on or under the surface of the M5 West Widening Site, the Temporary Areas or the Extra Land will (as between RMS and the Company) be the absolute property of RMS.
- (b) The Company must:
  - (i) at all times permit and allow RMS or any person authorised by RMS to watch or examine any excavations on the M5 West Widening Site, the Temporary Areas or the Extra Land;
  - (ii) at its expense, take every precaution to prevent Artefacts being removed or damaged; and
  - (iii) immediately upon discovery of any Artefact notify RMS of such discovery and comply with any directions or orders imposed by any relevant

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Authority upon the Company, the Contractor or RMS in respect of such Artefact.

- (c) Subject to clause 2.11(c)(v), RMS will pay the Company the reasonable costs and expenses directly incurred by:
- (i) the Contractor (excluding any amounts payable by the Contractor to the Company, a Related Entity of the Company or a Related Entity of the Contractor, to the extent that the Contractor or the Related Entity is not engaged by the Contractor on an arm's length basis and on commercial terms); and
  - (ii) the Company (without double counting) (excluding any amounts payable by the Company to the Contractor or a Related Entity of the Contractor),
- arising directly as a result of such direction, order or requirement (including delay costs), to the extent only that such direction, order or requirement prevents the Company from achieving Construction Completion by the Date for Construction Completion. For the purposes of clause 2.11(c) the Company must:
- (iii) take all reasonable steps to mitigate such costs and expenses;
  - (iv) for this purpose, comply with all reasonable directions of RMS concerning the Artefacts and the consequences thereof; and
  - (v) ensure that the Contractor complies with the requirements of this clause 2.11(c).
- (d) Clause 2.11(c) does not apply in respect of any costs or expenses incurred by the Company (without double counting) or the Contractor to the extent such costs or expenses result from a failure by the Company to comply with clause 2.11(c).
- (e) If the Company is prevented from carrying out the Company's Work for a period exceeding 6 months as a result of any directions or orders as referred to in clause 2.11(b)(iii) then RMS may in its absolute discretion terminate the M5 West Widening Deed by giving a written notice to that effect to the Company after which the M5 West Widening Deed will be terminated and clause 9.13 of the M5 West Widening Deed will apply.
- (f) For the purposes of clause 2.11(c), reasonable costs and expenses directly incurred by:
- (i) the Contractor includes reasonable on-site overheads, but does not include any off-site overheads or any margin for the Contractor's profit; and
  - (ii) the Company includes any reasonable interest, fees and other amounts payable by the Company under the M5 West Widening Debt Financing Documents during the period of the delay.
- (g) Other than as may be expressly set out elsewhere in the M5 West Widening Deed, the Company's entitlement under clause 2.11(c) will be its sole and exclusive right to payment of money arising out of, or in any way in connection with, the discovery of an Artefact referred to in clause 2.11(b)(iii).

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## 2.12 Native Title Application

- (a) If there is a Native Title Application with respect to the M5 West Widening Site, the Temporary Areas, or any part thereof, the Company must continue to perform the Company's Work, unless otherwise:
- (i) directed by RMS;
  - (ii) ordered by a court or tribunal; or
  - (iii) required by Law.
- (b) For the purposes of clause 2.12(a)(i), RMS may by written notice direct the Company to suspend any or all of the Company's Work until such time as RMS gives the Company further written notice.
- (c) If the Company (or the Contractor) is directed, ordered or required to cease to perform the Company's Work as referred to in clause 2.12(a) then:
- (i) subject to clause 2.12(c)(ii)(C), RMS will pay the Company the reasonable costs and expenses directly incurred by:
    - (A) the Contractor (excluding any amounts payable by the Contractor to the Company, a Related Entity of the Company or a Related Entity of the Contractor, to the extent that the Contractor or the Related Entity is not engaged by the Contractor on an arm's length basis and on commercial terms); and
    - (B) the Company (without double counting) (excluding any amounts payable by the Company to the Contractor or a Related Entity of the Contractor),arising directly as a result of such direction, order or requirement (including delay costs), to the extent only that such direction, order or requirement prevents the Company from achieving Construction Completion by the Date for Construction Completion; and
  - (ii) the Company must:
    - (A) take all reasonable steps to mitigate such costs and expenses;
    - (B) for this purpose, comply with all reasonable directions of RMS concerning the Native Title Application and the consequences thereof; and
    - (C) ensure that the Contractor complies with the requirements of this clause 2.12(c)(ii).
- (d) If the Company is prevented from carrying out the Company's Work for a period exceeding 6 months as a result of a direction, order or requirement as referred to in clause 2.12(a) then RMS may in its absolute discretion terminate the M5 West Widening Deed by giving a written notice to that effect to the Company after which the M5 West Widening Deed will be terminated and clause 9.13 of the M5 West Widening Deed will apply.
- (e) For the purposes of clause 2.12(c)(i), reasonable costs and expenses directly incurred by:



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- (i) the Contractor includes reasonable on-site overheads, but does not include any off-site overheads or any margin for the Contractor's profit; and
  - (ii) the Company includes any reasonable interest, fees and other amounts payable by the Company under the M5 West Widening Debt Financing Documents during the period of the delay.
- (f) Clause 2.12(c)(i) does not apply in respect of any costs or expenses incurred by the Company (without double counting) or the Contractor to the extent that such costs or expenses result from a failure by the Company to comply with clause 2.12(c)(ii).
- (g) Other than as may be expressly set out elsewhere in the M5 West Widening Deed, the Company's entitlement under clause 2.12(c)(i) will be its sole and exclusive right to payment of money arising out of, or in any way in connection with, a Native Title Application referred to in clause 2.12(a).

### **2.13 Contamination**

- (a) In addition to the requirements of the Environmental Documents and without limiting clauses 2.9 and 2.10 but subject to clause 2.13(b), the Company bears the risk of all Contamination in, under or around the M5 West Widening Site, the Temporary Areas or any Extra Land which:
- (i) exists at the date of the M5 West Widening Deed; or
  - (ii) otherwise occurs or arises on or after the date of the M5 West Widening Deed,
- and the Company must:
- (iii) dispose of, or otherwise deal with, such Contamination in accordance with Law and the Environmental Documents;
  - (iv) remediate the M5 West Widening Site, the Temporary Areas and any Extra Land, to the extent it is in any way degraded by such Contamination (provided that, except to the extent required by Law, the Company is not required to remediate any Temporary Areas to a state which is better than that which was existing at the date of the M5 West Widening Deed); and
  - (v) indemnify RMS from and against any Claim or Loss (including in respect of third party claims against RMS or its contractors) suffered or incurred by RMS arising out of or in any way in connection with such Contamination (other than Migratory Contamination).
- (b) Subject to clause 2.13(b)(v), RMS will pay the Company the reasonable costs and expenses directly incurred by:
- (i) the Contractor (excluding any amounts payable by the Contractor to the Company, a Related Entity of the Company or a Related Entity of the Contractor, to the extent that the Contractor or the Related Entity is not engaged by the Contractor on an arm's length basis and on commercial terms); and
  - (ii) the Company (without double counting) (excluding any amounts payable by the Company to the Contractor or a Related Entity of the Contractor),

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arising directly as a result of the Company carrying out its obligations under clause 2.13(a) in respect of Migratory Contamination (including delay costs). For the purposes of clause 2.13(b) the Company must:

- (iii) take all reasonable steps to mitigate such costs and expenses;
  - (iv) for this purpose, comply with all reasonable directions of RMS concerning the Migratory Contamination and the consequences thereof; and
  - (v) ensure that the Contractor complies with the requirements of paragraphs (iii), (iv) and (v).
- (c) Clause 2.13(b) does not apply in respect of any costs or expenses incurred by the Company (without double counting) or the Contractor to the extent such costs or expenses result from a failure by the Company to comply with clause 2.13(b).
- (d) If the Company is prevented from carrying out the Company's Work for a period exceeding 6 months as a result of any Migratory Contamination then RMS may in its absolute discretion terminate the M5 West Widening Deed by giving a written notice to that effect to the Company after which the M5 West Widening Deed will be terminated and clause 9.13 of the M5 West Widening Deed will apply.
- (e) For the purposes of clause 2.13(b), reasonable costs and expenses directly incurred by:
- (i) the Contractor includes reasonable on-site overheads, but does not include any off-site overheads or any margin for the Contractor's profit; and
  - (ii) the Company includes any reasonable interest, fees and other amounts payable by the Company under the M5 West Widening Debt Financing Documents during the period of the delay.
- (f) Other than as may be expressly set out elsewhere in the M5 West Widening Deed, the Company's entitlement under clause 2.13(b) will be its sole and exclusive right to payment of money arising out of, or in any way connection with, Migratory Contamination.

#### **2.14 Existing Operations of the Tollroad and the M5 Western Link**

Except to the extent expressly permitted by the M5 West Widening Deed and without limiting any other obligations of the Company, the Company must:

- (a) continue the Existing Operations during the course of carrying out the Company's Work;
- (b) in carrying out the Company's Work, not disrupt, interrupt or interfere in any way with the free movement of traffic into and out of, adjacent to, around, on or about the M5 West Widening Site, the Tollroad or the M5 Western Link or block or impair access to any premises, roadways or other facilities (whether or not associated with the Existing Operations) and comply with RMS' reasonable directions in relation to them;
- (c) not cause any nuisance or inconvenience to the users of the Tollroad or the M5 Western Link except to the extent such nuisance or inconvenience was a direct and unavoidable result of carrying out and completing the Company's Work in accordance with the M5 West Widening Deed;
- (d) program and co-ordinate the Company's Work with the Existing Operations;

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- (e) ensure that, in carrying out the Company's Work, the M5 West Widening properly interfaces and integrates with, and connects to, the physical infrastructure of the Tollroad and the M5 Western Link so as to enable the M5 West Widening, when completed, to fully comply with the requirements of the F-5 Tollroad Project Deed and the M5 Western Link Project Deed; and
  - (f) immediately:
    - (i) repair and make good any damage to the physical infrastructure of the Tollroad or the M5 Western Link to the extent arising out of, or in connection with, the Company's Work to the standard required by F-5 Tollroad Project Deed or the M5 Western Link Project Deed (as the case may be); and
    - (ii) when directed by RMS, take such action as is required to ensure that its obligations in this clause 2.14 are complied with.

### **3. QUALITY**

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#### **3.1 Quality system**

- (a) The Company must implement a quality system for the management of all aspects of the Company's obligations under the M5 West Widening Deed and in accordance with the requirements of the Scope of Works and Technical Criteria and the Quality Plan.
- (b) The Company must:
  - (i) develop and implement a Quality Plan in accordance with the Scope of Works and Technical Criteria;
  - (ii) submit each revision of the Quality Plan to RMS' Representative and the Independent Verifier; and
  - (iii) not reduce the number of personnel, the minimum expertise of personnel or the scope of work or extent of surveillance included in the Quality Plan without the written approval of RMS' Representative.
- (c) The Company must provide to RMS and, where applicable, the Independent Verifier, the certificates required by the Certification Schedule.

#### **3.2 Independent Verifier**

- (a) The Independent Verifier must be engaged by RMS and the Company at the Company's cost on the terms of the Deed of Appointment of Independent Verifier. The Independent Verifier's role is to:
  - (i) independently verify in accordance with the Deed of Appointment of Independent Verifier that the M5 West Widening Works and the M5 West Widening Temporary Works comply with the requirements of the M5 West Widening Deed; and
  - (ii) make determinations on matters that the M5 West Widening Deed expressly requires be determined by the Independent Verifier.
- (b) The Independent Verifier is obliged to act independently of the Company, RMS, the Contractor and any Subcontractors.
- (c) Without limiting clause 3.2(b), the Parties acknowledge that the Independent Verifier may be separately engaged by the Company and the Contractor to

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perform the role of the independent verifier under the M5 West Widening D&C Contract.

- (d) Any determination by the Independent Verifier in respect of a matter required by the M5 West Widening Deed to be determined by the Independent Verifier will be final and binding upon the Parties except in the case of Manifest Error.
- (e) The Company must provide the Independent Verifier with all information and documents and allow the Independent Verifier:
  - (i) to attend design meetings; and
  - (ii) access to such premises (subject to reasonable safety and security requirements),

all as may be necessary or reasonably required by the Independent Verifier to allow the Independent Verifier to perform its obligations under the Deed of Appointment of Independent Verifier.

- (f) Where contemplated in any certificate which the Independent Verifier is required to provide pursuant to the Certification Schedule, the Independent Verifier must in that certificate address any matters required by RMS.
- (g) Nothing that the Independent Verifier does or fails to do pursuant to the purported exercise of its functions and activities under the Interim Design and Independent Verification Deed or the Deed of Appointment of Independent Verifier will entitle the Company to make any Claim against RMS.

### **3.3 Quality management and certification**

- (a) RMS and the Company acknowledge that the finance, design and construct project delivery method chosen for the M5 West Widening:
  - (i) requires the Company to assume responsibility for all aspects of the quality of the Company's Work and for the durability of the M5 West Widening Works;
  - (ii) allows the Independent Verifier under the Deed of Appointment of Independent Verifier to observe, monitor, audit and test all aspects of the quality of the Company's Work and the durability of the M5 West Widening Works to ensure compliance with the requirements of the M5 West Widening Deed;
  - (iii) requires the Independent Verifier under the Deed of Appointment of Independent Verifier, by reviewing and assessing the quality of the Company's Work and the durability of the M5 West Widening Works, to verify the Company's compliance with the requirements of the M5 West Widening Deed; and
  - (iv) allows RMS to monitor compliance of the Company's Work with the requirements of the M5 West Widening Deed.
- (b) The Company must ensure that a Quality Manager is engaged who must:
  - (i) independently certify the effectiveness and integrity of the Company's quality system in achieving conformance with the requirements of the M5 West Widening Deed;

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- (ii) report to RMS' Representative and the Independent Verifier on quality issues in accordance with the requirements of the M5 West Widening Deed; and
    - (iii) have the requisite experience and ability described for the Quality Manager in Schedule 5.
  - (c) The Company must provide to RMS' Representative a certificate executed by the Quality Manager in the form of:
    - (i) Schedule 2 to the Certification Schedule every 3 months from the date of the M5 West Widening Deed up to the Date of Construction Completion;
    - (ii) Schedule 3 to the Certification Schedule as a condition precedent to Construction Completion; and
    - (iii) Schedule 4 to the Certification Schedule upon the expiry of the last Defects Correction Period.

#### **3.4 M5 West Widening Project quality non-conformance**

- (a) The Company must comply with the procedure for non-conformances set out in the Scope of Works and Technical Criteria and the Quality Plan.
- (b) Corrective actions implemented under the Company's quality system must comply with the requirements of the M5 West Widening Deed including the Scope of Works and Technical Criteria.
- (c) The Company must promptly issue all documents relating to quality non-conformances to the Independent Verifier and RMS' Representative.

#### **3.5 Monitoring and audits**

Without limiting section 3.1.9 of the Scope of Works and Technical Criteria, the Company must:

- (a) have its compliance with the Quality Plan, Environmental Management Plans and Occupational Health, Safety and Rehabilitation Management Plan audited at intervals not exceeding 6 months during the Company's Work at its cost by an independent auditor who is acceptable to RMS' Representative;
- (b) permit representatives of RMS and the Independent Verifier to be present during such audits; and
- (c) deliver 2 copies of each audit report to RMS' Representative and the Independent Verifier within 5 Business Days of its completion.

#### **3.6 No relief from obligations**

The Company will not be relieved from any of its liabilities or responsibilities under the M5 West Widening Deed (including under clause 11 of this annexure A) or otherwise according to Law nor will the rights of RMS whether under the M5 West Widening Deed or otherwise according to Law be limited or otherwise affected by:

- (a) the implementation and compliance with any quality system or the Quality Plan; or
- (b) any failure by RMS, RMS' Representative, the Independent Verifier or any person acting on behalf of RMS or engaged by RMS to detect any Defect including where such failure is the result of a negligent act or omission.

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## **4. M5 WEST WIDENING PROJECT CONSENTS**

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### **4.1 Consents and Approvals**

- (a) The Company must:
  - (i) expeditiously apply for and obtain from each relevant Authority all Approvals (other than the M5 West Widening Project Approval);
  - (ii) comply with the lawful requirements of each such Authority to permit their proper consideration of the applications for such Approvals;
  - (iii) comply with, carry out and fulfil, all conditions and requirements of all Approvals (including those which RMS is expressed under the terms of the Approval to be required to comply with, carry out and fulfil) other than to the extent specified in Part B of Schedule 4;
  - (iv) not intentionally do anything to prevent RMS from complying with its responsibilities as described in Part B of Schedule 4;
  - (v) provide all reasonable assistance sought by RMS (or agreed between Interlink Roads and RMS) to enable RMS to comply with RMS' responsibilities as described in Part B of Schedule 4;
  - (vi) pay all fees, effect all insurances, provide any bonds and execute any undertakings or agreements required by any relevant Authority in respect of any Approval other than to the extent specified in Part B of Schedule 4 or clause 4.1(e); and
  - (vii) comply with the Law in carrying out the Company's Work.
- (b) RMS must comply with those conditions of the M5 West Widening Approval to the extent specified in Part B of Schedule 4 provided that RMS may seek to satisfy any such obligation by directing specific work through a Change for any work required within the M5 West Widening Site.
- (c) Subject to clause 4.1(d), RMS must use its best endeavours to assist the Company in obtaining any Authority Approvals required to be satisfied as a condition precedent to the commencement of construction of the M5 West Widening Works so as to enable construction of the M5 West Widening Works to commence by the time referred to in clause 9.1(b).
- (d) RMS is under no obligation to approach any Authority for the purposes of obtaining such approvals or to otherwise act in any manner which RMS considers to be inconsistent with its functions, duties or status as a government agency.
- (e) If, in complying with condition no. B17 of the M5 West Widening Project Approval, the Company is required to undertake drainage design or other work in excess of that required by the Scope of Works and Technical Criteria so as to achieve compliance with that condition, clause 8.1 will apply as if RMS' Representative had given a Change Order for that design or other work (as the case may be).

### **4.2 M5 West Widening Project Approval**

- (a) Notwithstanding any review of any aspect of the design or construction of the M5 West Widening Works or the M5 West Widening Temporary Works by RMS or any other Authority, the Company warrants that the Concept Design and Early Design Documentation and the Scope of Works and Technical Criteria comply with the M5 West Widening Project Approval.

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(b) Without limiting clause 4.2(c), clause 8.1 will apply as if RMS' Representative had given a Change Order if:

- (i) the M5 West Widening Project Approval is modified under the EP&A Act;
- (ii) the Minister for Planning issues a new Approval under the EP&A Act in respect of the M5 West Widening Works in substitution for or replacement of the M5 West Widening Project Approval; or
- (iii) any such new Approval is modified under the EP&A Act,

(other than as a result of a breach of the M5 West Widening Project Approval or a breach of any M5 West Widening Project Document by the Company, the Contractor or any of their Subcontractors, or an application for modification or a new Approval made, requested or initiated by the Company or the Contractor, or any Change to the M5 West Widening Project proposed by the Company and approved by RMS under clause 8.2) and such modification or new Approval requires a Change to the M5 West Widening Works (but excluding any effect which such modification or new Approval has upon the M5 West Widening Temporary Works or the process required to design and construct the M5 West Widening Works).

(c) The Company must:

- (i) take all reasonable steps to mitigate the cost of any Change to the M5 West Widening Works or any change to the M5 West Widening referred to in clause 4.2(b);
- (ii) for this purpose, comply with all reasonable directions of RMS' Representative concerning the Change to the M5 West Widening Works or any change to the M5 West Widening referred to in clause 4.2(b), and its consequences; and
- (iii) ensure that the Contractor and its Subcontractors comply with this clause 4.2(c),

and RMS' liability under clause 4.2(b) will be reduced to the extent that the Company fails to comply with these obligations.

### **4.3 Environmental assessment**

(a) If there is a legal challenge brought about by way of commencement of court proceedings in relation to the validity of the M5 West Widening Project Approval or part of it, the Company must continue to perform the Company's Work unless, as a result of that legal challenge, it or the Contractor is otherwise ordered by a court.

(b) If RMS, the Company or the Contractor is ordered by a court to cease to perform the Company's Work (or to change the way it does so) as referred to in clause 4.3(a), then:

- (i) subject to clause 4.3(d), RMS must pay the Company the reasonable costs and expenses directly incurred by:
  - (A) the Contractor (excluding any amounts payable by the Contractor to the Company, a Related Entity of the Company or a Related Entity of the Contractor, to the extent that the Contractor or the Related Entity is not engaged by the Contractor on an arm's length basis and on commercial terms); and

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- (B) the Company (without double-counting) (excluding any amounts payable by the Company to the Contractor, a Related Entity of the Company or a Related Entity of the Contractor),
- arising directly as a result of a court order referred to in clause 4.3(a) (including delay costs), to the extent only that such court order prevents the Company from achieving Construction Completion by the Date for Construction Completion; and
- (ii) the Company must:
- (A) take all reasonable steps to mitigate such costs and expenses;
- (B) for this purpose, comply with all reasonable directions of RMS concerning the legal challenge and consequences thereof; and
- (C) ensure that the Contractor complies with the requirements of this clause 4.3(b)(ii).
- (c) For the purposes of clause 4.3(b)(i), reasonable costs and expenses directly incurred by:
- (i) the Contractor includes reasonable on-site overheads, but does not include any off-site overheads or any margin for the Contractor's profit; and
- (ii) the Company includes any reasonable interest, fees and other amounts payable by the Company under the M5 West Widening Debt Financing Documents during the period of the delay.
- (d) Clause 4.3(b) does not apply:
- (i) in respect of any costs or expenses incurred by the Company (without double counting) or the Contractor to the extent that such costs or expenses result from a failure by the Company to comply with its obligations under clause 4.3(b)(ii); or
- (ii) to the extent that the legal challenge is initiated or upheld, or the court order is made, due to the Company's non-compliance with its obligations under the M5 West Widening Deed.
- (e) Other than as may be expressly set out elsewhere in the M5 West Widening Deed, the Company's entitlement under clause 4.3(b)(i) will be its sole and exclusive right to payment of money arising out of or in any way in connection with a court order referred to in clause 4.3(a).

## **5. ADMINISTRATION**

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### **5.1 RMS' representatives**

- (a) RMS:
- (i) must appoint a person to be RMS' Representative for the purpose of the M5 West Widening Deed;
- (ii) may at any time replace RMS' Representative, in which event RMS may appoint another person as RMS' Representative; and
- (iii) must give written notice of all appointments under clauses 5.1(a)(i) and 5.1(a)(ii) to the Company.



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- (b) RMS' Representative may:
- (i) by written notice to the Company appoint persons to exercise any of RMS' Representative's functions under the M5 West Widening Deed (each a **RMS Assistant Representative**) and the notice must specify:
    - (A) the functions which the RMS Assistant Representative may perform; and
    - (B) whether the RMS Assistant Representative can give any direction to the Company under the M5 West Widening Deed;
  - (ii) revoke or vary any appointment under clause 5.1(b)(i) by written notice to the Company; and
  - (iii) continue to exercise a function under the M5 West Widening Deed despite appointing one or more RMS Assistant Representatives to exercise the function under clause 5.1(b)(i), provided that only one person may exercise the same function in relation to the same issue at any one time.
- (c) RMS' Representative may:
- (i) by written notice to the Company appoint one or a number of officers to perform the functions identified in clause 5.1(d) (each a **RMS Surveillance Officer**);
  - (ii) revoke or vary any appointment under clause 5.1(c)(i) by written notice to the Company; and
  - (iii) continue to exercise a function under the M5 West Widening Deed despite appointing a RMS Surveillance Officer to exercise the function under clause 5.1(c)(i).
- (d) The functions of a RMS Surveillance Officer may be all, some or any of the following:
- (i) monitoring the Company's Work, including:
    - (A) product quality;
    - (B) quality management and verification;
    - (C) environmental management;
    - (D) occupational health, safety and rehabilitation;
    - (E) control of traffic; and
    - (F) community relations;
  - (ii) monitoring the Independent Verifier's surveillance of the Company's Work; and
  - (iii) reporting the findings of its monitoring activities under clauses 5.1(d)(i) and 5.1(d)(ii) from time to time to RMS' Representative.
- (e) RMS and the Company acknowledge and agree that any person appointed by RMS as RMS' Representative or RMS' Assistant Representative acts at all times as the agent of RMS and is subject to the directions of RMS.

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- (f) Unless expressly provided otherwise in the M5 West Widening Deed, RMS' Representative and any RMS' Assistant Representative are not obliged to review, or comment upon, any documentation or information which the Company gives to RMS in respect of the M5 West Widening Project.

## **5.2 Company's representatives**

- (a) The Company must ensure that the Company's Representative acts as a representative of, and is authorised to act on behalf of, the Company in discharging its functions under the M5 West Widening Deed.
- (b) The Company may appoint more than one Company's Representative and, if it does so, the Company must provide written notice to RMS' Representative specifying the functions which each of the Company's Representatives is authorised to discharge. The Company may not appoint more than one Company's Representative to discharge the same function or functions under the M5 West Widening Deed.
- (c) The Company may, by notice in writing to RMS' Representative, substitute a Company's Representative with another person.

## **5.3 Company's personnel**

- (a) The Company must:
- (i) provide experienced and skilled personnel to perform its obligations under the M5 West Widening Deed; and
  - (ii) ensure that its personnel (including those referred to in clause 5.3(b)) as a team carry out the Company's Work in a manner that is courteous and co-operative and recognises the interests and needs of the local community.
- (b) The Company must:
- (i) engage those personnel specified in Schedule 5 in the positions specified in Schedule 5;
  - (ii) subject to clause 5.3(b)(iii), not replace the personnel referred to in clause 5.3(b)(i) without RMS' Representative's prior written approval (acting reasonably); and
  - (iii) if any of the personnel referred to in clause 5.3(b)(i):
    - (A) die;
    - (B) become seriously ill; or
    - (C) resign from the employment of the Company, the Contractor or any other Subcontractor of the Company (other than to accept other employment with the Company or any Related Body Corporate of the Company),replace them with personnel of at least equivalent experience, ability and expertise (including the experience, ability and expertise required by Schedule 5) approved by RMS' Representative (acting reasonably).
- (c) The personnel referred to in clause 5.3(b) (including any replacements) must:
- (i) carry out the functions specified for them in the M5 West Widening Deed; and

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- (ii) otherwise be available for consultation with RMS' Representative when RMS' Representative reasonably requires.
  - (d) RMS' Representative may, in its absolute discretion and without being obliged to give any reasons, by notice in writing direct the Company to remove any person (including a person referred to in clause 5.3(b) and the Independent Verifier) from the M5 West Widening Site, the Temporary Areas, the Extra Land and the Company's Work.
  - (e) The Company must ensure that any person the subject of a direction under clause 5.3(d) (other than the Independent Verifier) is not again employed in the Company's Work or on the M5 West Widening Site, the Temporary Areas or the Extra Land.

#### **5.4 Environmental Manager**

- (a) In accordance with clause 5.3(b), the Company must ensure that there is an Environmental Manager who performs the role referred to in Schedule 5.
- (b) The Company must provide to RMS' Representative a certificate executed by the Environmental Manager in the form of Schedule 11 to the Certification Schedule every 3 months from the date of the M5 West Widening Deed until the Date of Construction Completion.

#### **5.5 Design development meetings**

- (a) The Company must hold regular meetings of its design team including its designers and the Independent Verifier (and in any event at the stage when concept designs or design solutions and detailed design documentation of discrete design elements are complete).
- (b) The Company must give reasonable notice to RMS' Representative of those meetings and of any other meetings at which design issues are to be discussed to enable RMS' Representative or its delegate to attend. RMS may request the Company to ensure the presence at the meeting of any relevant persons from any of the Contractor or any of its Subcontractors involved in the design of any part of the M5 West Widening Works.
- (c) The Company must give RMS' Representative:
  - (i) an agenda prepared in consultation with, or as directed by, RMS' Representative for each design meeting no less than 48 hours prior to each meeting (which must include an accurate schedule of all design issues as at the date of issue of the agenda); and
  - (ii) minutes of each design meeting within 72 hours after each meeting.

#### **5.6 M5 West Widening Site meetings**

- (a) The Company must convene meetings on the M5 West Widening Site at fortnightly intervals prior to the Date of Final Completion.
- (b) The meetings referred to in clause 5.6(a) must be attended by:
  - (i) RMS' Representative (or his or her delegate);
  - (ii) the Company's Representative (or his or her delegate); and
  - (iii) any other person (including the Contractor or any of its Subcontractors) required by RMS' Representative.

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- (c) The Company must provide RMS' Representative with an agenda prepared in consultation with RMS' Representative for each meeting under clause 5.6(a) no less than 48 hours prior to each meeting.
  - (d) The role of chairperson for meetings under clause 5.6(a) will be held by RMS' Representative (or his or her delegate).
  - (e) The chairperson of a meeting under clause 5.6(a) must give all persons who attended the meeting (and may give any other person) minutes of the meeting within 48 hours after the meeting.
  - (f) The purpose of the meetings under clause 5.6(a) includes the review of (at least) the matters set out in the reports referred to in clause 5.11.

#### **5.7 M5 West Widening Project Control Group**

- (a) A M5 West Widening Project Control Group must be established consisting of:
  - (i) RMS' Representative;
  - (ii) the Company's Representative;
  - (iii) 2 persons from each Party holding positions more senior to the persons referred to in clauses 5.7(a)(i) and 5.7(a)(ii); and
  - (iv) such other members as RMS and the Company may from time to time agree.

The persons referred to in clauses 5.7(a)(i), 5.7(a)(ii) and 5.7(a)(iii) may appoint delegates to attend M5 West Widening Project Control Group meetings in their absence and to otherwise discharge their responsibilities under this clause 5.7.

- (b) The objectives of the M5 West Widening Project Control Group will be to monitor and review the progress of the M5 West Widening Project, including to:
  - (i) assist in the resolution of any special matters referred to the M5 West Widening Project Control Group by a Party;
  - (ii) monitor the progress of the Company's Work; and
  - (iii) review all progress reports in accordance with the Company Documentation Schedule.
- (c) The M5 West Widening Project Control Group will meet monthly prior to the Date of Final Completion or at such other regular interval as RMS and the Company agree in writing.
- (d) RMS' Representative will convene and chair meetings of the M5 West Widening Project Control Group and will take the minutes of all meetings and distribute the minutes to members of the M5 West Widening Project Control Group.
- (e) RMS:
  - (i) has the right to have representatives of any Authority attend any meeting of the M5 West Widening Project Control Group as observers; and
  - (ii) may request the Company to procure the attendance of representatives of the Contractor or any of its Subcontractors at any meeting of the M5 West Widening Project Control Group and the Company must comply with any such request.

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- (f) The Company has the right to have a representative of the Contractor attend any meeting of the M5 West Widening Project Control Group as an observer.
  - (g) RMS and the Company may agree to establish additional project management groups.

#### **5.8 M5 West Widening Project Review Group**

The M5 West Widening Project Review Group comprises:

- (a) RMS' Representative;
- (b) the Company's Representative;
- (c) the M5 West Widening Project Manager;
- (d) the Design Manager;
- (e) the Construction Manager;
- (f) the Quality Manager;
- (g) the Environmental Manager;
- (h) the Community Relations Manager;
- (i) the Company's occupational health, safety and rehabilitation management representative; and
- (j) any other person RMS' Representative reasonably requires from time to time.

#### **5.9 M5 West Widening Project Review Group functions**

M5 West Widening Project Review Group functions include reviewing:

- (a) the progress of the M5 West Widening Works and the M5 West Widening Temporary Works in relation to the Overall D&C Program and the Subsidiary D&C Programs and the performance of the Contractor and its Subcontractors prior to the Date of Final Completion;
- (b) issues arising out of the quality of the M5 West Widening Works or the M5 West Widening Temporary Works;
- (c) matters arising from the Design Documentation, including any proposed design changes;
- (d) environmental issues; and
- (e) safety issues.

#### **5.10 M5 West Widening Project Review Group meetings**

- (a) The M5 West Widening Project Review Group must meet:
  - (i) on a regular monthly basis prior to the Date of Final Completion or such other regular interval as RMS and the Company agree in writing; and
  - (ii) at other times prior to the expiry of the last Defects Correction Period which RMS' Representative or the Company's Representative reasonably requires.

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- (b) The Company must provide RMS' Representative with an agenda prepared in consultation with RMS' Representative for each meeting of the M5 West Widening Project Review Group no less than 48 hours prior to each meeting.
  - (c) The role of chairperson for meetings of the M5 West Widening Project Review Group will alternate between the Company's Representative and RMS' Representative with RMS' Representative to chair the first such meeting.
  - (d) The chairperson of a meeting of the M5 West Widening Project Review Group must give all members of the M5 West Widening Project Review Group (and any other person nominated by RMS' Representative) minutes of the meeting within 48 hours after the meeting.

#### **5.11 The Company's reporting obligations**

The Company must provide reports to RMS and RMS' Representative as required by the Company Documentation Schedule.

#### **5.12 Programming**

- (a) Within 28 days of the Satisfaction Date, the Company must prepare and submit to the Independent Verifier and RMS' Representative subsidiary programs for all design and construction activities (including procurement of goods and materials) (**Subsidiary D&C Programs**).
- (b) The Subsidiary D&C Programs must:
  - (i) be based upon the Overall D&C Program;
  - (ii) contain the details required by section 24.3 of the Company Documentation Schedule; and
  - (iii) contain the details which RMS' Representative reasonably requires.
- (c) The Overall D&C Program and all Subsidiary D&C Programs must be:
  - (i) reviewed and updated on a monthly basis to take into account changes to the Company's program for the Company's Work and delays which may have occurred; and
  - (ii) given to the Independent Verifier and RMS' Representative with the reports required by section 24.2 of the Company Documentation Schedule in both hard copy form and electronic form approved by RMS.
- (d) Any review of, or comments upon, the Overall D&C Program, the Subsidiary D&C Programs or any other program by RMS will not:
  - (i) relieve the Company from or alter its liabilities or obligations under the M5 West Widening Deed;
  - (ii) evidence or constitute a Change, an extension of time or a direction by RMS' Representative to accelerate, disrupt, prolong or vary any, or all, of the Company's Work; and
  - (iii) affect the time for performance of RMS' obligations under the M5 West Widening Deed, including obliging RMS to do anything earlier than is necessary to enable the Company to achieve Construction Completion by the Date for Construction Completion or Final Completion by the Date for Final Completion (as the case may be).

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- (e) If the Company chooses to compress or otherwise accelerate progress of the Company's Work:
    - (i) RMS will not be obliged to take any action to assist or enable the Company to achieve Construction Completion before the Date for Construction Completion or Final Completion before the Date for Final Completion (as the case may be); and
    - (ii) the time for the carrying out of RMS' obligations will not be affected.

### **5.13 M5 West Widening Project Plans**

- (a) The Company must prepare the M5 West Widening Project Plans specified in Appendix 14 to the Scope of Works and Technical Criteria.
- (b) Each M5 West Widening Project Plan must:
  - (i) where an initial plan exists for the relevant M5 West Widening Project Plan and is contained in Appendices 34, 35, 36, 37, 38, 40, 41, 43 and 44 of the Scope of Works and Technical Criteria, be based upon that initial plan; and
  - (ii) whether or not an initial plan exists for the relevant M5 West Widening Project Plan, be prepared and further developed in accordance with this clause 5.13 and section 2.12 of the Scope of Works and Technical Criteria.
- (c) Each M5 West Widening Project Plan must be initially submitted to the Independent Verifier and RMS' Representative within the time period specified in Appendix 14 to the Scope of Works and Technical Criteria and contain the contents specified in Appendix 14 of the Scope of Works and Technical Criteria for the initial submission.
- (d) The Company acknowledges and agrees that:
  - (i) an intended purpose of each M5 West Widening Project Plan is for the Company to provide a detailed description of how the Company intends to carry out the Company's Work in accordance with the requirements of the M5 West Widening Deed with respect to the subject matter of each M5 West Widening Project Plan; and
  - (ii) the M5 West Widening Project Plans will require ongoing development, amendment and updating throughout the duration of the Company's Work to take into account:
    - (A) Changes;
    - (B) changes in Law;
    - (C) the commencement of new phases or stages of design and construction as shown in the Overall D&C Program and the Subsidiary D&C Programs;
    - (D) those events, circumstances or requirements:
      - (I) expressly identified in Appendix 6 and Appendix 14 to the Scope of Works and Technical Criteria for each M5 West Widening Project Plan;
      - (II) specified in the Scope of Works and Technical Criteria; or

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- (III) of any reviews and audits which identify a non-compliance with the requirements of the M5 West Widening Deed, including the Scope of Works and Technical Criteria;
    - (E) non-compliance with the requirements of the M5 West Widening Deed, including the Scope of Works and Technical Criteria; and
    - (F) any other events or circumstances which occur or come into existence and which have, or may have, any effect on the manner in which the Company carries out the Company's Work.
  - (e) RMS' Representative owes no duty to the Company to review any M5 West Widening Project Plan submitted by the Company for errors, omissions or compliance with the M5 West Widening Deed.
  - (f) No review of, comments upon, or notice in respect of, any M5 West Widening Project Plan or any other act or omission of RMS or RMS' Representative (including a request made under clause 5.13(h)) about any M5 West Widening Project Plan will lessen or otherwise affect:
    - (i) the Company's liabilities or responsibilities under the M5 West Widening Deed or otherwise according to Law; or
    - (ii) RMS' rights against the Company, whether under the M5 West Widening Deed or otherwise according to Law.
  - (g) The Company:
    - (i) warrants that each M5 West Widening Project Plan will be fit for its intended purposes; and
    - (ii) must continue to develop and promptly amend or update the M5 West Widening Project Plans:
      - (A) to take into account the circumstances and events referred to in clause 5.13(d)(ii) as those circumstances and events occur or come into existence;
      - (B) to correct any defects in, or omissions from, the M5 West Widening Project Plans; and
      - (C) as otherwise specified in the Scope of Works and Technical Criteria, including Appendix 14 to the Scope of Works and Technical Criteria,and promptly submit each further M5 West Widening Project Plan to the Independent Verifier and RMS' Representative as it is further developed, amended or updated.
  - (h) If RMS' Representative reasonably believes that:
    - (i) any M5 West Widening Project Plan does not comply with the requirements of the M5 West Widening Deed; or
    - (ii) the Company has not further developed, updated or amended any M5 West Widening Project Plan in accordance with the requirements of clause 5.13(g),RMS' Representative may by written notice request that the Company further develop, update or amend the M5 West Widening Project Plan specifying:



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- (iii) the reasons why such development, updating or amending is required; and
  - (iv) the time within which such development, updating or amending must occur (which must be reasonable, having regard to the amount of work required),
- and the Company must:
- (v) further develop, update or amend the M5 West Widening Project Plan as requested by RMS' Representative; and
  - (vi) submit the further developed, updated or amended M5 West Widening Project Plan to the Independent Verifier and RMS' Representative within the time specified under clause 5.13(h)(iv).
- (i) The Company:
    - (i) must comply with each M5 West Widening Project Plan which has been submitted to RMS' Representative under this clause 5.13 and in respect of which RMS' Representative has not given a notice under clause 5.13(h) ; and
    - (ii) agrees that compliance by it with any M5 West Widening Project Plan will not in any way lessen or otherwise affect:
      - (A) its liabilities or responsibilities under the M5 West Widening Deed or otherwise according to Law; or
      - (B) RMS' rights against it, whether under the M5 West Widening Deed or otherwise according to Law.
  - (j) The Company must comply with the restrictions upon the carrying out of the Company's Work specified in Appendix 14 to the Scope of Works and Technical Criteria.
  - (k) To the extent they are relevant to operation, maintenance, repair and reinstatement of the M5 West Widening, all M5 West Widening Project Plans must be incorporated into the Maintenance Manual.

#### **5.14 Services and supplies**

- (a) The Company:
  - (i) must obtain and pay for any Services and all connections for all Services it needs to perform its obligations under the M5 West Widening Project Documents;
  - (ii) must investigate, protect, relocate, modify and provide for all Services necessary for it to comply with its obligations under the M5 West Widening Project Documents;
  - (iii) assumes the risk of the existence, location, condition and availability of Services;
  - (iv) must procure the connection to the stormwater discharge points and their operation, maintenance and repair; and
  - (v) must contract for, acquire or otherwise procure or provide the provision of all fuel and other materials required for the performance of its obligations under the M5 West Widening Deed.

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- (b) RMS will not be liable under the M5 West Widening Deed or otherwise in relation to any Services required for the M5 West Widening.

#### **5.15 Environmental management**

- (a) Without limiting the Company's other obligations under the M5 West Widening Deed, the Company must carry out the Company's Work:
  - (i) in an environmentally responsible manner so as to protect the Environment; and
  - (ii) in accordance with the Environmental Documents, the Environmental Management Plans and all relevant Law.
- (b) The Company must indemnify RMS from and against any Claim or Loss RMS suffers or incurs arising out of or in any way in connection with a failure by the Company to comply with any obligation under this clause 5.15.
- (c) The Company must immediately notify RMS in writing of any breach or potential breach of, or non-compliance or potential non-compliance with, the conditions or requirements of any of the Environmental Documents or any Law regarding the Environment in the carrying out of the Company's Work.

#### **5.16 Environmental Representative**

- (a) The Environmental Representative must be engaged by RMS and the Company at the Company's cost on the terms of the Deed of Appointment of Environmental Representative.
- (b) The Environmental Representative's role is to perform and fulfil the function of the Environmental Representative or ER as contemplated by the M5 West Widening Project Approval and in accordance with the Deed of Appointment of Environmental Representative.
- (c) The Environmental Representative is obliged to act independently of the Company, RMS, the Contractor and any of their respective Subcontractors.
- (d) The Company must provide the Environmental Representative with all information and documents and allow the Environmental Representative:
  - (i) to attend meetings; and
  - (ii) access to such premises (subject to reasonable safety and security requirements),all as may be:
  - (iii) necessary or reasonably required by the Environmental Representative or RMS' Representative to allow the Environmental Representative to perform its obligations under the Deed of Appointment of Environmental Representative; or
  - (iv) requested by the Environmental Representative or directed by RMS' Representative.
- (e) Nothing that the Environmental Representative does or fails to do pursuant to the purported exercise of its functions under the Deed of Appointment of Environmental Representative will entitle the Company to make any Claim against RMS.

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## 5.17 Minimise disruption and complaints

- (a) The Company must in carrying out the Company's Work:
  - (i) take all measures necessary to protect people and property;
  - (ii) avoid unnecessary interference with the passage of people and vehicles;
  - (iii) without limiting the Company's obligation to comply with all Law in all respects:
    - (A) prevent nuisance except to the extent that nuisance is the inevitable and unavoidable consequence of performing the Company's Work in accordance with the requirements of the M5 West Widening Deed including under clause 5.17(a)(iv); and
    - (B) minimise noise and disturbance to those affected by the Company's Work; and
  - (iv) ensure that in designing and constructing the M5 West Widening Works it takes all steps that a prudent and reasonable owner of infrastructure would at that time have taken to prevent nuisance in accordance with clause 5.17(a)(iii).
- (b) Subject to clause 5.17(a), the Company is responsible for the method and manner of carrying out the Company's Work and for all acts or omissions of the Company, the Contractor, or any of their respective employees or Subcontractors or anyone for which they are responsible in the course of carrying out the Company's Work.
- (c) The Company must immediately notify RMS' Representative in writing if any:
  - (i) complaint is made or any proceedings are instituted or threatened;
  - (ii) letter of demand is issued; or
  - (iii) order or direction is made,by anyone (including any Authority other than RMS) or any landowner, lessee or licensee near the M5 West Widening Site, the Temporary Areas or any Extra Land against the Company, the Contractor or their respective employees or Subcontractors that could materially impact on the carrying out of the Company's Work, including:
  - (iv) Contamination arising out of, or in any way in connection with, the Company's Work;
  - (v) the Company's non-compliance with any Environmental Document (or condition or requirement thereunder) or any Law regarding the Environment;
  - (vi) the Company's use or occupation of the M5 West Widening Site, the Temporary Areas or any Extra Land; or
  - (vii) Loss or damage relating to real or personal property.
- (d) The Company must (at its own cost):
  - (i) deal proactively with any complaint, proceedings, letter of demand, order or direction referred to in clause 5.17(c);

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- (ii) take all measures to seek to resolve those matters as soon as possible; and
  - (iii) keep a register of all complaints, proceedings, letters of demand, orders and directions referred to in clause 5.17(c), which:
    - (A) contains full details of:
      - (I) each complaint, proceedings, letter of demand, order and direction; and
      - (II) the action taken by the Company with respect to each complaint, proceedings, letter of demand, order and direction;
    - (B) is promptly updated to take into account any developments with respect to any complaint, proceedings, letter of demand, order or direction; and
    - (C) may be inspected by RMS' Representative whenever RMS' Representative reasonably requires.

#### **5.18 Security measures**

The Company must, until Construction Completion, provide such security measures as are reasonable for the protection and security of the M5 West Widening Works, the M5 West Widening Temporary Works and the M5 West Widening against theft, vandalism, unauthorised entry into the M5 West Widening Site, the Temporary Areas and any other unlawful acts.

#### **5.19 Deed of Engagement of Principal Contractor**

- (a) On or before the date of the M5 West Widening Deed, the Company must:
  - (i) execute, and ensure that the Contractor executes, the Deed of Engagement of Principal Contractor in the form of Schedule 7; and
  - (ii) provide an original execution copy of that document to RMS.
- (b) The Company must, on and from the Satisfaction Date, comply with its obligations under the executed Deed of Engagement of Principal Contractor.
- (c) Without limiting clause 5.19(b), the Company must carry out the Company's Work in a safe manner and so that no damage is caused to any person.

#### **5.20 Australian goods, services and materials**

The Company must comply with section 2.9 of the Scope of Works and Technical Criteria.

#### **5.21 Training**

The Company must ensure that the Contractor complies with the NSW Government Training Management Guidelines and the requirements of section 2.11 of the Scope of Works and Technical Criteria.

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## 5.22 Employee relations

The Company must:

- (a) assume sole responsibility for, and manage all aspects of industrial relations in relation to, the Company's Work;
- (b) comply with the NSW Government Industrial Relations Management Guidelines dated December 1999;
- (c) comply with the Construction Plan and the NSW Government Code of Practice for Procurement in respect of industrial relations;
- (d) keep RMS' Representative fully and promptly informed of any industrial relations problems or issues which affect or are likely to affect the carrying out of the Company's Work; and
- (e) develop and implement the M5 West Widening Industrial Relations Plan in accordance with clause 5.25.

## 5.23 Community liaison

The Company:

- (a) acknowledges that the areas where the M5 West Widening Works and the M5 West Widening Temporary Works are to be carried out are of great importance to many people, including local residents and businesses; and
- (b) must manage and participate in all community relations programs and activities as:
  - (i) required by the Scope of Works and Technical Criteria;
  - (ii) contained in the Community Involvement Plan; and
  - (iii) reasonably requested by RMS from time to time.

## 5.24 M7 Motorway and M5 East Motorway interface

- (a) The Company must, in carrying out the M5 West Widening Works and the M5 West Widening Temporary Works, comply with all conditions and requirements set out in Appendix 21 and Appendix 22 to the Scope of Works and Technical Criteria.
- (b) The Company must, in carrying out the Company's Work, ensure that none of the connections of the Tollroad or the M5 Western Link to either of the M7 Motorway or the M5 East Motorway are closed or materially reduced at any time except to the extent permitted under (as applicable):
  - (i) Appendix 21 and Appendix 22 to the Scope of Works and Technical Criteria; or
  - (ii) the M5/M7 Interface Deed.

## 5.25 M5 West Widening Industrial Relations Plan

- (a) Prior to commencing any M5 West Widening Works or M5 West Widening Temporary Works on the M5 West Widening Site or the Temporary Areas, the Company must submit to RMS' Representative a M5 West Widening Industrial Relations Plan.

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- (b) The M5 West Widening Industrial Relations Plan must:
- (i) meet the requirements of the Scope of Works and Technical Criteria;
  - (ii) contain a signed declaration on the Company's letterhead verifying compliance in the preceding 12 months with all relevant employment and legal obligations, including those relating to:
    - (A) payment of remuneration to employees;
    - (B) annual leave;
    - (C) long service payment scheme registration;
    - (D) worker's compensation insurance;
    - (E) superannuation fund membership and contributions; and
    - (F) over-award payment;
  - (iii) identify the location of time and wage records or other documents required to verify compliance with the obligations referred to in clause 5.25(b)(ii); and
  - (iv) identify the "Modern Awards" and/or other industrial instruments that are likely to cover the Contractor and its Subcontractors in the carrying out of the Company's Work.

**5.26 M5 West Widening Industrial Relations Plan implementation review**

- (a) The Company must each month submit the M5 West Widening Industrial Relations Plan to RMS' Representative for review.
- (b) RMS' Representative must inform the Company of the outcome of each review conducted under this clause 5.26 and any corrective action which RMS considers necessary.
- (c) For the purposes of a review under this clause 5.26 the Company must:
  - (i) make available to RMS' Representative, upon request, all industrial relations management records held or obtainable by the Company which are relevant to the review, including those relevant to the Contractor and its Subcontractors; and
  - (ii) provide all assistance necessary to RMS' Representative during the review process, including:
    - (A) attending reviews; and
    - (B) promptly implementing any corrective action deemed necessary by RMS' Representative.

**5.27 Notices of Claims**

- (a) Subject to clause 8.3, RMS will not be liable upon any Claim by the Company arising out of or in any way in connection with any act or omission of RMS or any other fact, matter or thing under, arising out of or in any way in connection with the M5 West Widening Project, the Company's Work, the M5 West Widening Deed, M5 West Widening Works or the M5 West Widening Temporary Works unless the Company gives RMS' Representative the following notices:

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- (i) a written notice within the earlier of:
    - (A) 15 Business Days of when the Company first became aware of, or ought reasonably to have been aware of, the act, omission or other fact, matter or thing upon which the Claim is based; or
    - (B) 2 months of the first occurrence of the act, omission or other fact, matter or thing upon which the Claim is based,expressly specifying:
    - (C) that the Company proposes to make a Claim; and
    - (D) the act, omission, fact, matter or thing upon which the Claim will be based; and
  - (ii) a written Claim within 20 Business Days of giving the written notice under clause 5.27(a)(i), which must include:
    - (A) detailed particulars concerning the act, omission, fact, matter or thing upon which the Claim is based;
    - (B) the legal basis for the Claim, whether based on a term of the M5 West Widening Deed or otherwise, and if based on a term of the M5 West Widening Deed, clearly identifying the specific term;
    - (C) the facts relied upon in support of the Claim in sufficient detail to permit verification; and
    - (D) details of the amount claimed and how it has been calculated.
  - (b) If the act, omission, fact, matter or thing upon which the Claim is based is, or the consequences of the act, omission, fact, matter or thing are, continuing, the Company must continue to give the information required by clause 5.27(a)(ii) every 20 Business Days after the written Claim under clause 5.27(a)(ii) was submitted or given to RMS, until after the act, omission, fact, matter or thing upon which the Claim is based has, or the consequences thereof have, ceased.
  - (c) This clause 5.27 will not apply to clause 10 of the M5 West Widening Deed, or any Claim where the procedures for notifying or making that Claim are dealt with expressly in another provision of the M5 West Widening Deed.

## **6. DESIGN AND DESIGN DOCUMENTATION**

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### **6.1 The Company's design obligations**

- (a) Subject to clauses 6.1(c) and 6.1(d), the Company warrants that:
  - (i) the Company has checked and carefully considered the Scope of Works and Technical Criteria and Environmental Documents and that:
    - (A) the Concept Design and Early Design Documentation has been prepared by the Company;
    - (B) it bears the risk of any ambiguities or inconsistencies in or between the Concept Design and Early Design Documentation, the Scope of Works and Technical Criteria and the Environmental Documents;

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- (C) it has satisfied itself that the Scope of Works and Technical Criteria is proper, adequate and fit for its intended purposes including for the purpose of enabling the Company to carry out the Company's Work in accordance with the M5 West Widening Deed including so as to satisfy the other requirements of this clause 6.1; and
    - (D) it has taken into consideration and made due allowance for the risks and costs associated with carrying out the Company's Work and with assuming the obligations and potential liabilities imposed on it under the M5 West Widening Deed;
  - (ii) the Design Documentation will:
    - (A) satisfy the requirements of the Scope of Works and Technical Criteria and the other requirements of the M5 West Widening Deed; and
    - (B) be fit for its intended purposes; and
    - (C) be completed in accordance with the requirements of the M5 West Widening Deed;
  - (iii) construction in accordance with the Design Documentation which the Company is entitled to use for construction purposes in accordance with clause 6.2(d) will satisfy the requirements of the Scope of Works and Technical Criteria and the other requirements of the M5 West Widening Deed; and
  - (iv) the M5 West Widening Works will:
    - (A) be completed in accordance with, and satisfy the requirements of, the M5 West Widening Deed;
    - (B) upon Construction Completion, be fit for their intended purposes;
    - (C) at Construction Completion not adversely affect the standard, repair and functionality of the Tollroad as required by the F-5 Tollroad Project Deed or the M5 Western Link as required by the M5 Western Link Project Deed; and
    - (D) at Construction Completion, allow the ongoing functionality of the Tollroad and the M5 Western Link, as required by the F-5 Tollroad Project Deed and the M5 Western Link Project Deed, not to be adversely affected.
  - (b) The Company agrees that its obligations under, and the warranties given in, this clause 6.1 will remain unaffected and that it will bear and continue to bear full liability and responsibility for the design and construction of the M5 West Widening Works and the M5 West Widening Temporary Works notwithstanding:
    - (i) any design work carried out by others prior to the date of the M5 West Widening Deed and incorporated in the M5 West Widening Deed; or
    - (ii) subject to clause 8.1, any Change the subject of a direction by RMS' Representative.



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- (c) Despite any other provision of the M5 West Widening Deed, the Company has no responsibility for the noise wall obligations allocated to RMS in section 7.11.2 of the Scope of Works and Technical Criteria.
  - (d) The Parties agree that:
    - (i) the Company's warranties in clauses 6.1(a)(iv)(B) and 7.1(a)(iii)(A) do not apply in respect of the M5 Resurfacing (Existing Tollroad) Works; and
    - (ii) nothing in this clause 6.1(d) limits or otherwise affects the Company's obligations under the F-5 Tollroad Project Deed or the M5 Western Link Project Deed, including the Company's obligations to operate, repair and maintain the Tollroad and the M5 Western Link respectively.

## **6.2 Preparation of Design Documentation**

- (a) The Company must give the Independent Verifier and RMS' Representative, throughout the preparation of the Design Documentation, the opportunity to comment on and monitor the development of Design Documentation by the Company in accordance with this clause 6.2, clause 7.1 of the Scope of Works and Technical Criteria and the Company Documentation Schedule.
- (b) The Company must develop and complete all Design Documentation in accordance with the M5 West Widening Deed including clause 7.1 of the Scope of Works and Technical Criteria and the Company Documentation Schedule.
- (c) The Design Documentation for each discrete design element of the M5 West Widening Works and the M5 West Widening Temporary Works must be certified by the Company and verified by the Independent Verifier as:
  - (i) being appropriate for construction; and
  - (ii) complying with the M5 West Widening Deed including the Scope of Works and Technical Criteria and, in particular, the durability requirements in section 2.14 and section 5.6 and the design life requirements of section 5.2 of the Scope of Works and Technical Criteria,in accordance with clause 7.1 of the Scope of Works and Technical Criteria and the Company Documentation Schedule.
- (d) Unless otherwise agreed in writing by RMS' Representative, the Company must construct the M5 West Widening Works and the M5 West Widening Temporary Works using Design Documentation which has been:
  - (i) certified by the Company;
  - (ii) submitted to RMS' Representative in a manner and at a rate which will give RMS' Representative a reasonable opportunity to review and, if he or she so wishes, to make comments within 15 Business Days of receipt of such Design Documentation; and
  - (iii) verified by the Independent Verifier, with any comments by RMS' Representative provided in the period contemplated by paragraph (d)(ii) addressed by the Independent Verifier as part of the verification,in accordance with clause 7.1 of the Scope of Works and Technical Criteria and the Company Documentation Schedule.
- (e) Without limiting clause 2.3 of the M5 West Widening Deed, RMS and the Company acknowledge and agree that:

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- (i) the receipt or review of, or any consultation or comments regarding, any Design Documentation by RMS or RMS' Representative is solely for the purpose of monitoring the performance of the Company;
  - (ii) RMS and RMS' Representative owe no duty to the Company to review the Design Documentation for errors, omissions or compliance with the requirements of the M5 West Widening Deed or to consult with the Company or make any comments regarding any Design Documentation; and
  - (iii) neither any review, consultation or comments by RMS or RMS' Representative, nor any failure to review, consult or comment by RMS or RMS' Representative, regarding any Design Documentation or any other act or omission by RMS or RMS' Representative in respect of any Design Documentation will lessen or otherwise affect:
    - (A) the Company's warranties under clause 6.1 or any of its other liabilities or responsibilities under the M5 West Widening Deed or otherwise according to Law; or
    - (B) RMS' rights against the Company whether under the M5 West Widening Deed or otherwise according to Law.
- (f) Each party acknowledges and agrees that:
- (i) subject to clause 6.2(f)(ii), all decisions made and documents issued by the Independent Verifier under the Interim Design and Independent Verification Deed will be deemed to have been made or issued (as appropriate) by the Independent Verifier under the Deed of Appointment of Independent Verifier and the terms of the Deed of Appointment of Independent Verifier will apply to them; and
  - (ii) all decisions made and documents issued by the Independent Verifier under the Interim Design and Independent Verification Deed must be remade or reissued (as appropriate) by the Independent Verifier under the Deed of Appointment of Independent Verifier to the extent that they relate to:
    - (A) any difference between the Scope of Works and Technical Criteria (which forms part of the M5 West Widening Deed) and the "Scope of Works and Technical Criteria" (which formed part of the Interim Design and Independent Verification Deed); or
    - (B) aspects of the Company's Work which have been the subject of a Change.

### **6.3 Concept Design and Early Design Documentation**

- (a) The Company acknowledges that prior to the date of the M5 West Widening Deed it procured the preparation of the Concept Design and Early Design Documentation. The Company agrees that it bears absolutely all risks (except as otherwise expressly provided in the M5 West Widening Deed) howsoever they may arise as a result of the use by the Company of, or the reliance by the Company upon, the Concept Design or Early Design Documentation in performing the Company's Work and that such use and reliance will not affect any of its obligations under the M5 West Widening Deed.
- (b) Without in any way limiting this clause 6, and irrespective of any assumptions, projections, estimates, contingencies or otherwise that the Company may have

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made in relation to any of the matters set out in clauses 6.3(a) and 6.3(b), except as otherwise expressly provided in the M5 West Widening Deed, the Company is responsible for and assumes the risk of all increased costs and any Loss or delay it suffers or incurs arising out of or in connection with:

- (i) the design and construction of the M5 West Widening Works and the M5 West Widening Temporary Works generally in accordance with the Concept Design and Early Design Documentation costing more or taking longer than anticipated; and
  - (ii) any differences between the M5 West Widening Works and the M5 West Widening Temporary Works which the Company is required to design or construct (ignoring for this purpose any differences which are the subject of a Change Order) and the Concept Design and Early Design Documentation including:
    - (A) differences necessitated by the physical conditions (including sub-surface conditions) or characteristics of the M5 West Widening Site, the Temporary Areas, any Extra Land, the Environment or their surroundings; and
    - (B) differences required to ensure that:
      - (I) upon Construction Completion, the M5 West Widening Works; and
      - (II) the M5 West Widening Temporary Works, will be fit for their intended purposes and satisfy the requirements of the M5 West Widening Deed, and to ensure that, upon Construction Completion:
      - (III) the standard, repair and functionality of the Tollroad and the M5 Western Link as required by the F-5 Tollroad Project Deed and the M5 Western Link Project Deed is not adversely affected; and
      - (IV) the M5 West Widening Works and the M5 West Widening Temporary Works will allow the ongoing functionality of the Tollroad and the M5 Western Link, as required by the F-5 Tollroad Project Deed and the M5 Western Link Project Deed, not to be adversely affected.
- (c) The Company warrants to RMS that:
- (i) the Concept Design and Early Design Documentation has been procured by the Company and it remains responsible for ensuring that the M5 West Widening Works and the M5 West Widening Temporary Works will satisfy the requirements of the M5 West Widening Deed despite the Concept Design and Early Design Documentation;
  - (ii) if the M5 West Widening Works and the M5 West Widening Temporary Works are designed and constructed in accordance with the Concept Design and Early Design Documentation, the M5 West Widening Works and the M5 West Widening Temporary Works will satisfy the requirements of the M5 West Widening Deed but nothing in this clause 6.3(c)(ii) affects or limits clause 6.3(a), which will prevail to the extent of any inconsistency; and

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- (iii) it will carry out and complete the Company's Work in accordance with the Concept Design and Early Design Documentation as developed in accordance with this annexure A but nothing in this clause 6.3(c)(iii) affects or limits clause 6.3(a), which will prevail to the extent of any inconsistency.

#### **6.4 Delivery up of Design Documentation**

If the M5 West Widening Deed is terminated for any reason, the Company must immediately deliver the original and all sets and copies of all Design Documentation (whether complete or not) then in existence to RMS.

### **7. CONSTRUCTION**

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#### **7.1 Construction**

- (a) The Company must ensure that the M5 West Widening Works and the M5 West Widening Temporary Works are, and warrants to RMS that the M5 West Widening Works and the M5 West Widening Temporary Works will be, constructed:
  - (i) in accordance with the requirements of the M5 West Widening Deed including:
    - (A) the Scope of Works and Technical Criteria;
    - (B) any relevant Design Documentation which has been:
      - (I) certified by the Company;
      - (II) submitted to RMS' Representative for the opportunity to make comments; and
      - (III) verified by the Independent Verifier,in accordance with clauses 6.2(c) and 6.2(d); and
    - (C) any Change directed by RMS' Representative in accordance with clause 8.1(a)(i) or 8.1(a)(iv) or 8.2(d);
  - (ii) with good workmanship and materials which are:
    - (A) new (or, with RMS' prior written consent, reused) and free of Defects or other imperfections; and
    - (B) of the quality specified in the Scope of Works and Technical Criteria;
  - (iii) so that:
    - (A) in relation to the M5 West Widening Works, upon Construction Completion they are fit for their intended purposes; and
    - (B) in relation to the M5 West Widening Temporary Works, they are fit for their intended purposes;
  - (iv) so that, upon Construction Completion, the standard, repair and functionality of the Tollroad and the M5 Western Link as required by the F-5 Tollroad Project Deed and the M5 Western Link Project Deed will not be adversely affected;

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- (v) so that, upon Construction Completion, the M5 West Widening Works will allow the ongoing functionality of the Tollroad and the M5 Western Link, as required by the F-5 Tollroad Project Deed and the M5 Western Link Project Deed, not to be adversely affected; and
  - (vi) in accordance with Law.
  - (b) The Company must not adversely affect the structural integrity of any existing structures or other things (whether or not the existing structures are within the M5 West Widening Site) as a result of carrying out the Company's Work.
  - (c) If there is any ambiguity, discrepancy or inconsistency between the M5 West Widening Deed and any Design Documentation, then unless otherwise directed by RMS' Representative, the requirements of the M5 West Widening Deed will prevail.

## **7.2 RMS' right to inspect**

- (a) RMS and RMS' Representative may at any time, subject to reasonable safety and security requirements, inspect the M5 West Widening Works and the M5 West Widening Temporary Works or the progress of the Company's Work.
- (b) Neither RMS nor RMS' Representative owes any duty to the Company to:
  - (i) inspect the M5 West Widening Works or the M5 West Widening Temporary Works; or
  - (ii) review any construction for errors, omissions or compliance with the requirements of the M5 West Widening Deed if it does so inspect.
- (c) No inspection of the M5 West Widening Works or the M5 West Widening Temporary Works or review of any part of the Company's Work by RMS, RMS' Representative or the Independent Verifier will in any way lessen or otherwise affect:
  - (i) the Company's obligations under the M5 West Widening Deed (including its warranties under clause 7.1(a)) or otherwise according to Law; or
  - (ii) RMS' rights against the Company whether under the M5 West Widening Deed or otherwise according to Law.

## **7.3 Review of construction**

- (a) RMS' Representative may (but is not obliged to) monitor the Company's Work in order to form an opinion as to whether the construction obligations of the Company are being complied with and, in particular, whether the M5 West Widening Works or the M5 West Widening Temporary Works are being constructed in accordance with the requirements of the M5 West Widening Deed.
- (b) If RMS' Representative believes that the M5 West Widening Works or M5 West Widening Temporary Works are not being constructed in accordance with the requirements of the M5 West Widening Deed, RMS' Representative may give written notice to the Company specifying the Defect.
- (c) If the Company disagrees with any notice given by RMS' Representative pursuant to clause 7.3(b), it must within 5 Business Days of receipt of such a notice give written notice of its disagreement to RMS' Representative. RMS' Representative and the Company must use reasonable endeavours to resolve the matter the subject of the disagreement. If the matter is not resolved within 5 Business Days of receipt of the notice of disagreement, either Party may by written notice to the

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other and the Independent Verifier refer the matter for determination in accordance with clause 11 of the M5 West Widening Deed.

- (d) If RMS' Representative gives a notice under clause 7.3(b) and the Company does not give a notice under clause 7.3(c) (or if the Company does give a notice under clause 7.3(c) and the Independent Verifier determines that the M5 West Widening Works or M5 West Widening Temporary Works are not being constructed in accordance with the requirements of the M5 West Widening Deed), the Company must correct the Defect the subject of the notice under clause 7.3(b) within a reasonable period and, in any event, prior to Construction Completion.

#### **7.4 Traffic management and temporary road closures**

- (a) If the Company reasonably considers that it must, or is likely to, interfere with the traffic flow on existing roadways (including the Tollroad, the M5 Western Link, M5 West Widening Local Roads and completed parts of the M5 West Widening Works) in order to perform any Company's Work, it must:
- (i) give RMS details of the arrangements it proposes;
  - (ii) obtain RMS' approval in respect of those arrangements;
  - (iii) give the public sufficient notice of those arrangements;
  - (iv) lodge with RMS' Representative any Traffic Management Plan required by section 8.17.1 of the Scope of Works and Technical Criteria; and
  - (v) lodge with RMS an application for a Road Occupancy Licence, that meets the requirements of Appendix 23 to the Scope of Works and Technical Criteria.
- (b) A Traffic Management Plan under clause 7.4(a)(iv) must be lodged as early as possible prior to the date when the Company intends to undertake any discrete part of the relevant Company's Work (and in any event no less than 10 Business Days prior to that date), so as to allow RMS' Representative to review the Traffic Management Plan and approve the Traffic Management Plan.
- (c) An application for a Road Occupancy Licence under clause 7.4(a)(v) must be lodged as early as possible prior to the date the Company intends to undertake the relevant Company's Work (and in any event no less than 10 Business Days prior to that date), so as to allow RMS to review the application and, where appropriate, approve the Road Occupancy Licence.
- (d) The Company must not undertake any Company's Work which has the effect of restricting, closing, interfering with or obstructing the free flow of traffic on any existing roadways (including the Tollroad, the M5 Western Link, M5 West Widening Local Roads and completed parts of the M5 West Widening Works):
- (i) without a Road Occupancy Licence issued by RMS in accordance with the requirements of Appendix 23 to the Scope of Works and Technical Criteria;
  - (ii) outside of the permitted times stated in the Road Occupancy Licence; or
  - (iii) otherwise than in accordance with the terms and conditions of the Road Occupancy Licence,
- and a breach of the Road Occupancy Licence will constitute a breach of the M5 West Widening Deed.

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- (e) Subject to clauses 7.4(a) to 7.4(d) inclusive, the Company:
- (i) is responsible for the control, direction and protection of all traffic in any way affected by the Company's Work;
  - (ii) must during the Company's Work manage all such traffic to ensure:
    - (A) its continuous, safe and efficient movement;
    - (B) the traffic carrying capacity of the Tollroad, the M5 Western Link, M5 West Widening Local Roads and any completed parts of the M5 West Widening Works is maintained in accordance with the Traffic Management Plan and the requirements of the Scope of Work and Technical Criteria in respect of traffic management and safety; and
    - (C) that any delays and disruptions to traffic and the movement of traffic are kept to an absolute minimum;
  - (iii) must at all times comply with the Traffic Management and Safety Plan, each Traffic Management Plan, each Road Occupancy Licence and the requirements of the Scope of Works and Technical Criteria in respect of traffic management and safety; and
  - (iv) must comply with the directions of any relevant Authority and RMS' Representative with respect to such traffic management and safety.

#### **7.5 Traffic instructions from New South Wales Police Service**

Notwithstanding any other provision of the M5 West Widening Deed, the Company:

- (a) must not restrict, close, interfere with or obstruct the free flow of traffic on any existing roadways (including the Tollroad, the M5 Western Link, M5 West Widening Local Roads or completed parts of the M5 West Widening Works) contrary to the instructions of the New South Wales Police Service; and
- (b) in restricting, closing, interfering with or obstructing the free flow of traffic on any existing roadways (including the Tollroad, the M5 Western Link, M5 West Widening Local Roads and completed parts of the M5 West Widening Works) must act in accordance with any instructions of the New South Wales Police Service including to cease any of the Company's Work and to re-open any lane or shoulder.

#### **7.6 Traffic instructions from RMS' Representative and Authorities**

Notwithstanding any Road Occupancy Licence issued by RMS during the period of the carrying out of the Company's Work, for any lane or shoulder closure, RMS' Representative or any relevant Authority (including RMS) may at any time direct the Company to temporarily cease any Company's Work and to re-open the lane or shoulder (which, other than in an emergency, will be given with reasonable notice having regard to the circumstances).

#### **7.7 Notice of accidents**

Where the Company becomes aware before the Date of Construction Completion of any accidents involving damage to persons or property occurring upon or in the vicinity of the M5 West Widening Site, the Temporary Areas or any Extra Land, the Company must:

- (a) promptly give RMS' Representative a detailed written report of the accident as required by section 8.18 of the Scope of Works and Technical Criteria; and

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- (b) otherwise comply with Law and the Occupational Health, Safety and Rehabilitation Management Plan.

## **7.8 Subcontracting**

- (a) The engagement by the Company of the Contractor to perform some or all of the obligations of the Company under the M5 West Widening Deed will not limit or otherwise affect the Company's obligations or liabilities under the M5 West Widening Deed.
- (b) The Company will be liable to RMS for the acts and omissions of the Contractor, its Subcontractors and their respective employees and agents as if such acts or omissions were the acts or omissions of the Company.
- (c) The Company must notify RMS' Representative of and, if RMS's Representative requires, give RMS' Representative:
  - (i) access to any proposed or executed contract in respect of the Company's Work with a contract sum of more than \$500,000 (including all plans, specifications and drawings relating to that contract); and
  - (ii) a copy of any proposed or executed contract in respect of the Company's Work with a contract sum of more than \$20,000,000 (including all plans, specifications and drawings related to that contract).
- (d) The Company must ensure that the Contractor:
  - (i) is at all times pre-qualified or registered to the appropriate level under RMS' pre-qualification and registration procedures; and
  - (ii) does not enter into any Subcontract in respect of the categories of work set out in Schedule 3 (regardless of contract value), unless the Subcontractor is pre-qualified or registered to the appropriate level under RMS' pre-qualification and registration procedures.
- (e) The Company must ensure that:
  - (i) its contract with the Contractor includes a clause; and
  - (ii) the Contractor includes a clause in each Subcontract entered into by the Contractor with any Subcontractor,

which provides that if the M5 West Widening Deed is terminated under clause 9.8 of the M5 West Widening Deed or clauses 2.11(e), 2.12(d) or 2.13(d), then:

- (iii) if required by RMS to do so, the Contractor or the Subcontractor (as the case may be) must consent to a novation of the relevant contract to RMS; or
- (iv) if RMS does not elect to novate the relevant contract, the Company or the Contractor (as the case may be) may terminate the relevant contract and the Company or the Contractor (as the case may be) will pay to the Contractor or the Subcontractor (as the case may be) an early termination amount equal to the amount determined by the Independent Verifier as being:
  - (A) the aggregate of:
    - (I) the contract value of the work properly executed in accordance with the relevant contract;



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- (II) reasonable costs and expenses properly incurred in expectation of completing the work under the relevant contract;
  - (III) liabilities to third parties (excluding any Related Entity or Related Body Corporate) for early termination; and
  - (IV) 2% of the unpaid balance of the relevant contract sum on account of profit foregone, less

(B) the total amounts paid on account of the relevant contract sum,

provided however that no such early termination amount is required to be paid by the Company or the Contractor (as the case may be) if the termination of the M5 West Widening Deed under clause 9.8 of the M5 West Widening Deed or clauses 2.11(e), 2.12(d) or 2.13(d) was caused or contributed to by an act or omission of, or the insolvency of, the Contractor or the Subcontractor (as the case may be).

## 7.9 Property Works

(a) The Company must:

(i) carry out the Property Works with respect to each Parcel:

- (A) in accordance with the Scope of Works and Technical Criteria;
- (B) so that, upon Construction Completion, they are fit for their intended purposes;
- (C) so that, upon Construction Completion, the standard, repair and functionality of the Tollroad and the M5 Western Link as required by the F-5 Tollroad Project Deed and the M5 Western Link Project Deed will not be adversely affected; and
- (D) so that, upon Construction Completion, they will allow the ongoing functionality of the Tollroad and the M5 Western Link, as required by the F-5 Tollroad Project Deed and the M5 Western Link Project Deed, not to be adversely affected;

(ii) after completion of the Property Works with respect to a Parcel, including the work described in clause 7.9(e), provide to RMS' Representative:

- (A) a certificate in the form of Schedule 10 to the Certification Schedule, duly executed by the owner or owners of any part of the Parcel not acquired by RMS; or
- (B) a statement signed by the Company to the effect that such owner or owners have failed or refused to sign a certificate in the form of Schedule 10 to the Certification Schedule within 15 Business Days of it being provided by the Company to the owner or owners following completion of the Property Works in accordance with the requirements of the M5 West Widening Deed including the work described in clause 7.9(e).

(b) The acceptance of a certificate or statement provided by the Company under clause 7.9(a)(ii) by RMS is not approval by RMS of the Company's performance of its obligations under this clause 7.9.

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- (c) Where any Property Works are required to be carried out on a Parcel the Company must give a written notice to the owner or owners of the property (with a copy to RMS' Representative) which:
- (i) describes the Property Works to be carried out;
  - (ii) specifies the intended date for commencement of the Property Works; and
  - (iii) requests access for the purpose of carrying out the Property Works,
- not less than 15 Business Days prior to the day upon which the Company intends to commence the Property Works.
- (d) Upon being given access to any property for the purpose of carrying out any Property Works, the Company must promptly carry out those Property Works in a manner which minimises inconvenience and disruption to the owners, occupiers and users of the Parcel.
- (e) The Company must:
- (i) rehabilitate each Parcel not owned by RMS at least to the state it was in immediately prior to the Company obtaining access; and
  - (ii) otherwise repair any damage or degradation to each such Parcel arising out of or in any way in connection with the performance of its obligations under this clause 7.9.
- (f) The:
- (i) completion of all Property Works under this clause 7.9 including all work under clause 7.9(e) is a condition precedent to Construction Completion; and
  - (ii) provision of all certificates or statements (as the case may be) to RMS' Representative under clause 7.9(a)(ii) is a condition precedent to Final Completion.
- (g) Section 2.3.1(b) and section 6.1 of the Scope of Works and Technical Criteria:
- (i) is indicative only of the scope of those Property Works of the kind referred to in paragraph (b) of the definition of Property Works in clause 1.1; and
  - (ii) does not limit or otherwise affect the Company's obligations under the M5 West Widening Deed in relation to the Property Works.
- (h) If, despite the Company using best endeavours, the owner or occupier of a Parcel fails or refuses to provide the Company with necessary access to the Parcel, the Property Works which cannot thereby be carried out by the Company will be omitted from the Company's Work by way of a Change directed by RMS' Representative after which clauses 8.1 and 8.3 will apply.

#### **7.10 Signage**

- (a) Subject to clause 7.8 of the F-5 Tollroad Project Deed, clause 7.7 of the M5 Western Link Project Deed and clause 7.10(b), the Company must not erect, install, paint or display any advertising, promotional or similar signage or material on, in or near any part of the M5 West Widening Works, the Temporary Areas or the M5 West Widening Site (or permit any third party to do so) at any time prior to the Date of Construction Completion.

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- (b) Prior to the Date of Construction Completion, the Company may only (with the prior written approval of RMS' Representative (acting reasonably)) erect the following signage on or near the M5 West Widening Site, the Temporary Areas or M5 West Widening Local Roads (as applicable):
- (i) temporary directional signage to assist businesses in the vicinity of the M5 West Widening Site or the Temporary Areas, access to which has been, or is likely to be, adversely affected by the Company's Work;
  - (ii) signage required by Law or reasonably required for the safety and security of the M5 West Widening Works and the M5 West Widening Temporary Works;
  - (iii) project identification signage approved by RMS' Representative (acting reasonably);
  - (iv) such directional signage as is reasonably required for the purposes of informing persons undertaking any part of the Company's Work; and
  - (v) directional and other signage necessary to inform, and direct the movement of, motorists, pedal cyclists and pedestrians in the vicinity of the M5 West Widening Site or the Temporary Areas.

For the avoidance of doubt, the Company may not erect, install, paint or display any such signage under this clause 7.10(b) on or near any part of the Tollroad or the M5 Western Link that does not form part of the M5 West Widening Site without RMS' prior written approval.

- (c) All signs erected in accordance with this clause 7.10 must be removed, and any damage caused must be made good, by the Company as a condition precedent to Construction Completion.
- (d) Any signage already existing at the date of the M5 West Widening Deed to the extent that that signage has been properly approved pursuant to the provisions of the F-5 Tollroad Project Deed or the M5 Western Link Project Deed, and any signage which is subsequently approved pursuant to the provisions of the F-5 Tollroad Project Deed or the M5 Western Link Project Deed, and erected in accordance with that approval will be deemed to be approved under this clause 7.10.
- (e) Should the Company wish to move (either temporarily or permanently) any signage which has been approved by RMS under the F-5 Tollroad Project Deed, under the M5 Western Link Project Deed or under clause 7.10(b), the Company must obtain RMS' prior written approval (acting reasonably) to the new location and the provisions of clause 7.8 of the F-5 Tollroad Project Deed and clause 7.7 of the M5 Western Link Project Deed shall apply. RMS' approval shall not relieve the Company of its other obligations under the M5 West Widening Deed including the obligation to comply with the Law.

#### **7.11 As constructed documentation and reports**

The Company must prepare and submit to RMS' Representative and the Independent Verifier as constructed documentation, Construction Completion reports and pavement reports as required by and in accordance with the requirements of the Company Documentation Schedule.

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## 7.12 Cleaning up

In carrying out the Company's Work, the Company must:

- (a) keep the M5 West Widening Site and any other areas affected by the Company's Work clean and tidy and free of refuse;
- (b) regularly remove rubbish, litter, graffiti and surplus material from the M5 West Widening Site and any other areas affected by the Company's Work; and
- (c) as a condition precedent to Construction Completion, remove all rubbish, surplus material, plant, equipment and M5 West Widening Temporary Works from the M5 West Widening Site and any other areas affected by the Company's Work except where:
  - (i) the retention of any of these are required for the correction of Defects during the Defects Correction Periods; and
  - (ii) such retention is approved in writing by RMS' Representative (such approval not to be unreasonably withheld or delayed).

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## 8. CHANGES

### 8.1 Changes proposed by RMS

- (a) Subject to clause 8.1(b), RMS may require the Company to carry out a Change in accordance with the following procedure:
  - (i) RMS' Representative may require the Company to carry out a Change by issuing a document entitled "Change Order" which sets out details of the proposed Change;
  - (ii) within 15 Business Days of receipt of a Change Order from RMS under clause 8.1(a)(i), the Company must provide RMS with a written notice containing:
    - (A) its estimate of the Change Costs or Change Savings involved in the Change, substantiated (to the extent possible) by detailed particulars;
    - (B) details of the functional integrity of any of the elements of the M5 West Widening Works and the performance standards required by the M5 West Widening Deed which will be adversely altered by the proposed Change;
    - (C) details of the quality standards, warranties and other obligations (including the Date for Construction Completion and the Date for Final Completion) required under the M5 West Widening Deed which will be adversely affected by the proposed Change;
    - (D) details of any adverse affect of the proposed Change on Existing Operations; and
    - (E) any other information requested by the Change Order (if applicable);
  - (iii) within 15 Business Days of receipt of the notice given under clause 8.1(ii) RMS' Representative must:

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- (A) give a written notice to the Company that it withdraws the relevant Change Order, in which case the Company is not obliged to carry out the Change Order;
  - (B) give a written notice to the Company that it agrees with the matters referred to in the Company's notice, in which case the Company must proceed to carry out the Change Order and the Company's obligations under the M5 West Widening Deed and the other matters referred to in clause 8.1(a)(ii) will be varied to the extent set out in the notice given under clause 8.1(a)(ii); or
  - (C) give a written notice to the Company that it disagrees with the matters referred to in the Company's notice and requires the dispute to be referred for determination under clause 11 of the M5 West Widening Deed in which case, subject to clause 8.1(a)(iv), the Company is not obliged to carry out the Change Order until the dispute has been determined under clause 11 of the M5 West Widening Deed and the Company's obligations under the M5 West Widening Deed and the other matters referred to in clause 8.1(a)(ii) will be varied to the extent set out in the notice given under clause 8.1(a)(ii) and agreed by RMS or, to the extent that agreement is not reached, as determined in accordance with clause 11 of the M5 West Widening Deed; and
- (iv) RMS' Representative may direct the Company to comply with a Change Order whether or not the matters referred to in clause 8.1(a)(ii) have been agreed between RMS' Representative and the Company or determined in accordance with clause 11 of the M5 West Widening Deed. In that case, the Company must proceed to carry out the Change and the Change Costs or Change Savings will, until RMS' Representative and the Company otherwise agree or a determination is made in accordance with clause 11 of the M5 West Widening Deed, be the amount as reasonably determined by RMS' Representative and payment will be made on that basis.
- (b) Unless otherwise agreed by RMS and the Company, the Company will not be obliged to carry out any Change proposed by RMS if the proposed Change will:
- (i) adversely affect the use, patronage or capacity of the Tollroad, the M5 Western Link or the M5 West Widening or the Company's ability to levy or collect tolls;
  - (ii) prevent the Company from achieving Construction Completion by the Date for Construction Completion; or
  - (iii) cause an adverse and material tax consequence for the Company, provided that RMS and the Company must first meet and negotiate in good faith to seek to agree a resolution to avoid or address that consequence.

## **8.2 Changes proposed by the Company**

- (a) The Company may propose a Change to RMS' Representative by giving a written notice with details of:
  - (i) the proposed Change;
  - (ii) the reason for the proposed Change;

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- (iii) the effect of the proposed Change on other elements of the M5 West Widening Works;
  - (iv) the effect of the proposed Change on the Tollroad and the M5 Western Link including the operation, maintenance and repair of the Tollroad and the M5 Western Link, both during the period of carrying out of the Company's Work and after Construction Completion;
  - (v) the effect of the proposed Change on the Overall D&C Program and Subsidiary D&C Programs; and
  - (vi) the estimated Change Savings arising from the proposed Change.
- (b) If the Company proposes a Change under clause 8.2(a) the Company must, if required by RMS' Representative, give to RMS' Representative:
- (i) a written statement stating that the proposed Change:
    - (A) will not adversely affect the functional integrity of any of the elements of the M5 West Widening Works and the performance standards required by the M5 West Widening Deed;
    - (B) will not adversely affect the quality standards, warranties and other obligations required under the M5 West Widening Deed;
    - (C) will not adversely affect the functional integrity of any of the elements of the Tollroad or the M5 Western Link and the performance standards required by the F-5 Tollroad Project Deed and the M5 Western Link Project Deed; and
    - (D) will not adversely affect the quality standards, warranties and other obligations (including those in relation to operation, maintenance and repair of the Tollroad, the M5 Western Link and the M5 West Widening Works) under the F-5 Tollroad Project Deed and the M5 Western Link Project Deed; and
  - (ii) any other information and supporting documentation RMS' Representative requires.
- (c) RMS' Representative:
- (i) in its absolute discretion, may approve or reject any Change the Company proposes; and
  - (ii) will be under no obligation or duty to approve any such Change for the convenience of or to assist the Company.
- (d) If RMS' Representative approves a Change proposed by the Company:
- (i) it will issue a written direction entitled "Company Proposed Change Order"; and
  - (ii) the Company must thereafter carry out the Change.
- (e) Unless otherwise agreed in writing by RMS' Representative, the Company must bear all costs:
- (i) associated with proposing a Change and providing the details under clause 8.2(b) and complying with clause 8.2(b);

- (ii) reasonably incurred by RMS in assessing a Change proposed by the Company; and
- (iii) associated with carrying out a Change proposed by the Company.

### 8.3 Payment for Changes

- (a) Subject to clause 8.3(b), if a Change directed by RMS' Representative in accordance with clause 8.1(a) (or a Change deemed to have been directed under clauses 4.1(e) or 4.2(b)) results in Change Costs:
  - (i) RMS must pay the Company the Change Costs (as agreed under clause 8.1 or determined in accordance with clause 11 of the M5 West Widening Deed) in accordance with this clause 8.3; and
  - (ii) unless otherwise agreed, RMS must pay the Company these Change Costs progressively within 10 Business Days after each month in which the relevant work was undertaken.
- (b) If a Change directed by RMS' Representative in accordance with clause 8.1(a) (or a Change deemed to have been directed under clauses 4.1(e) or 4.2(b)) results or will result in Change Costs, RMS may give notice to the Company that it proposes that the Change Costs be funded in accordance with the regime set out in clause 8.3(c).
- (c) Where RMS issues a notice under clause 8.3(b):
  - (i) the Company must use reasonable endeavours to fund the Change Costs resulting from the Change;
  - (ii) if, after using reasonable endeavours, the Company is able to fund the Change Costs resulting from the Change, it must notify RMS of that fact, in which case:
    - (A) the end date of:
      - (I) the Term (as defined in the F-5 Tollroad Project Deed);
      - (II) the end date of the M5 Western Link Term (as defined in the M5 Western Link Project Deed); and
      - (III) the end date of the M5 Leases,will be extended at a rate of \_\_\_\_\_ per \_\_\_\_\_ of Change Costs (or where the Change Costs are more or less than \_\_\_\_\_ will be extended on a pro rata basis);
    - (B) clause 8.3(a) does not apply in respect of the Change; and
    - (C) the Company will not be entitled to be paid any amount from RMS, and RMS will have no obligation to pay any amount, for Change Costs in respect of the Change; and
  - (iii) if, after using reasonable endeavours, the Company is not able to fund the Change Costs resulting from the Change, it must notify RMS of that fact in which case clause 8.3(a) will apply.
- (d) If a Change directed by RMS' Representative under clause 8.1(a) or clause 8.2(d) (or if a Change deemed to have been directed under clauses 4.1(e) or 4.2(b))

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results in Change Savings (or in the case of a Change directed by RMS' Representative under clause 8.2(d), is expected to result in Change Savings, as advised by the Company under clause 8.2(a)), RMS and the Company agree that:

- (i) in the case of a Change directed by RMS's Representative under clause 8.1(a) (or a Change deemed to have been directed under clauses 4.1(e) or 4.2(b)), RMS is entitled to receive 100% of the Change Savings; and
- (ii) in the case of a Change directed by RMS' Representative under clause 8.2(d), RMS is entitled to receive 50% of the greater of:
  - (A) the actual Change Savings; and
  - (B) the estimated Change Savings (as advised by the Company under clause 8.2(a)).
- (e) Where an amount is payable to RMS pursuant to clause 8.3(d):
  - (i) to the extent that it relates to the Company's Work, this may be set off against Change Costs in respect of the Company's Work payable by RMS to the Company under clause 8.3(a) or where this is not set-off it must be paid by the Company to RMS progressively within 10 Business Days after each month in which the relevant work which has been deleted or omitted would have been undertaken but for the Change; or
  - (ii) to the extent that it relates to the operation, maintenance and repair of the Tollroad, the M5 Western Link or the M5 West Widening Works, the Company must pay this to RMS in the manner and at the time as agreed between RMS and the Company or, to the extent that they fail to agree, as determined by an expert in accordance with clause 11 of the M5 West Widening Deed.
- (f) Except where the Company is directed to carry out a Change pursuant to a Change Order (or a Change deemed to have been directed under clauses 4.1(e) or 4.2(b)), RMS will not be liable to the Company for any Loss or otherwise upon any Claim arising out of or in any way in connection with any Change.

## **9. TIME**

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### **9.1 Commencement and progress**

The Company must:

- (a) promptly start to perform the Company's Work from the Satisfaction Date;
- (b) use its best endeavours to commence construction of the M5 West Widening Works (including the M5 West Widening Temporary Works and site establishment) within one month from the Satisfaction Date; and
- (c) consistent with its obligations under clause 9.2, expeditiously and diligently progress the Company's Work.

### **9.2 Completion**

The Company must use its best endeavours to achieve:

- (a) Construction Completion by the Date for Construction Completion; and
- (b) Final Completion by the Date for Final Completion.



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### **9.3 Delay**

If:

- (a) the Company becomes aware of any matter which will, or is likely to, give rise to a delay in achieving:
  - (i) Construction Completion by the Date for Construction Completion; or
  - (ii) Final Completion by the Date for Final Completion; or
- (b) RMS' Representative reasonably believes that the Company will not achieve:
  - (i) Construction Completion by the Date for Construction Completion; or
  - (ii) Final Completion by the Date for Final Completion,and gives the Company a written notice to that effect,

the Company must promptly and in any event within 5 Business Days:

- (c) in the case of clause 9.3(a), give RMS' Representative a written notice setting out detailed particulars of the delay together with a detailed corrective action plan which the Company proposes to implement to mitigate the effects of the delay; and
- (d) in the case of clause 9.3(b), provide RMS' Representative with a detailed corrective action plan showing how it proposes to mitigate the effects of the delay.

### **9.4 Mitigation**

The Company must take all reasonable steps to mitigate any delay caused by, or any other effect of, a failure by RMS to give, or ensure that the Company has, access to the M5 West Widening Site or the Temporary Areas in accordance with clause 2, including making any changes to the sequencing or timing of, or the construction methodologies used in, the Company's Work and changing the Subsidiary D&C Programs to reflect this.

### **9.5 Corrective action plan**

- (a) RMS' Representative may within 5 Business Days of receipt of a corrective action plan under clause 9.3 give written notice to the Company that it does not believe (acting reasonably) that implementation of the corrective action plan will enable the Company to mitigate the effects of the delay.
- (b) If RMS' Representative gives the Company a notice under this clause 9.5 the Company must amend and resubmit the corrective action plan to RMS' Representative after which this clause 9.5 will continue to apply until RMS' Representative does not issue a notice under this clause 9.5.
- (c) The Company must thereafter comply with a corrective action plan for which RMS does not issue a notice under this clause 9.5.
- (d) The Company will not be relieved of any liability or responsibility under the M5 West Widening Deed or otherwise at Law arising out of or in connection with:
  - (i) any notice given by RMS' Representative under clause 9.3(b) or this clause 9.5; or
  - (ii) implementation of any corrective action plan in respect of which RMS' Representative has or has not issued a notice under this clause 9.5.

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## 10. COMPLETION

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### 10.1 Completion process

- (a) The Company must give RMS' Representative and the Independent Verifier both:
- (i) 3 months; and
  - (ii) 1 month,
- prior written notice of the estimated Date of Construction Completion and the estimated Date of Final Completion.
- (b) RMS' Representative, the Company's Representative and the Independent Verifier must, within 7 days of receipt of the notice referred to in clause 10.1(a)(ii), undertake a joint inspection of the Company's Work included in Construction Completion or Final Completion (as the case may be) at a mutually convenient time. It is acknowledged that a representative of the Contractor may attend that joint inspection of the Company's Work.
- (c) Following the joint inspection referred to in clause 10.1(b), the Independent Verifier may give the Company (with a copy to RMS) a written notice either:
- (i) containing a list of items which it believes must be completed before Construction Completion or Final Completion (as the case may be) is achieved; or
  - (ii) stating that it believes the Contractor is so far from achieving Construction Completion or Final Completion (as the case may be) that it is not practicable to issue a list as contemplated in clause 10.1(c)(i).
- (d) When the Company considers it has achieved Construction Completion or Final Completion (as the case may be), the Company must issue a certificate in the form of Schedule 13 to the Certification Schedule, duly executed by the Company to RMS' Representative and the Independent Verifier stating the date on which the Company considers Construction Completion or Final Completion (as the case may be) was achieved.
- (e) The Parties acknowledge that within 15 Business Days of receipt of the certificate under clause 10.1(d), the Independent Verifier is required to either:
- (i) determine whether Construction Completion or Final Completion (as the case may be) has occurred and either issue:
    - (A) if Construction Completion or Final Completion (as the case may be) has occurred, a Certificate of Construction Completion or a Certificate of Final Completion (as the case may be) under clause 10.2; or
    - (B) if Construction Completion or Final Completion (as the case may be) has not occurred, a written notice to the Company and RMS' Representative of the list of work remaining to be performed to achieve Construction Completion or Final Completion (as the case may be); or
  - (ii) issue a written notice to the Company and RMS' Representative stating that the M5 West Widening Works and M5 West Widening Temporary Works for Construction Completion or Final Completion (as the case may be) are so far from Construction Completion or Final Completion (as the

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case may be) that it is not practicable to form an opinion under clause 10.1(e)(i)(B) after which the Company must continue to diligently pursue Construction Completion or Final Completion (as the case may be).

- (f) Immediately upon receipt of a notice of a kind referred to in clause 10.1(e)(i)(B), the Company must perform or procure the performance of the work specified in that notice as soon as practicable.
- (g) The Company must give notice to RMS' Representative and the Independent Verifier when the work specified in the Independent Verifier's notice under clause 10.1(e)(i)(B) has been completed.
- (h) Clauses 10.1(e) and 10.1(f) will apply in respect of the Company's notice under clause 10.1(g) in the same way as if it were the original notice given under clause 10.1(d). The Company acknowledges that the Independent Verifier, in making its determination as to whether Construction Completion or Final Completion (as the case may be) has occurred:
  - (i) will not be restricted by the list which it previously provided to the Company under clause 10.1(e)(i)(B); and
  - (ii) will be entitled to raise any other items of work (other than the Defects referred to in paragraph (a) of the definition of Construction Completion) as a ground for determining that Construction Completion or Final Completion (as the case may be) has not occurred.

## **10.2 Certificate of Construction Completion and Certificate of Final Completion**

Subject to clause 10.3:

- (a) where the Independent Verifier determines Construction Completion has occurred it must issue to the Company and RMS' Representative a Certificate of Construction Completion within the time required by clause 10.1(e) certifying that Construction Completion has taken place and the date this occurred; and
- (b) where the Independent Verifier determines Final Completion has occurred it must issue to the Company and RMS' Representative a Certificate of Final Completion within the time required by clause 10.1(e) certifying that Final Completion has taken place and the date this occurred.

## **10.3 Effect of Certificate of Construction Completion or Certificate of Final Completion**

The Parties acknowledge that:

- (a) the Date of Construction Completion set out in the Certificate of Construction Completion or the Date of Final Completion as set out in the Certificate of Final Completion (as the case may be) will be final and binding for all purposes and not capable of challenge on any basis other than Manifest Error; and
- (b) subject to clause 10.3(a), the issue of a Certificate of Construction Completion or the Certificate of Final Completion (as the case may be) will not:
  - (i) constitute an approval by RMS of the Company's performance of its obligations under the M5 West Widening Deed or evidence that the Company's Work included in Construction Completion or Final Completion (as the case may be) is in accordance with the M5 West Widening Deed; or
  - (ii) prejudice any rights or powers of RMS.

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#### **10.4 Opening of the M5 West Widening**

- (a) Except as expressly contemplated in the Scope of Works and Technical Criteria, the M5 West Widening may not be opened for public use prior to the Date of Construction Completion.
- (b) As soon as practicable after the Date of Construction Completion, the Company must open the M5 West Widening to the public for the safe, efficient and continuous passage of vehicles.

#### **11. DEFECTS CORRECTION PERIODS**

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##### **11.1 Defects**

Notwithstanding that Construction Completion may have occurred, the Company must, as soon as practicable after Construction Completion, correct any Defects which existed at the time of the issue of the Certificate of Construction Completion.

##### **11.2 RMS direction**

- (a) The Company must correct all Defects in the M5 West Widening Works during the relevant Defects Correction Period.
- (b) Without limiting clause 11.2(a), if during a Defects Correction Period RMS' Representative discovers or believes there is a Defect in the M5 West Widening Works, RMS' Representative may, without prejudice to any other rights which RMS may have under the M5 West Widening Deed or otherwise at Law, give the Company a written direction specifying the Defect and:
  - (i) requiring the Company to correct the Defect or a part of it and specifying a reasonable time within which this must occur and other matters (if any) associated with the carrying out of the rectification work;
  - (ii) requiring the Company to carry out a Change to overcome the Defect or any part of it and specifying a reasonable time within which this must occur and other matters (if any) associated with the carrying out of the Change; or
  - (iii) advising the Company that RMS will accept the work or any part of it despite the Defect.
- (c) If the Company disagrees with any direction given by RMS' Representative pursuant to clause 11.2(b) (including any time period in which the Company is required to rectify the Defect), it must within 10 Business Days of receipt of such a notice give written notice of its disagreement to RMS' Representative. RMS' Representative and the Company must use reasonable endeavours to resolve the matter the subject of the disagreement. If the matter is not resolved within 10 Business Days thereafter, either Party may by written notice to the other and the Independent Verifier refer the matter for determination by the Independent Verifier, who must within 10 Business Days make a determination as to the matter and notify RMS and the Company in writing of its determination.

##### **11.3 Correction of Defects**

If a direction is given under clause 11.2(b) prior to the expiration of the Defects Correction Period applicable to the relevant part of the M5 West Widening Works and the Company does not give a written notice under clause 11.2(c) or, if it does, the Independent Verifier determines that a Defect exists, the Company must correct the Defect (or the part of it):

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- (a) within the time specified in RMS' Representative's direction (as varied if at all by the determination of the Independent Verifier);
  - (b) at times agreed with RMS' Representative and in accordance with the requirements of any relevant Authority;
  - (c) so as to minimise the impact on the use of the relevant part of the M5 West Widening, Tollroad, the M5 Western Link, M5 West Widening Local Road Works, Service Works or Property Works; and
  - (d) in a manner which causes as little inconvenience as possible to users of the M5 West Widening, Tollroad, the M5 Western Link, any M5 West Widening Local Road, a Service, the Property Works or any access and the adjacent community.

#### **11.4 M5 West Widening Defects Correction Period**

Subject to clauses 11.5, 11.6 and 11.7, the M5 West Widening Works has:

- (a) a Defects Correction Period which begins on the Date of Construction Completion and ends at the expiry of 12 months after the Date of Final Completion; and
- (b) a further Defects Correction Period in respect of any work the subject of a direction under clause 11.2(b) during the Defects Correction Period which begins on the date of the correction of the Defect (or the part of it) and ends on the date which is 12 months after the date of the correction of the Defect (or the part of it).

#### **11.5 M5 West Widening Local Road Works**

- (a) Each discrete part of the M5 West Widening Local Road Works has:
  - (i) a Defects Correction Period which begins when:
    - (A) the relevant discrete part of the M5 West Widening Local Road Works is complete (being the date notified under clause 11.5(d)(i)); and
    - (B) RMS' Representative and the Independent Verifier have been provided with a copy of that notice,and ends on the date which is 2 years after the Date of Construction Completion; and
  - (ii) a further Defects Correction Period in respect of any work the subject of a direction under clause 11.2(b) (relating to the discrete part of the M5 West Widening Local Road Works) during the Defects Correction Period, which begins on the date of the correction of the Defect and ends on the date which is 2 years thereafter.
- (b) The completion of the M5 West Widening Local Road Works will be assessed on a road by road basis.
- (c) When the Company considers that each discrete part of the M5 West Widening Local Road Works is complete, it must notify the Independent Verifier and RMS' Representative in writing and the Independent Verifier, RMS' Representative, the Company's Representative and the representative of any relevant Authority must jointly inspect the relevant M5 West Widening Local Road Works at a mutually convenient time. It is acknowledged that a representative of the Contractor may attend that joint inspection of the relevant M5 West Widening Local Road Works.

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- (d) Following the joint inspection under clause 11.5(c), the Independent Verifier must notify the Company (with a copy to RMS) in writing:
- (i) if the discrete part is complete, of the date on which the Company has completed the discrete part of the M5 West Widening Local Road Works in accordance with the M5 West Widening Deed which, subject to clause 11.5(e)(i), will be the relevant date for the purposes of clause 11.5(a)(i); or
  - (ii) if the discrete part is not complete, the items which remain to be completed (after which the procedure in clause 11.5(c) will reapply).
- (e) Subject to clause 11.5(f), it is a condition precedent to:
- (i) the commencement of the Defects Correction Period for a discrete part of the M5 West Widening Local Road Works that the Company provide RMS' Representative with a written notice from each Authority with jurisdiction over the discrete part stating that the Authority is satisfied that the discrete part is complete; and
  - (ii) Construction Completion that the written notices required under clause 11.5(e)(i) have been provided to RMS' Representative for all discrete parts of the M5 West Widening Local Road Works.
- (f) If the Company demonstrates to the satisfaction of RMS' Representative that an Authority other than RMS has failed to provide a written notice required under clause 11.5(e), despite the Company using its best endeavours to obtain the written notice, and that failure has prevented:
- (i) the commencement of the Defects Correction Period applicable to a discrete part of the M5 West Widening Local Road Works; or
  - (ii) the Company achieving Construction Completion,
- RMS' Representative may, acting reasonably, by notice in writing to the Company, waive the requirement for the Company to obtain the written notice as a condition precedent to the commencement of the relevant Defects Correction Period or Construction Completion (as the case may be).

## 11.6 Service Works

Each discrete part of the Service Works has:

- (a) a Defects Correction Period which begins when:
  - (i) the relevant Authority which has jurisdiction in respect of the Service gives written notice to the Company that the work is complete; and
  - (ii) RMS' Representative and the Independent Verifier have been provided with a copy of that notice,and which expires 12 months after the Date of Construction Completion; and
- (b) a further Defects Correction Period of 12 months in respect of any work the subject of a direction under clause 11.2(b) (relating to the discrete part of the Service Works) during the Defects Correction Period, which begins on the date of correction of the Defect (or the part of it).

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## 11.7 Property Works

Each discrete part of the Property Works has:

- (a) a Defects Correction Period which begins upon the later of:
  - (i) the completion of that discrete part of the Property Works; and
  - (ii) the submission by the Company to RMS' Representative and the Independent Verifier of a certificate or signed statement (as the case may be) under clause 7.9(a)(ii),and which expires 12 months after the Date of Final Completion; and
- (b) a further Defects Correction Period of 12 months in respect of any work the subject of a direction under clause 11.2(b) (relating to the discrete part of the Property Works) during the Defects Correction Period, which begins on the date of correction of the Defect (or the part of it).

## 11.8 Failure by the Company to comply with direction

- (a) Without limiting clause 2.5 of the M5 West Widening Deed, if the Company does not comply with a direction given under clause 11.2(b), RMS may, after giving at least 5 Business Days' notice of its intention to do so to the Company, employ others to carry out that direction.
- (b) The Loss suffered or incurred by RMS in taking the action contemplated in clause 11.8(a) or as a result of the Company's failure to comply with clause 11.3 will be a debt due and payable from the Company to RMS.

## 11.9 Rights not affected

Neither RMS' rights, nor the Company's liability, whether under the M5 West Widening Deed or otherwise according to Law in respect of Defects, whether before or after the expiration of any relevant Defects Correction Period, will be in any way affected or limited by:

- (a) the rights conferred upon RMS' Representative or the Independent Verifier by this clause 11 or any other provision of the M5 West Widening Deed;
- (b) the exercise of, or the failure by RMS' Representative or the Independent Verifier to exercise, any such rights; or
- (c) any direction of RMS' Representative under this clause 11.

## 11.10 Use of defective facilities

The Company must:

- (a) not allow the use of any part of the M5 West Widening Works or the M5 West Widening Temporary Works which the Company knows are defective or unsafe and which threaten the safety of members of the public; and
- (b) promptly notify RMS if the Company knows that any part of the M5 West Widening Works or the M5 West Widening Temporary Works are defective or unsafe or threaten the safety of members of the public.

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## **12. SECURITY BOND**

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### **12.1 Provision of Security Bond**

As a condition precedent to Construction Completion, the Company must give RMS an unconditional undertaking which must be:

- (a) for an amount of \$1,555,000;
- (b) in the form of Schedule 1;
- (c) in favour of RMS; and
- (d) where required, duly stamped and given by a financial institution acceptable to RMS (acting reasonably) with an address for service in Sydney.

### **12.2 Release of Security Bond**

Subject to its rights to have recourse to the unconditional undertaking, RMS must on the earlier of:

- (a) 20 Business Days after the later of:
    - (i) the date of expiry of the final Defects Correction Period; and
    - (ii) receipt by RMS of each release or statement required pursuant to clause 2.3(a)(ii); and
  - (b) three months after the date of termination of the M5 West Widening Deed,
- release the unconditional undertaking provided by the Company under clause 12.1.

### **12.3 Interest**

RMS:

- (a) is not obliged to pay the Company interest on:
  - (i) any unconditional undertaking; or
  - (ii) the proceeds of any unconditional undertaking if it is converted into cash; and
- (b) does not hold the proceeds referred to in clause 12.3(a)(ii) on trust for the Company.

### **12.4 Company not to injunct**

The Company must not take any steps to injunct or otherwise restrain:

- (a) any issuer of the unconditional undertaking provided under this clause 12 from paying RMS pursuant to the unconditional undertaking;
- (b) RMS from taking any steps for the purposes of making a demand under the unconditional undertaking provided under this clause 12 or receiving payment under any such unconditional undertaking; or
- (c) RMS from using the money received under the unconditional undertaking provided under this clause 12.



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## **12.5 Purpose of unconditional undertaking**

- (a) The unconditional undertaking provided under this clause 12 is for the purpose of ensuring the proper performance of the Company's obligations:
  - (i) under clause 11; and
  - (ii) to achieve Final Completion.
- (b) Subject to clause 12.5(c), RMS may make a demand under the unconditional undertaking provided under this clause 12 despite any dispute between the Parties as to such performance.
- (c) RMS may not make a demand for more than \$777,500 in each 12 month period from the date of receipt by RMS of the unconditional undertaking provided under this clause 12.

## **13. MAINTENANCE MANUAL**

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### **13.1 Maintenance Manual**

- (a) As a condition precedent to Construction Completion and in respect of the M5 West Widening Works set out in clause 2(e) of Part 1 of Schedule 2, the Company must update, develop and amend the Maintenance Manual to incorporate the Maintenance Work associated with the M5 West Widening and identify the methods, systems and procedures (which must comply with the Scope of Works and Technical Criteria) whereby the Company will operate, maintain and repair the M5 West Widening in accordance with the requirements of the F-5 Tollroad Project Deed.
- (b) As a condition precedent to Final Completion and in respect of the entire M5 West Widening Works, the Company must update, develop and amend the Maintenance Manual to incorporate the Maintenance Work associated with the M5 West Widening and identify the methods, systems and procedures (which must comply with the Scope of Works and Technical Criteria) whereby the Company will operate, maintain and repair the M5 West Widening in accordance with the requirements of the F-5 Tollroad Project Deed.
- (c) The updates, development and amendments to the Maintenance Manual must be developed with consideration of the durability assessment reports that are required to be prepared by section 24.4.6 of the Company Documentation Schedule.
- (d) The Maintenance Manual (without the updates required by clauses 13.1(a) and 13.1(b)) must be submitted to RMS' Representative and the Independent Verifier within 180 days of the date of the M5 West Widening Deed;
- (e) RMS' Representative may:
  - (i) review any Maintenance Manual submitted under this clause 13; and
  - (ii) if the Maintenance Manual submitted does not comply with the M5 West Widening Deed, notify the Company of that within 15 Business Days of the submission of the Maintenance Manual.
- (f) If the Company receives a notice under clause 13.1(e)(ii), the Company must promptly submit an amended Maintenance Manual to the Independent Verifier and RMS' Representative and the process in clause 13.1(e) will reapply.

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- (g) RMS and RMS' Representative owe no duty to the Company to review the Maintenance Manual or any draft submitted by the Company for errors, omissions or compliance with the M5 West Widening Deed.
  - (h) No review of, comments upon, notice given in respect of the Maintenance Manual or any draft or any other act or omission of RMS or RMS' Representative in respect of the Maintenance Manual or any draft will lessen or otherwise affect:
    - (i) the Company's liabilities or responsibilities under the M5 West Widening Deed or otherwise according to Law; or
    - (ii) RMS' rights against the Company, whether under the M5 West Widening Deed or otherwise according to Law.
  - (i) The Company:
    - (i) warrants that, at Construction Completion, the Maintenance Manual will be fit for its intended purposes;
    - (ii) warrants that, at Final Completion, the Maintenance Manual will be fit for its intended purposes; and
    - (iii) agrees that compliance by it with the Maintenance Manual will not in any way lessen or otherwise affect:
      - (A) its liabilities or responsibilities under the F-5 Tollroad Project Deed, the M5 Western Link Project Deed, the M5 West Widening Deed or otherwise according to Law; or
      - (B) RMS' rights against it, whether under the F-5 Tollroad Project Deed, the M5 Western Link Project Deed, the M5 West Widening Deed or otherwise according to Law.

#### **14. CHANGE IN LAW**

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##### **14.1 No Claim**

- (a) Subject to clause 14.1(b), the F-5 Tollroad Project Deed and the M5 Western Link Project Deed, the Company will be liable for the consequences of, and will have no Claim against RMS arising out of or in any way in connection with, any changes in Law.
- (b) Clause 6.2 of the M5 West Widening Deed will apply if a Change in Law occurs.

#### **15. LOSS OR DAMAGE AND INSURANCE**

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##### **15.1 Risk of loss or damage**

- (a) The Company bears the risk of loss or damage to the M5 West Widening Works and the M5 West Widening Temporary Works at all times until the end of the Term.
- (b) The Company must, in accordance with clause 15.10, promptly make good any loss or damage to the M5 West Widening Works, the M5 West Widening Temporary Works or the M5 West Widening (as applicable).

##### **15.2 Liability and indemnity**

- (a) The Company must indemnify RMS and the Minister from and against any Claim or Loss suffered or incurred by RMS or the Minister, in respect of:

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- (i) any injury to, or disease or illness (including mental illness) or death of, persons;
  - (ii) the loss of, loss of use of (whether total or partial), or destruction or damage to, any real or personal property of any person (including RMS);
  - (iii) any disruption to any Services;
  - (iv) subject to clause 15.2(e), any economic loss arising out of loss, loss of use of, destruction, damage, injury, disease or death or disruption referred to in clauses 15.2(a)(i), 15.2(a)(ii) and 15.2(a)(iii);
  - (v) subject to clause 15.2(e), economic loss suffered or incurred by RMS or a third party;
  - (vi) without limiting the foregoing, any claim made by the owner or occupier of any Extra Land,

caused by, arising out of, or in any way in connection with:

- (vii) the Company's Work; or
  - (viii) any failure by the Company to comply with its obligations under the M5 West Widening Deed.
- (b) Without limiting clause 15.2(a) but subject to clause 15.2(g), the Company must indemnify RMS and the Minister from and against any Claim or Loss suffered or incurred by RMS or the Minister arising out of, or in connection with, the Company's breach of a term of the M5 West Widening Deed or the Interim Design and Independent Verification Deed.
  - (c) Clauses 15.2(a) and 15.2(b) do not lessen or otherwise affect the Company's other obligations under the M5 West Widening Deed.
  - (d) The Company has the same responsibilities to third parties in respect of persons, property and all other aspects of the M5 West Widening Project which it would have if it held the freehold title to the M5 West Widening Site and the Temporary Areas.
  - (e) Without limiting clause 5.17 and subject to clause 15.2(f), clauses 15.2(a)(iv) and (v) do not apply in respect of any pure economic loss suffered or incurred by a third party to the extent that:
    - (i) such Claims or Loss arise as a result of:
      - (A) the decision by the Government or RMS to proceed with the M5 West Widening Project;
      - (B) the existence or location of the M5 West Widening; or
      - (C) the existence or location of local area traffic management measures in accordance with the Environmental Documents; or
    - (ii) any such Claim or Loss in aggregate together with all other such Claims or Losses exceeds
  - (f) Clause 15.2(e) does not apply in respect of, or limit the Company's liability to RMS or the Minister for, a breach of clause 2A of the M5 West Widening Deed.

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- (g) Subject to clause 15.2(h), neither of RMS nor the Minister may make any Claim against the Company:
- (i) under clause 15.2(b) for, and the indemnity in clause 15.2(b) does not extend to, any Loss suffered or incurred by RMS arising out of, or in any way in connection with, an Event of Default in respect of which RMS has exercised or is entitled to exercise its Default Step-In Rights; or
  - (ii) for, and the indemnity in clause 15.2(b) does not extend to, any Indirect Loss suffered or incurred by RMS or the Minister in respect of the M5 West Widening Deed or the Interim Design and Independent Verification Deed exceeding (in aggregate):
    - (A) plus
    - (B) any amount:
      - (I) indemnified under a policy of insurance required to be effected by the Company under the M5 West Widening Project Documents; or
      - (II) which would have been so indemnified, but for:
        - i. the application of any policy excess, deductible, self-insured retention, co-insurance or waiting period;
        - ii. a breach by the Company of its obligations under the relevant policy or policies of insurance;
        - iii. a breach by the Company of its obligations under the M5 West Widening Project Documents to effect and maintain insurance; or
        - iv. any refusal by the insurer to indemnify the Company solely by reason of the inclusion and application of this clause 15.2(g).
- (h) Clause 15.2(g) does not apply in respect of, or limit the Company's liability to RMS or the Minister for:
- (i) a breach of clause 2A of the M5 West Widening Deed; or
  - (ii) a failure by the Company to pay RMS the RMS Default Step-In Costs under clause 9 of the M5 West Widening Deed or a breach by the Company of any of clauses 9.4, 9.5, 9.5A, 9.6B or 9.8 of the M5 West Widening Deed.

### 15.3 Damage to third party property

- (a) Without limiting clause 15.2, where any loss of or damage to real or personal property (other than the M5 West Widening Works, the M5 West Widening Temporary Works, the M5 West Widening, the Tollroad or the M5 Western Link) occurs which arises out of, or in any way in connection with, the Company's Work or any failure by the Company to comply with its obligations under the M5 West Widening Deed, the Company must, at its cost, promptly repair any such loss or damage or, if the affected person agrees, reasonably compensate the affected person for that loss or damage (where the Company has a legal liability to do so).

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- (b) Without limiting clause 2.5 of the M5 West Widening Deed and subject to clause 15.3(c), if the Company fails to carry out any repair work or to pay reasonable compensation under clause 15.3(a), RMS may, after giving reasonable prior notice to the Company, carry out such work or pay any such reasonable compensation and any Loss suffered or incurred by RMS will be a debt due and payable from the Company to RMS.
  - (c) If urgent action is required to avoid death, injury, loss or damage, RMS may take the action at the Company's cost and any Loss suffered or incurred by RMS will be a debt due and payable from the Company to RMS.
  - (d) This clauses 15.3 does not relieve the Company from any of its obligations under the M5 West Widening Deed.

#### **15.4 Insurances during the Company's Work**

- (a) The Company must effect and maintain or cause to be effected and maintained, under one or more policies of insurance (without requiring any risk to be insured twice), the following:
  - (i) a contract works or construction risks policy of insurance:
    - (A) insuring the M5 West Widening Works, the M5 West Widening Temporary Works, the existing improvements on the M5 West Widening Site or the Temporary Areas and all things brought on to the M5 West Widening Site or the Temporary Areas, and all things stored off the M5 West Widening Site or Temporary Areas for incorporation into the M5 West Widening Works or M5 West Widening Temporary Works by the Company, the Contractor or any of their Subcontractors for the purpose of the Company's Work;
    - (B) against such risks as are reasonably required by RMS and on the basis set out in annexure K to the M5 West Widening Deed; and
    - (C) for a sum insured of not less than the full reinstatement or replacement value of the insured property plus an additional amount to cover the cost of demolition and removal of debris, fees for the project managers and other consultants, and an amount to cover additional costs and expenses to expedite the commencement or completion of repair;
  - (ii) transit insurance (including wet marine insurance and cover for storage during transit) covering the risk of loss of or damage to relevant items intended to be employed about or used in the Company's Work during transit to the M5 West Widening Site or Temporary Areas for a sum insured each conveyance of not less than 110% of the full replacement value on an indemnity basis of the items conveyed;
  - (iii) public and products liability insurance written on an occurrence basis covering the liability of the Company, the Contractor, their respective Subcontractors and their respective officers, employees, consultants and agents for:
    - (A) loss of, loss of use of, destruction or damage to, tangible property; and
    - (B) injury to, or disease or death of, persons (other than a liability insured under the insurance referred to in clause 15.4(a)(v)),

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arising out of or in connection with the Company's Work for a minimum of \$100 million for each and every occurrence with respect to public liability and \$100 million for each and every occurrence and in the aggregate for all occurrences in any one 12 month policy period with respect to products liability and including cover for loss or damage to the property of RMS in the care, custody or control of the insureds;

- (iv) project specific professional indemnity insurance for any civil liability incurred in a professional capacity by the Contractor, the Company's or the Contractor's Subcontractors and any of their respective sub-consultants, engaged in professional activities in connection with the Company's Work for a minimum of \$50 million for any one claim, and which has a retroactive date of no later than the date on which the Company or the Contractor (or any of the Company's or the Contractor's Subcontractors and any of their respective sub-consultants) commenced any professional activities in connection with the Company's Work;
  - (v) workers' compensation insurance as required by Law;
  - (vi) motor vehicle insurance covering third party property damage caused by plant, equipment and motor vehicles used in connection with the M5 West Widening Works and third party injury or death caused by unregistered plant, equipment and motor vehicles used in connection with the M5 West Widening Works for a minimum of \$20 million for each and every occurrence and unlimited in the aggregate as to the number of occurrences;
  - (vii) advance consequential loss or delay in start up insurance for a 24 month indemnity period covering loss of anticipated additional revenue from the M5 West Widening Project; and
  - (viii) directors and officers liability insurance (including coverage for fines and penalties to the extent insurable at Law) for a minimum amount of \$10 million per occurrence and in the aggregate annually.
- (b) In respect of the insurances referred to in clause 15.4(a), the Company must:
- (i) in the case of the directors and officers liability insurance, effect the insurance on or before commencing the Company's Work and thereafter maintain the insurance for a period of 7 years after the Date of Construction Completion;
  - (ii) in the case of the professional indemnity insurance, effect the insurance on or before the Satisfaction Date and thereafter maintain the insurance for a period of 7 years after the expiry of the last Defects Correction Period;
  - (iii) in the case of the public and products liability insurance policy, workers compensation insurance and motor vehicle insurance, effect the insurances on or before commencing the Company's Work and thereafter maintain the insurances until the expiration of the last Defects Correction Period; and
  - (iv) in the case of the other insurances, effect the insurances on or before commencing the Company's Work (or such other date as agreed by the Company and RMS, both acting reasonably) and thereafter maintain the insurances until the Date of Final Completion.

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## 15.5 General requirements

- (a) All insurances which the Company is required to effect under this clause 15, with the exception of the workers compensation insurance:
  - (i) must be effected with Relevant Insurers, save for the first \$1 million of motor vehicle insurance referred to under clause 15.4(a)(vi);
  - (ii) must be on the terms required by this clause 15 and annexure K to the M5 West Widening Deed and otherwise as approved by RMS (which approval will not be unreasonably withheld or delayed);
  - (iii) must not be materially adversely amended, unless such amendment is first approved in writing by RMS;
  - (iv) in the case of the contract works insurance and transit insurances, must insure the Company and RMS and such others as have an insurable interest in the property insured for their respective rights and interests;
  - (v) in the case of the public and products liability insurance and motor vehicle insurance, must include a clause in which the insurer waives all rights of subrogation which it may have or acquire against all or any of the persons comprising the insured;
  - (vi) in the case of the public and products liability insurance, professional indemnity insurance and motor vehicle insurance, must extend to cover the vicarious liability of the Company for the acts and omissions of the other insureds;
  - (vii) not used;
  - (viii) in the case of the public and products liability insurance, must contain a cross liability clause in which the insurer agrees to insure the liability of one insured to another insured;
  - (ix) in the case of the professional indemnity insurance, must provide that the cover for the liability of RMS as principal does not prevent the policy from responding to a claim by RMS against the Company;
  - (x) in the case of the public and products liability insurance and the professional indemnity insurance, must contain a severability clause in which the insurer:
    - (A) accepts the term insured as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased as a result); and
    - (B) agrees not to impute any pre-contractual non-disclosures or post-contractual acts or omissions from one insured to another for the purpose of determining rights to cover under the policy;
  - (xi) in the case of the contract works insurance and advanced consequential loss insurance, must while any M5 West Widening Project Debt remains outstanding, specify the Security Trustee as a loss payee; and
  - (xii) in the case of the contract works insurance and transit insurance, must be endorsed to note and allow the Company's obligations under clause 15.10, to the effect that compliance by the Company with the provisions of that

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clause will not prejudice the Company's or any other insured parties' rights to indemnity under the insurances.

(b) In relation to all the insurances the Company is required to effect under this clause 15, the Company must:

(i) except in respect of the workers compensation insurance and directors and officers liability insurance, give RMS current draft copies of:

(A) policy wordings; and

(B) policy schedules,

not less than 10 Business Days prior to commencement of the Company's Work, and give RMS certified copies of all:

(C) policy wordings;

(D) policy schedules;

(E) renewal certificates; and

(F) endorsements,

as soon as it receives the final versions issued by the insurers;

(ii) give RMS a certificate of currency for each insurance within 5 Business Days of the receipt by the Company of a written request from RMS;

(iii) except in respect of the workers compensation insurance and directors and officers liability insurance, ensure each policy provides that the insurer agrees that any act, error, omission, neglect, fraud, misrepresentation, misdescription, non-disclosure or breach of condition or warranty by any individual insured party shall not prejudice or invalidate the rights of the other parties comprising the insured who are themselves not guilty of such act, error, omission, neglect, fraud, misrepresentation, misdescription, non-disclosure or breach of condition or warranty;

(iv) except in respect of the workers compensation insurance, directors and officers liability insurance and advanced consequential loss or delay in start up insurance, ensure each policy provides that the insurer agrees that any insured can give notice of a claim and that notice by one insured of a claim will be treated as notice by all insureds; and

(v) except in respect of the transit insurance, workers compensation insurance, motor vehicle insurance and directors and officers liability insurance, give RMS:

(A) 20 Business Days' notice in writing prior to:

(I) the insurer cancelling the policy on the request of the Company (or the Contractor);

(II) the Company (or the Contractor) allowing the policy to expire; and

(B) as soon as practicable, notice in writing of receipt from the insurer of:

(I) a notice of cancellation of the policy;



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(II) any other notice in respect of the policy.

#### **15.6 Premiums**

- (a) The Company must punctually pay all premiums in respect of all insurance policies and give RMS copies of receipts for payment of premiums if and when requested by RMS.
- (b) If the Company fails to effect or maintain (or cause to be effected and maintained) any insurance policy referred to in this clause 15 or to pay a premium or other amount payable to the insurer in respect of such insurance, RMS may (but is not obliged to) effect such insurance or pay such premium or other amount and any costs so incurred by RMS will be a debt due and payable to RMS by the Company.
- (c) If RMS exercises its rights under clause 15.6(b) to effect insurance, the Company must provide all such assistance and documents as reasonably required by RMS to enable it to place the insurance(s).

#### **15.7 Undertaking to inform**

The Company must, subject to its obligations to insurers, inform RMS immediately it becomes aware of any actual, threatened or likely claims (with the exception of claims or potential claims by RMS against the Company) under any of the insurances referred to in this clause which could materially reduce the available limits of indemnity or which may involve RMS, and must reinstate or replace any depleted aggregate limit, resulting from claims that are unrelated to the Company's Works, if requested to do so in writing by RMS.

#### **15.8 RMS insurance**

The Company must not do anything which has been notified to the Company in writing by RMS that may invalidate any insurance policy held by RMS in relation to the M5 West Widening Site or the Temporary Areas or any indemnity to which RMS may be entitled from the New South Wales Treasury Managed Fund.

#### **15.9 Subcontractors**

Notwithstanding any other provision of the M5 West Widening Deed, the Company must use its best endeavours to ensure that the Contractor and any Subcontractors and agents retained by the Company or the Contractor are insured as required by this clause 15, amended as is appropriate (including with respect to the amount of insurance, types of insurance and period of insurance) given the nature of services or work to be performed by them, as if they were the Company.

#### **15.10 Reinstatement**

If any loss or damage occurs to any part of the M5 West Widening Works or the M5 West Widening Temporary Works, the Company must (without limiting its other obligations under this clause 15):

- (a) subject to allowing reasonable time for inspection by insurers, take immediate steps to clear any debris and begin initial repair work;
- (b) promptly consult with RMS and carry out such steps as are necessary to ensure:
  - (i) the prompt repair or replacement of the loss or damage so that:
    - (A) it complies with the Scope of Works and Technical Criteria; and
    - (B) there is minimal disruption to the M5 West Widening Works and the M5 West Widening Temporary Works; and

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- (ii) that, to the greatest extent possible, the Company continues to comply with its obligations under the M5 West Widening Project Documents;
  - (c) manage all repair and replacement activities so as to minimise the impact on the M5 West Widening Works or the M5 West Widening Temporary Works;
  - (d) keep RMS fully informed of the progress of the repair and replacement activities; and
  - (e) subject to the RMS Consent Deed, apply all insurance proceeds in the repair or reinstatement of the M5 West Widening Works or the M5 West Widening Temporary Works.

## **16. INTELLECTUAL PROPERTY**

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### **16.1 Design Documentation and Maintenance Manual**

- (a) Ownership of, and all Intellectual Property Rights in, the Design Documentation (other than the Concept Design and Early Design Documentation) and the Maintenance Manual vests in RMS when each item of Design Documentation and the Maintenance Manual comes into existence. To the extent that the Company may at any time acquire any right, title or interest in the Design Documentation or Maintenance Manual, or any Intellectual Property Rights in the Design Documentation or Maintenance Manual, the Company, by this annexure A, assigns to RMS, absolutely, all such right, title and interest. Upon request by RMS, the Company must do all things necessary to perfect the vesting of such ownership and Intellectual Property Rights in RMS.
- (b) The Company, as beneficial owner, by this annexure A assigns to RMS, absolutely, all Intellectual Property Rights in the Concept Design and Early Design Documentation.
- (c) The Company must procure that the Contractor and their respective Subcontractors and any agents of the Company, the Contractor or their Subcontractors, and any other third party who has created any aspect of the Design Documentation or the Maintenance Manual, assign to RMS any Intellectual Property Rights held by the Contractor, the Subcontractors or agents in that aspect of the Design Documentation or Maintenance Manual so that those Intellectual Property Rights vest in RMS on their creation.
- (d) In respect of the Design Documentation and Maintenance Manual, the assignment to RMS includes the right to sue for, and recover, damages and other relief in relation to any infringement of copyright in the Design Documentation and the Maintenance Manual (including for conversion or detention) including any that may have occurred before the date of the M5 West Widening Deed.
- (e) RMS grants to the Company a non exclusive, non transferable licence (including a right to sub-license) to use the Design Documentation and the Maintenance Manual to the extent necessary for performing the M5 West Widening Works, the M5 West Widening Temporary Works and the performance of its obligations under the M5 West Widening Deed.

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## 16.2 Proprietary Software

- (a) The Company grants to RMS a perpetual, irrevocable, royalty-free and non-exclusive licence to use (including a right to sub-licence) any computer software which is incorporated into or provided as part of the M5 West Widening Works or the M5 West Widening Temporary Works (**Proprietary Software**).
- (b) The licence in clause 16.2(a):
  - (i) will permit RMS to use the Proprietary Software for all purposes associated with the M5 West Widening Works or the M5 West Widening Temporary Works or the general performance by RMS of its statutory functions;
  - (ii) will apply from when the Proprietary Software comes into existence; and
  - (iii) will survive the termination of the M5 West Widening Deed on any basis.
- (c) At RMS' request, the Company must place into escrow the source code for any Proprietary Software, with an escrow agent and on terms approved by RMS (acting reasonably). RMS must pay the reasonable fees payable to the escrow agent to enable the Company to comply with its obligation under this clause 16.2(c).

## 16.3 Warranty and indemnity

- (a) The Company warrants that:
  - (i) none of the Design Documentation, the Maintenance Manual, the Proprietary Software, the M5 West Widening Works (including any plant, equipment or material forming part of the M5 West Widening Works) nor any method of working used by the Company in performing the M5 West Widening Works or the M5 West Widening Temporary Works will infringe any Intellectual Property Right or any Moral Right of any person, nor give rise to any liability to make royalty or other payments to any person; and
  - (ii) it has or will have sufficient interest in the Design Documentation, the Maintenance Manual and Proprietary Software to comply with its obligations under clauses 16.1 and 16.2(a).
- (b) Subject to clause 16.3(c), the Company must indemnify RMS against any Claim or Loss suffered or incurred by RMS arising out of or in connection with the Design Documentation, the Maintenance Manual, the Proprietary Software, the M5 West Widening Works (including any plant, equipment or materials forming part of the M5 West Widening Works) or any method of working used by the Company in performing the M5 West Widening Works or the M5 West Widening Temporary Works infringing or allegedly infringing any Intellectual Property Right or any Moral Rights.
- (c) The indemnity in clause 16.3(b) shall be reduced proportionally to the extent that the Claim or Loss was caused by the unlawful conduct or wilful misconduct of RMS.

## 16.4 Moral Rights

- (a) Without limiting clause 16.3, the Company must use its best endeavours to ensure that it obtains irrevocable and unconditional written:
  - (i) consents permitted by applicable Law from the author of any artistic work or literary work to be incorporated into, or used during the design or

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construction of the M5 West Widening Works, or incorporated into or forming part of the Design Documentation or the Maintenance Manual, including any necessary consents from its employees and any consultants engaged by it, the Contractor and the employees and consultants of their respective Subcontractors, to:

- (A) any non attribution or false attribution of authorship of the artistic work or literary work; and
- (B) allow any repairs to, maintenance and servicing of additions, refurbishment or alterations to, changes, relocation, destruction or replacement of the artistic work, literary work or the M5 West Widening Works,

whether occurring before or after the consent is given; and

- (ii) waivers of Moral Rights that are permitted by applicable law outside Australia from the author of any artistic work or literary work to be incorporated into, or used during the design or construction of the M5 West Widening Works, or incorporated into or forming part of the Design Documentation or the Maintenance Manual,

for the benefit of RMS, the Company, their licensees, successors in title and anyone authorised by any of them to do acts comprised in the copyright.

- (b) The terms **artistic work**, **literary work** and **attribution** have the meaning given to them in the *Copyright Act 1968* (Cth).

## 17. GENERAL

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### 17.1 Set-off

- (a) RMS may deduct from the money which would otherwise be payable to the Company or moneys otherwise due to the Company any debt or other moneys due from the Company to RMS whether under the M5 West Widening Deed or otherwise in relation to the Company's Work.
- (b) This clause 17.1 will survive the termination of the M5 West Widening Deed.

### 17.2 Provisions limiting or excluding liability

Any provision of the M5 West Widening Deed which seeks to limit or exclude a liability of RMS or the Company is to be construed as doing so only to the extent permitted by Law.

### 17.3 Privacy

If under the M5 West Widening Deed the Company is required to disclose Personal Information, the Company must:

- (a) if the disclosure is not authorised under the Privacy Acts, obtain the consent of the natural person to whom that Personal Information relates in relation to RMS' collection and use of that Personal Information for the purposes of the M5 West Widening Deed or the purposes authorised by the M5 West Widening Deed;
- (b) ensure that the Personal Information disclosed is accurate; and
- (c) inform that natural person:
  - (i) that the Personal Information has been collected by or on behalf of RMS; and

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- (ii) of any other matters required by the Privacy Acts.

#### **17.4 Rates and Taxes**

The Company will be liable for:

- (a) all land-based rates, Taxes and charges, including municipal rates, water, sewerage and drainage rates and land tax in respect of the M5 West Widening Site and the Temporary Areas; and
- (b) all other Taxes levied in respect of the Company's Work, whether in connection with the M5 West Widening, the performance of the Company's obligations under the M5 West Widening Deed or the execution of the M5 West Widening Deed and other M5 West Widening Project Documents or otherwise.

#### **17.5 Exclusion of proportionate liability scheme**

- (a) To the extent permitted by Law, Part 4 of the *Civil Liability Act 2002* (NSW) (and any equivalent statutory provision in any other state or territory) is excluded in relation to all and any rights, obligations or liabilities of either party under the M5 West Widening Deed whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (b) Without limiting clause 17.5(a), the rights, obligations and liabilities of RMS and the Company under the M5 West Widening Deed with respect to proportionate liability are as specified in the M5 West Widening Deed and not otherwise, whether such rights, obligations or liabilities are sought to be enforced by a claim in contract, in tort or otherwise.